A “Tale of Two Statutes” Redux

Anti-Union Employment Discharges Under the NLRA and RLA, with a Solution

By Charles J. Morris†

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DOI: https://doi.org/10.15779/Z38862BC0P
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Twenty years ago, I published an article entitled “A Tale of Two Statutes,”¹ which contrasted the epidemic of anti-union employee discharges among private-sector employees under the National Labor Relations Act (NLRA or “Act”)² with the rarity of such discharges in the airline and railroad industries under the Railway Labor Act (RLA).³ I concluded that the extreme difference in the quantity of violations was due to the deterrent effect of the availability of federal court injunctive authority under the RLA, and that the NLRA could achieve a similar effect if its Section 10(j)⁴ injunctive proceedings were substantially expanded.⁵ Accordingly, I recommended that such expansion be applied to almost all Section 8(a)(3) discharge cases.⁶ Nevertheless, in the years that followed, despite a tiny increase in, and a more efficient usage of, Section 10(j) in a limited number of cases, the Section 8(a)(3) epidemic continued—in fact, even more heavily.⁷ During that interim period, however, I discovered a tried and trusted legal procedure that has the capacity to give Section 10(j) the meaningful authority Congress intended. A redux of the “Tale of Two Statutes” thus became appropriate. That redux, with its proposed solution, follows.

I. THE PROBLEM

Section 8(a)(3), one of the most critical provisions of the Act that was meant to prohibit discriminatory employment discharges, is routinely violated. Section 8(a)(3) states it is an unfair labor practice (“ULP”) for an employer “by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .”⁸ Despite the foregoing clear statutory language and long-standing presence—the Act was enacted in

⁵. Morris, supra note 1, at 360.
⁶. Id. at 358.
⁷. See infra note 27 (table showing discriminatory employment discharges under the NLRA for years 1969–2014).
1935—unlawful terminations of union adherents continue to be common occurrences under the NLRA, especially during organizational campaigns and first contract negotiations. Their occurrence sends a powerful message to other employees in the designated bargaining unit: “Avoid the union.” The frequency of such discharges has reached epidemic proportions. In fact, the leading treatise on the NLRA still opens its chapter on Section 8(a)(3) by announcing that: “[t]he most frequently filed unfair labor practice charges are those alleging discrimination in employment.”

A. Two Statutes—Controlling Discharges for Union Activity Under the NLRA and RLA

Notwithstanding the thousands of successful prosecutions of Section 8(a)(3) ULP violations, the fact that almost a million of such terminated employees have been offered reinstatement and many millions of dollars in back-pay have been recovered since passage of the NLRA indicates that enforcement of this provision has been virtually a total failure. How, with such an extensive enforcement record, can this be true? It’s true because during the last several decades the rate of Section 8(a)(3) violations in relation to union activity has continually increased, revealing that those remedies, despite their number, have had little if any deterrent effect. Truly successful enforcement would have been reflected in a relatively small number of enforcement cases and an increase in union organizational activity, which would have indicated a high level of voluntary compliance.

Preventing such discharges and the fear of their occurrence would surely have made union organizing more successful, which is what the NLRA was intended to encourage. But can such discharges ever be prevented under this Act? As this article will demonstrate, the answer is mostly “yes.” It will be through a process whereby the number of such discharges can be drastically reduced—a process that can be instituted without further legislation. This can be achieved by applying essentially the same enforcement remedy currently available for similar discharges under the RLA, although an entirely different procedure will be required.

Indeed, the widespread violations of Section 8(a)(3) by employers covered by the NLRA stands in stark contrast to the rarity of such terminations by employers in the airline and railroad industries, which are covered by the RLA. Although both statutes contain clear prohibitions

10. See infra note 27.
against such conduct, employers under the NLRA frequently use employee discharges to discourage union representation—especially during organizational campaigns—whereas employers under the RLA, who may be equally opposed to initial unionization, will almost always avoid discharging union adherents during such campaigns. This is not only true for older established carriers in the railroad industry. It’s also true for carriers in the ever-expanding airline industry. With substantive law essentially the same under both statutes, why is there such a difference in employer conduct?

The answer to that question can be found in the remedial records of discriminatory discharges under both statutes and by comparing their enforcement practices. Those factors reveal a critical **common denominator**, which is the availability of **injunctive relief in federal district courts** in both statutes; but there is a vast difference in each statute’s usage of that remedy. It’s my thesis that the institution of certain procedural changes relating to the NLRA’s broad Section 10(j)\(^\text{13}\) injunction provision—which can be achieved administratively by the NLRB and its General Counsel without any new legislation—would allow that agency to employ federal district court preliminary injunctions in a manner that should achieve essentially the same deterrent effect that the availability of those injunctions has produced under the RLA. The RLA’s ever-present availability of injunctive authority has generally allowed unions to organize without expectation of discriminatory discharges, and for employees to exhibit pro-union sentiments without fear of retaliation. These conditions can also be realized under the NLRA.

II. A STATISTICAL STORY

A. Union Density

Union density in the private sector in the United States has been steadily declining. In 2018 it was only 6.4 percent.\(^\text{14}\) Some of that decline is because most labor unions have been unable to regenerate new members sufficiently to make up—even partially—for losses from economic forces.

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\(^{13}\) NLRA § 10(j), 29 U.S.C. § 160(j) (“The Board shall have power, upon issuance of a complaint as provided in subsection (b) [of this section] charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.”) (emphasis added).

The rate of successful union organizing has even fallen behind the rate of losses due to attrition. One might assume—as many do—that the primary reason for this organizational failure is that most American workers prefer to retain their non-union status, whatever their reason. If this were an accurate assessment of employee attitudes one would expect to find a similar decline in union membership throughout the private sector. That is not the case, however, for the record of both union density and successful union organizing in the two industries covered by the RLA remains exceedingly high.

The National Mediation Board (NMB),\(^\text{15}\) the federal agency that conducts the union representational process under the RLA and assists the parties in collective bargaining with mediation and arbitration, reported in 1986 that “[o]ver 80% of the rail industry and about 60% of the airline industry”\(^\text{16}\) were unionized. A quarter-century later, despite airline deregulation, the appearance of many start-up carriers, and the merger of several major airlines—the largest of which is mostly non-union—the rate of unionization in both the railroad and airline industries remains high. Indeed, they are roughly the same. Thus, while union membership in the total private sector has declined steeply, membership in the two industries covered by the RLA is still high. The NMB has reported that in 2011–2012, the combined union density for both railroads and airlines was 62 percent\(^\text{17}\)—a far cry from the low density for the private sector as a whole.\(^\text{18}\)

The NMB further reported that among the 146 air carriers, with a total of 540,000 employees, union density in 2012 was 56 percent.\(^\text{19}\) Among the 567 railroads with a total of 176,000 employees, union density in 2011 was 83 percent.\(^\text{20}\) Precise union employee numbers by the NMB from 2012 are not available. However, in 2017, the NMB reported that an additional 71,060 union-represented airline employees had been added by representation elections during that period, and there was no major change among the numbers and percentages of railroad union employees.\(^\text{21}\) Accordingly, union membership among airline employees is now about 60 percent, and among railroad employees, about 83 percent.

\(^{17}\) Response from NMB to Freedom of Information Act (FOIA) request, File No. F-1656 (March 23, 2015) (on file with author). “This percentage is calculated as 56% of the airline employees plus 83% of the railroad employees divided by the total number of employees.” Id.
\(^{19}\) Id. (Data from Airlines for America, formerly The Air Transport Ass’n, as of 2012.)
\(^{20}\) Id. (“Based on information provided by the Association of American Railroads (this percentage was taken from the total number of Class-1 employees times 85% (85% of whom, are unionized) and the total number of non-Class-1 employees, 5,443 Regional, 11,874 Local (this number includes 6,040 Linehaul employees and 5,843 Switching and Terminal employees.”).
\(^{21}\) Response from NMB to FOIA request, File No. F-1721 (June 28, 2017) (on file with author).
B. Discriminatory Discharges for Union Activity

There’s another—undoubtedly related—statistical comparison between these two statutes that presents an equally startling study in contrast. It’s the comparison that supplies the factual basis for the focus of this article. I’m referring to data that reveal the comparative number of discriminatory discharges for union activity under both statutes. Such discharges have been commonplace under the NLRA, but relatively rare under the RLA.

1. Statistics Under the NLRA

The primary source of relevant NLRB data regarding enforcement of Section 8(a)(3), a core provision of the Act, has, until recently, been the NLRB Annual Reports. One must be aware, however, that Section 8(a)(1), which broadly prohibits employer-interference with the exercise of all employee rights guaranteed in Section 7, also accounts for ULP discharges of some employees because of their engagement in protected concerted activity that’s not identifiably related to a specific labor union. Section 8(a)(3) is not applicable to those ULPs, for most employees who engage in protected concerted activity do so with reference to a specific union, therefore most discharges relative to such activity are covered by Section 8(a)(3). Accordingly, because Section 8(a)(1) discharge records have not been separately contained in the NLRB Annual Reports, the available data reported in the Table below are limited to Section 8(a)(3) cases and consequently tend to be conservative. The data in that Table reveal a dismal story of the Board’s persistent failure—and inability—to successfully enforce Section 8(a)(3). These are the cold, hard statistics that

22. 33–74 NLRB ANN. REP., Tables 4 & 13 (1968–2009). Table 4 shows remedial actions taken in unfair labor practice cases closed, and Table 13 shows the final outcome of representation elections in cases closed. After issuance of the 74th Annual Report for fiscal year 2009, the Board ceased issuing conventional annual reports, thus limiting the availability of more recent data. Nevertheless, the Board graciously supplied, pursuant to FOIA, later data based on equivalents to Tables 4 and 13 of the former annual reports. See infra note 26 (collection of relevant data).
tell us that employee discharges for union activity long ago reached towering proportions, hence the designation of “epidemic.”

Table 27

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Employees eligible to vote in preceding year’s RC elections 28</th>
<th>Employee § (8)(a)(3) discriminatees who received back pay from employers 29</th>
<th>Percentage ratio of § 8(a)(3) discriminatees to eligible voters in preceding year’s elections</th>
</tr>
</thead>
<tbody>
<tr>
<td>1969</td>
<td>517,372</td>
<td>6,166</td>
<td>1.2%</td>
</tr>
<tr>
<td>1970</td>
<td>552,037</td>
<td>6,679</td>
<td>1.2%</td>
</tr>
<tr>
<td>1971</td>
<td>575,464</td>
<td>6,423</td>
<td>1.1%</td>
</tr>
<tr>
<td>1972</td>
<td>546,632</td>
<td>5,822</td>
<td>1.1%</td>
</tr>
<tr>
<td>1973</td>
<td>556,100</td>
<td>6,215</td>
<td>1.1%</td>
</tr>
<tr>
<td>1974</td>
<td>506,289</td>
<td>6,794</td>
<td>1.3%</td>
</tr>
<tr>
<td>1975</td>
<td>506,047</td>
<td>6,948</td>
<td>1.4%</td>
</tr>
<tr>
<td>1976</td>
<td>533,576</td>
<td>6,822</td>
<td>1.3%</td>
</tr>
<tr>
<td>1977</td>
<td>435,171</td>
<td>7,220</td>
<td>1.7%</td>
</tr>
<tr>
<td>1978</td>
<td>519,102</td>
<td>8,270</td>
<td>1.6%</td>
</tr>
<tr>
<td>1979</td>
<td>424,481</td>
<td>14,320</td>
<td>3.4%</td>
</tr>
<tr>
<td>1980</td>
<td>528,798</td>
<td>15,357</td>
<td>2.9%</td>
</tr>
<tr>
<td>1981</td>
<td>471,651</td>
<td>25,631</td>
<td>5.4%</td>
</tr>
<tr>
<td>1982</td>
<td>395,573</td>
<td>Unavailable</td>
<td>4.9%</td>
</tr>
<tr>
<td>1983</td>
<td>244,292</td>
<td>17,888</td>
<td>7.4%</td>
</tr>
<tr>
<td>1984</td>
<td>164,925</td>
<td>34,532</td>
<td>11.0%</td>
</tr>
<tr>
<td>1985</td>
<td>205,717</td>
<td>18,280</td>
<td>8.9%</td>
</tr>
<tr>
<td>1986</td>
<td>211,161</td>
<td>17,588</td>
<td>8.3%</td>
</tr>
<tr>
<td>1987</td>
<td>217,110</td>
<td>16,973</td>
<td>7.8%</td>
</tr>
<tr>
<td>1988</td>
<td>198,865</td>
<td>17,487</td>
<td>8.8%</td>
</tr>
<tr>
<td>1989</td>
<td>208,394</td>
<td>18,888</td>
<td>9.1%</td>
</tr>
<tr>
<td>1990</td>
<td>243,045</td>
<td>16,073</td>
<td>6.6%</td>
</tr>
<tr>
<td>1991</td>
<td>229,015</td>
<td>17,661</td>
<td>7.7%</td>
</tr>
</tbody>
</table>

