

**OFFICE OF THE GENERAL COUNSEL**

**MEMORANDUM GC 01-03**

February 5, 2001

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

**FROM:** Leonard R. Page, Acting General Counsel

**SUBJECT:** Report on Utilization of Section 10(j) Injunction Proceedings March 3, 1998 through January 15, 2001

Attached hereto is a report that I recently sent to the Board concerning Section 10(j) authorizations and litigation during the period since the last General Counsel Report. I believe that you will find it informative as well as helpful in your management of your Section 10(j) program.

The accomplishments outlined in this report are the result of hard work and dedication by you and your staffs. You can take pride that these efforts have contributed to a more effective enforcement of the Act.

/s/  
Leonard R. Page  
Acting General Counsel

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MEMORANDUM GC 01-03

UNITED STATES GOVERNMENT  
**memorandum**

**NATIONAL LABOR RELATIONS BOARD**  
**OFFICE OF THE GENERAL COUNSEL**

**DATE:** February 5, 2001

**TO:** The Board

**FROM:** Leonard R. Page Acting General Counsel

**SUBJECT:** Report on Utilization of Section 10(j) Injunctive Proceedings March 3, 1998 through January 15, 2001

**I. Introduction**

During my tenure as General Counsel and Acting General Counsel, I have strived to continue the emphasis of prior General Counsels and Boards to vigorously use the interim injunctive remedies of Section 10(j) of the Act as an essential element in the effective enforcement of the Act. I agree with my predecessors that in certain unfair labor practice cases, the Board's normal remedies will be insufficient to restore the proper status quo ante and effectively protect employee statutory rights. Further, absent prompt interim relief under Section 10(j), some respondents will be able to accomplish their unlawful objectives before the Board can enter its final administrative order. Accordingly, during my term as General Counsel, I took steps to enhance the Agency's ability to utilize the remedial authority of Section 10(j) in the most effective manner.

1. I have continued and expanded the Regional Office training program, under the guidance of the Division of Advice, to assure that all of the Board's Regional Offices are fully conversant with outstanding Agency Section 10(j) procedures, investigative techniques and applicable law. During this period, we trained eight Regional Office staffs and intend to complete training programs in every Regional Office in the near future. Such programs will be updated and repeated in the future on a regular basis.

2. To upgrade the Division of Advice's ability to provide training and litigation support services to the Regional Offices, I have appointed two new Deputy Assistant General Counsels in that division. One of these new managers deals exclusively with Regional Office training on both injunction and merits issues. Such training includes seminars conducted by Washington managers held at the local Regional Offices, as well as the preparation of both written and video training materials. This individual oversees the regular review, expansion and updating of the NLRB Section 10(j) Manual, which is used by all the Regional Offices as a investigation guide and research resource for 10(j) litigation. The other newly appointed manager serves as the primary contact person in the Division of Advice for litigation advice issues that arise during both administrative trials as well as U.S. district court injunction litigation under Sections 10(j) and 10(l) of the Act. The addition of this individual will improve the allocation of the managerial resources in the Division of Advice and will provide more prompt litigation advice services to the Regional Offices when such issues arise and require expedited consideration.

3. I have also continued to monitor cases that arise in the Regional Offices to guarantee that potential 10(j)-worthy cases are not overlooked by the Regions. Under this initiative I required Regional Offices for limited periods of time to submit to the Division of Advice all cases in which unfair labor practices are alleged to have interfered with a union's initial organizing campaign. Similarly, I also required the mandatory submissions from the Regions dealing with all cases where violations are found during the first year of a union's Board certification as the exclusive collective-bargaining representative.

Further, in 1999 my predecessor, Fred Feinstein, required Regional Offices to submit to the Division of Advice a recommendation regarding Section 10(j) proceedings in all cases where a remedial bargaining order under *NLRB v. Gissel Packing Co.* [1] is sought in the unfair labor practice complaint. [2] Since this directive issued, the consistency of the Agency's Gissel unfair labor practice complaints has improved among the Regional Offices now that these cases are reviewed in Washington regarding the propriety of Section 10(j) proceedings.

In sum, the Section 10(j) initiative started by my predecessor, Fred Feinstein, [3] is continuing and has been enhanced under my direction. The Agency's utilization of Section 10(j) proceedings continues to be among the Board's most effective weapons to remedy NLRA violations and protect employee statutory rights.

The nature of the Board's Section 10(j) activity from March 3, 1998 through January 15, 2001 is detailed in the following report. [4] I have categorized the Section 10(j) cases according to the framework, developed by prior General Counsels, of 15 situations or categories that typically give rise to the need for injunctive relief. Part II contains general statistics on the Section 10(j) program, summarizing the number of cases submitted by Regional Offices to Washington for consideration of Section 10(j) relief, as well as those in which the General Counsel requested and the Board granted authorization to seek such relief, and the outcomes in the cases authorized. In Part II we also analyze the types of situations in which we resorted to Section 10(j) during this period. Part III provides details and statistical information regarding the authorized cases in each recognized 10(j) case situation. Part IV deals with other developments in Section 10(j) litigation that occurred during the report period. Finally, attached to this report are two appendices which set forth the details of the results of the Section 10(j) cases authorized by the Board.

## II. Cases Submitted and Authorized in General

During the period covered by this report, Regional Offices submitted 359 cases with a recommendation regarding Section 10(j) relief to the Injunction Litigation Branch of the Division of Advice. [5] The General Counsel's Office sought Section 10(j) authorization from the Board in 191 cases, a "request percentage" of 53%, as compared to 44% during the prior reporting period. Of these cases, the Board authorized Section 10(j) proceedings in 164 cases, an "authorization rate" of 86%. [6] The Board authorization rate for the 1998 reporting period was 93%.

