SECTION 10(j) MANUAL

USER'S GUIDE

National Labor Relations Board
Office of the General Counsel

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1.0 INTRODUCTION

This is the first major revision of the 10(j) Manual. The last revision, in June 1996, was partial; the current revision is comprehensive. The User's Guide has been completely rewritten and extensively expanded. Sample arguments have been updated to incorporate developments in recent 10(j) caselaw and theories regarding the need for injunctive relief. A wider variety of model papers are provided to assist the Regions in preparing and litigating their 10(j) cases in district court.

The 10(j) Manual is intended to be a general guideline for the processing of Section 10(j) cases. The Manual consists of two parts: the User's Guide and the Appendices which follow. The User's Guide will explain each step in the process, from identification and investigation through litigation in federal district court, instruct Board agents on their responsibilities in processing 10(j) cases, identify various issues that may arise in processing a case, and provide necessary information to successfully address those issues.

To assist in meeting those responsibilities, this guide contains material to help identify the situations in which interim injunctive relief under Section 10(j) may be necessary. It also explains how to conduct an investigation to elicit evidence relevant to determining whether Section 10(j) relief is "just and proper" in a particular case. This guide provides instruction on the procedure to follow once a Regional office has decided that a case warrants immediate injunctive relief, including the preparation of the memorandum recommending 10(j) relief, the preparation of papers for district court, how to argue the case in district court, and how to address any other litigation issues that may arise.

The appendices that follow the User's Guide contain material to support Board agents throughout the 10(j) process. Among other things, there are checklists, suggested questions for investigation, sample documents, model arguments, and citations to relevant research material. Of course, Board agents should use these documents to the extent they are relevant to their 10(j) case, and modify them as needed to fit the facts or particular legal theories in their case. For ease of use, Board agents can obtain access to

many of these documents on the Agency's Intranet. This will allow Board agents to download into their computers the necessary documents for processing their 10(j) cases.

This manual was prepared by the Injunction Litigation Branch with the sole purpose of supporting the Regions in their efforts to achieve a prompt and effective remedy in those cases which require immediate 10(j) injunctive relief. The material was prepared based on the knowledge and experience of legions of Board agents who have litigated 10(j) cases throughout the country. Please contact the Injunction Litigation Branch if additional assistance is needed at any time.

1.1 General 10(j) Principles

Section 10(j) of the Act authorizes the Board to seek injunctive relief in U.S. District Court in situations where, due to the passage of time, the normal adjudicative processes of the Board likely will be inadequate to effectively remedy the alleged violations. Such injunctive relief may be sought as soon as an unfair labor practice complaint is issued by the General Counsel and remains in effect until the unfair labor practice case is finally disposed of before the Board. It may be requested by the charging party or sought by the Regional Office, sua sponte. It is imperative that Board agents be aware of the types of situations where such relief may be appropriate, the requirements of the investigative process in those situations, and the internal procedures to be followed in such cases.

Congress created Section 10(j) relief as a means to preserve or restore the lawful status quo ante, so that the purposes of the Act are not frustrated and the final order of the Board is not rendered meaningless by the passage of time. Congress recognized that a respondent's illegal acts could, in some cases, permanently alter the situation and prevent the Board from effectively remedying the violations by its final order. Thus, to justify Section 10(j) relief, the Board must demonstrate how the alleged violations threaten statutory rights and the public interest while the parties await a final Board order.

This involves two elements of proof:

1. a sufficient showing that an unfair labor practice has occurred; and

2. a sufficient showing that there is a threat that the Board's ultimate remedial order will be a nullity.

The first element is often referred to as the "merits analysis," and the latter element is often referred to as a threat of "remedial failure." In most circuits these elements are tested under the two-prong analysis of whether there is "reasonable cause to believe" that the Act has been violated as alleged in the unfair labor practice complaint; and whether interim injunctive relief, pending a final Board order, is "just and proper." The First, Seventh, Eighth and Ninth Circuits have abandoned the "reasonable cause" test as the limit of a district court's inquiry into the merits of the unfair labor practice case and

held that requests for Section 10(j) injunctions should be evaluated under traditional equitable principles. A more precise definition of the standards for each circuit is set out in the Model 10(j) standards for each circuit contained in Appendix D.

The merits analysis of a 10(j) case is the same as the merits determination of any unfair labor practice charge. What distinguishes a 10(j) case from other unfair labor practice cases is the threat of remedial failure. This threat may be demonstrated by the nature and extent of the alleged violations, and the anticipated and actual impact of the unremedied violations upon statutory rights that is expected to continue until a Board order issues. For instance, if an unfair labor practice complaint alleges that an employer unlawfully discharged an employee during a union organizing campaign, interim reinstatement of the discriminatee may be necessary to avoid "chilling" the remaining unit employees' support for the union or their willingness to engage in protected union activities during the Board proceedings.

Courts differ as to whether the Board must introduce direct evidence of "chill" to establish that such injury, or chill, is threatened. Generally, many courts have been willing to examine the very nature and extent of the particular unfair labor practices to determine, by inference or presumption, whether the violation will, over time, tend to chill or undermine remaining unit employee support for a union. Other courts appear less likely to infer a chilling effect on employee statutory rights; instead, they insist upon evidence that the violation is actually having a chilling effect. In either case, however, direct evidence of chill is always probative as to the need for Section 10(j) relief and should be sought in every Section 10(j) case.

The quantum of evidence required to establish the need for Section 10(j) relief varies depending upon the type of case involved, the applicable case law, and the judicial circuit in which injunctive relief is sought. The absence of direct evidence of impact in a particular case does not necessarily mean that Section 10(j)proceedings are inappropriate. The existence or absence of such evidence is always relevant to the evaluation of a case, however, and the Regions should always attempt to obtain such evidence.

2.0 IDENTIFYING POTENTIAL 10(j) CASES

Early identification of potential 10(j) cases is critical to avoid the threat of remedial failure. When a case warrants 10(j) relief, the longer it takes to obtain that relief, the greater the threat of remedial failure. For this reason, Board agents should evaluate every new charge to determine whether it might be a potential 10(j) case.

Most potential 10(j) cases are identified at the outset by the charging party who requests 10(j) relief. However, a substantial portion of 10(j) requests are sua sponte, i.e., the regions identify the case as requiring 10(j) relief even if the charging party does not. For this reason, Board agents should "think 10(j)" even if there is no specific request. In addition, although most 10(j) cases are identified around the time an initial charge is filed, in others the need for injunctive relief might not arise until the respondent has

demonstrated a pattern of violations over a period of time. Therefore, Board agents should be alert at every stage of case processing for the potential need for a 10(j) injunction.

2.1 Categories of Section 10(j) Cases

The Board may seek Section 10(j) injunctions for any alleged violation of the Act, other than those enumerated in Section 10(l). The following categories of cases, however, are particularly likely to threaten the efficacy of the Board's order.[1]

1. Interference with Organizational Campaign (No Majority Union Support)

In these cases the union has either not obtained a card majority from employees in an appropriate unit or the Region's complaint does not seek a remedial bargaining order for some other reason. Section 10(j) proceedings are authorized to prevent the irreparable destruction of a union's nascent organizational campaign. These cases usually involve an employer's response to an organizational campaign with serious, if not massive, unfair labor practices: threats, coercive interrogations, surveillance of protected activities, improper grant of benefits, and unlawful employee discipline, including discriminatory discharges. Such violations virtually "nip in the bud" the union's campaign or clearly threaten to do so if not immediately enjoined. Accordingly, an order is typically sought to enjoin the violations alleged, as well as an affirmative order to reinstate any discriminatees. See, generally, Schaub v. West Michigan Plumbing & Heating, Inc., 250 F.3d 962 (6th Cir. 2001); Sharp v. Webco Industries, Inc., 225 F.3d 1130 (10th Cir. 2000); Pye v. Excel Case Ready, 238 F.3d 69 (1st Cir. 2001); Pascarell v. Vibra Screw, Inc., 904 F.2d 874 (3rd Cir. 1990); Aguayo v. Tomco Carburetor Co., 853 F.2d 744 (9th Cir. 1988).

2. Interference with Organizational Campaign (Majority Union Support)

These cases are the same as those in the previous category, except that the union has obtained a card majority in an appropriate unit, and the Region's complaint pleads that the unfair labor practices are sufficiently egregious to preclude the holding of a fair election and thus warrant the imposition of a remedial bargaining order under NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).[2] In such cases, the relief typically sought includes a broad cease and desist order, an affirmative order to reinstate any discriminatorily discharged employees and, to ensure 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--an interim bargaining order will also be requested. See, generally, Scott v. Stephen Dunn & Assoc., 241 F.3d 652 (9th Cir. 2001); NLRB v. Electro-Voice, Inc., 83 F.3d 1559 (7th Cir. 1996); Seeler v. The Trading Port Inc., 517 F.2d 33 (2d Cir. 1975). Accord: Levine v. C&W Mining Co., Inc., 610 F.2d 432 (6th Cir. 1980); Asseo v. Pan American Grain Co. Inc., 805 F.2d 23 (1st Cir. 1986).

3. Subcontracting or Other Change to Avoid Bargaining Obligation

These cases involve an employer's implementation of a major entrepreneurial-type decision which impacts adversely on 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 an organizational campaign or to escape from an incumbent union--and, therefore, may violate Section 8(a)(3). In addition, these changes can independently violate Section 8(a)(5) if undertaken without bargaining over the decision, when required, with the incumbent union. In these types of cases, the Board seeks Section 10(j) relief, including the affirmative restoration of operations, because of the devastating impact such decisions can have on the affected bargaining units--namely, elimination of all or a substantial part of the unit and termination of unit employees. The injury done to the union, either the incumbent or the one seeking recognition, is very often fatal unless injunctive relief is obtained. Moreover, by restoring and preserving the status quo ante, injunctive relief freezes the circumstances, thereby permitting the Board to issue a final restoration order which will not be judged later by an enforcing circuit court as too burdensome on the respondent because of the passage of time or the alienation of the old facility or equipment. See, generally, Hirsch v. Dorsey Trailers, 147 F.3d 243 (3d Cir. 1998); Maram v. Universidad Interamericana de Puerto Rico. Inc., 722 F.2d 953 (1st Cir. 1983); Aguago v. Quadrtech Corp., 129 F.Supp.2d 1272 (C.D. CA 2000); Dunbar v. Carrier Corp., 66 F.Supp.2d 346 (N.D.N.Y. 1999).

4. Withdrawal of Recognition from Incumbent

These cases involve an employer's withdrawal of recognition from, or its refusal to bargain a new agreement with, an incumbent union, where the employer is unable to prove an actual loss of the union's continued majority status. Very often, such a withdrawal of recognition is accompanied by other independent unfair labor practices designed to undermine employee support for the incumbent union. This category includes withdrawal of recognition from a newly certified union, when the union is first attempting to establish itself among the employees. Section l0(j) relief is sought in these cases, including affirmative bargaining orders, to ensure that the 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 employees which predictably would occur if the union were unable to represent them. See, generally, Dunbar v. Park Associates, Inc., 23 F. Supp.2d 212, 218, 159 LRRM 2353 (N.D.N.Y.), affd. mem. 166 F.3d 1200 (2d Cir. 1998); Brown v. Pacific Telephone & Telegraph Co., 218 F.2d 542 (9th Cir. 1955); D'Amico v. Townsend Culinary, Inc., 22 F. Supp.2d 480, 492 (D. Md. 1998); Overstreet v. Tucson Ready Mix, Inc., 11 F. Supp.2d 1139, 1148-49 (D. Ariz. 1998); De Prospero v. House of the Good Samaritan, 474 F.Supp. 552 (N.D. N.Y. 1978); Sachs v. Davis & Hemphill. Inc., 295 F.Supp. 142 (D. Md. 1969), affd. 71 LRRM 2126 (4th Cir. 1969), vacated as moot and opinion withdrawn, 72 LRRM 2879 (4th Cir. 1969);.

