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My name is Cynthia Estlund, and I am a law professor at the New York University School of Law. Since 1989, after several years of practicing labor law at the firm of Bredhoff & Kaiser here in Washington, I have taught at the University of Texas School of Law, Columbia Law School, and Harvard Law School, as well as at NYU. I have published and lectured extensively over the past twenty-two years on the law of the workplace, including on various aspects of the National Labor Relations Act.

I want to thank the Committee for inviting me to offer my perspective on recent developments within the National Labor Relations Board (NLRB or Board). Recent actions or statements by the Board and its Acting General Counsel have attracted interest, and even some controversy and criticism. Those include the Board's decision to challenge four recent state ballot initiatives on preemption grounds; two General Counsel memoranda regarding the use of preliminary injunctions and other remedies for unfair labor practices during union organizing campaigns; the use or consideration of rulemaking to address certain issues; and the solicitation of briefs on significant policy issues raised by several pending cases.

Before turning to some of the particulars, let me start with my conclusion: In my view, these recent proposals and actions are modest by any measure, and well within both the boundaries of the Board's statutory authority and the traditional scope within which past Boards and General Counsels have exercised that authority. Indeed, some of what has spurred controversy amounts to no more than the solicitation of comments from interested parties on how certain issues should best be resolved. Far from running amok or striking out in radical new directions, the Board and General Counsel have taken or considered a few cautious steps to improve the efficiency and efficacy of the Board's administration of the statute and to improve the transparency of its decisionmaking. Moreover, in examining the recent developments, it is worth keeping

in mind that any substantive decisions that the Board or its General Counsel do make – whether embodied in a decision on an unfair labor practice complaint, a rulemaking, or petition for preliminary injunctive relief – are subject to judicial review or approval to ensure that they are consistent with the statute and the Board's authority. In short, nothing that the Board is doing or has proposed to do will work a major change in the labor relations landscape.

These recent developments should be understood in the context of the statutory scheme over which the Board presides. The National Labor Relations Act was passed in 1935, amended significantly in 1947 and less significantly in 1959 and 1974. In the past fifty years Congress has enacted no significant amendments to the basic provisions of the Act in spite of dramatic changes in the labor force, the economy, the organization of work, and the surrounding legal landscape. That is the context within which one should examine proposals, decisions, and actions by the current Board and the Acting General Counsel pursuant to their statutory responsibility to interpret and administer the nation's labor relations regime.

Some Issues of Process and the Institutional Role of the Board

Let me first distinguish process from substance, as law professors are wont to do. Some recent developments are procedural in nature, or relate to the institutional role of the Board, rather than affecting the substance of labor relations policy.

Rulemaking: The Board has traditionally announced changes in its interpretation of the Act in the course of deciding particular cases; and it unquestionably has the statutory authority to do so.[1] On the other hand, courts and commentators, regardless of ideological leanings, have often urged the Board to consider acting more often through rulemaking,[2] as it also unquestionably has the authority to do.[3] As the Supreme

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1 *See* NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974) ("The Board is not precluded from announcing new principles in an adjudicative proceeding[;] the choice between rulemaking and adjudication lies in the first instance within the Board's discretion"); NLRB v. Wyman-Gordon, 394 U.S. 759 (1969).

2 *See Bell Aerospace, supra* note 1, at 295; NLRB v. Majestic Weaving Co., 355 F.2d 854, 860 (2d. Cir. 1966). Encouragement of rulemaking is a recurring refrain among commentators. *See* James J. Brudney, *Isolated and Politicized: The NLRB's Uncertain Future, 26* COMP. LAB. L. & POL'Y. J. *221 (*2005); Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. LAW REV. 163 (1985); Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Exile: Problems with its Structure and Function and Suggestions for Reform*, 58 DUKE L. J., 2013 (2009); Kenneth Kahn, *The NLRB and Higher Education: The Failure of Policymaking through Adjudication,* 21 U.C.L.A. L. REV. 63 (1975); Cornelius J. Peck, *The Atrophied Rule-Making Powers of the National Labor Relations Board,* 70 YALE L.J. 729 (1960).