Appendices A and B attached to this report summarize the results of the cases authorized by the Board. Appendix A is a numerical summary of the cases authorized divided into the 15 □ 10(j) "situations" or categories. It provides, for each □ 10(j)

category and for the cases as a whole, the total number of cases authorized, the number settled both before and after a petition was filed in district court, the number of cases in which injunctions were either granted or denied, the number of cases in which changed circumstances caused us not to proceed with the litigation and the number of cases which were pending in court at the time this report was prepared. Appendix B is a list of each of the cases within each □10(j) category. In addition to identifying information about the case, it provides the outcome of the authorization.

As Appendix A shows, of the 164 cases authorized by the Board, 134 have been pursued to a conclusion at this time.<sup>[7]</sup> Of these cases, 70 were resolved by a successful settlement, either before or after a petition was filed in court. The proportion of authorized and pursued cases adjusted by settlement, 52%, is consistent with prior 10(j) reporting periods, including the settlement adjustment of 49% during the prior reporting period.

The remaining 64 cases were resolved by court decision, with injunctions granted in whole or substantial part in 46 cases. Thus, of these litigated cases, we were successful in 72% of the cases; this compares well to the litigation success rate of 77% during the 1998 reporting period. All together, we obtained a successful settlement or favorable court decision in 116 cases, a "success rate" of 87% of the cases pursued to a conclusion. This success rate is virtually identical with the 89%, 88% and 87% success rates of General Counsels Collyer, Feinstein and Lubbers, respectively.

Almost 43% of the cases authorized since the last Section 10(j) report arose out of a union organizing drive (Category 1, 25%; Category 2, 18%).<sup>[8]</sup> This was a slight increase from a 41% proportion of all authorized cases during the prior reporting period. Category 1 cases dropped from a 27% proportion of the total 10(j) authorized in the 1998 reporting period to the current figure of 25%. Category 2 cases, involving a request for an interim remedial bargaining order under the rationale of *NLRB v. Gissel Packing Co.* rose from 14% of the total cases authorized during the 1998 reporting period to the current figure of 18%. Other situations that gave rise to a significant number of Section 10(j) authorizations during this reporting period included improper employer withdrawals of recognition from incumbent unions (Category 4, 16%); employer conduct intended to undermine an incumbent union (Category 5, 13%); a successor employer's refusal to recognize and bargain with an incumbent union (Category 7, 13%); and a party's failure to bargain in good faith in negotiations (Category 8, 8%). The large percentage of cases in Category 4 continues an upward trend that began under General Counsels Hunter and Feinstein.

### III. Types of Cases

#### 1. Interference with organizational campaign (no majority)<sup>[9]</sup>

Section 10(j) proceedings are authorized in Category 1 cases to prevent the irreparable destruction of a union's organizational campaign. In each of these cases an employer responded to an organizational campaign with serious unfair labor practices: threats, coercive interrogations, surveillance of protected activities, improper solicitation of grievances and/or grant of benefits and unlawful employee discipline, including discriminatory discharges. Such violations threaten to, or do, "nip in the bud" the union's campaign, if not immediately enjoined. Accordingly, we typically seek an order enjoining the violations alleged, as well as an affirmative order to properly reinstate any discriminatee who has suffered an unlawful discharge, layoff, transfer or more onerous work duties. *See, e.g., Aguayo v. Tomco Carburetor Co.*, 853 F.2d 744 (9th Cir. 1988); *Angle v. Sacks*, 382 F.2d 655 (10th Cir. 1967); *D'Amico v. United States Service Industries, Inc.*, 867 F. Supp. 1075 (D. D.C. 1994).

We continued the Board's past practice of aggressively seeking interim relief in this category of cases and continued to enjoy substantial success. Of the 31 cases resolved during the period of the report, we were successful in 27 cases. See Appendix A. We obtained a major victory in the Tenth Circuit when it affirmed an injunction involving the alleged discriminatory selection of union supporters for inclusion in an economic layoff during the union's attempt to revive an organizational campaign. *See Sharp v. Webco Industries, Inc.*, 225 F.3d 1130 (10th Cir. 2000). The interim reinstatement of the pro-union supporters, particularly in view of the employer's past unlawful conduct, was "reasonably necessary to preserve the ultimate remedial power of the Board." 225 F.3d at 1135.

In *Pye v. Excel Case Ready*, \_\_\_ F.3d \_\_\_, No. 00-1632 (1st Cir. January 26, 2001), the First Circuit affirmed a 10(j) injunction requiring the interim reinstatement of five employees discharged during a union organizing campaign. The Court concluded that the lower court had applied the correct injunction standards and had not abused its discretion where the evidence indicated that "the discharge of union supporters has delayed or halted the unionization effort," slip op. at 11. The Court noted that "such cessation may be sufficient to support a finding of irreparable harm to the collective bargaining process," slip op. at 14.

Another important decision was in *Silverman v. J.R.L. Food Corp.*, 196 F.3d 334 (2d Cir. 1999), where the Second Circuit reversed a district court's partial denial of injunctive relief. In the Court's view that the lower court had not given "appropriate deference" to the favorable decision of the ALJ which had been submitted to the district court. Thus, it reversed the district court's conclusion that the Regional Director had failed to prove "reasonable cause" to believe a violation had been committed regarding a particular employee.

In an unreported decision, *Scott v. PHC-Elko, Inc., d/b/a Elko General Hospital*, Nos. 99-16755, 00-15141 (9th Cir. April 17, 2000), the Ninth Circuit affirmed the interim reinstatement of a single alleged discriminatee-union activist to protect a union's participation in a Board election. The Court in Elko also indicated that interim relief was just and proper even if the discriminatee had only been discharged in violation of Section 8(a)(1) of the Act based upon her protected concerted activities, as such violation "may threaten the collective bargaining process" (slip op. at 6).

Finally, we prevailed in a case where an employer allegedly resorted to a mass termination of poorly performing employees in order to discourage the union activities taking place at its facility. See *Aguayo v. Tres Estrellas de Oro*, CV 00-5422 MMM (Mex) (C.D. Ca. June 26, 2000). The court concluded that interim reinstatement was just and proper and in the public interest where the "union organizing process may continue to be chilled if the employees are not reinstated" and that "the longer they remain away from the company, the more likely it is that they will 'scatter in the winds,'" slip op. at 31, n. 112.