5. Undermining of Bargaining Representative

This category closely resembles the previous category in that the cases involve a variety of employer unfair labor practices designed to undermine employee support for an incumbent or newly certified union; however, in this category, the employer has not

literally withdrawn recognition from the union but has taken action which belittles the union in the eyes of employees and impairs the union's authority to effectively represent employees. The violations can include threats, the discharge of key union officers or activists, or implementing important changes in working conditions either discriminatorily or without bargaining with the union. The need for Section l0(j) relief is to prevent the predictable, irreparable erosion of employee support for the incumbent union. See, generally, Arlook v. Lichtenberq & Co., 952 F.2d 367 (llth Cir. 1992); Pascarell v. Vibra Screw Inc., 904 F.2d 874 (3d Cir. 1990); Eisenberg v. Wellington Hall Nursing Home. Inc., 651 F.2d 902 (3d Cir. 1981); Morio v. North American Soccer League, 632 F.2d 217 (2d Cir. 1980); Overstreet v. Thomas Davis Medical Centers, 9 F.Supp.2d 1162 (D. Ariz. 1997); Silverman v. Major League Baseball Player Relations Committee, Inc., 880 F.Supp. 246 (S.D.N.Y.), aff'd 67 F.3d 1054 (2d Cir. 1995).

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 grants exclusive recognition to a union that does not represent an uncoerced majority of employees in the unit. The cases can also include a wide variety of illegal assistance to and/or domination of a labor organization. The danger posed by such cases is that, absent interim relief, the assisted union will become so entrenched in the unit that the affected employees will be unable freely to exercise their Section 7 right to select or reject union representation. See, generally, Kaynard v. Mego Corp., 633 F.2d 1026, 1033-1035 (2d Cir. 1980); Fuchs v. Jet Sprav Corp., 560 F.Supp. 1147, 1156 (D. Mass. 1983), aff'd per curium 725 F.2d 664 (1st Cir. 1983). Accord: Zipp v. Dubuque Packing Co., 112 LRRM 3139 (N.D. Ill. 1982).

One court rejected this theory as grounds for interim relief because, under the status quo, employees enjoyed the benefits of a fair contract and the result of an injunction would have been to leave employees unrepresented during the time the Section 8(a)(2) case was pending before the Board. Eisenberg v. Hartz Mountain Corporation, 519 F.2d 138 (3d Cir. 1975). A Section 10(j) injunction to withdraw recognition from a minority union may be appropriate notwithstanding such considerations where the injunction makes an election possible before the Board decision issues. Thus, we have sought Section 10(j) if the petitioning union indicates it will, upon issuance of an injunction, make a request to proceed to an election and agree to withdraw the 8(a)(2) charge if the allegedly assisted union wins (cf. Carlson Furniture Industries, 157 NLRB 851 (1966)), and the Regional Director is satisfied that the injunction will restore the conditions necessary to a free and fair election.

7. Successor Refusal to Recognize and Bargain

In this category, an employer acquiring a business and becoming the legal "successor" to an existing bargaining relationship under NLRB v. Burns International Security Services, 406 U.S. 272 (1972), and Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987), has refused to recognize and bargain with the predecessor employer's incumbent union. In some cases, the finding of a successorship may be predicated on the employer's allegedly discriminatory refusal to hire the predecessor's employees in a deliberate attempt to avoid any bargaining obligation. The danger of

irreparable injury is similar to that present in the withdrawal of recognition situation--i.e., that the employees are denied the benefits of union representation for the entire duration of the Board proceeding and the passage of time foreseeably will sever employee ties and loyalty to the union. See, generally, Bloedorn v. Francisco Foods, Inc. d/b/a Piggly Wiggly, 276 F.3d 270 (7th Cir. 2001) Hoffman v. Inn Credible Caterers, Ltd., 247 F.3d 360 (2d Cir. 2001); Frye v. Specialty Envelope, Inc., 10 F.3d 1221 (6th Cir. 1993); Asseo v. Centro Medico del Turabo, 900 F.2d 445 (1st Cir. 1990); Scott v. El Farra Enterprises. Inc., 863 F.2d 670 (9th Cir. 1988).

8. Conduct During Bargaining Negotiations

In these cases, one party to a collective-bargaining relationship has engaged in a refusal to bargain in good faith. The violation may be based upon a wide variety of situations--such as a refusal to meet and bargain, 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 a bad-faith refusal to bargain with an open mind and a sincere desire to reach an acceptable agreement. Where such violations pose a real danger of creating industrial unrest and/or of undermining employee support for the union, Section l0(j) relief may be appropriate. See, generally, Rivera-Vega v. ConAgra, Inc., 70 F.3d 153 (1st Cir.); aff'g 876 F.Supp. 1350 (D. P.R. 1995); Kobell v. United Paperworkers Intern., 965 F.2d 1401 (6th Cir. 1992); Fleischut v. Burrows Paper Corp., 162 LRRM 2719, 2723 (S.D. Miss. 1999); Silverman v. Reinauer Transportation Co., 130 LRRM 2505 (S.D.N.Y. 1988), aff'd mem. No. 89-6010 (2d Cir. June 23, 1989); Boire v. SAS Ambulance Services. Inc., 108 LRRM 2388 (M.D. Fla. 1980), aff'd per curium 657 F.2d 1249 (5th Cir. 1981); Douds v. I.L.A., 241 F.2d 278 (2d Cir. 1957).

9. Mass Picketing and Violence

This category encompasses cases in which a labor organization or its agents have engaged in restraint or coercion of 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 which blocks ingress and egress to the plant or 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. However, there are cases in which state authorities are unwilling or unable to control the situation; in those cases, Section 10(j) relief is warranted because the threatened injury cannot be adequately remedied by a Board order issued many months later. See, generally, Frye v. District 1199, 996 F.2d 141 (6th Cir. 1993); Squillacote v. Local 248. Meat & Allied Food Workers, 534 F.2d 735 (7th Cir. 1976). As to the comity issues, compare Clark v. International Union UMWA (Clinchfield Coal, 714 F.Supp. 791 (W.D. Va. 1989) and Clark v. International Union UMWA (Covenant Coal), 722 F.Supp. 250 (W.D. Va. 1989).

10. Section 8(d) and 8(g) Notice Requirements for Strike or Picketing

These cases involve union strikes or picketing undertaken in contravention of the notice and waiting periods set forth in Section 8(d) (federal and state mediation) and 8(g) (notices to health care institutions). When unions engage in such violations, and where

the economic activity is having or threatens to have a substantial adverse impact on the other party's operations, Section l0(j) relief is often sought. Absent quick relief, the Board's final order may not adequately restore the status quo, ensure that the parties' dispute will be open to the ameliorative effects of mediation under Section 8(d), or that adequate arrangements for the continuity of patient care may be made by the affected institution under Section 8(g). The relief sought includes the cessation of the strike and picketing unless and until the union properly complies with the requirements of 8(d) or 8(g). See, generally, McLeod v. Compressed Air, etc., Workers, 292 F.2d 358 (2d Cir. 1961). Accord: McLeod v. Communications Workers of America, 79 LRRM 2532 (S.D. N.Y. 1971).

11. Refusal to Permit Protected Activity on Private Property

These cases involve an employer's interference with the right of employees to engage in protected Section 7 activity in nonworking areas on the private property of an employer. Such activity can include employee picketing or handbilling arising from a labor dispute; it may, in certain circumstances, encompass nonemployee efforts to disseminate organizational material to employees. Such cases involve an analysis of the employer's private property rights, the Section 7 rights being exercised or restrained, and any alternative means of communication; Where the protected rights prevail, an employer's denial of or interference with such rights violates Section 8(a)(1) of the Act. See, Hudqens v. NLRB, 424 U.S. 507 (1976); Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992). When the employer's illegal conduct is having a substantial adverse impact on the protected activity, Section 10(j) relief may be warranted, inasmuch as these disputes are often of a temporal nature. Absent quick relief, the Board's ultimate remedial order will come too late. See, Eisenberg v. Holland Rantos Co., Inc., 583 F.2d 100 (3d Cir. 1978). But see Silverman v. 40-41 Realtv Associates, Inc., 668 F.2d 678 (2d Cir. 1982).

Section 10(j) relief also may be appropriate where the denial of access to an incumbent union constitutes a unilateral change in terms and conditions of employment. See Sheeran v. American Commercial Lines, Inc., 683 F.2d 970 (6th Cir. 1982).

12. Union Coercion to Achieve Unlawful Object

These cases typically involve union conduct violative of Section 8(b)(1)(B), 8(b)(2) or 8(b)(3) of the Act. Very often the misconduct arises in negotiations where the union insists to the point of impasse that an employer agree to a permissive or illegal subject of bargaining, or where the union's conduct amounts to restraint or coercion of the employer in its selection of representatives for the purposes of collective bargaining or grievance adjustment. Where the union's misconduct creates industrial unrest or is having substantial adverse impact on the employer's operations, or is affecting employees in a unique and possibly irreparable manner, Section 10(j) relief becomes appropriate. See, generally, Boire v. I.B.T., 479 F.2d 778 (5th Cir. 1973), rhg. denied 480 F.2d 924. Accord: Kobell v. United Paperworkers Int'l Union, 965 F.2d 1401 (6th Cir. 1992); D'Amico v. Industrial Union of Marine and Shipbuilding Workers, 116 LRRM 2508 (D. Md. 1984).

13. Interference with Access to Board Processes

These cases involve employer or union retaliation against employees 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 or harass employees for their resort to the Board's processes. Such violations are often worthy of Section l0(j) relief, inasmuch as the chilling impact of such misconduct may preclude other employees from filing timely charges with the Board, or from giving testimony needed in ongoing administrative proceedings. See, generally, Sharp v. Webco Industries, 265 F.3d 1085 (10th Cir. 2001); Humphrev v. United Credit Bureau, 99 LRRM 3459 (D. Md. 1978). Accord: Wilson v. Whitehall Packing Co., 108 LRRM 2165 (W.D. Wisc. 1980). But see Szabo v. P.I.E., 878 F.2d 209 (7th Cir. 1989).

14. Segregating Assets

These cases involve situations where a respondent has allegedly committed unfair labor practices which are being litigated before the Board and the ultimate Board remedy may include some measure of backpay for affected employees. During litigation, the respondent begins to close down operations and/or to liquidate its physical assets. These circumstances create a danger that, after liquidation, the respondent's assets will be dispersed and there will be no assets to satisfy the Board's backpay order. Section l0(j) relief is sought to restrict the respondents alienation of assets unless or until it establishes an escrow or bond in an amount of money equal to the Region's best estimate of anticipated net backpay plus interest. See, generally Blyer v. Unitron Color Graphics of NY, Inc., 1998 WL 1032625 (E.D.N.Y. 1998); Aguayo v. Chamtech Service Center, 157 LRRM 2299 (C.D. Cal. 1997); Jensen v. Chamtech Service Center, 155 LRRM 2058 (C.D. Cal. 1997); Maram v. Alle Arecibo Corp., 110 LRRM 2495 (D.P.R. 1982).