3 See Section 6 of the NLRA: "The Board shall have authority from time to time to make, amend and rescind, in the manner prescribed by subchapter II of chapter 5 of Title 5, such rules and regulations as

Court put it, "rulemaking would provide the Board with a forum for soliciting the informed views of those affected in industry and labor before embarking on a new course."[4] Rulemaking – the issuance of a proposed rule, solicitation and consideration of public comments, and then issuance of a final rule – has several advantages: It allows for more thorough consideration of a wider range of views on policy issues with implications that extend beyond the parties to a particular case; it facilitates the more efficient adjudication of cases raising recurring issues; and it tends to promote policy stability because rules tend to last longer than precedents adopted through adjudication. But of course the last advantage follows from the disadvantage that the rulemaking process itself is quite time-consuming. While the Board has only rarely proceeded through rulemaking, and may or may not do so beyond the one proposed rule issued so far, its decision to do so would be greeted by many mainstream observers as a victory for transparency and administrative regularity in Board decisionmaking.[5]

Solicitation of Briefs: Another recent development has been the Board's solicitation of briefs on a number of issues posed by pending cases.[6] As a procedural matter, that approach represents a middle ground between simply rendering revised policy judgments through adjudication, which has been the well-established norm at the Board, and initiating rulemaking proceedings, which is bound to be a rare undertaking.[7] The practice of inviting submission of briefs has at least one of the virtues of rulemaking: It allows interested parties who may be affected by the Board's deliberations to make their case and to introduce relevant viewpoints and considerations that may not otherwise enter the adjudication process. The Board's approach in this handful of cases in which significant policy issues are raised represents a clear advance in terms of public notice, participation, and transparency. Moreover, the solicitation of views from a wide

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may be necessary to carry out provisions of this subchapter." The Supreme Court upheld this authority in *American Hospital Association v NLRB*, 499 U.S.606 (1991), having previously encouraged its more frequent use in *Bell Aerospace, supra* note 1.

[4] *Bell Aerospace, supra* note 1, at 295.

[5] The one rule that the Board has actually proposed through rulemaking proceeding, as discussed below, is well-grounded and long-overdue.

[6] So for example, in one such amicus brief, a group supporting the employer on behalf of "businesses of all sizes from every industry sector in every region of the country" noted that it "welcome[d] the opportunity" to express its views to the Board. Brief for Coalition for a Democratic Workplace as Amicus Curiae Supporting Respondent, Roundy's, Inc., Case No. 30-CA-17185 (2011).

[7] This process has been used by the Board before, but not often enough in the view of Professor Samuel Estreicher, for example. Samuel Estreicher, *Policy Oscillation at the Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163, 174 (1985).

range of interested parties should not be taken to signal any particular outcome on the merits.

The Board's Policymaking Role: It is probably not a concern about process, but rather speculation about substance, that has brought attention to the initiation of one rulemaking and the solicitation of briefs in several cases. But that brings us to a related set of issues that relate to the Board's institutional role under our nation's labor laws. To begin with, the Board's role includes a significant policymaking component. The Supreme Court "has emphasized often that the NLRB has the primary responsibility for developing and applying national labor policy."[8] That is the scheme that Congress established.[9] The Board's latitude under the NLRA to establish labor relations policy has grown narrower over the years. Although the text of many key provisions of the NLRA leaves room for interpretation, much of that interpretive latitude has been whittled down over the past 75 years by Supreme Court decisions that have narrowed the scope of the Board's discretion. Still, within those constraints, there is no question that the Board has an important role in interpreting and administering the statute.

