

OFFICE OF THE GENERAL COUNSEL**MEMORANDUM GC 02-07**

August 9, 2002

TO: All Regional Directors, Officers-in-Charge and Resident Officers**FROM:** Arthur F. Rosenfeld, General Counsel**SUBJECT:** Utilization of Section 10(j) Proceedings

During the time that I have been General Counsel, it has become clear to me that the Section 10(j) program is, and must continue to be, an important tool in administering the Act. In certain cases, temporary injunctive relief under Section 10(j) of the National Labor Relations Act is a necessary and effective way to protect employees' Section 7 rights and the Board's remedial processes. To that end, the regional offices should consider the propriety of interim injunctive relief in every case. At the Field Managers' conference in June 2002, a recent decline in the number of cases identified for Section 10(j) relief by regional offices was noted. To assure that all cases warranting interim relief receive full consideration in the regional offices, the Division of Operations Management, at my request, has begun to discuss with you whether any cases under investigation may be appropriate 10(j) vehicles. In addition, as a method of providing guidance on the types of cases I believe warrant Section 10(j) relief, the Injunction Litigation Branch has begun to post on its Outlook bulletin board descriptions of all Section 10(j) cases for which I have sought Board authorization.

Certainly not every complaint warrants Section 10(j) relief. In reviewing cases, the regions should continue to evaluate two factors. Most important is the potential threat that the Board's ultimate order will be ineffective to remedy the unfair labor practices and to protect statutory rights. The other factor is the strength of the alleged violations.

As to the first element of Section 10(j) analysis--the threat of remedial failure--I am particularly interested in the utilization of Section 10(j) to protect the right of employees to freely choose whether or not they want union representation. For example, in the union organizing context, Section 10(j) relief appropriately fosters employee free choice where the processing of a representation petition is blocked by serious unfair labor practices but the petitioner would be willing to proceed to an election under the protection of a court-ordered injunction. Recently, I requested that the Board authorize Section 10(j) relief in a case where an employer discriminatorily laid off and refused to rehire employees and the union indicated that, if the court granted a Section 10(j) injunction, it would file a request to proceed to an election. Where employers assist and recognize unions that represent only a minority of unit employees, Section 10(j) injunctions that order the parties to sever that relationship permit employees to freely select whether or not they want union representation. Similar considerations of protecting employee free choice are also present in serious cases of union picket line violence.

An interim bargaining order may be necessary to protect the Board's ultimate remedy. For example, when a successor employer unlawfully refuses to recognize a union that represented its employees under the predecessor, an interim bargaining order preserves the employees' choice of representation. In addition, when a successor employer makes unilateral changes after commencing operations, an interim bargaining order limits the potential burden of a Board restoration order that could appear punitive. Further, where a recidivist respondent is engaged in a repeated pattern of unfair labor practices, the violations are likely to erode employee Section 7 rights over time and may warrant Section 10(j) relief.

Concerning the "success on the merits" factor, the allegations of the complaint must be sufficiently strong that the Board likely will enter the final relief sought on a temporary basis through the Section 10(j) proceeding. The clarity of the alleged violations is an important factor in the 10(j) determination because interim equitable relief should be imposed on respondents only when it is likely that the Board will impose such relief permanently.

Finally, I believe that regions should continue to use the expedited hearing procedures outlined in GC Memorandum 94-17, particularly in cases where the charged party has refused to cooperate in the investigation and the region believes that it will raise a substantial defense at the administrative hearing. In those cases, the regions should reevaluate the need for Section 10(j) relief immediately after the close of the hearing, and seek Section 10(j) authority if it is still warranted. The regions also may reassess whether to seek Section 10(j) authority in close Section 10(j) cases where a favorable decision of the administrative

law judge issues promptly after the hearing closes and the passage of time has not defeated the need for interim relief or the ability to restore the status quo.

In sum, where an interim injunction will restore employee statutory rights, facilitate the prompt holding of a fair election, or retain collective bargaining rights, Section 10(j) proceedings may be appropriate. Therefore, the regional offices should carefully investigate the impact of unfair labor practices on employee statutory rights, evaluate whether cases warrant Section 10(j) relief, and promptly submit those cases they believe are appropriate to the Injunction Litigation Branch in the Division of Advice.

/s/
A.F.R.

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