15. Miscellaneous

These cases involve imminent threats to statutory rights which do not fit into any of the first fourteen categories. Examples of these cases may include injunctions against the prosecution of certain lawsuits, employer violence, and interference with employee activities for mutual aid and protection. See, generally Lineback v. Printpack, Inc., 979 F. Supp. 831 (S.D. Ind. 1997) (enjoin prosecution of alleged baseless and retaliatory Section 303 LMRA suit); Sharp v. Webco Industries, 265 F.3d 1085 (10th Cir. 2001)(enjoin prosecution of preempted state court lawsuit).

The foregoing categories are not exclusive. Cases may arise in various contexts that are not encompassed by these categories but that still warrant extraordinary injunctive relief. The common denominator for all cases in which Section l0(j) relief is sought is that the Board's ultimate remedial order will be unable to restore completely the status quo and, thereby, neutralize the damage caused by the violations.

Therefore, when taking a charge or investigating a case which falls within one of the above categories, or when circumstances otherwise suggest a threat of remedial failure, Board agents should be particularly alert for the potential need for 10(j) relief.

3.0 NOTICE TO PARTIES & EXPEDITION OF 10(j) CASES

As soon as it appears that 10(j) relief may be considered, the Region immediately should notify all parties of this fact and invite the parties to submit evidence and argument relevant to the 10(j) consideration. See Casehandling Manual Section 10310.1.

Although Section 10(j) cases do not have statutory priority, the Agency has determined that, based upon policy considerations, any cases involving Section 10(j) relief should have priority over all other non-statutory priority cases in the Region (see Casehandling Manual 10310.6 and 102.94(a) Rules and Regulations). This expedition is necessary because inordinate delay in processing a Section 10(j) case diminishes the effectiveness of any relief obtained. Delay may entirely preclude relief where the situation has so changed that restoration of the status quo is impossible or would be no more effective than the Board's order in due course. Regions should therefore be reluctant to grant postponements to parties for production of witnesses and position statements.

4.0 INVESTIGATING AND ANALYZING "JUST AND PROPER"

As noted above, a 10(j) case differs from other unfair labor practice cases because the circumstances of the case make it likely that the Board's ultimate order will be ineffective to restore the status quo. Accordingly, when investigating an unfair labor practice charge that includes 10(j) consideration, the Board Agent will determine whether there is evidence establishing a violation of the Act, but should also conduct additional investigation and analysis to determine whether a Board order in due course will be inadequate to protect statutory rights. To make these determinations, the 10(j) investigator should focus on the impact of those unfair labor practices on statutory rights. The Region should also determine the type of interim relief that is needed to preserve the status quo so that the Board can issue an effective remedy.

The quantum of evidence required to establish the need for Section 10(j) relief will vary depending upon the type of cases involved, the applicable case law, and the judicial circuit in which injunctive relief is sought. Although some courts are willing to infer the irreparable injury to statutory rights from certain violations, others may require actual evidence of harm. For this reason, the existence or absence of direct evidence of impact in a particular case is always relevant to the evaluation of the need for 10(j) relief. Its absence does not necessarily mean that Section 10(j) proceedings are inappropriate. But, the ability of the Regions to adduce demonstrable evidence of irreparable harm or undermining effects of the unfair labor practices increases the Board's chances for success in litigating "just and proper" issues in Section 10(j) proceedings.

In any case being considered for 10(j) relief, the Board Agent should routinely question witnesses about the impact of the alleged violations on statutory rights, including possible "chill" on Section 7 rights, and include witness responses in their initial affidavits. In some instances, evidence of chill will be apparent from the nature of

the violations, such as the discharge of a prominent activist or threats of plant closure made by high level officials at captive audience meetings. In any event, Board Agents should make every attempt to obtain both objective and subjective evidence which can be put before a district court. Objective evidence would include such things as a drop in the number of union authorization cards obtained after the onset of the unfair labor practices or a decrease in attendance at union organizing meetings. Subjective evidence is usually provided in statements given by employees, or union or employer representatives about the state of mind of employees as a result of the unfair labor practices; e.g. fear of job loss or anger at the Union. Although evidence from the affected employees is most persuasive, evidence can be obtained from another employee or union business representative to whom the affected employee expressed concern.[3] Union representatives can provide useful evidence in a variety of circumstances, such as whether a respondent's unlawful conduct has had an impact on an organizing campaign or the bargaining process.

In developing the appropriate questions, Board Agents should determine whether the case falls within one of the 15 categories of Section 10(j) cases and consider the nature of the remedy the Region would seek in a 10(j) proceeding. These categories are discussed above in Section 2.1 and outlined in Appendix A. Board Agents should then refer to Appendix B of this Manual which provides a checklist of questions designed to adduce relevant evidence as to the need for interim relief. The checklist is grouped by the types of violations alleged and is cross-referenced to the 15 Section 10(j) categories.

If a charged party refuses to cooperate in an investigation and, as a result, the Region lacks sufficient evidence to evaluate the propriety of Section 10(j) relief, the Region should consider setting the case for an expedited administrative hearing within 28 days after complaint issues, in accordance with the applicable procedures.[4] After respondent produces its evidence pursuant to either procedure, the Region should reevaluate the need for Section 10(j) relief.

4.1 Region's Evaluation of Whether to Seek 10(j) Relief

After the Region completes its 10(j) investigation, it should evaluate whether 10(j) proceedings are appropriate. In determining whether to recommend the institution of 10(j) proceedings, the Region should consider the strength of the violations as well as the threat of remedial failure. The Region should also consider the case in light of the "just and proper" theories set forth in established 10(j) caselaw,[5] as well as the "just and proper" evidence adduced during the Region's investigation and provided by the parties. The Region's evaluation generally should be made at the same time that it determines whether to issue complaint on the allegations in the charge(s).

4.2 Region Concludes Injunction Proceedings Not Warranted

Except in circumstances where 10(j) submissions are mandatory, regions may conclude that Section 10(j) proceedings should not be instituted. In those instances, it should inform the parties of its decision that injunctive relief is not warranted.

5.0 SUBMISSION OF 10(j) CASE TO THE BOARD

5.1 Relationship between the Unfair Labor Practice Proceeding and 10(j) Proceeding

In considering whether to seek injunctive relief, the Region should keep in mind the relationship between the administrative proceeding and any injunction proceeding that is instituted under Section 10(j) of the Act. The statute provides that the Board may petition a district court for temporary relief "upon issuance of a complaint." Therefore, an administrative unfair labor practice complaint is a necessary predicate for seeking injunctive relief.

The Board may not seek relief in district court for a violation that is not alleged in the complaint. Similarly, the Board may not argue in district court a theory of violation that is not also being argued in the ancillary administrative proceeding. However, the converse is not true. Thus, while the violations alleged in the 10(j) petition must be alleged in the administrative complaint, it is not always necessary to seek interim relief on every violation alleged in the administrative complaint. Instead, in every 10(j) case, the Region should evaluate the unfair labor practice complaint to determine which violations must be remedied on an interim basis in order to restore the status quo. In addition, the Regions may consider omitting complaint allegations from the 10(j) petition if they are weak on the merits and not necessary to support the need for interim relief.

Regions should remain vigilant about recommending 10(j) proceedings in cases even when there are related charges still unresolved in the Region. If a case is 10(j) worthy, the Region should not wait for additional related charges to be resolved before submitting the original case to Washington. If those related charges are ultimately found to be meritorious and also worthy of 10(j) relief, the Region should call the Injunction Litigation Branch.[6]

5.2 Preparing the Section 10(j) Memorandum to the General Counsel

After the Region determines that a case has merit and believes 10(j) proceedings are appropriate, the Region makes a recommendation in writing to the General Counsel, through the Injunction Litigation Branch (ILB) of the Division of Advice, as to whether it believes that Section 10(j) relief is warranted. The 10(j) memorandum should be submitted to the ILB within 14 days of the merit determination. If the General Counsel agrees that 10(j) proceedings should be sought, the Region's memorandum provides the foundation for the General Counsel's request for authorization from the Board. Therefore, the Region's memorandum should contain the necessary information, analysis, and recommendations for the General Counsel and the Board to decide whether to recommend and to authorize Section 10(j) relief in the case.

5.2.1 Content of the 10(j) Memorandum

If the Region concludes 10(j) relief is warranted, its memorandum should detail the "merits" analysis and the analysis of the threat of remedial failure necessary to prove a 10(j) case in district court. This memorandum should set forth:

- the relevant facts and legal arguments and authorities establishing the violations, omitting analysis of minor violations
- responses to defenses raised by the respondent
- the Region's analysis including relevant facts and case law regarding why interim injunctive relief is necessary and a Board order in due course will be insufficient[7]
- responses to arguments against 10(j) raised by the respondent
- a proposed order listing specific interim remedies to be sought before the district court
- attach a copy of the unfair labor practice complaint,[8] the answer (if filed), any 10(j) position statements submitted by the parties, and a list of counsel representing the parties

5.2.2 Resources for preparing the 10(j) Memorandum

There are several resources available to help Board Agents prepare the Region's 10(j) memorandum. An outline of a model 10(j) memorandum is included in Appendix C of this manual. In addition, the Regions may obtain copies of prior 10(j) memoranda to the Board in the ILB's research database on the agency's Intranet. These memoranda contain arguments used in prior 10(j) cases and may have legal arguments—both on the merits and on the need for relief—that can be used in preparing the 10(j) memorandum. By searching through the ILB database with key words or by 10(j) category number (ie, "Go 10(j)#3"), one can review and copy from the hundreds of memoranda that have issued over the years.

Also, the ILB has prepared a number of model arguments that are frequently used (i.e., need for an interim bargaining order, need for interim reinstatement, delay should not preclude injunctive relief) which are found in Appendix G of this Manual. A list of important 10(j) cases, grouped by 10(j) categories, is located in Appendix E.

While the ILB, General Counsel, and Board are considering the case, the Region should continue to investigate the effects of the unfair labor practices, pursue settlement,

and, in cases where the likelihood of obtaining authorization to seek Section 10(j) relief is high, begin the preparation of the appropriate papers for filing in court.

5.3 Division of Advice Evaluation

Once the Division of Advice receives the Region's recommendation to institute 10(j) proceedings, the case is assigned to an ILB attorney for an independent review and evaluation and presented to the ILB managers for a decision. When the Division of Advice agrees with the Region's recommendation that injunctive relief is appropriate, it prepares a cover memorandum on behalf of the General Counsel which is attached to the Region's memorandum requesting injunctive relief. Together, these two documents constitute the General Counsel's request to the Board for authorization to institute 10(j) proceedings. The cover memorandum includes items not included in the Region's memorandum and necessary for the Board to make a full and reasoned evaluation of the case. Also, as discussed below, the combination of these two documents serves as a road map for the Region in ultimately preparing the appropriate papers for filing in court.

After the General Counsel reviews and signs ILB's cover memorandum to the Board, the entire case, including the Region's memorandum and attachments, is submitted to the Board. The ILB will also fax or transmit by electronic mail to the Region a copy of the memorandum sent to the Board. At this point, at the latest, the Region should immediately begin preparing papers to file in district court.

5.4 Inform ILB of Changed Circumstances

The Region should routinely keep the Injunction Litigation Branch updated on any new developments in cases submitted for 10(j) authorization at all stages of 10(j) processing, including after Board authorization. For example, the filing of additional charges, changes in the status of discriminatees, problems with the evidence at the ALJ hearing, issuance of an ALJ decision, or other changed circumstances could enhance or detract from the district court litigation and any appellate review of a 10(j) order.

