

OFFICE OF THE GENERAL COUNSEL

Memorandum GC 94-17

December 29, 1994

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Fred Feinstein, General Counsel

SUBJECT: Expedited Hearings

As set forth in my August 3, 1994 memorandum, one of our new operational priorities is to ensure that all cases for which Section 10(j) relief may be appropriate are identified at the earliest possible time and then promptly investigated, decided and litigated. Regions have traditionally, pursuant to Casehandling Manual Section 10310.1, submitted the Section 10(j) issue to the Division of Advice immediately upon completion of the investigation and, upon authorization by the Board, filed a motion for Section 10(j) relief in U.S. District Court.

Regional Director Alvin Blyer at this year's RD conference, as well as the General Counsel's Committee on Casehandling and Cost Savings, provided valuable suggestions regarding the expedition of hearings in 10(j) cases. After reviewing their recommendations, we have concluded that in certain limited cases that warrant injunctive relief it might be more efficacious to proceed to an expedited hearing before an administrative law judge rather than to initially seek Section 10(j) authorization. In those cases, immediately subsequent to the hearing, or sooner when appropriate, the Region would then seek Section 10(j) authority if it were still warranted.

One major advantage of this alternative procedure is that an early hearing date may enhance early settlement to the same extent as securing Section 10(j) authority. In addition, the expenditure of Agency resources could be reduced since Section 10(j) work, including the process of seeking Section 10(j) authority, is time consuming. If an injunction is subsequently sought, it is less likely that Regions will have to expend resources in the discovery process. Furthermore, evidence adduced at the ALJ hearing could strengthen the Agency's argument for an injunction.

Accordingly, Regions shall now have the discretion to conduct an expedited ALJ hearing rather than initially seeking Section 10(j) authorization in two types of cases: (1) when the prima facie case warrants Section 10(j) relief but the charged party has refused to cooperate in the investigation and the Region believes that it will raise a substantial defense such as a Wright Line defense to alleged discriminatory action or an economic defense to a restoration remedy; or (2) when a Region concludes that resources will be saved by scheduling an expedited hearing rather than recommending injunctive relief because an early hearing is likely to prompt a settlement. Regions may consult with the Division of Advice regarding the advisability of using the alternative procedure in a particular case, but are not required to obtain authorization before using it. However, Regions should notify the Division of Operations-Management of each decision to use this procedure in lieu of seeking 10(j) authorization, and should keep it apprised of procedural developments in the case. Moreover, upon completion of the unfair labor practice hearing and, if conducted, the 10(j) proceeding, the Region should submit an assessment of this expedited procedure. The views of the Board agents involved in the proceedings should be included in the assessment if they so desire. Copies of the Regions' assessments will be provided to the NLRBU.

When a Region decides to hold an expedited hearing in lieu of seeking 10(j) authorization, the hearing must be scheduled to commence no later than 28 days after issuance of complaint. The parties' counsel should be informed that the Region is scheduling an early hearing date because the nature of the case requires expedited treatment, and that the charging party's 10(j) request is being held in abeyance.

At present, the Division of Judges cooperates with the Regions' efforts to secure early hearing dates in priority matters even when the Regions do not have any early trial slots available. It is anticipated that this cooperation will continue so that Regions will not need to save unused trial slots for these potential Section 10(j) cases. In the event that an early trial date is unavailable, the Region must follow CHM Section 10310.

As long as the Region acts expeditiously in the investigation and litigation before the ALJ, the passage of time between the alleged unfair labor practices and the request for Section 10(j) relief should not pose a

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problem. Delays in this process, however, could jeopardize our ability to subsequently secure an injunction, should one prove to be indicated. Therefore, Regions should oppose requests for postponement or continuance. When the Respondent is granted a lengthy postponement of the scheduled hearing date, the Region should reconsider whether it would be best to seek Section 10(j) authority immediately. Similarly, if there were a prolonged continuance during the trial, it might be appropriate to then seek Section 10(j) authority. In this regard, when it is anticipated that the ALJ hearing will be lengthy, the expedited procedure will not be a viable alternative, since continuances in these cases are not uncommon.

Immediately upon the close of the hearing, or earlier if appropriate, it will be necessary to reevaluate whether to request Section 10(j) authorization and, when warranted, promptly to submit the issue to the Division of Advice. If authorization is granted and district court litigation commenced, the Region should seek to use the transcript in lieu of live testimony, at least as to the "reasonable cause" or equivalent portion of the case. Absent unusual circumstances, it will not be necessary to request an expedited transcript of the ALJ proceeding, since Regions will not need the transcript to prepare their submissions to Advice or the initial Section 10(j) papers. The normal 10-day delivery should give Regions sufficient time to timely submit the transcript to the court.

In most cases, the record evidence will not directly address whether an injunction is "just and proper." Therefore, even if the transcript of the ALJ proceeding were used in the injunction proceeding, it may still be necessary to present affidavit or live testimony on this issue in the 10(j) proceeding.

In summary, this procedure affords Regions the discretion to conduct an expedited ALJ hearing in lieu of initially seeking Section 10(j) authorization in appropriate cases. The ALJ hearing would be scheduled within 28 days from service of the complaint. Immediately upon the close of the hearing, or sooner, the Region would reevaluate the propriety of an injunction and, if warranted, seek Section 10(j) authority. When an injunction is subsequently sought, the Region would attempt to use the transcript in lieu of live testimony or affidavits for the "reasonable cause" portion of the case. When this procedure is utilized, it is important for the Regions to continually monitor the progress of these cases to ensure that

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injunctive relief is timely requested. Furthermore, as in the past, Regions should give priority to scheduling hearings in cases where an injunction has been secured and should take appropriate steps to have the Board expedite the decisional process.

As noted above, the use of expedited hearings in selected cases should save resources in the Regions. Moreover, it is in the Regions' discretion whether to utilize the procedure. Over the next several months we will evaluate whether this procedure is accomplishing its purposes.

Combined C and R Cases:

Finally, another priority established by the General Counsel is the expeditious resolution of questions concerning representation. When representation cases are consolidated for hearing with unfair labor practice cases, resolution of the QCR is generally delayed a substantial period of time. In order to reduce the delay in these cases, we have determined to utilize the expedited hearing schedule procedure. Accordingly, when the Regions consolidate an R and C case for hearing, the hearing should be scheduled to commence within 28 days from issuance of the consolidation order.

When assigning an attorney to an expedited hearing, the Region should consider the attorney's other trial and investigatory assignments. As I have noted previously, the rules for appraising the performance of our employees require us to consider relevant extenuating circumstances. The reassignment of attorneys to expedited hearings will clearly be an extenuating circumstance. So too, an increase in workload to employees, caused by the reassignment of cases to permit other employees to handle expedited hearings, should also be considered as an extenuating circumstance.

I appreciate greatly the thoughtful efforts you and your staff are making to carry-out my priorities.

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cc: NLRBU