## 2. Interference with organizational campaign (majority)

Like the cases in the previous category, these cases arise out of a union's organizing campaign. In addition, the union has obtained an authorization card majority in an appropriate unit and the Region's complaint pleads that the employer's unfair labor practices are sufficiently egregious to undermine the union's majority and preclude the holding of a fair election even with traditional Board remedies and thus warrant the imposition of a remedial bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). In these cases we typically seek a broad cease and desist order and affirmative relief similar to that in Situation 1 cases. In addition, to assure that the Board's ultimate remedial Gissel bargaining order will not be a nullity, i.e., for the benefit of a union totally bereft of employee support, we also seek an interim bargaining order in favor of the union. See generally *Seeler v. The Trading Port, Inc.*, 517 F.2d 33 (2d Cir. 1975); *Levine v. C & W Mining Co., Inc.*, 610 F.2d 432 (6th Cir. 1979); *Asseo v. Pan American Grain Co.*, 805 F.2d 23 (1st Cir. 1986); *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559 (7th Cir. 1996), cert. denied 519 U.S. 1055 (1997).

Of the 20 cases that were resolved in this category, we were successful in 17 cases, albeit in some of the cases in which injunctions were granted, the courts declined to include affirmative bargaining order remedies.

The most important decision of the reporting period in this category was *Scott v. Stephen Dunn & Associates*, \_\_\_ F.3d \_\_\_, No. 00-15416 (9th Cir. February 2, 2001), where the Ninth Circuit for the first time passed on the propriety of interim Gissel bargaining orders under 10(j). It reversed the decision of the lower court and ruled that the language of Section 10(j), its legislative purpose and the weight of legal precedent all compel the conclusion that a district court has the authority to grant interim bargaining orders prior to a Board certification of a union. The Court concluded that the Regional Director had shown a stronger case than the respondent that the alleged violations, particularly a unit wide grant of benefits including a wage increase, had undermined the union's status in the facility and precluded a fair rerun election to justify an interim bargaining order. The Court further concluded that the respondent's alleged violations played a major part in the drop in the union's support as reflected by an election loss after having secured a card majority. To refuse to issue an interim bargaining order would permit the respondent to take advantage of the declining employee support for the union and result in a significant harm to the Board's remedial authority.

Among other significant decisions was *Calatrello v. General Fabrication Corp.*, 161 LRRM 2017 (N.D. Ohio 1999). In this case the court granted interim relief, including a Gissel bargaining order remedy, where the employer's alleged violations, including threats of plant closure, coercive interrogations, threats of discharge and discriminatory discharges, were serious and where the effect of them "eliminated the union as an effective force with continuing vitality." 161 LRRM at 2022. The court did not consider it relevant that the employer was not continuing its unlawful conduct. *Id.* Where threats of job loss were combined with actual terminations, the court concluded that "the impact of the employer's conduct is very likely to linger pervasively unless equally strong countermeasures restore free choice to the workforce." 161 LRRM at 2023. The court thus concluded that the effects of the employer's alleged violations could not be eradicated within the small workforce "by any means other than an

interim bargaining order." Id.

Another victory was obtained in *Moore-Duncan v. Aldworth Company, Inc. et al.*, 99-CV-3568 (JBS) (D. N.J. December 28, 2000), where the court granted an interim Gissel bargaining order against two employers alleged to be joint employers of certain warehouse employees at one of the employer's distribution facilities. The alleged violations included, inter alia, promises of benefits, solicitation of employee grievances, threats of plant closure, job loss and discharge, unlawful discharges and unilateral changes in working conditions. The court concluded that the public interest that the case implicated was the safeguarding of the collective bargaining process and that there was ample reason to believe that the respondents' conduct had "effectively thwarted the objectives and goals of the NLRA." Slip op. at 55. The court further concluded that the alleged joint employer had not been a "passive bystander" in the commission of the alleged violations and that both respondents should be bound by the terms of the injunction. Slip op. at 60.

Finally, in *Ahearn v. Beckley Mechanical, Inc.*, 161 LRRM 2311 (S.D. W. Va. 1999), a district court in the Fourth Circuit, which has not yet passed upon the propriety of interim Section 10(j) bargaining orders under Gissel, granted an interim card-based bargaining order solely upon alleged violations of Section 8(a)(1) of the Act. The court concluded that the interim bargaining order was just and proper to restore the status quo and serve the public interest by maintaining the integrity of the collective bargaining system and further the remedial purposes of the Act. 161 LRRM at 2314-2315.

### 3. Subcontracting or other change to avoid bargaining obligation

These cases involve an employer's implementation of a major entrepreneurial-type decision that adversely affects unit employees: for example, subcontracting or relocating entire plants, departments, or product lines. Such changes may be discriminatorily motivated, i.e., designed either to interfere with a union organizational campaign or to escape from an incumbent union, and thus violative of Section 8(a)(3).<sup>[10]</sup> The change may also be independently violative of Section 8(a)(5) if undertaken without satisfying an employer's bargaining obligation to an incumbent union.<sup>[11]</sup> We seek an order restoring the prior operation and prohibiting similar conduct in the future. Such relief is necessary because, when these actions unlawfully eliminate all or large portions of an operation and the jobs of unit employees, they undermine the status of an incumbent union or one seeking recognition. Moreover, an interim restoration order preserves the Board's ability to issue (and courts' to enforce) a final order restoring operations<sup>[12]</sup> without it being too burdensome for the respondent because of the passage of time or the prior alienation of the old facility or equipment.<sup>[13]</sup> Based upon these considerations, courts have granted interim restoration of operations injunctions in these situations. See, e.g., *Maram v. Universidad Interamericana de Puerto Rico, Inc.*, 722 F.2d 953, 959-960 (1st Cir. 1983); *Frye v. Seminole Intermodal Transport, Inc.*, 141 LRRM 2265, 2267 (S.D. Ohio 1992); *Bernstein v. Carter & Sons Freightways, Inc.*, 983 F. Supp. 994, 1007-08 (D. Kan. 1997). In certain cases the courts have granted a less drastic interim remedy of preventing the sale or alienation of a facility pending a Board decision. See, e.g., *Hirsch v. Dorsey Trailers, Inc.*, 147 F.3d 243 (3d Cir. 1998).