26. This being a redux, much of the material that follows repeats data contained in Morris, supra note 1.
27. Table showing discriminatory employment discharges under the NLRA for years 1969-2014.
<table>
<thead>
<tr>
<th>Year</th>
<th>Eligible to Vote</th>
<th>RC Votes</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>1992</td>
<td>192,257</td>
<td>21,193</td>
<td>11.0%</td>
</tr>
<tr>
<td>1993</td>
<td>183,865</td>
<td>21,106</td>
<td>11.5%</td>
</tr>
<tr>
<td>1994</td>
<td>203,674</td>
<td>20,248</td>
<td>9.9%</td>
</tr>
<tr>
<td>1995</td>
<td>186,339</td>
<td>26,042</td>
<td>14.0%</td>
</tr>
<tr>
<td>1996</td>
<td>191,825</td>
<td>17,505</td>
<td>9.1%</td>
</tr>
<tr>
<td>1997</td>
<td>191,929</td>
<td>20,673</td>
<td>10.8%</td>
</tr>
<tr>
<td>1998</td>
<td>215,562</td>
<td>23,682</td>
<td>11.0%</td>
</tr>
<tr>
<td>1999</td>
<td>227,390</td>
<td>22,669</td>
<td>10.0%</td>
</tr>
<tr>
<td>2000</td>
<td>221,210</td>
<td>30,590</td>
<td>13.8%</td>
</tr>
<tr>
<td>2001</td>
<td>234,111</td>
<td>27,582</td>
<td>11.8%</td>
</tr>
<tr>
<td>2002</td>
<td>205,722</td>
<td>15,722</td>
<td>7.6%</td>
</tr>
<tr>
<td>2003</td>
<td>173,912</td>
<td>23,144</td>
<td>13.3%</td>
</tr>
<tr>
<td>2004</td>
<td>165,462</td>
<td>30,784</td>
<td>18.6%</td>
</tr>
<tr>
<td>2005</td>
<td>161,073</td>
<td>31,358</td>
<td>19.5%</td>
</tr>
<tr>
<td>2006</td>
<td>148,831</td>
<td>26,824</td>
<td>18.0%</td>
</tr>
<tr>
<td>2007</td>
<td>121,501</td>
<td>29,559</td>
<td>24.3%</td>
</tr>
<tr>
<td>2008</td>
<td>100,996</td>
<td>17,204</td>
<td>17.0%</td>
</tr>
<tr>
<td>2009</td>
<td>111,013</td>
<td>14,554</td>
<td>13.1%</td>
</tr>
<tr>
<td>2010</td>
<td>79,020</td>
<td>7,808</td>
<td>9.9%</td>
</tr>
<tr>
<td>2011</td>
<td>95,369</td>
<td>1,849</td>
<td>1.9%</td>
</tr>
<tr>
<td>2012</td>
<td>89,996</td>
<td>32,015</td>
<td>35.6%</td>
</tr>
<tr>
<td>2013</td>
<td>83,734</td>
<td>29,380</td>
<td>35.1%</td>
</tr>
<tr>
<td>2014</td>
<td>74,616</td>
<td>21,038</td>
<td>28.2%</td>
</tr>
</tbody>
</table>

The above Table contains data for a forty-six-year period, which reveals a timeline when Section 8(a)(3) violations reached ever-widening proportions. Column A shows the fiscal years covered.

Column B shows the number of employees eligible to vote in union-representation (RC) elections during each immediately preceding fiscal year. RC elections thus provide a reasonably accurate measure of the extent of union organizational activity for the fiscal year in question, providing a comparative indication of the extent of union organizational activity for various years. The preceding year(s) are likely to be the year(s) that produced the violations of Section 8(a)(3) during a next or near related year for which back-pay remedies were received during the years shown in Column C. In order to roughly account for the approximate time-lag between when the adverse action occurred and when the applicable cases were successfully concluded (whether by settlement or by Board order),

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30. RC elections are union-representation elections for which the petition is filed by a labor organization or by employees seeking union representation pursuant to NLRA § 9(c)(1)(A), 29 U.S.C. § 159(c)(1)(A) (2012). These petitions, except in rare instances, relate to organizational campaigns for initial representation.
corresponding election figures are thus given for the preceding year rather than for the current year of the final ULP resolution. This index of eligible voters also provides the approximate employee populations being reviewed, thereby showing the diminishing number of employees who have been involved in RC elections. However, it doesn’t account for employees in early organizational campaigns that never reached an election, a factor for which there’s no available data.

Column C indicates, by fiscal year, the number of individual employees who received back pay from employers for violations of Section 8(a)(3). These figures provide a rough approximation of the number of employees determined to have been wrongfully discharged the previous year in violation of Section 8(a)(3). Despite its limitations, this index is the most accurate available statistical measure of meritorious discharges for union activity.\(^{31}\) It includes almost all Section 8(a)(3) discriminatees, omitting only those few cases where discriminatees recovered no back pay because their interim earnings during the critical periods (i.e., between the date of discharge and the offer of reinstatement) equaled or exceeded their lost earnings—an insignificant number. Column C therefore provides the best available yearly count of the total number of employees who were finally determined to have suffered from employment discrimination because of their union activity. Not counting the years prior to 1979, when unlawful discharges were relatively low, the total number of such discharges for the thirty-five year period from 1979 through 2014 was

\(^{31}\) An index purporting to show the volume of § 8(a)(3) discharges based on the number of employees offered reinstatement would be highly inaccurate, for the final outcomes of a large proportion of § 8(a)(3) cases don’t result in reinstatement. This is so for a variety of reasons, such as: (1) most meritorious cases settle prior to hearing or Board order and many employers offer and many employees accept back pay without reinstatement as a condition of settlement; (2) many discharged employees obtain other employment and don’t desire to return to the company that discharged them; and (3) where the union has not obtained representation rights, which is most often, wrongfully discharged employees may not wish to return to a hostile environment. See Warren H. Chaney, The Reinstatement Remedy Revisited, 32 LAB. L. J. 357, 359 (1981); Elvis C. Stephens & Warren Chaney, A Study of the Reinstatement Remedy Under the National Labor Relations Act, 25 LAB. L. J. 31, 34 (1974). For the foregoing reasons, estimates reported in Robert J. LaLonde & Bernard D. Meltzer, Hard Times for Unions: Another Look at the Significance of Employer Illegalities, 58 U. CHI. L. REV. 953, 992 n.39 (1991) (arguing focus on the number of individuals covered by reinstatement offers, as distinguished from backpay awards, is appropriate), and DUNLOP COMM’N ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS ET AL., FACT FINDING REPORT 68-70, 84-85 (1994), which were based on statistics showing offers of reinstatement rather than backpay, seriously underestimate the incidence of meritorious § 8(a)(3) cases in relation to union organizational campaigns. Nevertheless, the Dunlop Commission reported that “[t]he number of reinstatement offers arising from certification elections, while small and relatively constant since 1975, has risen significantly when compared to the numbers of workers voting for unions.” DUNLOP COMM’N at 70. LaLonde and Meltzer were responding to Paul C. Weiler, Promises to Keep: Securing Workers’ Rights to Self-Organization under the NLRA, 96 HARV. L. REV. 1769, 1772–73 (1983). Weiler’s reply is in Paul C. Weiler, Hard Times for Unions: Challenging Times for Scholars, 58 U. CHI. L. REV. 1015 (1991).
887,217—close to a million since passage of the Act in 1935—truly a quantity of epidemic proportion.\(^{32}\)

Column D shows, by fiscal year, the percentage-ratio of the approximate number of employees determined to have been wrongfully discharged in violation of Section 8(a)(3) the previous year in relation to the number of eligible voters in union elections that year. This listing thus provides a rough approximation of the percentage likelihood of an employee being terminated because of her/his union activity during the covered years.

The foregoing Table reveals the dramatic, but dark, relationship between union-organizing activity and discharges for such activity. It shows a chronologically consistent trend that provides overwhelming proof of the Board’s failure to successfully enforce Section 8(a)(3). Despite many valiant efforts, including the use of Section 10(j) preliminary injunctions,\(^{33}\) widespread deterrence has never been achieved. For comparative purposes, it is notable that this Table demonstrates that during the 1970s, compliance with the law was considerably better than in later years. Specifically, from 1969 through 1976, organizational activity was relatively high. As Column B indicates, in each of those years, on average, over a half million employees were eligible to vote in an RC election.\(^{34}\) That was more than five times the annual average number of employees eligible to vote during the eight years from 2007 through 2014, which was only 105,781. These figures thus demonstrate the extent to which union-election activity, i.e., organizational activity, has declined.

During most of the 1970s, when a much higher rate of organizational activity prevailed, the ratio of meritorious Section 8(a)(3) cases to eligible voters was relatively low and fairly level from year to year. During the eight-year period from 1969–1976, the likelihood of an employee in an election campaign being discharged in violation of Section 8(a)(3) averaged 1.2 percent. Standing alone, that might not seem exceptionally low. But compared to what happened in subsequent years, that level appears quite tolerable. During the next eight years, from 1977-1984, the ratio climbed to an average of 4 percent, and continued to climb even more sharply thereafter. And for the eight-year period from 2006-2014, the ratio averaged 20.2 percent. In two of those years, 2012 and 2013, the likelihood of an employee in an election campaign being unlawfully discharged reached over 35 percent.

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\(^{32}\) However, to the extent that Column C omits pure § 8(a)(1) discharges, it slightly understates the magnitude of the problem. See supra notes 28-29, and accompanying text.

\(^{33}\) See infra Section IV.B.1 for discussion of Section 10(j) injunctions.

\(^{34}\) 536,690 employees. See infra Table.
The importance of these figures lies not only in the total number of discriminatees shown for any given year, or in the ratio of organizational activity to meritorious Section 8(a)(3) cases in any single year, but also in the unmistakable upward trend of those figures. Beginning in the late 1970s, the rate of violations started to climb to unacceptable heights. For present purposes, it’s of little importance to know the exact timing of the Section 8(a)(3) discharges in any given year, and the NLRB supplies no such data. However, it is generally accepted that most Section 8(a)(3) cases represent discharges occurring during union organizational campaigns, although many occur during the period of attempted first-contract negotiations, and a much smaller number occur after a union becomes established.\(^35\) Regardless of exactly when they occur, the demonstrable average increase in the known percentage-ratio affecting all discriminatees—from 1.2 percent to 35 percent—describes a patently unacceptable level of violations. Indeed, in a democratic and civilized industrial society such extensive and deliberate infractions of the law—Section 8(a)(3), with rare exceptions, requires a finding of *intent* by the employer\(^{36}\)—necessitate condemnation. In a country like the United States, which is normally—some might even say abnormally—obsessed with a need to expose and prosecute violations of the law, one would expect both the media and the public to be appalled to learn that a huge number of employers involved in union organizational campaigns deliberately use employment discrimination against their employees as a device to remove union activists, thereby injecting fear in the process of selecting or rejecting union representation. Employers who have engaged in this type of illegal conduct evidently don’t view their violations as reprehensible—their conduct might even be deemed socially acceptable in many environments. The magnitude of these violations, however, should no longer be ignored. Although union organizational activity has declined over the years, as highlighted in Column B, the rate of Section 8(a)(3) violations (Column C) is seventeen times higher today than forty years ago. These alarming statistics reveal a critical problem in law enforcement that should not be tolerated in a law-abiding society.

