

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM GC 18-05

June 20, 2018

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

From: Peter B. Robb, General Counsel /s/

Subject: Utilization of Section 10(j) Proceedings

In my first several months as General Counsel, I have relied on Section 10(j) as an important tool for effective enforcement of the Act.¹ I will continue to do so, believing that, in certain cases, temporary injunctive relief under Section 10(j) provides the only means of ensuring the protection of employees' Section 7 rights and the Board's remedial processes. Regional offices should therefore continue to consider the propriety of interim injunctive relief in every case.

As prior General Counsels have noted, certain types of unfair labor practices are more likely than others to lead to remedial failure. Thus, discharges that occur during an organizing campaign, violations that occur during the period following certification when parties should be attempting to negotiate their first collective-bargaining agreement, and cases involving a successor's refusal to bargain and/or refusal to hire, should all be scrutinized to determine whether there is a threat of remedial failure. To ensure that adequate consideration is given to those cases, regional offices should continue to submit a recommendation to the Injunction Litigation Branch (ILB) as to whether or not to seek an injunction in accordance with previously issued GC memoranda. Of course, consideration should be given to seeking an injunction in other types of cases as well if there is a threat of remedial failure.

In all cases identified as potentially requiring an injunction, Regions should continue to evaluate the two factors necessary to obtain an injunction from a district court: (1) whether there is reasonable cause to believe the violations occurred (or, in some circuits, whether there is a likelihood of success on the merits), and whether injunctive relief is just and proper (or, whether there is a threat of irreparable harm). Courts generally apply a highly deferential standard to the reasonable cause/likeness of success question. As a consequence, in my determination of whether to seek Board authorization for injunction proceedings in a particular case, I will not be overly-concerned with

¹ In my first six months in office, I sent 11 cases to the Board for 10(j) authorization, receiving authorization to proceed, at least in part, in all of them.

credibility disputes or with insuring that a case is unshakable on the merits. As to the need for relief, Regions should continue to investigate to obtain evidence of the impact of the violations, but should be ready to rely on court-recognized inferences of harm where necessary and applicable. With regard to appropriate remedies, extraordinary remedies have presented problems for the Board as well as the Courts in Section 10(j) cases. Consequently, if the Region recommends seeking an extraordinary remedy in an injunction, it should include in its submission to ILB sufficient evidence and analysis to support the remedy.

Of utmost importance, Regions must expedite the processing of any potential 10(j) case. If a case raises a threat of irreparable harm or remedial failure, we need to obtain that relief as quickly as possible when there is still an opportunity to restore the status quo ante. Potential injunction cases should therefore be given priority for expedited investigation. Those cases should be brought quickly to an agenda to determine whether there is merit and, if there is, Regions should submit the case to ILB even if settlement discussions are ongoing (unless there is a very strong likelihood that the case is going to settle). Moreover, even when multiple charges are filed, or new charges raising additional violations, Regions should promptly submit a recommendation to ILB as soon as the merit determination of an initial charge would make 10(j) relief appropriate.

Along these lines, potential 10(j) cases should be submitted to ILB in advance of the hearing before an Administrative Law Judge. As mentioned above, the threshold for proving a violation to a district court is very low. In light of that highly deferential standard, it does not serve our purpose to delay seeking an injunction to strengthen the theory of violation where the Regional Director has already found sufficient merit to issue a complaint. In fact, it works against us by creating additional delay. It should therefore be only in the rarest of circumstances that a Region submits a potential 10(j) case to ILB after an ALJ hearing has commenced; and those rare cases should occur only after consultation with ILB.²

In sum, I believe that, in certain cases, interim relief under Section 10(j) is necessary to effectively protect the rights established in the National Labor Relations Act. Regional personnel should continue to promptly identify cases potentially requiring injunctive relief,

² This requirement is not intended to prevent Regions from seeking an expedited administrative hearing for any potential injunction case. Pursuant to CHM Section 10310.4(a) and OM Memo 06-60, Regions should continue to seek a hearing no later than 8 weeks from the date of issuance of complaint for any potential 10(j) case. However, contrary to Section 10310.4(b) of the Casehandling Manual and other directives, Regions may no longer proceed to an expedited hearing to first determine the strength of the merits of a case without first consulting with ILB. The Casehandling Manual will be updated to reflect this change.

quickly investigate them for merit and for evidence of the impact of the violations, and soon after making a merit determination submit a recommendation to ILB regarding the need for an injunction.

If you have any questions about any of the above, please contact the Injunction Litigation Branch.

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P.B.R.