There is also no question that presidential appointments alter the mix of policy considerations that Board members bring to the process of statutory interpretation.[10] That is by congressional design. Especially in recent decades, that has led to a degree of policy oscillation (or "flip-flopping") on a number of recurring issues whenever presidential appointments shift majority control of the Board.[11] The previous Board majority in particular gained some notoriety for overturning numerous precedents, some recent and some well-established. When the Board overturns one of its

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8 Curtin Matheson Scientific v. NLRB, 494 U.S. 775, 786 (1990) (citing Beth Israel Hospital v. NLRB, 437 U.S. 483, 500-501 (1978); NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963); NLRB v. Truck Drivers, 353 U.S. 87, 96 (1957)).

9 As the Court has explained, "it is to the Board that Congress entrusted the task of 'applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms'"; if the Board "is to accomplish the task which Congress set for it, [it] necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions."*Curtin Matheson,* 494 U.S. at 786 (citing Beth Israel Hospital, 437 U.S. at 500-501, and Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945)).

10 As the Supreme Court has emphasized, "[t]o hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decisionmaking." NLRB v. J. Weingarten, Inc., 420 U.S. 251, 265-266 (1975). See also *Curtin Matheson,* 494 U.S. at 786 ("A Board rule is entitled to deference even if it represents a departure from the Board's prior policy").

11 Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163 (1985).

precedents, it may provoke debate among Board members, advocates, and scholars over whether the new decision is consistent with the statute (a matter on which the courts have the last word), or justified as a matter of policy. But there is nothing unusual or illegitimate about the Board's reconsidering some of its own precedents. If the current Board does so – and that remains largely a matter of speculation so far – its decisions will be subject to the normal processes of judicial review that confine the Board to carrying out the statute as written by Congress and interpreted by the Supreme Court.

Preemption: Another dimension of the Board's role in our national labor relations framework relates to the preemption of state and local laws regulating labor relations. Some have criticized the Board and the Acting General Counsel for the decision to threaten suit against four states – Arizona, South Carolina, South Dakota, Utah – to enjoin the enforcement of constitutional amendments approved by voters in those states last November.[12] Each of these new provisions, with small variations, would prohibit workers from seeking union representation, and would prohibit employers from voluntarily recognizing a union, other than through a secret ballot election; they would prohibit reliance by either side on union authorization cards. To understand how unexceptional the Board's action is here, it is necessary to understand another aspect of the federal labor laws.

With the enactment of the NLRA in 1935, and then the major Taft-Hartley amendments in 1947, Congress created a comprehensive nationwide scheme of labor relations. The Supreme Court has long held that the NLRA preempts state and local laws and actions that regulate labor relations (with one large explicit exception allowing state right-to-work laws). Under the Supreme Court's decisions, the NLRA preempts not only state and local actions that directly conflict with the federal scheme, but those that regulate virtually any aspect of labor relations, including activity that the Act arguably or actually protects, arguably or actually prohibits, or intentionally leaves unregulated.[13]

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12 The Acting General Counsel's letter to the Attorneys General sought to secure voluntary resolution of the preemption conflict without ligitation. But the Attorneys General of the four states vowed to defend the new provisions, and called the decision to threaten suit against them "extraordinary." A.G. Response to NLRB Concerning Secret Ballots, January 27, 2011, *available at* http://attorneygeneral.utah.gov/cmsdocuments/nlrb012711.sol.pdf.

13 The Supreme Court concisely summarized its preemption doctrine recently in *Chamber of Commerce v. Brown*, 554 U.S. 60, 64 (2008):

> Although the NLRA itself contains no express pre-emption provision, we have held that Congress implicitly mandated two types of pre-emption as necessary to implement federal labor policy. The first, known as *Garmon* pre-emption, see *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959), "is intended to preclude state interference with the National Labor Relations Board's

The Supreme Court has long recognized the power of the NLRB, acting through its General Counsel, to sue to enjoin the implementation of preempted state laws, and has often done so.[14] Of course, the Board may sometimes be able to protect the federal interest in other ways, for example, by intervening in a private suit or supporting one as *amicus curiae*.