2. **Lack of Statistics Under the RLA**

Having viewed the dismal figures for anti-union terminations under the NLRA, it’s now time to examine similar phenomena under the RLA. This involves cases where employees or unions, by some official action,
protested discharges or other denial of employment because of union activity and the resulting outcome of those cases. But unlike the NLRB data, there are no available statistics that show how many employees for whom legal actions have been filed alleging such discrimination under the RLA, nor are there statistics that show the extent to which such cases were successfully concluded. However, there are other dependable indicators, as well as consistent anecdotal evidence, that provide sufficiently accurate information from which to draw reliable conclusions. The reason for this absence of precise data is that the RLA does not provide the NMB with quasi-judicial authority comparable to the NLRB’s unfair-labor-practice jurisdiction. The NMB’s jurisdiction is largely limited to administering the representation process, assisting carriers and unions in collective bargaining by providing mandatory mediation, and providing or facilitating arbitration. Accordingly, the duties and prohibitions that govern conduct under the RLA—primarily the rights and duties provisions in Section 2— are enforced in the federal courts through lawsuits brought directly by unions, employees, or carriers, but not by the NMB, which has no such authority. Although the RLA also contains criminal penalties for violations, these are almost never used.

Ever since the Supreme Court’s decision in the 1930 T. & N. O. case, aggrieved parties have relied upon the injunctive power of the federal district courts to enforce statutory rights under the RLA. Among those rights are the prohibitions against carrier interference with the organizational rights of employees guaranteed by Section 2 of that Act. Accordingly, if a carrier discharges an employee for union activity, such conduct will be deemed an interference with those rights, enforceable by private-party actions in federal district court.

That availability of relatively quick injunctive relief—albeit in accordance with a showing of traditional four-pronged equitable criteria

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37. 45 U.S.C. § 155; see also id. § 152, Ninth.
40. A rare example of attempted, but unsuccessful, use of 45 U.S.C. § 152, Tenth, which makes it a criminal offense for a railroad or airline to willfully influence or coerce its employees in matters involving union representation, occurred in United States v. Winston, 558 F.2d 105 (2d Cir. 1977) (reversing and remanding where a jury had found discharge of seven pilots was motivated by their union activity). For re-confirmation of the civil suit jurisdiction of enforcement actions under Section 2, Fourth of the RLA, see Stepanischen v. Merchants Dispatch Transportation Corp., 722 F.2d 922, 926–27 (1st Cir. 1983).
42. 45 U.S.C. § 152, Third, Fourth.
43. For the Supreme Court’s more recent articulation of standards for injunction, see Winter v. NRDC, Inc., 555 U.S. 7, 20 (2008) (“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of
applicable to most preliminary injunctions in the federal courts—has had such a strong deterrent effect that discriminatory employee terminations to discourage unionization rarely occur under the RLA. The last published court decision on this subject was in 1987, *Arcamuzi v. Continental Airlines, Inc.* Although there are no later cases among published decisions, there are references to unpublished federal district court cases in four NMB decisions, the most recent of which occurred in 1992, as noted below.

Of the seventeen published court cases involving the issue of whether employees were being discharged for union-related activity under the RLA to discourage or avoid union representation, the earliest occurred in 1970 and the latest in 1997. In those cases where anti-union employment discrimination was alleged, a total of 49 employees were implicated. Of that number, the courts ruled in favor of fourteen employees and against ten others. As to the other twenty-five, further actions were ordered (or assumed) either by the district courts on motion, or by the appellate courts on remand. Based on the facts recounted in those opinions, the final results in a majority of those cases were probably favorable to the employees. In addition to those seventeen published cases, four NMB decisions referred to pre-election activity that included additional unpublished federal court actions that resulted in the reinstatement of discharged pro-union employees—thirteen in three such cases and an unspecified number in the other case.

44. *Arcamuzi v. Continental Airlines, Inc.,* 819 F.2d 935 (9th Cir. 1987). A later case, *Fennessey v. Southwest Airlines, Inc.,* 91 F.3d 1359 (9th Cir. 1996), is not included here because its issue concerned an employee allegedly fired for activity designed to replace an incumbent union with another union, thus wholly different from the types of discharges on which this article focuses. Were it included, however, there would be no significant difference in the resulting case numbers.

45. See infra note 47.


47. *EgyptAir, 19 N.M.B 166, 175 (1992)* (referring to settlement and dismissal of a federal court action involving five employees allegedly discharged for union activity); *Sea Airmotive, Inc., 11 N.M.B. 87, 90–91 (1983)* (referring to employer’s discharge of an unspecified number of pro-union employees plus allegedly engaging in other anti-union discrimination); *Transkentucky Transp. R.R.,*
Yet, not surprisingly, as the five additional cases noted below illustrate,48 some employees discharged for union activity apparently did not have access to federal court action. Nevertheless, their terminations were deemed to be evidence of employer misconduct that tainted the laboratory conditions required for a fair election, thereby constituting grounds (usually among other grounds) for setting aside the results of those elections, which resulted in rerun elections by the NMB. The most recent of those cases occurred in 2003, which is when the last publicly known alleged discharge for union activity occurred under the RLA, according to court and NMB published decisions.49

A bit of history is now in order. The airlines were not brought under the RLA until 1936.50 The earliest of the foregoing nineteen identifiable federal district court cases concerned a discharge that occurred in 1967, indicating that general compliance with this area of the law evidently existed before any recorded judicial action on the subject. The first reported case was Burke v. Mexicana Airlines, Inc.,51 a 1970 Ninth Circuit decision that affirmed the district court’s jurisdiction to protect an airline employee who had been discharged on account of his activity on behalf of the Machinists Union (IAM). The court spelled out the well-recognized proposition, that pursuant to Section 2, Fourth’s guarantee of the “’right’ of employees ‘to organize and bargain collectively[,]’” there could be no doubt “that discharge of an employee because of his attempts to organize a union is a harm of the type the statute was intended to forestall.”52 The court noted that “the only remedies adequate fully to effectuate the congressional purpose . . . are . . . damages and reinstatement.”53 That message defined the basic substantive law that has been consistently followed ever since, and for which preliminary injunctions became routine. The following two post-


51. Burke, 433 F.2d 1031.

52. Id. at 1034.

53. Id.
Burke cases are examples of the current state of this law and the process of its enforcement.

In Adams v. Federal Express Corp., the Sixth Circuit affirmed the application of the four traditional equitable standards for issuance of preliminary injunctions for the protection of employees discharged for union activity under the RLA. Those standards are: “[1] whether the plaintiffs have shown a strong likelihood of success on the merits; [2] whether the plaintiffs have shown irreparable injury; [3] whether the issuance of a preliminary injunction would cause substantial harm to others; and [4] where the public interest lies.” Emphasizing the importance of the injunctive process under the RLA, the court found that

The right of employees to organize, free from interference and coercion by their employer, is rooted in the freedom of citizens of a free society to organize for lawful purposes. . . . In cases such as the present one, a District Court must exercise great care to prevent the employees’ right to organize from becoming illusory.

Following the Sixth Circuit’s remand, the district court concluded that Federal Express’s (FedEx) order to an employee to remove a Teamster button and his subsequent discharge for refusing unlawfully coerced him and other employees in violation of Section 2 Third and Fourth of the RLA. The court ordered the employee reinstated with backpay. The court found, however, that the discharges of two other employees were unrelated to their union activity. It also ordered corrective action for a fourth employee who had been transferred unlawfully because of his union activity. The court also enjoined FedEx from engaging in various acts deemed coercive of the rights of its employees and issued a broad injunction against the company’s “coercing, interfering with or influencing its employees in any way with respect to their right to choose a bargaining representative.” Notwithstanding the considerable union activity that has since occurred at FedEx, there have been no apparent recorded instances,

55. Id. at 323. See also Winter v. NRDC, Inc., 555 U.S. 7, 20 (2008).
56. Adams, 547 F.2d at 323.
58. Id.
59. Id. at 1364–65, 1372.
60. Id. at 1372.
61. See, e.g., the following partial listing of Federal Express Corp. NMB cases: 22 N.M.B. 215 (1995) (finding FedEx’s Global Operations Control Specialists to constitute a separate craft or class); 20 N.M.B. 486 (1993) (certifying Air Line Pilots’ Association as the representative of FedEx’s Flight Deck Crew Members); 20 N.M.B. 7 (1992) (finding FedEx’s conduct tainted laboratory conditions in an election for Flight Deck Crew Members, and ordering a re-run); 17 N.M.B. 24 (1989) (reporting an election for representation of Flight Deck Crew Members in which less than a majority of eligible employees cast ballots, resulting in no certification); 6 N.M.B. 442 (1978) (finding, pursuant to an application by the Teamsters, that Fleet Service Employees constituted a craft or class).
either in federal court cases or in NMB decisions, of union-related employee discharges.

The other illustrative case is Union of Professional Airmen v. Alaska Aeronautical Industries, Inc., in which the union sought reinstatement of nine discharged pilots and damages for their lost wages. \(^{62}\) Observing that the union was “in its formative stages and possibly will suffer irreparable harm if these employees are not allowed to continue their close association through employment,” the court therefore found “that as a result of these discharges the union organizing activity has been harmed [and] the careers of these pilots, whose future employment possibilities depend upon their number of hours flown, have been harmed by this action.” The court accordingly stressed that “the Railway Labor Act was promulgated to prevent precisely this type of activity,”\(^{63}\) whereupon it found that these pilots had been discharged for union activity and accordingly ordered their reinstatement and back pay.

The foregoing reports of alleged and meritorious cases of airline and railroad employees discharged for union activity under the RLA represent the total of all such cases that I’ve been able to determine have occurred since airlines were brought under that statute in 1936. This conclusion is based on a comprehensive search for all such cases, using NMB sources, Lexis, Westlaw, Shepherds, and the treatise The Railway Labor Act, 3\(^{rd}\) edition and supplement.\(^{64}\) The small number of dischargees found demonstrates that the availability of prompt federal court injunctive action has been remarkably successful in deterring discharges for union activity, especially during the last several decades, which was a period of considerable organizational activity on the airlines under the RLA.

One should not assume, however, that carriers under the RLA do not fight hard to keep their employees nonunion.\(^{65}\) Most carriers have vigorously opposed union organizing, and many have engaged in pre-election conduct that constitutes illegal interference under the RLA, i.e., activity that taints the “laboratory conditions” that are deemed a requirement for a fair election under Section 2 Third and Fourth of that statute.\(^{66}\) However, because of its limited jurisdiction, the NMB can only


\(^{63}\) Id. at 2870.

\(^{64}\) The Railway Labor Act (Chris A. Hollinger et al. eds., 3d ed. 2012) and 2015 Supplement.


\(^{66}\) See, e.g., Delta Airlines, Inc., 37 N.M.B. 281, 283 (2010); Petroleum Helicopters, Inc., 25 N.M.B. 197, 229 (1998); Evergreen Int’l Airlines, 20 N.M.B. 675, 676 (1993); Egyptair, 19 N.M.B. 166, 167 (1992); Metroflight, 18 N.M.B. 532, 533 (1991); USAir, 17 N.M.B. 377, 379 (1990); America West
treat such conduct, including discharges for union activity, as grounds for setting aside an election and ordering a new election.\textsuperscript{67} However, with only a few exceptions, RLA carriers, unlike employers under the NLRA, seem to have learned to stop short before firing employees when the motive for such terminations might be perceived as anti-union.