5.5 Board Authorization and Timing of Filing Petition

If the Board authorizes Section 10(j) proceedings, the ILB will immediately notify the Region. The Region must file the Section 10(j) petition within 48 hours after notice by the ILB that the Board has authorized the use of Section 10(j). If a settlement is imminent, the Regional Office should consult with the Injunction Litigation Branch to seek telephone authorization to file the petition outside the 48-hour deadline.

During the 48 hours from the authorization of Section 10(j) proceedings until the filing of the Section 10(j) court papers, settlement efforts should be vigorously pursued.

Experience demonstrates that the authorization of Section 10(j) proceedings is a strong catalyst for settlement of the underlying case.

6.0 PREPARING 10(j) PAPERS FOR DISTRICT COURT

As mentioned above, the Region must file the 10(j) petition in district court within 48 hours after notice by the ILB that the Board has authorized the use of Section 10(j). The typical documents to be filed in the U.S. District Court include:

- Petition for Injunctive Relief (attach charge, complaint and Regional Director's affidavit)
- Proposed Order to Show Cause
- Memorandum of Points and Authorities
- Proposed Findings of Fact and Conclusions of Law
- Proposed Temporary Injunction Order (should track the 10(j) memo to Board)

Examples of these basic pleadings, as well as others that may be applicable (i.e, a sample motion for a Temporary Restraining Order) are included in Appendix H of this Manual.[9]

The Region should always check the local district court rules to determine the procedures that should be followed in filing the papers. These rules can be obtained from Westlaw, and some courts maintain their own website containing the rules and other pertinent information. It may be helpful to contact attorneys in the area who are well practiced in civil litigation to help explain the vagaries of the local district court. It could also prove worthwhile to telephone the court and establish contact with someone in the clerk's office who can provide help on some of these procedural matters.

In preparing the papers for filing, the Region should ensure that the court is made aware at the outset that the Board's 10(j) petition should be given expedited treatment under 28 U.S.C. Section 1657(a) (gives priority to preliminary injunction cases in federal courts). Typically, this may be accomplished by indicating in the cover letter accompanying the filing of the court papers that treatment of the case is governed by Section 1657(a).

6.1 The Evidence

The Region should decide how to make or place an evidentiary record before the district court judge. The Region's evidence should support both its petition allegations on the merits of the case, as well as the petition allegations on the propriety of granting

injunctive relief. Some district courts permit or require the Board to litigate 10(j) cases purely on affidavits. In those circumstances, check with the district court or judge's law clerk as to when the affidavits should be filed in court. The Region should then prepare for filing with the court a volume of the affidavits and exhibits upon which it intends to rely.

In some cases, a record already compiled in the administrative proceeding before an administrative law judge (or relevant portions thereof) can be used in place of, or in conjunction with, affidavits. The administrative record will generally only support the merits of the violations, and not the need for injunctive relief. For this reason, 10(j) cases heard on the administrative record also will need supplementary evidence on the need for interim relief either in the form of affidavits or live testimony before the district court judge.

In either event, unless the district court has approved as a general rule the use of affidavits or administrative transcripts in 10(j) proceedings,[10] the Region should file a motion to hear the case on affidavits or the administrative record. This, preferably, should be filed simultaneously with the petition. Sample motions and a model memorandum to support such motions are contained in Appendix K of this Manual. In some instances, a district court will insist on hearing live testimony to prove the violations or just and proper allegations in the petition. In that case, the Region should be prepared to present witnesses at a 10(j) hearing in district court to prove the merits of the petition allegations.

6.2 The Memorandum of Points and Authorities

In preparing the Memorandum of Points and Authorities, the Region should keep in mind that the district court judge or magistrate is unlikely to be as familiar with labor law principles as an administrative law judge. Thus, the Board's memorandum in support of the Petition for Injunctive Relief should lay out a theory of violation in greater detail than the Region is likely to do in its administrative litigation, and should avoid labor law jargon.

The Region's memorandum regarding Section 10(j) relief and the General Counsel's memorandum to the Board serve as a blueprint for the district court petition and brief and a repository of solutions for anticipated litigation problems in the particular case. The Region is not expected to perform additional research to prepare its court papers. Rather, the Region should rely upon these two documents, together with other resources, such as the Model 10(j) standards in Appendix D, the list of important 10(j) cases in Appendix E, sample arguments in Appendix G, and sample 10(j) pleadings in Appendix H, to draft papers in appropriate format for the district court. In addition, the attorney should review prior memoranda of points and authorities in support of a 10(j) petition to obtain the proper format for drafting the memorandum.

Basically, every memorandum of points and authorities should include, in the following order:

- an introduction to the case which describes briefly the nature of the case and why the Board is before the court
- an overview of the statutory scheme of Section 10(j) of the Act
- the applicable 10(j) standard that should be applied in the case
- a chronological narrative containing the facts of the case, including all facts necessary to support the allegations in the petition and the need for relief, with annotations referring to any attached affidavits
- an analysis of how the facts support each of the violations alleged in the petition (applying either the "reasonable cause" or "likelihood of success" test), with citation to applicable Board and court authority
- a description of the specific relief the Board is seeking, together with an analysis of why that relief is needed in the case, relying upon, where available, evidence of the impact of the violations
- a conclusion

If sample memoranda of points and authority are unavailable in the regional office, the Region can request samples from the Injunction Litigation Branch. A listing of recommended samples available from ILB is located in Appendix F of this Manual. In addition, special instructions and model arguments for briefing Gissel 10(j) cases are located in Appendix G-2 of this Manual.

The respondent is afforded the opportunity to file answering papers and, where relevant, counter-affidavits and exhibits. The Region may need to file a reply brief and rebuttal affidavits and exhibits to answer unanticipated arguments raised by the respondent. Check the local district court rules to determine whether these are permitted as a matter of course or by motion.

7.0 ORAL ARGUMENT IN DISTRICT COURT

Once the Region files the initial 10(j) papers in district court, the case will be assigned to a judge who should schedule a hearing.[11] As shown in the following sections, numerous resources are available to assist Board attorneys in their preparation to argue before a federal district court judge. In addition to these resources, the Injunction Litigation Branch is available at all times to provide additional guidance and support as the 10(j) hearing approaches.

7.1 Preparation for the 10(j) Hearing

Unless the court has specifically limited the issues to be addressed at hearing, the Board attorney should be prepared to address all aspects of the 10(j) case. In most instances, the Region will have filed with its initial papers a motion to either hear the case

on affidavits or on the ALJ transcript. If the court has granted the motion, than it is doubtful that there will be any need to present live testimony on the merits of the unfair labor practice allegations. However, it may be advisable for Board counsel to prepare and bring to the hearing at least one key witness since it is within the court's discretion to ask for live testimony at any time.

On the other hand, it is also possible that the court will not have ruled on the motion, even as the hearing date approaches. In that event, the Board attorney should contact the judge's clerk and attempt to get a ruling on the motion prior to the hearing, or at least get a sense of which issues the court anticipates addressing during the hearing. If, at the time of the hearing, the court has still not ruled on the outstanding motion to try the case on either affidavits or ALJ record, than the Board attorney should be prepared to put on a full evidentiary hearing on both the merits of the unfair labor practice allegations as well as the need for injunctive relief.

Generally, however, the district court hearing is non-evidentiary, providing an opportunity to present oral arguments in support of the petition. The Board attorney should be prepared to argue all the affirmative elements of the case. Typically, these include the standard to be applied by the court for deciding whether to grant injunctive relief, the low burden of proof on the merits, the merits themselves (applying either the "reasonable cause" or "likelihood of success standards), and why injunctive relief is necessary in the case before the court. In addition, the Board attorney should address the defenses which respondent may have raised in its opposition memorandum.

In preparation for the district court hearing, the Board attorney should review "Questions By The Court and Possible Answers in Section 10(j) Proceedings" which is found in Appendix L of this Manual. This document lists questions which are frequently asked by judges in district court proceedings. As the list evinces, among the most common concerns of a judge presiding over a 10(j) hearing are (1) whether injunctive relief is truly needed, and (2) whether the Board has taken too long in getting the case before the court. The suggested answers will provide guidance on how to address these concerns.

There are certain steps the Board attorney should take prior to the hearing to help address these preeminent concerns of the district court. First, the Board attorney should notify the ALJ assigned to the case that 10(j) relief has been sought, and request expedited treatment of the unfair labor practice case. Having accomplished this task, Board counsel can fairly report to the judge that the Board has done everything possible to expedite the case. In this vein, the Board attorney should avoid and oppose any delay in the administrative hearing â•„ trial postponements and extensions for filing briefs can indicate a lack of urgency. Second, the Board attorney should confirm prior to the hearing that any discriminatees involved in the case still desire reinstatement. It would be awkward to argue before the court about the need for reinstatement, only to have Respondent counter that the discriminatee is no longer interested in reinstatement.

7.2 Charging Party Intervention

Occasionally, a charging party may wish to intervene as a party in the Section 10(j) proceeding. Board counsel should oppose any effort by the charging party to intervene.[12] Instead, the Region should support amicus status for the charging party. If possible, this matter can be handled informally between the parties. However, if the charging party files a motion for intervention in district court, the Region should oppose that motion and support amicus status at that time. A sample argument to support a motion to oppose intervention is in Appendix M of this Manual.

7.3 Moot Court

A moot court session prior to a district court hearing may be advisable. A moot court provides the Board attorney with a greater level of familiarity and experience articulating the arguments. It also provides exposure to another point of view. Board attorneys can arrange a moot court with the supervisors or managers in their Regional office. In addition, the ILB is available to conduct a moot court session, either by telephone or via the agency's video conferencing equipment.

7.4 At the District Court Hearing or Oral Argument

Here are some general points to review before a district court hearing or oral argument:

A. Review most common questions asked by courts in 10(j) proceedings (Appendix L)

B. Be ready to explain why injunctive relief is needed in this case. Know the "hook" (the essence or the critical aspect of the case) and keep the court focused on this point.

Judges are primarily looking for a concrete explanation of irreparable harm. Argue the facts. Don't be vague or too general.

Don't use labor law "buzz words" because the district court is not familiar with NLRA law.

C. Argue the Board's affirmative case before addressing any defenses raised by Respondent.

D. Don't assume that the judge is hostile just because he/she asks questions; the court may be honestly confused and seeking guidance. A large part of the Board attorney's job is to educate the court.

E. If a question appears irrelevant or nonsensical, consider how the judge may be confused. Counsel for the Board may have to give a brief explanation of some labor law principle or ask the judge to repeat the question.

F. Develop the evidentiary record. Don't accept the judge's statement that affidavits need not be submitted into evidence. If the judge refuses to accept any evidence, then the Board attorney should make an offer of proof and place the evidence in a rejected exhibit file.

G. Get the court's ruling on any outstanding motions at the hearing.

H. Have a proposed order ready for the judge's signature (even if one was submitted with the 10(j) petition).

I. Questions about Board delay (see also Appendix G-5)

1. Mention the actual time table in which charges were filed, complaints issued, etc., to explain why due process (full investigation including opportunity for charged party to respond, before complaint issues) and statutory requirements (e.g. complaint must issue before petition can be filed) are inevitably time-consuming.

2. Don't be defensive and don't concede that the Board has delayed. Point out to the court, if necessary, that a 3-6 month passage of time is normal due to the administrative process and that district courts have granted injunctions after up to 14 months.

Try to shift the court's focus from the delay itself to a focus on whether so much time has passed that an injunction will be no more effective than a Board order.

a) Mention any evidence that shows that the situation can still be remedied effectively if prompt action is taken.

b) For example, emphasize that a core of employee supporters is still willing to revive the campaign or that a Union leader is ready to go back and resume organizing.