Preemption doctrine is decidedly a double-edged sword. Especially in the last decade, the doctrine has most often blocked state and local actions supported by organized labor (and the Board joined in many of these lawsuits); unions and their advocates have thus argued for a narrower preemption doctrine that gave more room for state variation and experimentation. For example, the Supreme Court's most recent labor law preemption decision reversed the U.S. Court of Appeals for the Ninth Circuit and struck down a California statute that sought to ensure that private employers that received state funds (as contractors, for example) did not use those funds to support or oppose employees' efforts to form a union; the Court held that the law infringed employers' ability to speak to their employees on the matter of unionization, as Section 8(c) of the Act left them free to do.[15]

Sometimes (as in *Brown*), it is debatable whether the law was preempted. In the case of the four state "secret ballot" laws, there is little room for debate. These laws would take away a well-established non-electoral route to union representation, long recognized by the courts, and would prohibit voluntary recognition of a union on the basis of a card majority. Employees' statutory right to seek, and employers' power to grant, union recognition on the basis of authorization cards was reaffirmed by the Board during the Bush Administration in the *Dana* decision of 2007.[16] Of course the *Dana* decision also imposed some new qualifications on voluntary recognition based on card check; but that only underscores the extent to which the four state laws tread on the

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interpretation and active enforcement of the 'integrated scheme of regulation' established by the NLRA." *Golden State Transit Corp. v. Los Angeles,* 475 U.S. 608, 613 (1986). To this end, *Garmon* pre-emption forbids States to "regulate activity that the NLRA protects, prohibits, or arguably protects or prohibits." *Wisconsin Dept. of Industry v. Gould Inc.,* 475 U.S. 282, 286 (1986). The second, known as *Machinists* pre-emption, forbids both the [NLRB] and States to regulate conduct that Congress intended "be unregulated because left 'to be controlled by the free play of economic forces.'" *Machinists v. Wisconsin Employment Relations Comm'n,* 427 U.S. 132, 140 (1976) (quoting *NLRB v. Nash-Finch Co.,* 404 U.S. 138, 144 (1971)).

14 NLRB v. Nash-Finch Co., 404 U.S. 138 (1971).

15 Chamber of Commerce v. Brown, 554 U.S. 60 (2008).

16 Dana Corp., 351 N.L.R.B. 434 (2007) ("We do not question the legality of voluntary recognition agreements based on a union's showing of majority support. Voluntary recognition itself predates the National Labor Relations Act and is undisputedly lawful under it.").

core of the Board's regulatory authority. Just as a state law *requiring* employers covered by the NLRB to honor card check requests would be pre-empted by federal law, so is its prohibition.

So, far from being extraordinary, the Board's decision to file suit is an unexceptional exercise of its duty to assert its Congressionally-granted jurisdiction over the regulation of labor relations in the bulk of the private sector, and to oppose state and local laws that are "preempted" by the NLRA. In this context, it would be extraordinary had the Board not taken action against the states. This is an obligation imposed upon the Board, regardless of the views its members may have of the underlying policy decisions reflected in the NLRA. The fact that the Acting General Counsel promptly notified the states of the NLRB's position, and sought voluntary correction, should be commended.

The Recent Board Decisions and Actions

The Board has recently proposed and sought public comment on a new rule that would require employers to post a notice informing employees of their rights under the NLRA. The proposed rule would merely bring practices under the NLRA into line with those under every other major federal employment statute (and some minor ones): Currently, employers must post notices informing employees of their rights under the Fair Labor Standards Act, Title VII of the Civil Rights Act and other antidiscrimination statutes, the Occupational Health and Safety Act, the Family and Medical Leave Act, among others. That uniformity of practice is based on the self-evident fact that employees' statutory rights can be more fully realized if they are aware of those rights. It is thus an entirely appropriate exercise of the Board's authority under Section 6 of the Act to "make ... such rules and regulations as may be necessary to carry out" the Act.