If termination of union adherents is so often relied upon to chill enthusiasm for union representation under the NLRA, why does that scenario almost never occur under the RLA? Why such restraint? The principal reason, as previously noted, is both simple and obvious, especially to labor attorneys who represent carriers under the RLA. If employees are terminated for what a union believes can reasonably be proved to be union activity, the affected employees—with the union’s assistance—will likely file for a preliminary injunction in federal district court fairly soon. And no rational employer wants to risk awarding a union credit for reinstating discharged union adherents just prior to a representation election. Consequently, election campaigns under the RLA generally turn on other issues. But for whatever reason, union organizational activity and union representation remains relatively high under the RLA,\textsuperscript{68} while both phenomena have declined drastically under the NLRA.\textsuperscript{69} The presence or absence of discharges for union activity would seem to be a significant factor in the extent of unionization under both statutes, but with opposite effect.

### III. Enforcement Under the Two Statutes

#### A. Failure of Reinstatement and Back Pay under the NLRA

I shall not review in detail the laborious procedures involved in processing contested unfair labor practice cases at the NLRB,\textsuperscript{70} including Section 8(a)(3) cases. I shall, however, note the principal stages, most of which are time-consuming and involve additional time-breaks for settlement efforts. Following are those stages, the length and complexity of which have contributed greatly to the Board’s systemic failure to provide

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\textsuperscript{67} This is not to say that the NMB is powerless to address the problem. It may require that the new election be run in a particular way to avoid repetition of the same problems. \textit{E.g.}, \textsc{Key I}, 16 N.M.B. at 308 (“Where the Board finds interference in the employees’ freedom of choice, the NMB has devised remedies to purge the taint and ensure a fair election”); \textit{id.} at 297 n.1 (describing the “Laker ballot” system first used in \textit{Laker Airways, Ltd.}, 8 N.M.B. 236 (1981).

\textsuperscript{68} See \textit{supra} notes 15–21.

\textsuperscript{69} See \textit{supra} notes 14, 2227.

\textsuperscript{70} See generally Ch. 31, NLRB Procedures, in \textit{DEVELOPING LABOR LAW}, \textit{supra} note 9, at 18–29.
effective deterrence of Section 8(a)(3) violations. The process begins with the filing of an unfair labor practice charge, followed by the Regional Office’s investigation, after which either a dismissal or issuance of a complaint occurs. If a complaint is issued, a trial before an Administrative Law Judge (ALJ) is conducted. The ALJ issues a decision, and finally there’s a decision by the Board. And because the Board’s final decisions are not self-enforcing, appellate court enforcement will often be required, which is also very time-consuming.

ULP cases at the NLRB thus take an extremely long time to process. For example, in fiscal year 2014 the median number of days required to process a case from filing a charge to issuance of the Board’s decision was 607 days—almost two years. And that figure does not include additional time for enforcement or appeal, which could add at least another one or two more years. The delay of several years between the discriminatory discharge and an order of reinstatement and lost backpay—the usual final remedial order that euphemistically “makes whole” the discharged victim—renders such an order when finally issued virtually meaningless. It’s almost always dead on arrival. In most cases the NLRB, through its normal remedial procedures, is institutionally unable to effectuate any remedy until long after the substantial and irreparable injury has occurred.

An empirical study of the reinstatement remedy’s effectiveness in Section 8(a)(3) cases indicated that 59 percent of employees offered reinstatement refused to accept it. Most of those employees (88 percent) feared company backlash. Of those who accepted reinstatement, 87 percent left again within a year; and of those who left (either within a year or later), 65.3 percent cited perceived unfair company treatment as the reason for leaving. Inasmuch as such belated reinstatement doesn’t repair the damage inflicted on other employees by the chilling effect which a discharge lays upon a union’s organizational process, a long-delayed offer of reinstatement to the dischargee of her or his former job is at best a pyrrhic victory. The

71. See Ch. 33, Judicial Review and Enforcement, in DEVELOPING LABOR LAW, supra note 9, at 2–38; NLRA § 10(e)–(f), 29 U.S.C. § 160(e)–(f) (2012).
73. Author’s estimate. Exact time not available.
74. See, e.g., Ch. 32, NLRB Orders and Remedies, in DEVELOPING LABOR LAW, supra note 9, at 36–37.
76. Chaney, supra note 31, at 359 (stating that out of 217 employees ordered reinstated, 129 refused reinstatement).
77. Id. (out of the 129 that refused reinstatement, 114 feared company backlash).
78. Id. at 360.
above data indicates that most Section 8(a)(3) victims likely declined reinstatement because they understood what would be awaiting them if they returned to what would still be a nonunion workplace. Accordingly, since in the normal course of Board procedures a reinstatement order is issued one or more years after filing of the charge, and inasmuch as such an order fails to meaningfully address the injury to other bargaining-unit employees, in the broader statutory scheme injury to the latter group is probably more significant than injury to the discharged employee(s). Clearly, the normal reinstatement remedy in most Section 8(a)(3) cases is institutionally insufficient to remedy the broad injury inflicted. History thus tells us that where there’s no established union relationship, this agency’s remedial effort is likely to be successful only in those few Section 8(a)(3) cases where the Board obtains an early Section 10(j) injunction. The current enforcement of Section 8(a)(3) has no deterrent effect on most employers.

B. Success of Injunctive Deterrence Under the RLA

Two high-profile organizing campaigns illustrate well the scarcity of discharges for union activity under the RLA and demonstrate the difference between the role of anti-union terminations under the RLA and the NLRA. One campaign was by the Communication Workers of America (CWA) to organize 9,000 passenger service employees at US Air. That “craft or class” of employees—as “bargaining units” are designated under the RLA—had never been organized previously, although there had been several unsuccessful attempts. Following vigorous campaigns by both the CWA and the carrier, the union lost the election held in April 1996. The NMB’s investigation, however, revealed that the carrier’s grant of benefits prior to the election and its use of “System Round Tables”—a version of employee committees—had tainted the “laboratory conditions,” whereupon the result of that election was set aside and a re-run election was ordered, which the union won.

The other campaign also involved the CWA, which was the representative of the Northwest Airlines flight attendants prior to Northwest’s merger with Delta Airlines. Prior to the merger, the Delta flight attendants were unrepresented. Following the merger, the NMB conducted an election to determine whether the 20,000 flight attendants of the merged

81. See Prah, supra note 65.
82. See id.; see also US Airways, Inc., 24 N.M.B. 354 (1997).
83. US Airways, 24 N.M.B. at 393.
carrier would be represented by CWA, which the CWA lost in a close contest of 49 percent to 51 percent. The NMB denied CWA’s contention that Delta’s pre-election conduct violated the laboratory conditions required for a fair election, ruling that the carrier’s references to pay increases had not tainted the election.

What is notable about those US Air and Delta elections is that despite the fact that both carriers waged intensive and lengthy anti-union campaigns, neither discharged any employees as an election tactic. Oral interviews with several NMB officials confirm this conclusion.

That record is so extraordinary in relation to what regularly occurs under the NLRA, that some numerical highlights are worth emphasizing. From the data reported above, I learned that the only unlawful discharges that may have occurred in the last recorded quarter century under the RLA were of two employees at Pinnacle Airlines in 2003, one employee at Atlas Air in 1997, fourteen employees at Sky Valet in 1996, and two employees at Egyptair in 1992. This is a total of 19 employees among the more than 690,000 eligible to vote in NMB union representation elections from the beginning of fiscal year 1990 to the end of fiscal year 2014. For the same period under the NLRA, the official record shows that among the 4,131,467 employees then eligible to vote in union-representation elections, 576,263 were unlawfully fired or otherwise denied employment because of their union affiliation or activity, with the bulk of those discriminatory terminations having occurred at the beginning or during union organizing campaigns. These figures record an epidemic of unlawful discharges. Over half a million employees were thus fired under the NLRA in that last quarter century because of their union support!

In contrast, carriers under the RLA ordinarily do not fire union-related employees during election campaigns. Their management and/or attorneys fully understand the likely response to federal-court injunctive action that would likely follow. Although federal district judges haven’t hesitated to deny injunctive relief to dischargee-plaintiffs when their cases were deemed insufficient, it’s the availability of this expeditious judicial process and the courts’ willingness to grant such relief when merited that promptly matters.

85. Swisher, supra note 65, at 1.
86. Id.
88. Response from NMB to FOIA Request, File No. F-1673 (June 4, 2015) (on file with author). This response omitted data for fiscal years 1993–95, when there were no annual reports; therefore the figures for those years have been estimated from the three years immediately preceding and the three years immediately following.
89. See supra at note 27, table showing discriminatory employment discharges under the NLRA (totals derived from columns B and C for the years 1990 to 2014).
As a consequence, the likelihood of such cases being filed has evidently discouraged RLA employers from using employee terminations as a weapon against union representation.

IV. PREVENTION LEARNED FROM THE RLA—CAN SECTION 10(j) OF THE NLRA BE A DETERRENT?

A. Prelude

Comparing union-animus discharges between the RLA and the NLRA is more a contrast of legal compliance than of dedicated law enforcement. Under the NLRA, violations of Section 8(a)(3) have been largely enforced through conventional NLRB administrative procedures. Such procedures involved filing and processing of thousands of cases decade after decade, and the expenditure of vast amounts of legal time, effort, and budget, all of which, as noted, resulted in only individualized, and mostly insufficient remedies—and virtually no deterrence. Despite those well-intentioned efforts, the law of Section 8(a)(3) continues to be broken repeatedly. And in workplaces with low-income workers, where the need is greatest, there’s accordingly very little effective compliance. It’s not as if we were dealing with a law that the public views as unpopular—such as a 55 mile-per-hour freeway speed limit. We’re dealing with a basic democratic right of individuals to exercise their freedom of association—a right of both statutory and constitutional dimensions. Nevertheless, that same right exists under the RLA where almost every employer is in compliance. There may be several causes for this extreme difference in attitude under the two statutes, but whatever the minor causes might be, the major cause is clearly the certainty of sure and swift injunctive enforcement—always available under the RLA—that formidably deters violations and produces compliance. This response is euphemistically called “voluntary compliance.”

Is there a way to achieve comparable voluntary compliance under the NLRA? And if so, why has it taken so long to discover it? The answer to that first question is a cautious “yes.” Because with the introduction of some administrative modifications that are outlined below, usage of federal temporary restraining orders and/or preliminary injunctions under Section

91. See N.L.R.B. v. Gissel Packing Co., 395 U.S. 575, 617 (1969) (where the Court required a balancing of “the rights of the employees to associate freely, as those rights are embodied in § 7 and protected by § 8(a)(1) and the proviso to § 8(c)” with the employer’s First Amendment free speech rights).
92. E.g., historical differences in attitudes toward union representation that may be applicable for some railroad employees, and safety factors that might characterize certain airline and railroad occupations.
10(j) can achieve wide-scale voluntary compliance with Section 8(a)(3). The answer to the second question—though of dubious importance to the ultimate objective—is more uncertain. It’s a regrettable fact that vigorous use of Section 10(j) injunctions from 1998 to the present, as proposed in my original *Tale of Two Statutes*, did not make a significant difference despite the sincere and dedicated efforts by several General Counsels.93 But the main reason why it has taken so long to discover my proposed solution is that it was only in recent years that the Board’s authority to *delegate* Section 10(j) functions to the General Counsel was judicially highlighted.

I shall begin the task of showing the path to this solution by calling attention to a critical feature of the NLRA about which most of the general public is unaware. Under this Act, an aggrieved individual cannot bring a case directly to the Board or to the courts. An unfair labor practice case can be processed only if and when the General Counsel of the Board issues a “complaint” in response to a “charge” that has been filed by or on behalf of an aggrieved party.94 The General Counsel thus has a virtual monopoly on seeking and obtaining injunctive relief for violations, and only the Board—by and through the General Counsel—has express statutory authority to petition a federal district court for temporary injunctive relief; individual aggrieved parties have no such authority.95 This is not the case, however, under the RLA, where the existence of free-market private legal representation enables private parties to seek and directly enforce that statute’s requirements in the federal district courts. As I previously emphasized, if a carrier under the RLA were to terminate a union adherent during an organizational campaign, a swift and certain response in the form of an action for a preliminary injunction—with its obvious consequences—would be readily available to the affected employee(s) and/or the union. That scenario is thus vastly different from procedures under the NLRA, where the filing of a charge with an NLRB regional office—except in the few cases that receive 10(j) treatment—can produce only a vague expectation of eventual reinstatement and/or backpay. Those remedies may come months or years later and usually too late to have any positive effect on a union’s ongoing organizational campaign or to successfully counteract the negative impact of unlawful terminations. Under present procedures the damage is almost always irreparable.