4. Be ready to argue how the passage of time has not been unreasonable. E.g., there have been continuing violations and successive charges; amended complaints; respondent contributed to delay; the Region waited for election results, an ALJ record, or the outcome of settlement discussions

J. Questions about administrative schedule:

1. Be prepared to give specific answers about the procedural history of the case: when trial will begin, if it has started, how far along it is, when were charges filed, when complaint issued, etc.

Courts are sometimes confused about the meaning of an ALJ decision versus a final Board order. Ensure that the court understands that interim relief is meant to cover the period until a final Board order, not just the start or end of the ALJ trial or ALJD.

3. Don't make any promises or predictions about when the ALJ or the Board will issue their decisions. Don't promise that there will be no delays, but emphasize that the General Counsel will make every effort to expedite the case (e.g., notify the ALJ and Board that the case involves the need for 10(j) relief).

8.0 DISCOVERY IN 10(j) LITIGATION

The Board does not initiate discovery in 10(j) proceedings; however, respondents often do. Despite the priority nature of Section 10(j) cases, the Board is subject to normal discovery procedures under the Federal Rules of Civil Procedure (Rules 26-37 and 45) in a district court proceeding. For this reason, Board attorneys should be prepared to respond to reasonable discovery requests in a 10(j) proceeding and to produce relevant, non-privileged evidence. These guidelines are designed to assist Board attorneys in responding to discovery requests by:

- setting forth the primary Agency objectives in handling discovery requests;

- summarizing how Regional Offices should deal with several general types of requested discovery material; and

- providing examples of strategies successfully used in the past to effectively respond to discovery requests while controlling the scope of discovered information.

Board attorneys should read these guidelines in conjunction with the Model Memorandum of Points and Authorities in Support of a Motion for a Protective Order to Limit Discovery Pursuant to Fed. R. Civ. P. 26(c)(1) (Model Memorandum), in Appendix N of this Manual. The Model Memorandum supplements the legal issues outlined here with more comprehensive arguments and citation to case authority.[13] In addition, Board attorneys should read the following reported decisions involving discovery in 10(j) and 10(l) cases, as they further explicate the issues discussed here: NLRB v. Building and Construction Trades Council, 131 LRRM 2022 (3d Cir. 1989) (special master); U.S. v. Electro-Voice, Inc., 879 F.Supp. 919 (N.D. Ind. 1995); D'Amico v. Cox Creek Refining Co., 126 F.R.D. 501 (D.Md. 1989).

The Region should immediately contact the Injunction Litigation Branch whenever it receives a discovery request in a Section 10(j) case.

8.1 Discovery Objectives

When faced with a discovery request, the Board's primary objectives are three-fold:

- to expedite the discovery process and not unduly delay the Section 10(j) hearing on the merits of the petition;

- to safeguard the Board's internal decision-making or deliberative processes; and

- to protect the employee witnesses who assist the Board in its investigations and who could be subjected to retaliation because of their testimony.

The Regions can implement these objectives by recognizing that the Agency has an affirmative duty to promptly respond to a respondent's legitimate need for relevant evidence in the Board's possession within the meaning of Fed. R. Civ. P. Rule 26(b)(1).[14] On the other hand, where a respondent's request seeks either irrelevant or privileged Agency documents or testimony, the Region should promptly move the court to strike such request, via a motion under Rule 26(c)(1) for a protective order to limit discovery. Where there is also a danger that the production of otherwise privileged employee affidavits, witness lists or union authorization cards could lead to a respondent's retaliation against the witness or card signers before entry of a 10(j) decree,[15] consideration must be given to securing protection for these witnesses via an appropriate Rule 26(c) motion.[16] The Region should also seek to stay a respondent's discovery request until the court passes upon the Region's motion for a protective order.

Also note that, pursuant to Rule 26(c), the movant must supply a "certification" that he has "in good faith conferred" with the opposing party in an effort to resolve the discovery dispute. Thus, the Region should give prior notice to the respondent regarding its position on the discovery issues and, if it cannot resolve the conflict, it can then supply the necessary certification required under Rule 26(c).

8.2 Types of Discovery Requests

The Board is generally faced with discovery requests for the following three types of information:

Requests for information regarding the evidence adduced during the Region's investigation. This may be in the form of a request for production of documents such as witness affidavits, union authorization cards, documentary evidence and exhibits contained in the Regional Office investigatory file. Such a request may cover not only evidence upon which the Board relies in support of its 10(j) petition, but also may cover evidence which the Board does not intend to use in the injunction proceeding. A respondent may also seek information about the Board's case in the form of a notice to depose the Board's witnesses or in the form of interrogatories.

Requests for production of documents, interrogatories or notice of deposition of the Regional Director or other Agency personnel regarding internal Agency communications, memoranda and investigative documents.[17]

Requests for production of documents, interrogatories or notices of deposition regarding the scope of the investigation, other Section 10(j) litigation and/or statistical information concerning numbers and types of unfair labor practice complaints issued by the General Counsel and similar injunctive proceedings initiated by the Board.

The scope of the Board's disclosure will vary according to the level of protection attached to the material sought by respondents, either under the relevancy requirement of the Federal Rules[18] or a valid qualified privilege exception.[19] Thus, when faced with a discovery request, the Region should carefully examine the requested information in light of the above discovery objectives, and generally respond with a motion for a protective order under Fed.R.Civ.P. 26(c) to limit discovery. The request for a protective order will be based on one or more of the following arguments.

Witness affidavits, documentary evidence and exhibits contained in Regional Office investigatory file

1. Affidavits of witnesses whom the Region plans to call in the 10(j) hearing and other documentary evidence relied upon by the Board in its petition

The Model Memorandum sets forth an Agency position that witness affidavits are subject to a qualified attorney work-product privilege.[20] However, since the evidence contained in these affidavits is almost always relevant under Rule 26(b)(1), and since the Board desires to expedite the discovery process, it may be advantageous to waive the privilege as to investigatory affidavits of witnesses on whose testimony the Region intends to rely at the hearing. Thus, where it would terminate and completely satisfy a respondent's discovery request, the Region should usually offer to transmit to a respondent copies of all witness affidavits as well as other relevant documentary evidence and exhibits in the Agency's possession which are intended to be used in the 10(j) proceeding.[21] This information should be quite sufficient to enable the respondent to adequately prepare its defense in the 10(j) proceeding.

If the respondent is unwilling to terminate discovery even with the Board's offer to produce such material, i.e., the respondent wants to depose the witnesses, or require the answers to interrogatories, or is insisting upon the production of privileged information, a different response is necessary. The Region should first move to stay all discovery until the court passes upon the Board's motion for a protective order to limit discovery. The Region should argue to the court that, in light of the Board's willingness to proffer certain information to the respondent, additional discovery would serve no useful purpose in the 10(j) proceeding and would only delay the hearing on the merits of the petition. The Region should raise the standard 10(j) argument in these cases that, given the Board's limited burden of proof, the court would be acting well within its

discretion to limit and expedite the discovery process in this type of ancillary injunction proceeding.[22]

We have often been successful in limiting discovery in this fashion. This is, however, a matter within the discretion of the district court. If the court denies our motion to limit discovery, the Region generally will have to comply with the discovery order.[23] The Region should consult with the ILB regarding developments in discovery litigation.

In some cases, the Region may have reason to believe that the identification either of Board witnesses or union card signers who are still employed by a respondent may result in retaliation against them. The Region should file a motion for a protective order to prohibit retaliation and to limit the scope of the disclosure of evidence turned over.[24]

2. Affidavits of witnesses in the Regional Office investigatory file upon which the Board did not rely in the petition and does not intend to call as witnesses at the hearing.

In its request for a protective order, the Region should argue that this information does not have to be produced for discovery, as it falls under the attorney work-product privilege.[25] Rule 26(b)(3) establishes a qualified immunity from discovery for attorney work-product. Under Rule 26(b)(3), absent a respondent's showing that it has a "substantial need of the materials" and that it is "unable without due hardship to obtain the substantial equivalent of the material by other means," privileged information is not discoverable. The Board is not obliged to provide the respondent with exculpatory material which falls within the attorney work-product privilege.[26] The Board is likely to be required to produce relevant documents in the case file that were received from outside sources during the investigation (i.e. documents not generated by a Board Agent), even if those documents will not be used at trial. Such documents cannot be viewed as attorney work-product.

The Region should also argue that the Government's informer's privilege protects from disclosure affidavits of witnesses whose testimony will not be used in the 10(j) proceeding. The informer's privilege is the Government's privilege to withhold from discovery the identity of persons who furnish information regarding violations of the law to those officials who are charged with enforcement of the law at issue. The privilege may be invoked in civil cases, including Board proceedings.[27]

The informer's privilege is a qualified privilege which must be balanced in each case with fundamental requirements of fairness; where the party seeking disclosure fails to make a sufficient showing of necessity, the court properly denies disclosure.[28] In Board injunction proceedings, unless the Board intends to call an affiant as a witness or to rely upon the affiant's affidavit as evidence supporting the petition, fairness concerns are not implicated because the Government is not using the evidence produced by the unknown informer. Courts will not permit the informer's privilege to be overcome where

the identity request is seen as a mere "fishing expedition" or where based upon mere speculation that the information could be useful to the respondent.[29]

Internal Agency communications, memoranda, and investigative documents and/or deposition testimony of Board personnel

1. Internal memoranda and privileged communications between the Regional Offices, the General Counsel and/or the Board.

The Board consistently opposes such discovery requests. The Region should argue in its request for a protective order that these documents (1) are not relevant in a 10(j) proceeding because the determination of whether there is "reasonable cause" or "a likelihood of success on the merits," and the assessment of the propriety of injunctive relief, should by made by the district court based on the pleadings and evidence presented, not on the Board's or General Counsel's mental processes or deliberations;[30] and (2) are also exempt from disclosure by the attorney-client privilege,[31] the attorney work-product privilege[32] and the internal Agency deliberations privilege.[33]

2. Deposition testimony of the Regional Director and/or other Agency personnel.

If a respondent notices the Regional Director or other Agency personnel for deposition, the Region should generally file a motion for a protective order under rule 26(c) to quash any such request. In our view, as discussed below, these individuals, as Government officials, have no personal knowledge of any of the facts in the case.[34] And, to the extent such a discovery request seeks to inquire into internal Agency thought processes or the official conduct of the Agency's officials, it is not relevant to the limited legal issues before the court, and the information sought is protected by the deliberative process privilege.[35]

3. Discovery aimed at the factual basis for allegations in the petition

The foregoing discussion covers a discovery request for documents or testimony of Board personnel regarding the Agency's decision to file a 10(j) petition. Different considerations apply to a notice to depose a Regional Director regarding the facts on which he or she relies to support particular allegations of the Section 10(j) petition, including allegations regarding the need for interim relief. A respondent likely can establish that identification of the factual foundation of the petition is relevant to its defense to the allegations in the petition. Nevertheless, a Regional Director's deposition regarding the violations alleged in the petition would almost necessarily disclose his or her analysis of the evidence, legal theories, and opinions. Therefore, when a respondent notices a Regional Director for a deposition to discover these facts, the Region should resist such discovery because it will implicate the attorney work product privilege and there are other, less intrusive, means to discover the information.

Of course, the facts supporting the 10(j) petition are likely among the facts the Regional Director considered as part of pre-petition deliberations. As discussed above, however, we would resist as irrelevant, discovery of those same facts if they were requested to discover what the Regional Director (or others in the Agency) considered or relied upon in deciding whether to file the petition. For, that inquiry is not relevant and implicates the deliberative process. NLRB v. Trades Council, 131 LRRM at 2023-2024, 1997 WL 120572 (deliberative process privilege); United States v. AT&T, 524 F. Supp. 1381, 1387-1388 (D. D.C. 1981)(irrelevant and privileged).