We were successful in all three resolved cases in this category, even though these cases are among the most difficult under Section 10(j) due to the respondents' defenses of undue burden to their businesses. In *Dunbar v. Carrier Corp.*, 66 F. Supp. 2d 346 (N.D.N.Y.), stay denied 66 F. Supp.2d 355 (N.D.N.Y. 1999), the district court enjoined an employer's alleged unilateral relocation of unit work to a new facility in another state. The court concluded that the employer had failed to bargain in good faith over the decision by its insistence upon changing the scope of the parties' historical bargaining unit, a permissive subject of bargaining. The court in *Carrier* concluded that interim relief was just and proper because, absent interim relief, the Board might be prevented from "effectively exercising its ultimate remedial authority" and "restoral of the status quo as it existed before the violations will be impossible." 66 F. Supp.2d at 353 and 354. While recognizing the "drastic" nature of the injunction, the court decided that such relief was warranted to preserve the status quo, protect the Board's remedial powers and prevent irreparable harm. Id., 66 F. Supp.2d at 354.

In a second case, *Aguayo v. Quadrtech*, CV 00-11039 CM (MANx) (C.D. Ca. November 21, 2000), the court enjoined the employer's alleged discriminatory attempt to relocate a substantial portion of the work of its facility to Mexico after the unit employees selected the union as their collective- bargaining representative in a Board election. The court concluded that based upon the Board's likelihood of success on the merits, there was a presumption that irreparable injury will result if the injunction was not granted. Slip op. at 13. In balancing the harms to the parties, the court commented that the respondent "adduces no meaningful evidence as to the dimensions of its suffering." Slip op. at 14.

#### 4. Withdrawal of recognition from incumbent

These cases involve an employer's withdrawal of recognition from an incumbent union, where the employer does not have objective considerations to support a "good faith doubt" of the union's continued majority support among the unit employees. [14] Often a withdrawal of recognition has been preceded by independent unfair labor practices designed to undermine employee support for the incumbent union. We seek 10(j) relief, including affirmative bargaining orders, in these cases to ensure that the unit employees will not be denied the benefits of union representation for the entire period of litigation before the Board and to prevent the irreparable injury to the union's support among the unit employees which would predictably occur if the union were unable to represent them pendent lite. See, e.g., *Brown v. Pacific Telephone and Telegraph Co.*, 218 F.2d 542, 544 (9th Cir. 1955)(as amended); *Hirsch v. Konig*, 895 F. Supp. 688, 697 (D. N.J. 1995); *Ahearn v. House of the Good Samaritan*, 884 F. Supp. 654, 662 (N.D.N.Y. 1995).

We were extremely successful in this category, as 23 of 25 resolved cases were successfully concluded. Injunctions were granted in a series of cases involving situations where employers had committed independent violations to "taint" subsequent showing of employee disaffection from an incumbent union. [15] See *Dunbar v. Park Associates, Inc.*, 23 F. Supp. 2d 212, 218 (N.D.N.Y. 1998), affd. mem. 166 F.3d 1200 (2d Cir. 1998); *D'Amico v. Townsend Culinary, Inc.*, 22 F. Supp. 2d 480, 490-91 (D. Md. 1998); *Overstreet v. Tucson Ready Mix, Inc.*, 11 F. Supp.2d 1139, 1148-49 (D. Ariz. 1998).

In one case, *Norelli v. Outrigger Hotels & Resorts d/b/a Outrigger Wailea Resort*, 00-00126 HG- LEK (D. Haw. September 21, 2000), an injunction was granted against a "successor" employer [16] which had allegedly improperly attempted to withdraw recognition from an incumbent union during a period when no question concerning representation could be raised under the Board's recently enunciated "successor bar" doctrine of St. Elizabeth Manor. [17]

Another court granted an interim bargaining order where an employer had withdrawn recognition from a newly certified union and had extended recognition to a rival union based on an alleged premature accretion, i.e., at a time when the employer's separate operations had not yet been functionally merged. See *Chavarry v. Innovative Communications Corp., et al.*, Civ. No. 2000-168 D. V.I., Division of St. Thomas and St. John September 14, 2000). Further, interim bargaining order injunctions were granted in other withdrawal of recognition cases where the alleged violations also included unilateral changes in unit employee working conditions (*McDermott v. Scott Brothers Dairy*, 162 LRRM 2224 (C.D. Ca. 1999)) and a mass discharge of the unit employees who had engaged in a protected unfair labor practice strike (*Blyer v. Pratt Towers, Inc.*, 00-CV-2499(FB)(MDG) (E.D.N.Y. November 16, 2000)). Finally, in one case the district court granted an injunction based upon the Regional Director's interpretation of the parties' labor agreement which prohibited the employer from rescinding the agreement and raising a good faith doubt of the incumbent union's majority status. See *Kinney v. Cook County School Bus, Inc.*, Case Number 00 C 2042 (N.D. Ill. Eastern Division May 30, 2000).

#### 5. Undermining of bargaining representative

Cases in this category involve a variety of employer unfair labor practices designed to undermine employee support for an incumbent union, short of actual withdrawal of recognition. The violations can include threats, promises and grants of new benefits, the discharge of key union officers or activists, and unilateral and/or discriminatory changes in important terms or conditions of employment, implemented without satisfying the employer's bargaining obligation to the incumbent union. We seek 10(j) relief to prevent the predictable, irreparable loss of employee support for the incumbent union. See, e.g., *Arlook v. S. Lichtenberg & Co., Inc.*, 952 F.2d 367 (11th Cir. 1992); *Pascarell v. Vibra Screw Inc.*, 904 F.2d 874 (3d Cir. 1990); *Gottfried v. Frankel*, 818 F.2d 485 (6th Cir. 1987); *Silverman v. Major League Baseball Player Relations Committee, Inc.*, 880 F. Supp. 246, 259 (S.D.N.Y.), affd. 67 F.3d 1054, 1062 (2d Cir. 1995); *Lineback v. Printpack, Inc.*, 979 F. Supp. 831, 847-850 (S.D. Ind. 1997).