This disconcerting evidence of the NLRB’s failure to enforce Section 8(a)(3) effectively—which has been readily apparent for decades—has led many commentators to advocate amending the Act to provide stronger

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93. *See infra* text accompanying notes 104–119.
95. *See infra* text accompanying note 100.
penalties for Section 8(a)(3) violations\textsuperscript{96} and/or mandatory injunctive relief\textsuperscript{97} as the means to address this problem.\textsuperscript{98} Inasmuch as those proposals were never Congressionally enacted, and they face no chance of enactment in the foreseeable future, realistic attention should be focused primarily on improving enforcement of existing law. That is the object of this article, notwithstanding the expected reluctance of some Board Members who might be effectively opposed to the Act’s basic purpose of encouraging the practice of collective bargaining.\textsuperscript{99}

B. Relevant Statutory Provisions—Sections 10(j), 8(a)(3), and 10(m)

1. Section 10(j) and its Current role

Section 10(j) offers the procedural means to make preliminary injunctions under the NLRA ultimately as effective as they are under the RLA. It reads that

The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court within any district where the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such

\begin{itemize}
\item \textsuperscript{98} Although I was one who made some of those legislative recommendations, I tempered my approach with a realistic recognition that given the partisan nature of the subject matter, legislative reform was not likely to occur in the foreseeable future. I argued, therefore, the Board should make a sustained effort to use more efficiently the procedural tools the law already provides. Morris, supra note 97, at 546–50; see also Charles J. Morris, \textit{Renaissance at the NLRB—Opportunity and Prospect for Non-Legislative Procedural Reform at the Labor Board}, 23 STETSON L. REV. 101, 106–08 (1993).
\end{itemize}
person, and thereupon shall have jurisdiction to grant to the Board such
temporary relief or restraining order as it deems just and proper.\textsuperscript{100}
The two most distinctive features of this text are that issuance of a
“complaint” is a prior requirement and that the court’s temporary relief
must be deemed “just and proper.”

Section 10(j)’s original legislative history leaves no doubt that
although the Board retains exclusive jurisdiction to make all final
determinations in unfair labor practice cases, Congress expressly designed
Section 10(j) to provide a readily available method to avoid a party
suffering substantial and irreparable injury while waiting for that final
determination. The Taft-Hartley Senate’s Report on this provision was
specific as to its purpose and the types of cases for which these temporary
injunctions would be used. It stressed that

Experience . . . has demonstrated that by reason of lengthy hearings and
litigation enforcing its orders, the Board has not been able in some instances
to correct unfair labor practices until after substantial injury has been done
. . . . [Thus,] it has sometimes been possible for persons violating the act to
accomplish their unlawful objective before being placed under any legal
restraint and thereby to make it impossible or not feasible to restore the
status quo pending litigation.\textsuperscript{101}

That description fits most Section 8(a)(3) cases. As William Cooke
indicated in his empirical study of the impact of Section 8(a)(3)
violations,\textsuperscript{102} the overwhelming majority of 8(a)(3) unfair labor practices
occur (1) during organizing campaigns, (2) just prior to union elections, and
(3) during first-contract negotiations; and it’s the chilling effect that such
conduct has on organizational fervor that is critical to the need for relatively
prompt injunctive relief.

Some historical background regarding Section 10(j)’s usage is in order.
In the early years following its addition to the Act in 1947, this provision
was not viewed as a key remedy among the Board’s arsenal of weapons.\textsuperscript{103}
During the first fourteen years, no more than seven petitions for preliminary
injunctions were filed in any single year, and in that entire period only
eleven petitions were filed against employers. In 1962 the number of
petitions jumped to eleven and thereafter averaged about sixteen per year
until the mid-1970s, when usage increased markedly as a result of General
Counsels Peter Nash and John Irving actively promoting the merits of the

\begin{footnotes}
\footnote{100. NLRA § 10(j), 29 U.S.C. § 160(j) (2012) (emphasis added).}
\footnote{101. S. Rep. No. 80-105, at 27 (1947).}
\footnote{102. Cooke, supra note 35, at 423.}
\footnote{103. See Helm, supra note 97, at 610–11; Frank W. McCulloch, New Problems in the
Administration of the Labor-Management Relations Act: The Taft-Hartley Injunction, 16 Sw. L.J. 82,
94–95 (1962).}
\end{footnotes}
Since then, every General Counsel has relied on Section 10(j) as an important enforcement tool. Former General Counsel Rosemary M. Collyer echoed that view when she asserted at a Congressional hearing that “General Counsels of the NLRB believe in injunctive relief under Section 10(j). You really have to believe in 10(j) if you believe in the statute’s purposes and you believe in the complaints you authorize.”

Former Acting General Counsel Lafe E. Solomon, in his explanation of the importance of Section 10(j) actions, called special attention to Section 8(a)(3) cases, asserting that “[w]hen an employer commits such unfair labor practices, it ‘nips in the bud’ all of the employees’ efforts to engage in the core Section 7 right to self-organization. . . . [because a]n unremedied discharge sends to other employees the message that they too risk retaliation by exercising their Section 7 rights.”

General Counsel Richard F. Griffin likewise pledged to emphasize “the need to seek 10(j) relief in particular types of cases. . . . [such as] when employees are unlawfully discharged . . . because of union organizing at their workplaces.” And although his report of the extent of successful 10(j) usage in 8(a)(3) discharge cases during organizing campaigns in fiscal years 2012 and 2013 tells us what these preliminary injunctions accomplished, it also—by comparison with the total number of meritorious 8(a)(3) ULP cases during those same years—demonstrates the limits of those accomplishments. He reported that during that period, “we sought 10(j) relief in 39 cases involving discharges during an organizing campaign with an average success rate of 80% . . . [T]he Agency obtained offers of reinstatement for 454 discharged employees and a total of $5,410,534 in back pay and interest from ULP and 10(j) litigation and settlements during those two fiscal years[,] and we are on the track for similar results in fiscal year 2014.”

His combining results in ULP cases with results in successful 10(j) cases reveals the unintended consequence of his disclosure, because the 39 successful 10(j) discharge cases are but a miniscule fraction of the

104.  Helm, supra note 97, at 610–612, 610 n.62.
107.  Id.
109.  See supra note 27, at Column C.
total meritorious 8(a)(3) discharges, i.e., 61,395 during those two years.\footnote{111} That is less than a tenth of one percent of the total number of employees found to have suffered loss of employment at that time because of their union linkage. The Board’s expenditure of huge amounts of time, effort, and budget—which was indicative of the best of good intentions—produced (based on similar records in prior years) no deterrence,\footnote{112} except perhaps for some of the few defendant-employers of the fortunate 39 Section 10(j) discriminatees described by Griffin.

In view of the Board’s limited resources, I can well understand the efforts to confine invocation of Section 10(j) to a relatively small group of strong cases, and the Board’s consistently high success rate in obtaining injunctive relief in 10(j) cases suggests that the 8(a)(3) cases have indeed been carefully selected. Although that approach may be suitable for the few fortunate dischargees whose cases are so favored, it’s woefully inadequate to achieve meaningful deterrence such as prevails under the RLA.\footnote{113} However, similar results could ultimately prevail under the NLRA through the revised use of Section 10(j) that I propose below.

Although Section 10(j) is also effectively employed for other ULPs, both against employers and against unions,\footnote{114} the focus of this article is confined to its use only in Section 8(a)(3) cases. As previously noted, however, the Board uses the 10(j) remedy in only a small number of those cases, particularly the so-called “nip-in-the-bud” cases, such as the infractions described as follows in the current \textit{10(j) Manual Users Guide}:

[These] usually involve an employer’s response to an organizational campaign with serious, if not massive, unfair labor practices: threats, coercive interrogations, surveillance of protected activities, improper grant of benefits, and unlawful employee discipline, including discriminatory discharges.\footnote{115}

The current procedure for handling those favored “nip-in-the-bud” 10(j) cases is contained in a “Memorandum (Memo)” originally issued by former Acting General Counsel Solomon in 2010.\footnote{116} I shall here list the principal stages in that procedure and briefly indicate which and how those

\begin{itemize}
\item \footnote{111} \textit{See supra} note 27, at Column C, for years 2012–13.
\item \footnote{112} \textit{See}, e.g., Press Release, NLRB, Acting NLRB General Counsel Fred Feinstein Issues Four-Year Report on Use of Section 10(j) Injunctions (Jul. 24, 1998) (indicating successful resolution in 88% of 10(j) cases during General Counsel Feinstein’s four-year term). \textit{But see Table supra} note 27, at Column C, for years 1994–97.
\item \footnote{113} \textit{See supra} text accompanying notes 46–49.
\item \footnote{114} \textit{See NLRB GEN. COUNSEL, SECTION 10(j) MANUAL USER’S GUIDE} (Sept. 2002), 6–8 (listing “Mass Picketing and Violence,” “8(d) and 8(g) Notice Requirements for Strikes or Picketing,” and “Union Coercion to Achieve Unlawful Object” among the union ULP categories deemed appropriate for Section 10(j) treatment. A total of 15 general categories are listed as appropriate.)
\item \footnote{115} \textit{Id.} at 4.
\item \footnote{116} NLRB Gen. Couns. Mem. 10-07, supra note 106.
\end{itemize}
stages will be affected under the plan proposed in this article. Deletion of some of the present stages will simplify and shorten the time required for future execution of the 10(j) process. Solomon explained that the goal was “to give all unlawful discharges in organizing cases priority action and a speedy remedy,”117 which was obviously intended to be in accord with the statutory priority required by Section 10(m), which is treated below.118

That Memo’s “Timeline,”119 as indicated by its features, which follow, calls for the following stages. (1) Nip-in-the-bud identification “as soon as possible after the filing of the charge,” and a lead affidavit to be taken within 7 calendar days from that filing. The charging party’s evidence should be obtained within 14 calendar days after that filing. (2) If the evidence points to a prima facie case that suggests the need for injunctive relief, the charged party is to be so notified within 7 calendar days. (3) Within 49 calendar days, the Regional Director is to make a determination as to the merits of the case and specifically decide whether a complaint shall issue and a 10(j) injunction recommended. (Inasmuch as this step under my proposal will require only a single rather than this double determination, the allotted time can be reduced to 30 calendar days, except in extraordinary circumstance.) (4) This next stage instructs that an administrative hearing should be promptly set. (5) The case is then sent to the Injunction Litigation Branch (ILB), after which the General Counsel decides whether or not 10(j) authorization should be sought. (Under my proposed plan, this stage will be unnecessary, hence eliminated.) (6) Within 7 calendar days after close of an expedited hearing, a short-form memorandum regarding 10(j) relief is to be submitted to the ILB. (This stage will also be unnecessary and hence eliminated under the proposed process.) (7) Within 2 business days after receipt of that memorandum, the ILB will decide whether it agrees that 10(j) relief is warranted, and if so will prepare within 7 days an appropriate memorandum that will be submitted to the General Counsel. (This step will no longer be needed and will therefore be eliminated.) (8) The General Counsel will review and decide whether to submit a 10(j) request to the Board, and if it is so decided, a request will be submitted. (This stage will be eliminated under my proposal, for the Board will already have been provided with notice of that decision.) (9) Within 10 business days after receiving notice from ILB that 10(j) relief is warranted, the Regional Office is to prepare its “points and authorities” and a memorandum for a proposed order. (Under my proposed procedure, this same timing will apply.) (10) Within 2 business days from notification that the Board has authorized 10(j) relief or received

117. Id. at 2.
118. NLRA § 10(m), 29 U.S.C. § 160(m). See infra text accompanying notes 134–158.
from ILB its review of the drafted court papers, whichever is later, the
Regional Office will file those papers with the district court. (This timing
need not be changed, although the prerequisites will differ.)