Thus, the Region should move to quash any such notice of deposition. It should first argue that respondents have alternative means to acquire the information sought, including reliance on the legal analysis and record references in the Regionâ•˙s memorandum of law in support of the petition, on the evidentiary record presented by the Board, and discovery of non-Board personnel with personal knowledge of events. It should further argue that depositions of Board personnel will implicate privilege concerns. Finally, in some circumstances the Region can argue that if any discovery of the Board on the information sought is to be allowed, the more appropriate means would be to propound interrogatories that will be answered by the Board attorneys who are more familiar with the petition and the record evidence than is the Regional Director. The Region should consult with the ILB to determine whether this response would be appropriate.

4. How to proceed if a motion to quash a deposition is denied

If the district court denies the Board's motion to quash the notice of deposition, the Regional Director (or other witness) must appear for deposition. We would not, however, view the denial of a motion to quash as precluding the Board from claiming that individual questions are subject to a specific claim of privilege or lack of relevancy. Thus, if counsel for the respondent asks a question that is not relevant, counsel for the petitioner should object on those grounds, but the witness will have to answer the question. On the other hand, if questions asked at the deposition raise privilege claims, Board counsel should object and direct the witness not to answer the question.

The Region should always consult with the Injunction Litigation Branch regarding strategy prior to any deposition. The ILB may be able to provide sample questions and answers in anticipation of the deposition.

Scope of Agency investigation, Agency 10(j) statistics or names of other 10(j) cases

1. Adequacy of the Regional Office's investigation of the case.

The Board consistently has opposed discovery regarding the scope and adequacy of the Board's investigation or whether the Agency in Washington was presented with all available evidence or legal arguments. Such issues clearly are not relevant to a district court's limited inquiry in a Section l0(l) or l0(j) proceeding.[36]

Similarly, to the extent that a respondent seeks discovery regarding matters which arguably involve allegations of selective or malicious prosecution on the part of the Regional Office, the General Counsel or the Board itself, it is clear that such matters are not generally relevant under Rule 26(b)(1) and should properly be the subject of a limiting protective order under Rule 26(c)(l).[37] The Region should argue that such issues are not relevant absent a showing that respondent has carried a "heavy burden" of proving prima facie that the Agency's 10(j) prosecution has been based upon improper motivations.[38] Further, such information would serve no useful purpose, would unduly delay the hearing, and would improperly require the production of privileged materials involving internal policy or litigation deliberations of a government agency.

2. Statistical information on the number and types of unfair labor practice complaints issued by the Regional Director and/or Agency in a given period of time and types of other 10(j) proceedings initiated by the Board.

The Board consistently opposes these requests. The courts have generally denied attempts by parties to discover such statistics or the names of other lawsuits involving the other party under a relevancy standard.[39]

8.3 Successful Strategies for Carrying Out Board's Discovery Objectives

A. As described above, although the Board has a substantial claim of attorney work-product privilege as to Board witness affidavits, we believe it can often expedite the discovery process, allow a prompt 10(j) hearing, and be less disruptive to the Board's witnesses, to produce these documents in discovery in lieu of subjecting these witnesses to formal depositions. If the Region can obtain a commitment from respondent's counsel that these individuals will not be deposed, as a quid pro quo for disclosure of their Board affidavits, it should produce the documents and thus waive the Board's work-product privilege.

B. Where the underlying unfair labor practice proceeding has been or will soon be litigated administratively, discovery on the issues of "reasonable cause" or "likelihood of success on the merits" can be obviated by use of the ULP transcript as the "merits" record in the district court. Thus, where the ULP hearing has already closed or will soon be litigated, the Region should move the court to utilize the ALJ transcript for all "merits" issues.[40] The Region should also move the court to stay any discovery requests until the court passes upon the Board's motion to use the ALJ transcript. Specifically, the Region should argue that the district court should accept the ULP transcript and preclude discovery as to the "reasonable cause" or "likelihood of success" element of the 10(j) case. Since the question before the court on this issue is whether the Board is likely to find a violation, the court should refer solely to the record adduced before the Board and not allow the introduction of any extraneous material not adduced before the Board.[41]

Accordingly, the Region should argue that discoverable information should be strictly limited to the "just and proper" inquiry because that evidence probably would not be included in the ULP record.

3. Where the allegations of a petition reveal serious violations by a respondent aimed at individual employees, the Region must be particularly sensitive to a respondent's use of employee affidavits, witness lists, union authorization cards, and its depositions of employee witnesses. In such cases, as soon as the discovery request is made, and before any witness or document is produced, the Region should seek to condition any proffer of witness affidavits, union cards or deposition with a protective order to ensure that these persons are free from possible retaliation or harassment prior to the 10(j) trial or administrative hearing. Thus, the Region should promptly file a motion to stay the discovery request until the court passes upon the Board's motion for a protective order, see nn. 14 and 15 and accompanying text, supra, to protect the individual employee witnesses or card signers whose affidavits or names will be submitted to the respondent.

We recognize that this list of strategies could expand as Regional Offices continue to respond to discovery requests in their 10(j) cases. Each case must be considered on its own facts, keeping in mind the primary objectives of the Board discussed above.

9.0 OTHER LITIGATION ISSUES

9.1 Impact of ALJD on 10(j) Litigation

Frequently, an ALJ issues a decision in an unfair labor practice case when there is a related 10(j) petition pending before a district court. In that event, the Board attorney should review the ALJD and determine whether the ALJ's findings support or undercut the allegations in the 10(j) petition. The Region should also immediately notify the Injunction Litigation Branch of the issuance of the ALJD.

A favorable ALJD supports the Board's effort to convince a district court judge that there is either "reasonable cause" to believe respondent violated the Act as alleged in the 10(j) petition, or that there is a "likelihood of success" in proving the violations before the Board. Therefore, if the ALJ's findings support the 10(j) petition allegations, then the Region should submit a copy of the ALJ's decision to the district court judge who is presiding over the 10(j) petition. The Region should send a cover letter which explains how the ALJ's decision supports the 10(j) petition. A proposed cover letter, with relevant arguments and case citation, is included in Appendix O of this Manual.

In the event of an adverse ruling by an ALJ, Board Rule 102.94(b) requires notification of the district court. Therefore, if the ALJ recommends dismissal of some or all of the complaint allegations which are contained in the 10(j) petition, the Region should immediately notify the ILB. The Region should evaluate the impact of the ALJ's

decision on the critical allegations contained in the 10(j) petition and should consider the viability of proceeding with the 10(j) litigation in district court in the face of an adverse ALJ decision. This determination will be based, in part, on whether the Region will take exceptions to the ALJ's adverse rulings. The Region should then make a prompt recommendation to the Injunction Litigation Branch as to whether or not to withdraw the 10(j) petition or, at least, the losing allegations.

9.2 District Court Delay in Issuing 10(j) Decision

The Board authorizes the use of injunction proceedings when immediate interim relief is needed to preserve the effectiveness of the Board's ultimate remedial order. For this reason, time is always of the essence in a 10(j) case. Just as the Agency makes every effort to expedite internal agency processes in every 10(j) case, the district court also should act quickly to resolve the 10(j) petition.

For this reason, the Region should be prepared to take action if it does not receive a prompt decision from a district court judge. Specifically, if a district court fails to issue a decision within 30 days after the close of the Section 10(j) hearing or the last court filing, the Region should contact the judge's clerk directly to determine the status of the case. If necessary, the Region may need to send a letter or move to expedite the case. In extreme circumstances, the ILB can file a petition for a writ of mandamus in the court of appeals to compel the district court to rule on the Section 10(j) petition. A complete timeline, with comprehensive instructions and model papers for obtaining a prompt 10(j) decision from a district court, are located in Appendix P of this Manual. The Region should keep ILB apprised of all developments concerning expediting the Section 10(j) decision.

9.3 Withdrawal or Dismissal of the 10(j) Petition

For various reasons, it may be necessary for the Region to consider withdrawing or seeking dismissal the Section 10(j) petition while it is pending in district court and before the court issues a decision. This may occur if the parties have settled the underlying labor dispute, or if there are other changed circumstances which render injunctive relief no longer appropriate. The Section 10(j) petition should not be withdrawn or dismissed, however, without the Region first conferring with the Injunction Litigation Branch.

10.0 POST INJUNCTION PROCEDURES

A number of issues may arise after a district court issues a decision either granting or denying the Board's 10(j) petition. As always, the Region should immediately inform the Injunction Litigation Branch of the issuance of a district court's decision in any 10(j)

matter, and promptly send by facsimile transmission a copy of the 10(j) decision or order. However, the granting or denial of a 10(j) injunction is not the end of a 10(j) case. Whether the decision is a win or a loss, the Board attorney should be aware of a number of issues may arise.

10.1 Notification to ALJ or Board

Depending on the stage of the administrative proceeding, the Region must notify either the presiding ALJ or the Board whenever a district court issues an Section 10(j) injunction in a pending unfair labor practice case and request that the case be expedited. Section 102.94(a) of the Board's Rules and Regulations requires that the Board give expedited treatment to any complaint which is the basis for interim injunctive relief.

10.2 Modification or Clarification of 10(j) Order

When a district court issues an order granting interim injunctive relief under Section 10(j) of the Act, the Region immediately should determine whether the relief granted differs from that which was requested in the 10(j) petition. If the relief granted does not exactly track the language of the petition and the proposed 10(j) order, the Region should determine whether the relief obtained is clear, capable of compliance, and provides the relief necessary to restore the status quo. If the order is vague, or omits relief the district court obviously intended to grant, then the Region should consider whether to file a motion to clarify the order. If the Region is aware of a change in circumstances, or has otherwise obtained new evidence which, had it been heard by the district court would have affected the case, then the Region should consider whether to ask for a modification of the order. In either instance, the Region should confer with the Injunction Litigation Branch regarding any possible defects in the district court order and for authorization to file a motion clarifying or modifying the order.

10.3 Appeal Consideration if 10(j) Relief is Denied

The Injunction Litigation Branch evaluates each Section 10(j) loss, in part or in total, as a potential appeal. The Board, as a federal agency, has 60 days from entry of the district court order to file a notice of appeal (Fed. R. App. P. 4(a)(1)(B)). Consequently, Regions should immediately inform the ILB of the entry of a final order in district court, followed up by a fax of the decision and order. This will trigger the appeal consideration process by ILB personnel.

In addition to the district court decision itself, the ILB bases the propriety of an appeal on three sets of documents: the record before the district court, a transcript of district court proceedings, and the Region's recommendation as to the merits of an appeal. Generally, regions should send the district court record to the ILB as soon as possible, including the petition; supporting memoranda of points and authorities, as well as

opposing briefs; and the record evidence submitted by both parties upon which the court relied (e.g., affidavits or the transcript of an ALJ hearing). The Region, however, should consult with the ILB to determine whether the case warrants transmission of the entire district court record.

Consideration of an appeal generally warrants review of the district court transcript. The Region is responsible for ordering the transcript and, if in doubt about the need for a transcript, should contact the ILB. A transcript may be unnecessary in certain circumstances, such as situations where the district court granted most of the requested relief and an appeal by Respondent is unlikely. The Region should advise the ILB of the transcript's delivery date and arrange for the court reporter to deliver it directly to the ILB, if possible.