We enjoyed very good success in the category, as 15 of 16 resolved cases were successful. Although many cases in this category settled, in one case an injunction was granted where the employer allegedly repudiated the terms of the parties' recently agreed-upon labor agreement and failed to reinstate ULP strikers who had made an unconditional offer to return to work. See *Aguayo v. South Coast Refuse Corp.*, 161 LRRM 2867 (C.D. Ca. 1999). In a second case, an injunction was granted to enjoin a successor employer's attempt to undermine an incumbent union, by making unilateral and discriminatory changes in employee working conditions, including work rules and work schedules, number of work hours and changes in job classifications. See *Miller v. ICH Corporation and Lyon's of California, Inc.*, C-00-0794 WHO (N.D. Ca. August 29, 2000).

## 6. Minority union recognition

Cases in this category typically involve alleged violations of Section 8(a)(2) and 8(b)(1)(A) where an employer recognizes a union which does not represent an uncoerced majority of employees in the unit.<sup>[18]</sup> The cases may also include other forms of illegal employer assistance to and/or domination of a labor organization. Interim relief is needed if, absent relief, the unlawfully assisted union will become so entrenched in the unit that the affected employees will be unable freely to exercise their Section 7 rights to select or reject union representation after the Board order issues. See generally *Fuchs v. Jet Spray Corp.*, 560 F. Supp. 11147 (D. Mass. 1983), *affd.* 725 F.2d 664 (1st Cir. 1983); *Zipp v. Dubuque Packing Co.*, 112 LRRM 3139 (N.D. Ill. 1982).

In this category, of the 2 cases authorized, an injunction was denied in one case and the other case was successfully resolved in a settlement.

## 7. Successor refusal to recognize and bargain

This category deals with employers that acquire a business and continue the "employing enterprise" with the predecessor's unionized work force, but refuse to acknowledge their legal obligation to maintain the bargaining relationship that existed under the predecessor.<sup>[19]</sup> In some cases, where the successor employer has discriminatorily refused to hire the predecessor's employees in a deliberate attempt to avoid any bargaining obligation, the element that the predecessor workforce has continued may be satisfied by inference that the employer would have hired the predecessor employees, absent its discriminatory motive.<sup>[20]</sup> The danger of irreparable injury to statutory rights is that, as in the withdrawal of recognition situation, the employees will be denied the benefits of union representation for the entire duration of the Board proceeding and during that time employees likely will sever irrevocably their ties and loyalties to the incumbent union. See, e.g., *Frye v. Specialty Envelope, Inc.*, 10 F.3d 1221 (6th Cir. 1993); *Asseo v. Centro Medico del Turabo, Inc.*, 900 F.2d 445 (1st Cir. 1990); *Scott v. El Farra Enterprises, Inc.*, 863 F.2d 670 (9th Cir. 1988); *Asseo v. Bultman Enterprises, Inc.*, 913 F. Supp. 89 (D. P.R. 1995); *Watson v. Moeller Rubber Products, Inc.*, 792 F. Supp. 1459 (N.D. Miss. 1992).

We enjoyed relatively good success in this category, as we were successful in 16 of 21 authorized cases. Injunctions were obtained in Burns-type successorship cases in *Scott v. Catholic Healthcare West South Bay, etc.*, C 00-20386 JW (N.D. Ca. June 19, 2000), appeal pending (9th Cir.) and *Dunbar v. Onyx Precision Services, Inc.*, 00-CV-686A (W.D.N.Y. December 20, 2000), appeal pending (2d Cir.). In Kallman-type successor cases, where there was an alleged discriminatory refusal to hire predecessor employees because their union support, we obtained injunctions in *Dunbar v. NRNH, Inc.*, etc., 163 LRRM 2033 (W.D.N.Y. 1999) and *Tellem v. New Silver Palace Restaurant*, 99 Civ. 12431 (S.D.N.Y. January 19, 2000). While injunctions were denied in several Burns and Kallman-type cases in this category, the Board has filed appeals in three of the lost cases based, in part, on the failure of the district courts to infer that Section 7 rights are chilled in the unsettled successorship situation, consistent with *NLRB v. Fall River Dyeing & Finishing Corporation*, 482 U.S. at 49-50.<sup>[21]</sup>

## 8. Conduct during bargaining negotiations

In these cases one party to a collective bargaining relationship refuses to bargain in good faith in violation of Section 8(a)(5) or 8(b)(3). These cases involve a wide variety of violations, e.g., a refusal to meet at reasonable times for bargaining, a refusal to supply relevant and necessary information requested by the other party, an insistence to impasse during negotiations on a permissive or illegal subject of bargaining, or a course of conduct reflecting the absence of "good faith" bargaining with an open mind and a sincere desire to reach an acceptable agreement. Where such violations pose the real danger of creating industrial unrest and/or stymieing the collective-bargaining process, 10(j) relief is often warranted. See, e.g., *Kobell v. United Paperworkers Int'l. Union*, AFL-CIO, 965 F.2d 1401 (6th Cir. 1992); *Silverman v. Reinauer Transportation*, 130 LRRM 2505 (S.D.N.Y. 1988), *affd.* per curiam 880 F.2d 1319 (2d Cir. 1989) (unpublished); *Hirsch v. Tube Methods, Inc.*, 125 LRRM 2198 (E.D. Pa. 1986); *Friend v. District Council of Painters No. 8*, 157 LRRM 2753 (N.D. Ca. 1997).