That last stage (10), with its existing short 2-day time-period for filing
the necessary court papers, impliedly recognizes the Board’s long
established de facto practice of actually delegating the 10(j) decision-
making process to the General Counsel, for under the Timeline Memo the
Board doesn’t receive the request for consideration until the matter has been
fully investigated, preliminarily determined, and court papers have been
drafted and made ready for immediate filing. Thus, even without formal
delegation (such as will prevail under my proposal), the present practice of
de facto delegation achieves the same result, but much more slowly, and for
only a few of the many meritorious 8(a)(3) cases.

The above described Timeline, or its equivalent, is probably also
appropriate for many ULP cases that require a closely studied determination
as to whether temporary injunctive relief should be initiated. In its present
form, however, this is not appropriate for the bulk of Section 8(a)(3)
discharge cases, most of which, except in rare instances, inherently fit the
“nip-in-the-bud” requirement for prompt injunctive relief needed to restore
the status quo ante. Thus, despite the well-intentioned efforts of several
General Counsels to streamline the 10(j) process, that process remains
woefully inadequate for most Section 8(a)(3) cases because it does not
remedy the chilling effects produced by the huge number of other Section
8(a)(3) ULPs, nor does it effectively discourage future violations.

2. Section 8(a)(3) and its Inherent Potency

A key element required in all the appellate circuits for issuance of a
Section 10(j) preliminary injunction is proof of the likelihood that unless
enjoined, irreparable damage will result from the employer’s action.120 With
reference to Section 8(a)(3) discharges, that might seem to mean requiring
separate evidence that the discharge of the known pro-union employee(s)
will have the likely effect of chilling union activity among other employees.
As noted earlier, however, the critical language in Section 8(a)(3) provides
that it is an unfair labor practice for an employer “by discrimination in
regard to hire or tenure of employment or any term or condition of
employment to encourage or discourage membership in any labor
organization. . . .”121 Thus, the text of the provision itself—and its judicial
construction as we shall see—specifies both a particular purpose and an
intended discriminatory effect which extends beyond the individual
employee or employees targeted by the action. As the Third Circuit

120.  See supra text accompanying note 55.
described that process, “[w]hen the Board files an application for [10(j)] relief it is not acting on behalf of individual employees, but in the public interest. . . . That interest is in the integrity of the collective bargaining process.”\textsuperscript{122} The primary focus in all of the federal circuits is therefore on the potential harm to the bargaining process, not merely on relief to the specific discharges.

Notwithstanding some differences among the circuits in the application of the Section 10(j) mandate to grant “such temporary relief or restraining order as [the court] deems just and proper,” the final 10(j) results do not appear to differ perceptively based on the particular circuit where the case is tried. Unlike Section 10(l),\textsuperscript{123} a “reasonable cause” standard is not spelled out in Section 10(j); nevertheless, most of the circuits maintain a two-prong standard for 10(j) injunctive-relief where the first prong is whether there’s “reasonable cause to believe” that the ULP has occurred, and (if so) the second prong is what relief is deemed to be “just and proper.”\textsuperscript{124} Other circuits expressly apply the four traditional equitable requirements for a preliminary injunction.\textsuperscript{125} The Developing Labor Law treatise records that

\begin{quote}
[under the reasonable cause standard, the Board is not required to adduce evidence to the extent required for enforcement of a Board order after a full hearing on the merits. Nor is the district court required to resolve disputed issues of fact or credibility. [T]he regional director’s version of the facts should be sustained if ‘within the range of rationality.’\textsuperscript{126}
\end{quote}

It’s also widely recognized that the “‘just and proper’ prong of the § 10(j) injunctive relief standard . . . incorporates elements of the four-part standard for preliminary injunctions[.]”\textsuperscript{127} Common to all of the circuits is recognition of the general proposition that “the irreparable harm to be addressed under § 10(j) is the harm to the collective bargaining process or to other protected employee activities if a remedy must await the Board’s full adjudicatory process.”\textsuperscript{128}

Although circuits differ slightly in their approaches to Section 10(j) decision-making, none of these differences are relevant to the changes that I shall propose as to which the Board and General Counsel should give effect in the selection of 8(a)(3) cases for 10(j) treatment.

\begin{footnotes}
\item 123. 29 U.S.C. § 160(l).
\item 124. The First, Second, Third, Fifth, Sixth, Tenth, and Eleventh Circuits. Developing Labor Law, supra note 9, ch. 32, § III.A.2.C.
\item 125. See supra note 55 and accompanying text.
\item 126. Ch. 32, NLRB Orders and Remedies, in Developing Labor Law, supra note 9, at 4-5.
\item 127. Kreisberg v. HealthBridge Mgmt., LLC, 732 F.3d 131, 141 (2d Cir. 2013).
\item 128. E.g., Sharp v. Parents in Cmty. Action, 172 F.3d 1034, 1038 (8th Cir. 1999) (emphasis added).
\end{footnotes}
It is my conclusion regarding Section 8(a)(3), which is supported by the classic Supreme Court construction spelled out below, that a determination contained in an NLRB complaint that charges a violation of that section is a determination ipso facto that the employer’s purpose was to prevent the establishment of union representation, an objective that would likely succeed unless early reinstatement occurs or is ordered. Accordingly, in a Section 10(j) case it should not be necessary for the Board or General Counsel—or the Regional Director, the usual plaintiff—to present any more proof of irreparable damage than that which is required to establish the necessary elements for issuance of a Section 8(a)(3) complaint. Supporting that time-saving concept is the Supreme Court’s classic construction of that provision, which it proclaimed many decades ago in the Radio Officers case.129

Although Section 8(a)(3) literally refers to discouragement of union “membership,” Radio Officers provides the basis for an implied—yet sufficient—showing of irreparable damage in its definition of the meaning of that provision’s critical language. Recalling its treatment of that language in past cases, the Court repeated that the phrase includes “discrimination to discourage participation in union activities as well as to discourage adhesion to union membership” per se.130 It’s therefore fundamental decisional law that Congress intended Section (a)(3) to protect more than bare union membership, and that any discrimination designed to encourage or discourage union activities or support is unlawful.131 Accordingly, when an employer motivated by union animus discharges an employee, that act alone is sufficient, absent a successful Wright Line defense,132 to establish a violation of Section 8(a)(3).

Regarding the foreseeable consequences of what might result from that discriminatory act, the Court in Radio Officers explained that although Congress intended the employer’s purpose in discriminating to be controlling . . . . specific evidence of intent to discourage [union membership] is not an indispensable element of proof of violation of § 8(a)(3) . . . . This recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common-law rule that a man is held to intend the foreseeable consequences of his conduct.133

130. Id. at 40.
131. See Ch. 7, Discrimination in Employment, in DEVELOPING LABOR LAW, supra note 9, at 3–4.
132. When the employer can satisfy the burden of proof that the discharge would have occurred regardless of the employee’s protected activity, § 8(a)(3) is not violated. See Wright Line, Inc., 251 N.L.R.B. 1083, 1089, enforced, 662 F.2d 899 (1st Cir. 1981).
133. Radio Officers, 347 U.S. at 44–45. The Court noted that this was the same concept that it had approved in Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 n.10 (1954), where it declared that an employer’s “rule prohibiting union solicitation by an employee outside of working hours, although on
Radio Officers thus provides the highest judicial recognition of a critical feature of Section 8(a)(3), which—as the reader will soon see—can help to achieve a speedier and more efficient use of Section 10(j) for securing effective enforcement of Section 8(a)(3).

3. Section 10(m) and Section 8(a)(3)’s Priority Status

The next applicable statutory clause is an ordinarily obscure but critically powerful provision, Section 10(m), which is an amendment to the NLRA that was enacted in the 1959 Landrum-Griffin Act. It’s a statutory jump-start device that Congress intended in order to accelerate enforcement of Section 8(a)(3). It’s a provision that provides specific proof of Congressional intent to significantly speed up protection of the right of employees to join unions without fear of losing their jobs. Section 10(m) reads as follows:

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (a)(3) or (b)(2) of section 8, such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (l) of this section.

Senator Mundt of North Carolina, the sponsor of that provision—for which there was no opposition to its passage—provided in his Senatorial presentation unequivocal legislative history that explains its purpose, which is “to accord to cases of individual discrimination . . . the same priority of treatment with reference to time as is accorded at present to cases of secondary boycott under section 10(l) of the act.” He added that this “would give priority treatment by the Board offices in cases where an individual . . . has been deprived of a job and a pay-check. At present, a vast majority of those cases are left hanging on the vine for a period, sometimes amounting to years.” His reference to Section 10(l) was both descriptive and pointed—as indicated by the above italicized text—which is identical company property . . . must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory[.]”

135. NLRA § 8(b)(2), 29 U.S.C. § 158(b)(2) (2012) (prohibiting unions from causing or attempting to cause an employer to discriminate in violation of § 8(a)(3)).
136. NLRA § 10(l), 29 U.S.C. § 160(l) (providing for mandatory filing in federal district court for appropriate injunctive relief against unions in secondary boycott and recognitional picketing ULP cases where the officer in charge or regional attorney “has reasonable cause to believe such charge is true and that a complaint should issue”). Section 10(l), hence, is an extremely rapid injunctive process prior to issuance of a complaint.
137. NLRA § 10(m), 29 U.S.C. § 160(m) (emphasis added).
139. Id.
to comparable text in Section 10(l). Immediate and preliminary injunctive-speed was thus the intended goal of that provision.

Sad to say, however, the Board has failed, or been unable, to treat this provision as the mandate Congress demanded in that text and which Senator Mundt specifically intended. In response to my Freedom of Information Act (FOIA) inquiry,140 the Board produced a “response”141 by the General Counsel to an anonymous complaint that it had received in 1996,142143 which acknowledged that the Board’s case-handling priorities were in effect inconsistent with the Section 10(m) requirement.144 The General Counsel’s reply, which had the approval of the Acting NLRB Inspector General,145 indicated that regarding “cases where individuals have been deprived of a job and a paycheck . . . a significant number of such cases, based upon the scope of the impact on the public, are specifically included in Category III,”146 the Board’s highest case-handling category. Indeed, the Board’s current Casehandling Manual includes such cases in Category III along with a broad range of other types of cases.”147 The General Counsel acknowledged, however, that numerous cases covered by Section 10(m) are handled no more promptly, and frequently less timely, than other cases both during the investigative and litigation stages. Thus non-Section 8(a)(3)/8(b)(2) cases are sometimes handled more expeditiously under the current system due to various factors, such as high visibility of the labor dispute.148

Notwithstanding, the foregoing case-allocation appears to be in violation of Section 10(m). General Counsel Feinstein’s explanation, however, was that Section 10(m) must be read as being congruent with our statutory mission and not as an isolated operational requirement which must be adhered to regardless of its detrimental consequences upon the public and our mission. Thus, Section 10(m) could be interpreted “as a direction to the Board that it ensure the most expeditious processing of sections 8(a)(3) and 8(b)(2) claims consistent with its expertise and other statutory responsibilities.”149

142. NLRB Response, File No. LR-2015-0460, supra note140.
143. See Memorandum OM 96-21, Impact Analysis and Sections 10(l) and (m), from B. Allan Benson to “All Regional Directors, Officers-in-Charge and Resident Officers (March 14, 1996).
144. Id.
146. Feinstein, supra note 141, at 1.
147. NLRB, CASEHANDLING MANUAL, PART ONE, § 11740.1 (2018)
148. Memorandum OM 96-21, supra note 143 at 3 (emphasis added).
149. Id. (quoting Hammontree v. NLRB, 925 F.2d 1486, 1495 (D.C. Cir. 1991)).
Even so, Section 10(m) obviously needs further—and major—enforcement, for the lengthy delays that Senator Mundt observed over half a century ago haven’t perceptively changed; indeed, they have worsened.\textsuperscript{150} Much more needs to be done to create compliance with that provision. My proposal will significantly help the Board to achieve Section 10(m)’s objective, indeed compliance, for it will dramatically speed up the handling and disposition of Section 8(a)(3) cases and thus give such cases the intended statutory priority over other types of cases.