With regard to adjudications, since April 2010, when the NLRB gained a Democratic majority, it has issued almost 300 decisions. Nearly 100 of those readopted previous unanimous decisions issued by the two-member Board (one Democratic and one Republican appointee) whose authority to act was struck down by the Supreme Court in the *New Process* decision.[17] Of the total of 292 decisions issued since last April, over 80 percent were unanimous.[18]

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[17] BNA Daily Labor Report, January 21, 2011, *NLRB Has a Full Docket, Major Cases, and Plans for an Active Year.*

[18] For example, in Jackson Hospital Corp., d/b/a Kentucky River Medical Center, 356 NLRB No. 8 (October 22, 2010), the Board unanimously authorized daily compounding of interest on backpay awards, in response to requests by past General Counsels, both Republican and Democratic appointees, over ten years, and consistent with the universal practice of awarding compound interest on damage awards in other areas of the law.

The remaining decisions were divided, but not always along party lines. For example, Chairman Liebman joined Member Becker in holding that a union flyer to employees about union dues obligations constituted an unlawful threat and an unfair labor practice.[19] Democratic Member Pearce dissented, and would have dismissed the complaint. In another case, a Board majority required a union to rescind its requirement that employees who object to paying full union dues under *Beck* renew their objection annually (a requirement that had first been permitted by Republican-appointed General Counsel Rosemary Collyer).[20] Members Schaumber and Hayes filed individual opinions, concurring in part & dissenting in part; and Member Pearce filed a dissent.

In several decisions, Board panels split along party lines – much as past Boards have done – but the majority's decision broke no new ground and overruled no precedents. So, for example, a Board decision required employers who post other employment-related notices electronically to post remedial NLRB notices in the same manner.[21] Another split decision attracted more attention, but in fact hewed closely to traditional Board law and judicial precedents: The Board held that a union's peaceful display of stationary banners advising the public of the existence of a labor dispute – with no patrolling and no obstruction of sidewalk traffic or building entrances – did not violate the NLRA because it was not "coercive."[22] The Board majority recognized that a contrary ruling would raise serious First Amendment concerns – concerns that in recent years had led several federal district courts and the Ninth Circuit Court of Appeals to reject the previous Board's petitions to enjoin these peaceful informational displays. The decision is long, methodical, and balanced in its assessment of the caselaw both under the Act and under the First Amendment.

Another long pending case also split the Board panel, with Chair Liebman and Member Pierce producing a decision, over Member Hayes' dissent, that was welcomed by many employers: The Board held that an employer and a union did not violate the Act by agreeing on a framework for future bargaining prior to the union's gaining majority support among the employees, noting that the employer in this case neither recognized the union nor negotiated the terms of a contract before the union was

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19 SEIU, Local 121RN, 355 NLRB No. 40 (2010)

20 Machinists Local Lodge 2777 (L-3 Communications), 355 NLRB No. 174 (2010).

21 J & R Flooring, Inc., d/b/a J. Picini Flooring, 356 NLRB No. 9 (2010).

22 Local 1506, UBC (Eliason & Knuth of Arizona, Inc.), 355 NLRB No. 159 (2010):

selected by a majority of employees to represent them.[23] The Board cited the argument of several management attorneys, as well as scholars, that employers' ability to negotiate a framework of this sort lays the foundation for a productive collective bargaining relationship, and promotes their business interests, in the event the employees choose to be represented by the union.[24] The Board quoted two management attorneys to this effect:

> As in other potential business relationships, the employer should be able to talk to the other side and perhaps even reach some preliminary understandings before it determines whether it wants to avoid such a relationship or not.[25]

Moreover, as the Board majority held, employees' ability to make a free and informed choice regarding unionization was fully protected, and even advanced, by their ability to examine the rough outlines of what they would gain through union representation and collective bargaining.