We were very successful in this category as 10 of 12 resolved cases were successful. In two cases district courts granted interim bargaining orders against employers that were alleged to be engaging in a course of "bad faith" collective bargaining. See *Fleischut v. Burrows Paper Corp.*, 162 LRRM 2719 (S.D. Miss. 1999); *Ahearn v. Muth Lumber Co., Inc.*, CIVIL NO. C-1-99-914 (S.D. Ohio February 10, 2000). In *Calatrello v. NSA*, a Division of Southwire Company, 164 LRRM 2500 (W.D. Ky. 2000), the employer's alleged bad faith bargaining had caused an unfair labor practice strike and the employer had refused to reinstate the strikers upon their unconditional offer to return to work. The court concluded that interim relief was warranted to

protect the status of the newly certified union. It granted an interim bargaining order and ordered the immediate recall of the strikers. In *Kobell v. United Refining Co.*, 159 LRRM 2762 (W.D. Pa. 1998), an employer had unilaterally and discriminatorily reduced the wages of employees who had voted to be represented by a union in an already existing, larger unit. The employer claimed the right to unilaterally reclassify the employees into the lowest rated work classification of the existing unit's labor agreement. The district court granted an injunction to restore the status quo, concluding that the employer was obligated to bargain with the union before establishing the initial wage and benefits of the employees who had been added to the established unit.

#### 9. Mass picketing and violence

This category encompasses cases in which a labor organization or its agents restrains or coerces employees, typically those who choose to refrain from engaging in Section 7 activities such as a strike. These violations of Section 8(b)(1)(A) include mass picketing that blocks ingress and egress to a worksite, violence and threats thereof at or away from a picket line and damage to private property. In these cases there is, of course, a concurrent state interest which may be protected through local police authorities and the state court system. If, however, state authorities are unwilling or unable to control the situation, 10(j) relief is warranted because the threatened injury to employee statutory rights cannot be adequately remedied by a Board order due course. See, e.g., *Frye v. District 1199, The Health Care and Social Services Union*, 996 F.2d 141 (6th Cir. 1993); *Squillacote v. Local 248, Meat & Allied Food Workers*, 534 F.2d 735 (7th Cir. 1976).

We obtained an injunction in the only case that the Board authorized in this category. See *Kollar v. United Steelworkers of America, Local No. 2155-7, et al.*, 161 LRRM 2307 (N.D. Ohio 1999).

#### 10. Notice requirement for strike or picketing (8(d) and 8(g))

These cases involve strikes or picketing undertaken in contravention of the notice and waiting periods required by Section 8(d) (federal and state mediation) and 8(g)(notices to health care institutions). When unions engage in such violations, and their economic activity substantially impairs or threatens to impair the employer's operations, the Board's final order may be too late to restore the status quo and assure that the parties' dispute will be open to the ameliorative effects of timely mediation under 8(d), or that adequate arrangements for the continuity of patient care may be made by the affected institution under 8(g). See, e.g., *McLeod v. Compress Air, etc., Workers*, 292 F.2d 358 (2d Cir. 1961).

There were no authorized 10(j) cases during the period under this category.

#### 11. Refusal to permit protected activity on property

These cases involve an employer's interference with the right of employees to engage in protected Section 7 activity, or to receive information from nonemployees, in nonworking areas on the employer's private property. Such activity can include employee picketing or handbilling arising from a labor dispute or nonemployee efforts to disseminate organizational material to employees. Whether such efforts are protected requires balancing the employer's private property right with employees' Section 7 rights. [22] When an employer's allegedly illegal conduct substantially impairs protected activity, 10(j) relief may be warranted, if an ultimate Board order granting access will be too late to permit the employees to use legitimate economic weapons while the dispute continues or to revive the organizational campaign. See *Eisenberg v. Holland Rantos Co., Inc.*, 583 F.2d 100 (3d Cir. 1978).

No cases were authorized during the period under this category.

#### 12. Union coercion to achieve unlawful object

These cases typically involve union conduct violative of Sections 8(b)(1)(B), 8(b)(2) or 8(b)(3) of the Act. Typically, the union insists in negotiations to the point of impasse that an employer agree to a permissive or illegal subject of bargaining, or it engages in conduct that restrains or coerces the employer in its selection of representatives for collective bargaining or grievance adjustment. Where the union's misconduct creates industrial unrest and is having a substantial adverse impact on the employer's operations, or is affecting employees in a unique and possibly irreparable manner, 10(j) relief becomes appropriate.

See *Boire v. I.B.T.*, 479 F.2d 778 (5th Cir.), reh. denied 480 F.2d 924 (5th Cir. 1973); *D'Amico v. Union of Marine & Shipbuilding Workers*, 116 LRRM 2508 (D. Md. 1984).

No cases were authorized during the period under this category.

### 13. Interference with access to Board processes

These cases involve employer or union retaliation against employees or their union for having resorted to the processes of the Board, typically for filing charges or giving testimony under the Act. Such retaliation may include threats, discharges, the imposition of internal union discipline, or even the institution of groundless lawsuits meant to retaliate against or harass employees and their unions for their resort to the Board's processes. Such violations are often worthy of 10(j) relief, as the chilling impact of such violations may preclude other employees from filing timely charges with the Board, or from giving testimony needed in ongoing administrative proceedings. See, e.g., *Humphrey v. United Credit Bureau*, 99 LRRM 3459 (D. Md. 1978).

We obtained an injunction in the one case authorized by the Board in this category. See *Sharp v. Webco Industries, Inc.*, Case No. 99-CV-893-H(E) (N.D. Okla. December 14, 1999), appeal pending (10th Cir.). In this case the employer had filed a state court lawsuit against two employees who were named by a union as discriminatees in a Board charge, which was being litigated in a complaint before the Board. The employer was defending before the Board on the grounds that the two employees had signed severance agreements and had received monetary payments which had waived their rights to litigate their NLRA claims before the Board. The state court lawsuit at first pled breach of contract, and then was later amended to base claims upon theories of unjust enrichment and for money had and received. The district court granted an injunction which temporarily stayed litigation of the employer's state court lawsuit on the basis that the matter was temporarily preempted by the pending unfair labor practice proceeding before the Board, where the employer was raising its severance agreements as a defense. The court concluded that a Section 10(j) injunction against such a preempted state court suit was not barred by the Supreme Court's decision in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 1983) and was permitted by *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971). In the court's view interim relief was warranted to prevent the possibility of inconsistent decisions between the state court and the Board regarding the waiver of NLRA rights under the employer's severance agreements. Slip op. at 4.