V. THE SECTION 8(A)(3) DETERRENCE PLAN

A. Objective

The objective of my proposal is to put into effect at the NLRB the same deterrent feature that prevails under the Railway Labor Act—a feature which, as the reader is now well aware, virtually eliminated pre-election anti-union discharges under the RLA. This feature is not merely the \textit{possibility} of a temporary injunction—which now sometimes occurs under the NLRA— but rather the \textit{probability} that such an action will in fact occur. The critical deterrent feature is therefore the \textit{perception} by employers and their attorneys of the \textit{likelihood}—indeed the \textit{virtual certainty}—that if discharges prompted by union animus occur during a union-organizing drive or first-contract negotiation period, the employer will soon find itself a defendant in a federal district court responding to a petition for a preliminary injunction. It is the universality of that scenario that conveys its deterrent effect—i.e., its \textit{probability} not merely its \textit{possibility}.

Although consistency in the application of the 10(j) remedy will be the key factor for creating deterrence, another important factor will be the speed with which this remedy is initiated. Some courts have been critical of the Board’s slowness in seeking 10(j) injunctions. When the Fifth Circuit approved a district court’s denial of temporary reinstatements under 10(j) because the Board had waited three months before petitioning for such relief, it treated that delay as “some evidence that the detrimental effect of the discharges have already taken their toll on the organizational drive . . . .[It was therefore] questionable whether an order of reinstatement would be any more effective than a final Board order at this point.”\textsuperscript{151} As the reader will soon see, the process that I propose will move much faster.

\textsuperscript{150}. See \textit{supra} notes 72–75 and accompanying text.

\textsuperscript{151}. Boire v. Pilot Freight Carriers, Inc., 515 F.2d 1185, 1193 (5th Cir. 1975). See also McDermott v. Ampersand Pub., LLC, 593 F.3d 950, 965 (9th Cir. 2010) (“[D]elay by itself is not a determinative factor in whether the grant of interim relief is just and proper . . . .[D]elay is only significant if the harm has occurred and the parties cannot be returned to the status quo or if the Board’s final order is likely to be as effective as an order for interim relief.”)
for among other time-related features, it will significantly shorten the time required for assembling materials required for filing 10(j) petitions in these Section 8(a)(3) cases. Another deterrence factor—one that’s also dependent on the consistency factor—is that if adequate advance publicity is given as to what will happen should discharges prompted by union-animalus occur, that alone might be sufficient to prompt some employers to refrain from implementing such discharges.

If a sufficient degree of universality and promptness can be realized in the filing of 10(j) petitions in 8(a)(3) cases, meaningful deterrence is bound to follow—at least after the new process becomes routine and reasonably certain. With the making of several partially automatic administrative changes to the previously described “nip-in-the-bud Timeline,” this objective can be achieved, as the following specifications will demonstrate.

B. The Delegation Process

_Delegation_ is the process that drives my proposal. Because the law clearly allows—and indirectly encourages—the NLRB to delegate some of its functions, especially to the General Counsel, Section 10(j) temporary restraining orders in Section 8(a)(3) complaint cases can become as universal under the NLRA as judicial relief for anti-union-termination cases has become under the RLA. The Board can achieve this result by delegating 10(j) authority to the General Counsel in a manner that I shall describe shortly. I shall first, however, review the existing settled law that provides clear authority for the Board to so delegate its 10(j) powers. This is authority that has been specifically affirmed during a period of over seventy years in at least twelve cases and repudiated or qualified in none.

The foundation case—which has been followed consistently—is _Evans v. International Typographical Union_, a 1948 decision which unequivocally confirmed the validity of the Board’s delegation of full and ongoing 10(j) authority to the General Counsel. The Board had initially delegated that authority by promulgating a Section 6 rule which provided in pertinent part that

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[w]henever the regional director deems it advisable to seek temporary injunctive relief under section 10(j) . . . the officer or regional attorney to whom the matter has been referred will make application for appropriate temporary relief or restraining order in the [appropriate] District Court of the United States . . . .

In addition, as the court recounted, “the Board and the General Counsel [also] entered into a ‘memorandum of understanding’ which in pertinent part states” that the General Counsel shall exercise full and final authority and responsibility on behalf of the Board for initiating and prosecuting injunction proceedings as provided for in Sections 10(j) and 10(l).

In rejecting the respondent’s contention that only the Board itself was authorized to initiate 10(j) judicial proceedings, the court relied upon express language in Section 3(d) of the Act that describes the General Counsel’s primary and regular duties and specifically adds that he “shall have such other duties as the Board may prescribe.” The court concluded that the latter clause “must mean necessarily that the Board may confer upon the General Counsel functions other than those committed to him [or her] by statute; otherwise it would be ‘superfluous and without meaning or purpose.’” In reaching that conclusion—with which there has since been agreement in all later decisions on this issue—the court emphasized the difference between the Board’s judicial and prosecutorial powers, stating that “delegation of [the Board’s] functions which are of a more prosecutive than judicial nature is in harmony with [Congressional] design . . . . If the Board itself were to petition the court for such temporary relief . . . [it would] be performing a function of a prosecutive nature[.]” Accordingly, the court denied respondent’s motion to dismiss.

Soon after, based on the same delegation of the Board’s full 10(j) authority to the General Counsel, two other district courts followed Evans with similar enforcements. The next relevant event was the Board’s publication in late 1950 of a memorandum in which it authorized the General Counsel to initiate and prosecute Section 10(j) injunction proceedings, but with Board authorization required prior to filing. That practice, which continued with the issuance of a similar memorandum in

155. See Evans, 76 F. Supp. at 887.
156. Id. (emphasis added).
157. NLRA § 3(d), 29 U.S.C. § 153(d) (emphasis added).
158. Evans, 76 F. Supp. at 889 (citing Cudahy Packing Co. v. Holland, 315 U.S. 357 (1942)).
159. 76 F. Supp. at 889.
1955,162 has remained in effect except on those occasions when, in anticipation of the loss of a Board quorum, the Board has issued temporary delegations of full ongoing 10(j) authority to the General Counsel, such as in 2001,163 2002,164 2007,165 and 2011.166

The first judicial decision relating to a 10(j) delegation to the General Counsel following the Board’s loss of a quorum was in 2002, in Kentov v. Point Blank Body Armor, Inc., which followed Evans and emphasized the “critical distinction between the Board delegating the authority Congress reposed in it to grant relief on the merits of a claim, from the delegation of its authority to seek relief from another adjudicative body.”167 That decision was followed by eight additional supportive cases relating to delegations prompted by the Board’s anticipated loss of quorum, including appellate decisions from the Second, Fourth, Fifth, Eighth, and Ninth Circuits.

The Ninth Circuit, in Frankl v. HTH Corp., provided a detailed and comprehensive history and rationale of this Section 10(j) delegation process.168 The court pointed out that although the Act provides that only the Board shall have power to petition for injunctive relief, “[i]t does not specify how the Board must exercise that power, or that the Board may not allow anyone else to decide where that power should be exercised in individual cases.”169 With reference to the prosecutorial role in 10(j), it noted that inasmuch as “petitioning a court for [such] relief is a lawyerly function... [s]o it seems quite natural that the Board should assign to the General Counsel the duty to decide when to exercise its power to petition.”170 Accordingly, it held that, “although the Board may reserve to itself the ultimate decision whether to petition for § 10(j) relief in individual cases, it may also exercise its power to petition for § 10(j) relief by

164. Order Delegating Authority to the General Counsel, 67 Fed. Reg. 70,628 (Nov. 25, 2002).
165. See Muffley v. Massey Energy Co., 547 F. Supp. 2d 536, 539 (“[E]ffective on December 28, 2007, the Board delegated to its General Counsel ‘full and final authority and responsibility on behalf of the Board to initiate and prosecute injunction proceedings under Section 10(j)’”).
168. Frankl v. HTH Corp., 650 F.3d 1334, 1340 (9th Cir. 2011).
169. Id. at 1348. Regarding the established common practice of the General Counsel subdelegating Section 10(j) authority to subordinates, such as Regional Directors, the Circuit Court added that “[e]xpress statutory authority for delegation is not required.” Id. at 1350 (quoting Loma Linda Univ. v. Schweiker, 705 F.2d 1123, 1128 (9th Cir. 1983)).
170. Id.
authorizing the General Counsel to decide in which cases to seek relief on
the Board’s behalf.” 171

It is of further significance that the Frankl court recognized an
additional basis that specifically supports the process of continuous
deposition of Section 10(j) authority to the General Counsel. Basing its
holding on the relationship of Section 10(j) to Section 10(e), 172 it noted that
[t]he Agency’s longstanding practice of having the General Counsel, and
not the Board, exercise final authority in approving petitions for
enforcement under § 10(e) is strongly supportive of that practice’s
validity. . . . To conclude that the General Counsel could not exercise such
authority would be to hold decades of unchallenged agency practice
unlawful—a practice, moreover, in which courts have acquiesced thousands
times over by granting petitions for enforcement. 173

The court therefore stressed that “[a]s long as the Board may grant
generic authorization to the General Counsel to approve petitions for
enforcement under § 10(e), the same must be the case under § 10(j).” 174

The most recent of the supportive circuit cases is Kreisberg v.
HealthBridge Mgmt., LLC, where the Second Circuit joined with the other
four circuits in upholding the Board’s full delegation of 10(j) power to the
General Counsel. 175 The court concluded that the “plain, broad language of
§ 153(d) permits a properly constituted Board to delegate its § 10(j) power
and enable the General Counsel to prosecute NLRA violations before a
federal district court.” 176 In declining certiorari, the Supreme Court thus left
standing the holdings of all five appellate courts 177 that had addressed this
issue.

In addition to the foregoing twelve cases involving NLRB delegations
of 10(j) authority to the General Counsel, it is noteworthy that in 1966 the
Fifth Circuit cited Evans with approval on the issue of the Labor
Department’s delegation of discretionary authority in Wirtz v. Atlantic
States Construction Co. 178

171. Id. at 1347.
172. NLRA § 10(e), 29 U.S.C. § 160(e). Inasmuch as final orders of the Board are not self-
enforcing, when judicial enforcement—including temporary relief or restraining orders—is required, §
10(e) provides the Board with power to petition the appropriate circuit court of appeals for suitable
relief.
173. Frankl, 650 F.3d at 1353.
174. Id.
175. Kreisberg v. HealthBridge Mgmt., LLC, 732 F.3d 131, 140 (2d Cir. 2013), cert. denied, 135
n.4 (2010), which stated that the Court’s “conclusion that the delegee group ceases to exist once there
are no longer three Board members to constitute the group does not cast doubt on the prior delegations
of authority to nongroup members, such as . . . the general counsel.”
177. See supra note 152.
Not only do the rulings in all of the above cases underscore the distinction between the Board’s quasi-judicial authority and its prosecutorial authority, the latter authority and its history confirm that its pertinent delegation thesis is derived from long-established law. And that thesis provides the appropriate legal platform on which to build a system that can produce reliable and consistent Section 8(a)(3) injunctive enforcement against union-related employee discharges.

C. A Proposal to Authorize Preliminary Injunctions in all Section 8(a)(3)-Discharge Complaint Cases

1. The Proposed Order

For the reasons presented above, and the reasons that follow, I propose—based upon the aforesaid legal factors—that the National Labor Relations Board issue the following order or its equivalent:

Title: Order Delegating to the General Counsel Continuing Authority Under Section 10(j) Relating to Section 8(a)(3)

Synopsis

Authority: Sections 3, 4, 6, 8, and 10 of the National Labor Relations Act, 29 U.S.C. §§ 153, 154, 156, 158, and 160.