Then there are a number of cases in which the Board has not decided anything, but has solicited briefs from interested parties on a number of questions that might arise in the cases. In *Roundy's, Inc*. (Case No. 30-CA-17185), the question is under what circumstances an employer's refusal to allow non-employee union speakers access to private property constitutes discrimination in violation of the Act. Current Board law on this issue has been rejected by some courts of appeals, including the 6th Circuit in *Sandusky Mall v. NLRB*,[26] which take a narrower view of what constitutes discrimination; other courts of appeals have affirmed the Board's decisions in this area. In its request for briefs, the Board has simply asked the parties to address the question of whether the Board should reconsider the question in light of what these reviewing courts have held. It is entirely proper, given the judicial reception the Board's current caselaw has received, that the Board should give careful consideration, and seek a range of views, on this difficult statutory question.

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23 Dana Corp. and International Union, UAW, Cases 7-CA-46965, 7-CA-47078, 7-CB-14083, 7-CA-47079, 7-CB-14119, 7-CB-14120 (Dec. 6, 2010) (*Dana II*).

24 *See, e.g.,* Marshall Babson, *Bargaining Before Recognition in a Global Market: How Much Will It Cost?*, 58 LAB. & EMPL. REL. ASS'N SERIES 113 (2006), *available at*http://www.press.uillinois.edu/journals/irra/ proceedings2006/babson.html; Stanley J. Brown & Henry Morris, Jr., *Pre-recognition Discussions with Unions in* U.S. LABOR LAW AND THE FUTURE OF LABOR-MANAGEMENT COOPERATION: SECOND INTERIM REPORT – A WORKING DOCUMENT 98, 99 (U.S. Dep't of Labor, 1988).

25 *Dana II*, citing Brown & Morris, *supra*.

26 242 F3d 682 (2011).

In *Lamons Gasket Co*., Case No. 16-RD-1597, the Board has solicited briefing on whether it should modify or rescind the *Dana I* rule. *Dana I* (which itself overruled a 40-year old Board precedent) held that that an employer's voluntary recognition of a union based on a card majority does not immediately trigger the "recognition bar" that normally follows voluntary recognition – that is, a year-long bar of rival or decertification petitions; rather, the recognition bar would begin only after the employer had posted for 45-days a Board-approved notice advising employees on their right to file a petition to oust the recently recognized union. This rule has required the expenditures of Board resources, and probably delayed the onset of collective bargaining in some cases; but it has apparently reversed very few outcomes. After more than two years, the parties now have sufficient experience with this new rule to offer valuable input into the Board's deliberations. The solicitation of briefs on this issue thus makes good adjudicatory sense.

The Board has also solicited views in several additional cases involving bargaining units in long term care facilities,[27] the duties of successor employers toward an incumbent union,[28] and to consider whether the Board should assert jurisdiction over an Illinois charter school or whether it is instead exempt from NLRA coverage as a government entity.[29] These cases are all standard grist for the Board's mill. There is no reason to believe that Board will decide these cases in a manner that is any less responsible than that exhibited by other cases it has decided over the last year. But perhaps most important for present purposes, the Board has not decided anything. It is hard to understand why the Board would court controversy by calling attention to these pending cases and soliciting views on these issues if it did not intend to actually consider those views.

Recent General Counsel Memos

Two recent memoranda by the Acting General Counsel have drawn some attention. Both address the appropriate remedial response to serious unfair labor practices in the context of union organizing. Many commentators and past General Counsels of the Board – Republican as well as Democratic appointees – have lamented the narrow range of remedies available under the statute to address employer interference with employees' statutory right to choose whether to form a union and engage in collective

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27 Specialty Healthcare, Case No. 15-RC-8773

28 UGL-Unicco Service Co., Case No. 1-RC-22447; Grocery Haulers, Inc., Case No. 3-RC-11944

29 Chicago Mathematics & Science Academy Charter School, Inc., Case No. 13-RM-1768

bargaining.[30] The statute permits only equitable remedies, which are neither fully compensatory nor calculated to deter illegal conduct; they fall far short of the remedies that Congress has seen fit to prescribe in employee rights statutes enacted in the past 50 years, such as the employment discrimination laws.