The Region's role in an appeal consideration culminates with the submission of a written recommendation. Although it is unnecessary to reiterate the merits of the petition, the Region should briefly relate the procedural history of the case before the district court, including the date the Region filed the petition; the date, nature and disposition of pertinent, substantive motions that bear on the ability to secure the requested relief (e.g., motions to dismiss); the hearing dates; and the evidentiary basis upon which the case was tried (e.g., affidavits or ALJ transcript). Since the 10(j) loss is reviewed in light of the evidentiary posture at trial, it is crucial to identify any material record evidence which differed from the facts upon which the Board authorized injunctive proceedings and analyze what, if any, impact the changed record would have on an appeal consideration. The Region should also identify any evidence which the court discredited and analyze the propriety of the credibility resolution according to circuit law.

The Region also should consider whether the decision is subject to reversal pursuant to the standard of review in the relevant circuit. Although standards differ, this analysis generally involves determining whether any of the court's adverse findings of fact were clearly erroneous; whether the court based its legal conclusions on an erroneous legal standard; and whether the failure to grant Section 10(j) relief constitutes an abuse of discretion. The Region should draw upon supporting, in-circuit precedent, as well as analyses of adverse caselaw. The Region should also review the court's adverse inferences, if any, to determine whether they were reasonably based in light of record evidence or, alternatively, constituted an abuse of discretion. The Region should further weigh the relative merits of likely respondent defenses to our arguments on appeal, as well as articulating possible rebuttals to those defenses.

The Region should next determine whether the denied relief continues to be needed, indicating any changed circumstances as well as the charging party's viewpoint. For instance, in a nip-in-the-bud case, the Region should determine whether the union believes its campaign is still viable and whether discriminatees remain willing to accept interim reinstatement.

Finally, the Region should analyze any policy considerations that support or negate taking an appeal. These would include the possible effect of adverse legal precedent resulting from a loss before the appellate court and any impact of an unappealed district court decision on future 10(j) litigation.

10.4 Monitoring Compliance with the 10(j) Injunction

To ensure the effectiveness of a 10(j) decree, the Region should monitor the respondent's compliance with all aspects of the district court's order, especially any affirmative provisions, such as reinstatement, bargaining, or rescission orders. The Region should take the following steps in order to monitor compliance:

- Once the injunction is issued, the Region should maintain contact with the charging party, employees, or other interested parties to stay apprised of respondent's post-injunction conduct.

- The Region should keep in mind any deadlines contained in the injunction (e.g., for reinstatement offers to be made, for the affidavit of compliance to be filed) and check that respondent has taken appropriate action within the prescribed time periods.

- The Region should also inquire whether any triggering events or actions required by the charging party, such as a union's request for bargaining or for rescission of unilateral changes, have taken place.

10.5 Investigating Possible Contempt of the 10(j) Injunction

If a respondent appears to be in noncompliance, the Region should conduct a contempt investigation. Post-injunction monitoring and contempt proceedings are essential tools in making sure that Section 10(j) decrees fulfill their purpose. The following are guidelines for these important post-injunction procedures.

- If the Region believes the respondent is in noncompliance with the court's order, the Region should identify the specific provisions of the order that are not being followed. The Region should analyze exactly what the order requires, of whom, and identify the acts or omissions it believes are noncompliant with those requirements.

- The Region should conduct an investigation, obtaining witness affidavits or documentary evidence, to establish how those specific provisions of the order are being disregarded. For example, in a reinstatement case, it may be necessary to obtain affidavits from each discriminatee to establish that no reinstatement offers have been made or that the offers are insufficient. In a refusal to bargain case,

affidavits from union representatives, copies of bargaining demands or other correspondence between the parties may be required.

• In conducting this investigation, the Region should bear in mind the higher standard of proof required to show civil contempt, i.e., "clear and convincing" evidence of noncompliance.[42] But, the elements of contempt may be proven by circumstantial evidence.[43] Moreover, contempt violations do not have to be willful or intentional, and good faith is not a defense.[44]

• During the investigation, the Region should contact respondent to ascertain that respondent received a copy of the district court's order. The Region should advise respondent that it believes there is noncompliance with the order and that it is conducting a contempt investigation. Respondent should be given an opportunity to respond and present evidence of compliance or raise defenses to contempt.

• The purpose of civil contempt sanctions are intended to coerce compliance with the order and compensate a party for damages resulting from noncompliance.[45]

• Contempt orders generally include payment to the Board of compensatory damages for the costs and expenditures incurred in investigating and prosecuting the contempt proceeding, including attorney fees of Board personnel. In order to calculate the Board's damages, Regional professional personnel should maintain a daily record of the time spent on the contempt case during this investigatory phase and continuing through prosecution of the contempt case. these records should be maintained in increments of tenths of one hour (or, every six minutes) and should include specific details of activities. Please contact ILB for further instructions and to obtain the appropriate forms for recording time.

10.6 Submitting a Contempt Recommendation to ILB

If the Region's post-decree investigation indicates that the respondent is not complying with the 10(j) injunction, and the Region determines there is "clear and convincing" evidence to indicate that the respondent is in contempt, the Region should submit the case to the Injunction Litigation Branch with a recommendation regarding whether to institute contempt proceedings. The Region's memorandum should include the following:

• a description of the 10(j) order, attaching a copy of the district court's opinion an order, including any modifications or clarifications;

• identify the specific provisions of the order with which the respondent is failing to comply;

• describe the evidence of noncompliance obtained in the Region's investigation;

• summarize respondent's position on the contempt allegations;

- analyze the investigation results and respondent's defenses, and explain the basis for the Region's conclusion, applying the appropriate contempt standard (e.g., "clear and convincing" evidence for civil contempt);

- state the Region's recommendation as to contempt proceedings and a proposed contempt order.

A sample contempt memorandum issued by the ILB containing relevant contempt principles, arguments, and the suggested format for a contempt decree, is located in Appendix Q of this Manual.

10.7 Impact of an Informal Settlement Agreement on a Section 10(j) Order.

From time to time, cases in which the Board has obtained interim Section 10(j) relief are subsequently settled by an informal settlement agreement. However, the language contained in the standard informal settlement agreement may create a compliance problem when there is an outstanding 10(j) decree.

The standard language provides that approval of the settlement agreement constitutes withdrawal of the complaint. But, since a Section 10(j) injunctive order terminates by operation of law upon the Board's final disposition of the case, there is the potential for a respondent to conclude that the case has been disposed of with the execution of the settlement and that the injunction thereupon expires by operation of law. This interpretation could interfere with the Board's ability to institute proceedings for contempt of the injunction based on continued misconduct during the compliance period, even if such action would constitute a breach of the settlement agreement sufficient to justify setting aside the agreement and litigating the unfair labor practice case.

In order to preserve the Board's authority to seek contempt sanctions under the Section 10(j) decree, the Region should modify the language of the standard informal settlement agreement to make it clear that the respondent's entering into the settlement will not result in the immediate withdrawal of the complaint, dismissal of the charge, or the vacating of the 10(j) injunction. Rather, the complaint will be withdrawn after compliance is complete. The Region should modify the standard informal settlement agreement with the model language set forth in Memorandum OM 01-62, Use of Special Informal Settlement Language in cases with Outstanding Section 10(j)-10(l) Injunctions, which is located in Appendix R of this Manual.

10.8 Adjustment of the Section 10(j) case

There may be occasions when a respondent is willing to adjust the Section 10(j) case while the case is pending in district court but desires to litigate the underlying unfair labor practice case before the Board. In those circumstances, the Region has two Section

10(j) settlement options: a consent injunction or a settlement stipulation. First, a respondent can enter into a consent injunction by which it agrees to entry of a Section 10(j) order that tracts the proposed order to the district court. If a respondent violates the consent injunction, it will be subject to contempt proceedings. This type of adjustment is desirable where a respondent has a proclivity to violate the Act or where the Region has concerns that respondent will not abide by the terms of an injunction.

Alternatively, a respondent can enter into a stipulation by which it agrees to terms equivalent to a consent injunction and to an indefinite postponement of the case in district court.[46] Under this type of settlement stipulation, if respondent breaches the injunctive terms, the court will conduct an expedited hearing to determine only whether there is reasonable cause to believe (or likelihood of success in showing) that the respondent has failed to comply with the settlement undertakings. Once a breach is shown, respondent agrees to entry of a consent injunction. A respondent may be more willing to enter into a stipulation than a consent injunction because a stipulation breach does not result in civil contempt, as does the breach of a consent injunction. This type of Section 10(j) adjustment is most appropriate where the Region believes that the respondent is likely to comply with the stipulation.

10.9 Issuance of Board Decision in Underlying Unfair Labor Practice Case

A 10(j) order is designed to provide interim relief during the pendency of the administrative proceeding and preserve the Board's ability to issue a meaningful order. Therefore, at some point while a 10(j) injunction is in effect, the Board will issue its final order in the underlying unfair labor practice case. When the final Board order issues, the 10(j) injunctive decree dissolves as a matter of law.[47]

When a 10(j) order is in effect, and the Board issues an order in the underlying case, the Region should immediately advise the ILB of the issuance of the Board's order. ILB can provide sample papers to instruct the Region on the best method for informing the district court of the issuance of the Board decision and its impact on the 10(j) decree. The Region should also consider and, where appropriate, discuss with ILB and the Appellate Court Branch whether there is a need for a Section 10(e) injunction to protect statutory rights pending enforcement of the Board order.

11.0 CONCLUSION

Section 10(j) of the Act remains a powerful tool for this Agency to effectively enforce the rights guaranteed by the Act. The ILB is committed to providing Agency personnel with the resources to help identify, investigate and litigate Section 10(j) cases. Please feel free to contact the ILB to discuss any questions or problems which may arise during the course of processing a 10(j) case.

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[1] A separate list of the 10(j) categories in outline form is located in Appendix A of this Manual.

[2] All Gissel cases must be submitted to the ILB for 10(j) consideration. See Memorandum GC 99-8 Guideline Memorandum Concerning Gissel. Also, for guidance on preparing the court papers for a Gissel 10(j), see Appendix G-2 of this Manual.

[3] See the model argument to support the use of hearsay evidence in Section 10(j) proceedings, in Appendix G-4.

[4] See Memorandum GC 94-17, Expedited Hearings.

[5] See Appendix E of this Manual for a list of court cases for each 10(j) category.

[6] See Memorandum OM 01-33, Timely Processing of Section 10(j) Case When Multiple Related Charges are Filed.

[7] If the evidence adduced during the investigation demonstrates that the irreparable injury is imminent, the Region should consider, and explain in its memo, why a temporary restraining order (TRO) should be sought. For example, TRO's are often needed where there is ongoing violence or where a respondent has immediate plans to dispose of its assets. See Guidelines for Filing Motions for Temporary Restraining Orders Under Section 10(j) in Appendix J of this Manual.

[8] The Region should not hold the 10(j) memorandum if complaint has not issued, but instead immediately forward the complaint after submitting the case to ILB.

[9] If the Board has authorized a 10(j) protective order to sequester assets, refer to Appendix I for samples of the model pleadings.

[10] For example, district courts in the Ninth Circuit require preliminary injunction cases to be tried on affidavits as a matter of course.

[11] If the judge does not set a date for a hearing after 30 days from the filing of the petition, refer to section 9.2 on District Court Delay in Issuing 10(j) Decision regarding how to proceed.

[12] See Memorandum GC 99-4, Participation by Charging Parties in Section 10(j) Injunction and Section 10(j) Contempt Proceedings, located in Appendix M of this Manual.