Summary: The National Labor Relations Board (Board) has issued an Order delegating full and final continuing authority and responsibility to initiate and prosecute injunction proceedings under section 10(j) of the National Labor Relations Act (Act) in all section 8(a)(3) discharge complaint cases where the target conduct has occurred at the beginning of or during a union organizing campaign or during a union’s first contract negotiation.

Text

Reason for Delegation: Limited only by a statutory limitation that is now rarely in issue (i.e., section 10(l)), section 10(m) of the Act requires this Agency to grant absolute priority-handling to section 8(a)(3) unfair-labor-practice (ULP) discharge cases. Because the enforcement record regarding meritorious section 8(a)(3) cases indicates that prior enforcement procedures have failed to bring most such cases to a speedy conclusion, as

179. The proposed order that follows is modeled after Order Contingently Delegating Authority to the General Counsel, 76 Fed. Reg. 69,768 (Nov. 9, 2011), which was issued in anticipation of the Board’s losing a quorum—which did occur—after which the General Counsel exercised authority granted in that order to petition for issuance of a preliminary injunction against Health Bridge Management, LLC, which the district court granted and the Third Circuit approved in Kreisberg v. Health Bridge Mgmt., LLC, supra note 175, after which the Supreme Court denied certiorari. See supra note 176 and accompanying text.
was contemplated for and directed by section 10(m), and have failed to
deter violations of section 8(a)(3), particularly at the beginning of and
during union organizing campaigns and during first contract negotiations, the
Board recognizes that a more effective procedure is needed to fully comply
with the policy and requirements of the Act. Accordingly, the procedures
required by this order are being adopted with the expectation that they will
accelerate the handling of most meritorious section 8(a)(3) cases and deter
such discharges in the future, just as the availability of comparable
temporary judicial relief under our sister statute, the Railway Labor Act, has
successfully deterred pre-election discharges under that statute.

Delegation Order:

(1) The National Labor Relations Board, cognizant of its role and
responsibility under sections 8(a)(3), 10(j), and 10(m) of the Act, and
pursuant to authority granted by the Act under sections 3, 4, 6, and 10,
especially section 3(d), which provides that the General Counsel shall have
“such other duties as the Board may prescribe,” hereby delegates to the
General Counsel full and final continuous authority and responsibility to
initiate and prosecute “for appropriate temporary relief or restraining order”
under section 10(j) of the Act in all section 8(a)(3) cases in which
complaints are issued that involve terminations of employment of one or
more employees that occur at the beginning of or during a union organizing
campaign, whether such campaign has been initiated by a section 2(a) labor
organization or by one or more individual employees, or during a period in
which a labor organization is bargaining for a first collective-bargaining
contract.

(2) The petition for 10(j) relief in each of these cases shall be filed in
the appropriate United States district court as promptly as possible after
issuance of the complaint.

(3) The only exceptions to the above filing requirements shall be if or
when the General Counsel determines that a particular filing would be
inconsistent with the policy of the Act.

(4) When a case involves any other ULP(s) in addition to section
8(a)(3) union-campaign-employment-termination ULP(s), such additional
ULP(s) may be including in the original section 10(j) petition, but to avoid
delay in filing the original petition, any such additional ULP(s) that require
further investigation may and should be added later in an amended petition
so as not to delay the filing of the original petition.

(5) Other section 8(a)(3) cases and other non-8(a)(3) cases shall not be
directly affected by the foregoing delegation. The policy and procedures
regarding the selection and handling of all such other ULP cases shall
remain unchanged for section 10(j) purposes, and all such other cases shall
continue to be handled in the usual manner as indicated by the relevant Case Handling Manual.

(6) The delegations under this order shall remain in effect unless and until it is appropriately amended or revoked by the Board.

(7) Because this delegation relates to the internal management of the National Labor Relations Board, it is therefore, pursuant to 5 U.S.C § 553, exempt from the notice and comment requirements of the Administrative Procedure Act.

(8) This order shall take effect on _______(date)_____________.

Signed in Washington, DC, ___(by Chairman)_____________.

2. The proposed order in operation

The statistical data presented in this article has starkly demonstrated an unacceptable level of discriminatory employment discharges under the NLRA. With a few simple changes in case-handling procedures, the above proposed order can correct that condition by providing reasonably prompt preliminary injunctive relief to employment-discrimination victims in complaint cases that involve Section 8(a)(3) ULPs that occur during union organizational campaigns or first contract negotiations. Because the processing of these cases would now skip a number of time-consuming case-handling steps that will no longer be necessary, such cases would move quickly to the federal-court preliminary-injunction stage, a process that should produce protection for dischargees and their fellow employees and also create a credible basis for deterrence. This simplified procedure is legally possible without need of additional legislation because it utilizes authority that’s already spelled out in Section 3(d)’s authorization for delegation to the General Counsel of “such other duties as the Board may prescribe.” And inasmuch as authorization of complete and continuous Section 10(j) delegation has been fully vetted by twelve unanimous court decisions that date back to 1948, including five appellate decisions and denial of certiorari by the Supreme Court, legal authority for this change should pose no legitimate problem.

I want to describe generally, however, how the process will be expected to function. The reader will recall that filing of a Section 10(j) petition must occur after a complaint has issued.180 Accordingly, the selection of a Section 8(a)(3) case for Section 10(j) filing will be virtually automatic once a potential charge that involves one or more employment terminations at the beginning of or during a union organizing campaign or

180. See supra text accompanying note 100.
during a first contract negotiation has been investigated and the Regional Office has reached a decision to issue a complaint. As the Supreme Court made clear in *Radio Officers*,\(^1\) such a determination establishes ipso facto that the employer’s intent was, in the language of the Act, “to discourage membership in [a] labor organization.” Proof of that fact, with or without additional evidence of future consequences, is thus sufficient to satisfy the most rigid requirement for a showing of impending irreparable damage to justify preliminary injunctive relief. As the Court in *Radio Officers* emphasized, this statutory-discrimination includes “discrimination to discourage participation in union activities as well as to discourage adhesion to union membership.”\(^2\)

Accordingly, how would cases be processed under the above proposed order? An example of a likely case-handling timeline—which can be compared with the “nip-in-the-bud” timeline currently in effect at the NLRB summarized above\(^3\)—might read as follows:

1. As soon as possible after the filing of the charge, identification should be made as to when and where the alleged Section 8(a)(3) ULP occurred, whether at the beginning of or during a union organizing campaign or during first contract negotiations. If the occurrence was in any of those time periods, the lead affidavit or affidavits should be taken within 7 calendar days from the filing of the charge, and the charging party’s evidence should be obtained within 14 calendar days after that filing.

2. If the evidence points to a *prima facie* case that suggests that a complaint will be filed, the charged party shall be so notified within 7 calendar days, and shall also be advised that if a complaint is issued a Section 10(j) petition for temporary injunctive relief will be filed immediately in federal district court; however, 7 calendar days will be given the charged party in which to agree to a settlement. Although a settlement may be arranged or may occur at any time, these timeline steps will not to be delayed, and the charged party shall be so advised at the beginning of the 7-calendar-day settlement deadline.

3. If a settlement has not been reached during that 7-day period, the Regional Director shall make a determination as soon as possible regarding the merits of the case and specifically decide whether to issue a complaint (after which a Section 10(j) petition must be filed). That determination shall occur within 30 calendar days unless extraordinary circumstances necessitate extending that time, but such extension shall not exceed 20 calendar days. When a determination to file a Section 10(j) petition is made, the General Counsel and the Board shall be notified immediately.

4. During the preceding period, an administrative hearing shall be set.

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\(^1\) Radio Officers’ Union of Commercial Telegraphers v. NLRB, 347 U.S. 17, 21 (1954); see supra text accompanying notes 129–132.

\(^2\) Radio Officers, 347 U.S. at 40 (emphasis added).

\(^3\) See supra text accompanying and following note 119.
(5) If the Regional Director has decided to issue a complaint, pertinent evidentiary information and the Region’s analysis, with a report if there is one, shall be promptly forwarded to the General Counsel and the Injunction Litigation Branch (ILB) for notice, consideration, and advice. Return communications to the Region shall be transmitted as soon as possible, preferably within 10 business days, for speed is of the essence.

(6) Thereafter, within 10 business days, the Region shall complete its preparation of points and authorities and necessary papers for filing in the appropriate United States District Court.

(7) Within two days thereafter, the Region shall file the Section 10(j) petition in that court.

(8) Thereafter, the case will be handled in that court in the same manner as 10(j) cases are ordinarily handled.

Having now examined the legal basis of the proposed program and its likely case-handling procedures, I turn to considerations of what some skeptics are likely to say about this program. Their first objection will likely be that it violates the Act because it’s not specified in the text of either Section 10(j) or Section 10(m). As our previous review of the text and legislative history of those provisions clearly established, that claim has no legs to stand on.\textsuperscript{184}

The next objection is likely to be that by requiring 10(j) coverage of substantially all 8(a)(3) ULPs, the federal district courts will become so overloaded that their normal dockets will be seriously impaired. As a first impression that reaction is understandable, but it overlooks several key factors that refute that conclusion. Even though the increased 10(j) filings will—at least initially—cause some generalized delays, including delays in 10(j) cases, such delays will not seriously impair the proposed procedure, for a major impact of these cases lies in the act of filing itself. The very act of a governmental agency filing a petition for injunctive relief on behalf of discharged employees diminishes the effect the unlawful termination was intended to convey. A court’s delay in processing a 10(j) petition would therefore not destroy its impact. And even if an NLRB election in which the union loses were to be held prior to a court’s issuance of an injunctive order, a subsequent supportive determination by either the district judge or an administrative law judge (ALJ) could be basis for the Board’s finding a violation of “laboratory conditions,”\textsuperscript{185} hence grounds for setting aside the election and ordering a new one. But—needless to say—the strongest positive effect on a union’s organizing drive will come when a discharged employee returns to work pursuant to a court order. Such effect on other employees prior to an election could be overwhelming—a happening that any rational employer would want to avoid. It is the consistent expectation

\textsuperscript{184.} \textit{See supra} notes 152-178 and accompanying text.

\textsuperscript{185.} General Shoe Corp., 77 N.L.R.B. 124, 127 (1948).
of this happening that would provide strong discouragement of future unlawful discharges, as it has with NMB elections in the airline and railroad industries.

Furthermore, although there will certainly be an increased number of Section 10(j) cases filed at the beginning of this proposed program, they will be widely scattered among many district courts, for the Act requires that 10(j) petitions be filed in the “district wherein the unfair labor practice in question is alleged to have occurred or where [the employer] resides or transacts business.” Accordingly, with this influx of 10(j) cases some courts will be much busier than others. But it will be the judge in each court who determines the time frame in which these cases will be heard and decided. Thus, although some federal-court dockets might become temporarily crowded with these cases, the initial runs of such cases should be followed later by very few cases, for potent deterrence will now be at work.

Thus, even if there is an apparent judicial overload in some locations, it should be only temporary and short lived. As experience under the RLA has demonstrated, this streamlined injunction policy should eventually result in a substantial reduction—and hopefully virtual eradication—of the practice of discharging union adherents as a tactic to discourage union representation. This now too-familiar ULP could thus become a rarity among NLRB cases, just as similar discharge cases under the RLA have virtually ceased to exist. And because the most common ULP cases pending before the NLRB in recent years have involved Section 8(a)(3), this proposed new program should ultimately result in the Board spending less time, less money, and requiring fewer Board employees to enforce a part of a law which almost everyone in an advanced civilized society should be willing to comply with voluntarily. Accordingly, because consistent filing of these 10(j) petitions in union-organizing situations will make the over-all unionization process easier, this procedural change should contribute significantly to the rebuilding of the American Labor movement, which in turn should help rebuild the American middle class.