The weaknesses of the standard equitable remedies, and the duration of the standard adjudicative process, are especially problematic in cases in which the employer may hope to stop an organizing drive in its tracks by firing a leading union activist. Absent prompt reinstatement, this illegal firing will predictably chill others from joining the union, as well as remove from the workplace a leading union advocate. The fact and the fear of retaliation will "nip in the bud" efforts to unionize, even if a remedy is eventually forthcoming years later. And employers facing only a long-distant threat of being ordered to reinstate the employee (which is often unrealistic years after a discharge) and to pay backpay (offset by what the employee earned or should have earned in the interim) are sorely tempted to violate the Act.

The Acting GC issued a Memorandum on September 30th, 2010 declaring his effort "to give all unlawful discharges in organizing cases priority action and a speedy remedy."[31] The Memorandum outlined procedures to expedite investigations of discriminatory firing, and to secure prompt GC approvals of requests from the Regional Offices for preliminary injunctive relief from the federal courts under Section 10(j) of the NLRA. That means that the Board's attorneys may sue in federal court, and if the court concludes that they meet all the normal requirements for preliminary relief – in particular a strong probability of success on the merits – the court may order the employer to reinstate the discharged employee.

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30 Former General Counsel Ronald Meisburg focused much attention, for example, on the need for stronger and faster remedies in first contract bargaining cases:

> Where there are bad faith bargaining tactics or other violations in the initial bargaining process that substantially delay or otherwise hinder negotiations, merely ordering the parties to bargain may not return the parties to the status quo ante. I believe that additional measures are often necessary in these situations to truly restore the conditions and the parties' relationships to what would have existed absent the violations . . . [In these circumstances] certain remedies specifically tailored to restore the pre-unfair labor practice status quo, make whole the affected parties, and promote good-faith bargaining should regularly be sought in initial bargaining cases where violations have interfered with contract negotiations.

Memorandum GC 07-08, Additional Remedies in First Contract Bargaining Cases (May 29, 2007).

31 Memorandum GC 10-07, *Effective Section 10(j) Remedies for Unlawful Discharges in Organizing Campaigns*, from Lafe Solomon to all Regional Directors, September 30, 2010.

Following this memo, there was a significant uptick in the number of 10(j) cases.[32] Of the 59 cases submitted to the General Counsel's office by the Regional Offices, only 16 were submitted to the Board for authorization, and the Board approved 15 to proceed with litigation. The very high success rate on those cases that have been concluded (total or partial success in all cases)[33] indicates that, far from pushing the boundaries of what the law authorizes, the General Counsel and Board have acted cautiously and prudently, and brought only strong cases to the courts.

The number of Section 10(j) injunctions has ebbed and flowed over the years, but their usefulness has long been widely recognized. Several General Counsels in the past have emphasized the essential role of these injunctions in redressing the impact of discriminatory discharges, especially in the organizing context. For example, former General Counsel Meisburg observed that, "[d]uring my tenure as General Counsel, I continued to support the use of Section 10(j) as an essential tool in the effective administration of the Act. As has long been recognized, in some unfair labor practice cases, the passage of time inherent in the Board's normal administrative process render its ultimate remedial orders inadequate to protect statutory rights and to restore the status quo ante."[34] The current GC's guidelines and practices do evince a strong focus on protecting employees' right to decide whether to form a union, but they break no new ground, nor is it likely that they will do so, given the need to present every one of these cases to a federal court before any injunction can issue.