### 14. Segregating assets

In these cases an unfair labor practice complaint being litigated before the Board will, if sustained, give rise to backpay for affected employees, but the respondent begins to close down its operations and/or to liquidate its physical assets without making adequate arrangements to satisfy any potential backpay order. These circumstances create a danger that the respondent's assets will be dispersed before a backpay order issues. We seek a 10(j) "protective order" to restrict the respondent's alienation of assets or require it to sequester an amount equal to the anticipated net backpay plus Board interest. See, e.g., *Schaub v. Brewery Products, Inc.*, 715 F. Supp. 829 (E.D. Mich. 1989); *Kobell v. Menard Fiberglass Products, Inc. et al.*, 678 F. Supp. 1155 (W.D. Pa. 1988); *Jensen v. Chamtech Services Center*, 155 LRRM 2058 (C.D. Ca. 1997).

We were successful in both of the two authorized cases that reached a conclusion. One case settled and an injunction was granted in the other case, *Cohen v. Estoril Cleaning Co., Inc.*, 00 CV 10440 EFH (D. Mass. March 13, 2000). In the litigated case, the Board's 10(j) petition named the respondent and a third party that owed monies to the respondent for services rendered. The third party was named as a party-in-interest in the 10(j) petition based upon the All Writs Act, 28 U.S.C. Section 1651(a) (1994). Based upon the closing of the respondent's operations, the court agreed with the Board that an injunction was just and proper to require the third party to deposit into the registry of the district court the monies owed to the respondent.

### 15. Miscellaneous

This category includes those cases which, in the Board's judgment, require extraordinary injunctive relief and yet are not easily placed in any one of the 14 previous categories. Their common denominator is that the Board's ultimate remedial order will be unable to fully restore the status quo and thereby to undo the damage caused by the violations. See generally I Legislative History LMRA of 1947 433 (Government Printing Office 1985)(legislative history of Section 10(j)). See, e.g., *Lineback v. Printpack, Inc.*, 979 F. Supp. 831, 843-46, 850-52 (S.D. Ind. 1997)(district court temporarily enjoined under Section 10(j)

prosecution of alleged baseless and retaliatory Section 303 LMRA suit (29 U.S.C. Section 187)).

No cases were authorized during the period under this category.

#### IV. Other Major Section 10(j) Issues

##### 1. Section 10(j) Standards

In recent years a conflict has developed among the circuits regarding what standard a district court should apply when considering a 10(j) petition. Historically, courts have considered whether the Board demonstrated "reasonable cause" to believe the alleged violations had occurred and whether injunctive relief is "just and proper," that is, whether interim relief is necessary to protect the remedial purposes of the Act. See, e.g., *Kobell v. Suburban Lines, Inc.*, 731 F.2d 1076, 1078 (3d Cir. 1984); *Frye v. Specialty Envelope, Inc.*, 10 F.3d 1221, 1224 (6th Cir. 1993). However, the Seventh and Ninth Circuits have rejected "reasonable cause" as an independent criteria and held district courts should consider only whether 10(j) relief is "just and proper," applying traditional equitable principles in that inquiry. *Kinney v. Pioneer Press*, 881 F.2d 485, 488-493 (7th Cir. 1989); *Miller v. California Pacific Medical Center*, 19 F.3d 449, 460 (9th Cir. 1994)(en banc). In 1999, the Eighth Circuit joined the Seventh and Ninth Circuits in abandoning "reasonable cause" and adopting the traditional equitable standards for evaluating 10(j) cases. *Sharp v. Parents In Community Action*, 172 F.3d 1034, 1038-1039 (8th Cir. 1999). At the same time, the Tenth Circuit in *Sharp v. Webco Industries, Inc.*, 225 F.3d 1130, 1133-1134 (10th Cir. 2000) declined the opportunity to change its reasonable cause/just and proper standard. See also *Calatrello v. Automatic Sprinkler Corp. of America*, 55 F.3d 208, 212 (6th Cir. 1995).

##### 2. Section 10(j) Contempt Proceedings

District courts that issue Section 10(j) injunctions have the inherent power to secure compliance with their orders through adjudication of civil and criminal contempt. In civil contempt cases, the Board must show noncompliance with the order by "clear and convincing" evidence.<sup>[23]</sup> A contempt order can impose additional strictures to compel compliance with the decree and/or direct compensation for injuries caused by non-compliance.<sup>[24]</sup>

During the period, the Board pursued civil contempt litigation in two cases in which the Board believed respondents had failed to comply with the terms of Section 10(j) decrees. In *Aguayo v. South Coast Refuse Corp.*, 161 LRRM 2867 (C.D. Ca. 1999), the district court had enjoined the employer from failing or refusing to comply with the terms of an agreed-upon labor agreement of the parties and from failing or refusing to reinstate unfair labor practice strikers upon their unconditional offer to return to work. We sought civil contempt sanctions before the district court when the employer refused to properly reinstate the former strikers. The district court concluded that there was clear and convincing evidence that the employer had failed to comply with the court's reinstatement order and held the corporate employer and its two owners, individually, in civil contempt. *Aguayo v. South Coast Refuse Corp., et al.*, CV 99 3053 AHM (AIJx) (C.D. Ca. February 29, 2000). The court ordered, inter alia, the respondents, jointly and severally, to promptly recall five named employees, pay them compensatory damages in the form of backpay and pay attorneys' fees to the Board in the investigation and prosecution of the case. The court later granted to the Board attorneys' fees in the amount of \$50,000.00.<sup>[25]</sup>

We successfully obtained compliance with a Section 10(j) interim bargaining order against an employer that was allegedly engaging in a course of "bad faith" bargaining (*Ahearn v. Muth Lumber Co., Inc.*, CIVIL NO. C-1-99-914 (S.D. Ohio February 10, 2000)). When the employer failed to comply with the 10(j) decree, the Board instituted civil contempt proceedings against the corporate respondent and the president of the company, as an individual. The Board sought as part of the contempt remedies, a make-whole provision for the union's bargaining expenses incurred after the date of the 10(j) decree, as well as a make-whole provision for any employees who lost paid work time in order to participate in collective-bargaining activities. During the pre-trial discovery process, the Board deposed the company president. Prior to the trial before the district court, the employer made a significant improvement in its outstanding contract offer to the union which resulted in a collective-bargaining agreement and a settlement of all unfair labor practice charges between the parties.