[13] Appropriate portions of the Model Memorandum should be filed in support of a motion to limit discovery. A model motion and order limiting discovery are also in Appendix N of this Manual. Note that the Model Memorandum discusses numerous types

of discovery problems that arise in 10(j) proceedings; therefore, a Region should be careful to use only those parts of the Memorandum, Model Motion and Model Order which concern its particular discovery request.

[14] Effective December 1, 2000, Fed.R.Civ.P. 26(b)(1) has been limited somewhat to provide for discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . . . For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

Previously, this rule permitted discovery of any nonprivileged matter "relevant to the subject matter involved in the pending action." Although the caselaw interpreting this amendment is in the early stages of development, the Region should, where appropriate, argue that certain matters are not discoverable under the new standard. See Thompson v. Dept. of Housing and Urban Development, 199 F.R.D. 168, 171, 173 (D.Md. 2001).

[15] This possibility is most likely where the respondent has already engaged in 8(a)(3) discrimination.

[16] See Model Memorandum at 24-26.

[17] E.g., Board personnel's notes to the file, FIRs, Agenda Minutes, Region's 10(j) memorandum to Advice, the General Counsel's 10(j) Memorandum to the Board, ILB litigation advice memos to the Region, etc.

[18] See Rule 26(b)(1).

[19] See Rule 26(b)(5).

[20] See Model Memorandum at 9-12.

[21] Id. at 11-12.

[22] Id. at 7-8.

[23] Discovery orders are not immediately appealable. The only way to obtain review of a discovery order is to refuse to comply and accept dismissal of the petition as a sanction for failing to comply with a discovery order. We can then appeal from the dismissal of the petition. We have taken this route on rare occasions rather than expose the Board's deliberative processes to discovery. It is, however, an option to be exercised only in extreme circumstances.

[24] See Model Motion, pp. 24-26; see also nn. 14 and 15, supra and accompanying text.

[25] See Model Memorandum at 9-12 and 25 n. 41.

[26] Id. at p. 25, n. 41.

[27] Id. at pp. 12-13.

[28] Model Memorandum at 13.

[29] Id. at 13.

[30] Id. at 16-17.

[31] Id. at 15.

[32] Id. at 9-12, 17-19.

[33] Id. at 7-8 and 14-17.

[34] Compare Church of Scientology of Boston v. I.R.S., 138 F.R.D. 9, 12 (D.Mass. 1990)(exception for general rule against testimony of government officials where official had personal knowledge pertaining to material issue in action). See Model Memorandum at 24.

[35] See Model Memorandum at 16-22.

[36] See Model Memorandum at 20-21.

[37] Id. at 19-20.

[38] Id. at 19-20 and n.34.

[39] See Model Memorandum at 21-23.

[40] See Appendix K of this Manual (Sample Motions & Memoranda to Hear 10(j) Case on Affidavits or ALJ Transcript).

[41] Once the ALJ record has closed, the Board will not consider any other evidence for its administrative adjudication, consistent with the Administrative Procedure Act, 5 U.S.C. Section 556(e). See Innovative Communications Corp., 333 NLRB No. 86, slip op. at 1, fn.2 (2001) (sustaining a motion to strike proffered documents pertaining to Section 10(j) district court proceedings, where the documents had not been made part of the official record in the administrative unfair labor practice case).

[42] NLRB v. Blevins Popcorn Co., 659 F.2d 1173, 1184-86 (D.C. Cir. 1981); Squillacote v. Local 248, Meat & Allied Food Workers, 534 F.2d 735, 746-47 (7th Cir. 1976).

[43] Walker v. City of Birmingham, 388 U.S. 307, 312 n. 4 (1967).

[44] Asseo v. Bultman Enterprises, 951 F. Supp. 307, 312 (D. P.R. 1996).

[45] Gompers v. Buchs Stove & Range Co., 221 U.S. 418, 441-444 (1911).

[46] See Appendix S, "Stipulation and Order Continuing Case under 29 U.S.C. Section 160(j)."

[47] Barbour v. Central Cartage, Inc., 583 F.2d 335, 336-337 (7th Cir. 1978); Johansen v. Queen Mary Restaurant Corp., 522 F.2d 6 (9th Cir. 1975).

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APPENDIX L

QUESTIONS BY THE COURT AND POSSIBLE ANSWERS IN SECTION 10(j) PROCEEDINGS

Counselor, where is this case before the Board?

… Tell court at what stage the proceeding is.

… If court is unclear about what this means, explain process of Board: Board order not self-enforcing, ALJ makes recommendation only, then Board order takes time.

… Tell court that Board rules (102.94(a)) require 10(j) cases be expedited, that General Counsel has put the case on the fast track, and that General Counsel won't agree to any continuances or postponements.

… Be careful not to criticize the Board.

Why can't the Board take care of these problems without this court getting involved?

… Section 10(j) is complement to administrative process.
… Section 10(j) enables district court to preserve Board's remedy during lengthy administrative process (which you have described to judge).

… Explain what harm to statutory rights/collective-bargaining will occur in the interim without 10(j) relief.

Why should I grant extraordinary relief when the Board is dragging its feet?

… Board has not caused delay in this case, e.g. pattern of violations emerged over time, describe time frame of pattern briefly, including most recent violations. Board needs time to investigate adequately.

… Where appropriate, violations are of continuing nature.

… Even if administrative delay, it should not be grounds to deny 10(j): (1) Delay only significant if prevents injunctive relief from being effective; (2) Delay punishes innocent employees who are trying to exercise their statutory rights.

These allegations occurred a number of months ago. Hasn't the damage already been done? What good will an injunction do now?

… Still a long time until Board issues order, which is not self-enforcing. There is still enough time for remaining employees to revive the Union. There may be some damage, but union support not dead. It is more effective to restore employee support now than much later when Board issues order.

… A union ordinarily doesn't have resources to keep an organizing drive going throughout the time the case is pending before the Board. Section 10(j) relief allows the Union campaign to go forward now while some support for the Union still exists rather than at the end of Board proceedings when the Union would have to start over.

… Court should not penalize innocent employees for passage of time.

Hasn't the unlawful conduct by the Company stopped at this point?

… The Company has effectively ended the union campaign and does not need to continue its unlawful conduct.

Whose rights are we protecting?

… We are trying to vindicate public interest to promote the collective-bargaining process which the NLRA is designed to protect.

… If Respondent is permitted to litigate the unfair labor practice charge

for say, several years, it is effectively insulated by its own misconduct. Congress did not intend the passage of time to reward the employer for its wrongdoing.

What about the rights of replacements who have been hired?

… Statutory rights of discriminatees outweigh private job rights of replacements.

… In strike situations, replacements have no expectation of permanent employment since they knew what they were getting into when they were hired.

If I grant the injunction, isn't the fight over? Aren't you really seeking a disposition of the case here rather than with the Board?

… No, the Board is not seeking a permanent order, only a temporary injunction until the Board has time to decide the case. The injunction expires upon the issuance of a Board order.

… We are not asking you to change anything, merely to put the situation temporarily back the way it should have been before the Respondent committed these unfair labor practices

… In bargaining order cases, the court is not imposing any agreement. The parties must bargain in good faith, they need not reach agreement on any terms. If they do reach agreement, they can condition it on the outcome of the Board's order.

… The real question is whether a bargaining order down the road will be effective? It is not. The Employer has stymied the collective-bargaining process.

… In non-majority organizing cases, once a cleansed atmosphere is restored by the injunction, the employees are always free to reject the union through the filing of a petition and holding of an election.

What if the Board ultimately sides with the Respondent? Won't the injunction have significantly harmed the Respondent?

… We view that as only a slight chance in this case. The Board itself authorized the General Counsel to seek this injunction. Board will likely find Respondent to be a wrongdoer, and the wrongdoer should bear the burden

of ambiguity here.

… The risk of error is much higher if nothing is done now, more onerous to employees and union if no injunction is granted. Once the Board issues an order, it cannot effectively revise the union and employee statutory rights have been effectively obliterated by the Employer's misconduct.

… If reinstatement sought, the Company will have the use of employees' services during this period of time, therefore no harm. The Employer will be able to operate its business and manage its workforce so long as it does not violate the NLRA.

… If bargaining order, any agreement can be conditioned on the outcome of a Board order. If parties don't agree, the Employer can implement its final offer to the Union.

… If order to turn over proprietary information, court can issue protective order. The Employer can't forestall bargaining by refusing to provide relevant information.

Aren't these injunctions reserved for only extraordinary cases? I don't see how this case is so special or different from other cases.

… To show why this case is unique, explain the need for relief in this case.

… Board sought Section 10(j) injunctions in less than 2% of all cases where complaints issued. On average the Board issues about 3,500 complaints a year, and in the last two years (1997-1998), the Board authorized Section 10(j) petitions in only 50 cases per year. These are cases where the Board is most concerned about the effectiveness of its remedy. Based on these numbers, one could argue that 10(j) cases are all "extraordinary".

Why is a reinstatement order necessary if discharged employees now have better jobs?

… Even if the discriminatees don't accept reinstatement, the remaining employees working for the Employer will know that the discharged employees had a choice whether or not to return and that the Employer is not free to discriminatee against them because they supported the Union.

… Circumstances may change suddenly for discriminatees, and they may desire to return to their jobs with Respondent.

Why do you need a reinstatement order? Why isn't a cease-and-desist order enough? There are other Union supporters in the workplace.

… Reinstatement is necessary to protect the statutory rights of other employees working at the facility.

… Reinstating the Union leaders and/or supporters sends an important message to other employees who fear losing their jobs if they support the Union, and who are very vulnerable to the Company's misconduct. Reinstatement tells employees that the Company cannot discriminate against them for supporting the Union.

… The fact that other employees have signed Union authorization cards doesn't mean that they will continue to support the Union, especially in the face of the Company's discharges and other unfair labor practices.

… Reinstatement restores the necessary Union leadership to jump-start the Union's campaign and/or representation which the Company has undermined.

If I put these people back to work, why do you need a bargaining order? Can't the Union go to an election?

… Explain need for Gissel bargaining order, especially that the unfair labor practices are hallmark violations, which undermine majority and devastate free choice.

… Bargaining order will prevent further erosion of the Union's support and strength pending a Board order. Without a bargaining order, Union will continue to weaken over time and be unable to effectively represent employees in collective-bargaining negotiations once a Board order finally issues.

… The Company's unfair labor practices have caused employees to lose negotiated benefits they would have received had the Union been elected during this interim period and bargained with the Company. These potential lost benefits cannot be measured in dollars or remedied by the final Board order.

IN "REASONABLE CAUSE" CIRCUITS

Are you saying that the reasonable cause standard requires this court to rubber stamp what the Board wants here?

… Board not asking court to be "rubber stamp", but threshold of proof under

reasonable cause is low and the court should give deference to the Regional Director's evidence and theory of violation. Under reasonable cause, question is whether we have presented enough evidence that Board could find violation. Is limited inquiry, not the absence of any inquiry.

… The more significant inquiry is into just and proper, i.e. whether there is a need for interim relief because, without it, the Board's order won't have any meaning several years down the road.

Doesn't this court have to weigh the equities in this case?

… A Section 10(j) injunction is an equitable remedy. The just and proper standard permits some inherent weighing of equities.

… Several circuits apply traditional equitable criteria, but the law in this circuit is clear that strict adherence to equitable principles is not the test.

Are you telling me that I can't resolve credibility?

… This court does not have to take on the burden of deciding credibility. Explain standard: within range of rationality, if there is an objective basis to credit General Counsel's evidence.

… Question is whether there is reasonable cause to believe that Board will decide credibility in favor of General Counsel, not who should be believed.

… Defer to Regional Director's version of the facts if within the range of rationality.