In December, 2010, the Acting General Counsel issued a second memorandum in which he outlined additional remedies the Board could use to more effectively protect employees' freedom of choice against serious misconduct by employers in the context of union organizing campaigns. In addition to the standard remedies that the Board generally pursues – reinstatement and backpay (in discharge cases) and cease-and-desist and posting of notices (in other cases) – the General Counsel's memo outlined

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32 From October 1 through December 31, 2010, regional offices submitted 59 recommendations for Section 10(j) relief to NLRB headquarters – 43 petitions more than were submitted by the regions during the same quarter in FY 2009. BNA Daily Labor Report, January 21, 2011, *NLRB Has a Full Docket, Major Cases, and Plans for an Active Year.*

33 NLRB Statistics, 10(j) Authorizations, 1st quarter FY 11; 11 of 15 cases were concluded, while 4 remained open at the end of the quarter. Of the 11 cases pursued to conclusion, 7 were settled and 4 concluded in court (all 4 of which resulted in either a complete or partial win for the NLRB).

34 End-of-Term Report on Utilization of Section 10(j) Injunction Proceedings, January 4, 2006 through April 30, 2010 (June 2, 2010). See also GC 07-01, December 16, 2006 ("Section 10(j) relief is particularly well suited to accomplish the goal of protecting the representational choice of employees, collective bargaining, and labor peace, while also encouraging the use of Board election processes.")

additional remedies that are designed to mitigate the chilling effect that unlawful acts, particularly "hallmark violations" such as discriminatory discharges and the threat of job loss and plant closing, can have on employees' ability to exercise their rights under the Act. Those remedies may include additional provisions for affording employees' notice of prior violations, measures to improve unions' ability to communicate with workers both at work and away from work. The purpose of all of these remedies would be to help recreate an atmosphere in which workers feel free to exercise their Section 7 rights.

It is crucial to recall that these additional remedies are to be sought only against employers that have been found to have committed serious violations of the Act. The GC's memo emphasized that the decision to pursue these remedies would be evaluated on a case-by-case basis and only when there was strong evidence of the "lasting or inhibitive coercive impact" of the violation and of the potential remedial impact of the proposed remedy. Moreover, none of the Board's remedies can take effect without an opportunity for judicial review or judicial enforcement. All three of these additional remedies have been repeatedly affirmed by courts – again, in appropriate cases in which the standard remedies are shown to be inadequate to remedy the effects of serious employer illegality – as well within the range of discretion granted the Board as the institution with "the primary responsibility . . . [for] devis[ing] remedies that effectuate the policies of the Act."[35] Once again, there is simply no room under the statute for the Board to overreach its authority, even if it were moved to do so; and nothing in what the Board or its General Counsel has done so far suggests any such inclination.

Conclusion

In conclusion, the current Board and Acting General Counsel are doing no more and no less than conscientiously carrying out their responsibilities, as prescribed by Congress

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35 Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 899 (1984). *See, e.g.,* United Steelworkers of America v. NLRB, 646 F.2d 616, 640 (D.C. Cir. 1981) (upholding a Board order granting the union broad rights of access to a plant where repeated unfair labor practices occurred, as well as to two plants where organizational activity had been conducted and all other company locations where no organizational drives had yet begun, as "within the authority of the Board to impose"; "the Board was clearly entitled, in shaping its remedial order in this case, to consider the extensive record of past unlawful activity...."); J. P. Stevens & Co. v. NLRB, 388 F.2d 896, 906 (2d Cir. 1967) (upholding Board order granting union access to company bulletin boards in order "to dissipate the fear in the atmosphere within the Company's plants generated by its anti-union campaign."); Montgomery Ward & Co. v. NLRB, 339 F.2d 889 (6th Cir. 1965) (enforcing a Board order granting the union equal time to address employees after the employer unlawfully prohibited employee solicitation in nonworking areas of the store during nonworking time).

and underscored by the Supreme Court, in administering and enforcing the National Labor Relations Act.