Acting General Counsel

[Attachments \(2\)](#)

<sup>1</sup> 395 U.S. 575 (1969). See Memorandum GC 99-8, "Guideline Memorandum Concerning Gissel," dated November 10, 1999 (herein Guideline Memorandum).

<sup>2</sup> Guideline Memorandum, at p. 15.

<sup>3</sup> See Memorandum GC 98-10, "Report on Utilization of Section 10(j) Injunction Proceedings March 3, 1994 through March 2, 1998," dated July 23, 1998, reported at [../././press/r2302.html](#).

<sup>4</sup> Prior General Counsels' reports have varied as to the time periods covered. This report covers the last 20 months of General Counsel Feinstein's tenure and my tenure beginning in December 1999.

<sup>5</sup> In June 1995, the Agency's Regional Directors were given the discretion to decide against seeking 10(j) authorization without submitting the case to Washington. Hence, almost all Regional submissions since that time have been recommendations in favor of instituting Section 10(j) proceedings.

<sup>6</sup> The difference between the number of General Counsel 10(j) requests and the number of Board authorizations includes cases in which the Board denied 10(j) authorization, a settlement was secured or changed circumstances intervened before the Board's vote on the request, thus mooting the warrant for interim relief.

<sup>7</sup> Fourteen (14) cases are pending litigation in the courts. Sixteen (16) cases were not pursued after Board authorization because changed circumstances rendered injunctive proceedings no longer appropriate in our view.

<sup>8</sup> Categories 1 and 2 both involve cases arising out of an organizing campaign; Section 2 involves cases in which we sought an interim remedial Gissel bargaining order in addition to other relief. See the discussion *infra*, Part III, Sections 1 and 2.

<sup>9</sup> Category 1 cases exclude those involving a campaign in which the union has obtained a card majority in an appropriate unit and the 10(j) petition seeks a remedial bargaining order on behalf of the union. That group is covered in Category 2.

<sup>10</sup> See, e.g., *Statler Industries, Inc. v. NLRB*, 644 F.2d 902, 907-909 (1st Cir. 1981); *NLRB v. Joy Recovery Technology Corp.*, 134 F.3d 1307, 1315-1316 (7th Cir. 1998).

<sup>11</sup> See, e.g., *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964); *Olivetti Office U.S.A., Inc. v. NLRB*, 926 F.2d 181, 186-187 (2d Cir.), cert. denied 502 U.S. 856 (1991); *Dubuque Packing Co.*, 303 NLRB 386, 390-392 (1991), *enfd. in rel. part* 1 F.3d 24, 30-33 (D.C. Cir. 1993), *pet. for cert. dismissed* 511 U.S. 1138 (1994).

<sup>12</sup> See, e.g., *Lear Siegler, Inc., No-Sag Products Division*, 295 NLRB 857, 861 (1989).

<sup>13</sup> See, e.g., *Teamsters Local Union No. 171 v. NLRB*, 863 F.2d 946, 957-958 (D.C. Cir. 1988), cert. denied sub nom., *A.G. Boone Co. v. NLRB*, 490 U.S. 1065 (1989) and the cases discussed therein.

<sup>14</sup> See *Allentown Mack Sales and Services, Inc. v. NLRB*, 522 U.S. 359, 367 (1998).

<sup>15</sup> See generally *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 177 (1996), *affd. in rel. part*, 117 F.3d 1454, 1459-1460 (D.C. Cir. 1997).

<sup>16</sup> See generally *NLRB v. Burns Int'l Security Services*, 406 U.S. 272, 280-81 (1972).

<sup>17</sup> *St. Elizabeth Manor, Inc.*, 329 NLRB No. 36, slip op. at 4 (September 30, 1999).

<sup>18</sup> See *Garment Workers (Bernhardt-Altman Texas Corp.) v. NLRB*, 366 U.S. 731, 738-739 (1961).

<sup>19</sup> See *NLRB v. Burns Int'l Security Services*, *supra*; *Fall River Dyeing & Finishing Corporation v. NLRB*, 482 U.S. 27 (1987).

<sup>20</sup> See, e.g., *Kallman v. NLRB*, 640 F.2d 1094 (9th Cir. 1981).

<sup>21</sup> See *Hoffman v. Inn Credible Caterers, Ltd.*, 164 LRRM 2554 (S.D.N.Y. 2000), appeal pending (2d Cir.); *Pye v. Samuel Bent LLC*, 111 F. Supp.2d 65 (D. Mass. 2000), appeal pending (1st Cir.); *Bloedorn v. Francisco Foods, Inc., d/b/a Piggly Wiggly*, 99-C-1402 (E.D. Wis. February 4, 2000), appeal pending (7th Cir.).

<sup>22</sup> See generally *Lechmere v. NLRB*, 502 U.S. 527 (1992); *Four B Corp. d/b/a Price Choppers*, 325 NLRB 186 (1997).

<sup>23</sup> See, e.g., *Squillacote v. Local 248, Meat & Allied Food Workers*, 534 F.2d 735, 746-747 (7th Cir. 1976).

<sup>24</sup> See, e.g., *Local 28, Sheet Metal Workers' Int'l v. EEOC*, 478 U.S. 421 (1986).

<sup>25</sup> The respondents have appealed the \$50,000.00 attorneys' fees award.