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RIGHTS WITHOUT REMEDIES:

The Failure of the National Labor Relations Act

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WAL-MART WARNS OF DEMOCRATIC WIN

Wall Street Journal
Ann Zimmerman and Kris Maher, 8/1/08, p. A1

> In recent weeks, thousands of Wal-Mart store managers and department heads have been summoned to mandatory meetings at which the retailer stresses the downside for workers if stores were to be unionized." … Wal-Mart's worries center on a piece of legislation known as the Employee Free Choice Act.

CHAMBER LAUNCHES GRASSROOTS CAMPAIGN, REITERATES OPPOSITION TO EFCA LEGISLATION,

BNA, Daily Labor Report, 7/23/08

> The U.S. Chamber of Commerce July 21 officially launched a grassroots campaign to oppose … the Employee Free Choice Act.

LABOR DISPUTE TAKES TO AIRWAVES, BUSINESSES TARGET CANDIDATES BACKING ORGANIZING BILL

Wall Street Journal
Kris Maher, 7/16/08, p. A6

> Two business-backed groups are targeting congressional candidates in half a dozen states with critical advertising based on their support for [the Employee Free Choice Act]. The two groups expect to spend a combined $50 million. … The … Coalition for a Democratic Workplace, was created by the U.S. Chamber of Commerce and other business associations last year to defeat the Employee Free Choice Act.

A WORKERS' RIGHTS STATUTE IS ONLY AS GOOD AS ITS ENFORCEMENT

The focus of a massive political and legislative assault spearheaded by America's corporations is the proposed Employee Free Choice Act. This proposed legislation has generated the drama described on the preceding page and has clearly become the corporate community's worst nightmare.

The Employee Free Choice Act amends the National Labor Relations Act by removing current barriers to unionization, guaranteeing workers a first contract when they choose union representation, and increasing remedies for employer violations during organizing and first contract campaigns. Specifically, it provides for union certification when a majority of workers in a bargaining unit have authorized the union to represent them, offers mediation and arbitration procedures when parties cannot reach a first contract, and imposes civil penalties, treble backpay damages and mandatory injunctive relief for "willful[] or repeated[]" violations during organizing and first contract efforts. That it could lead to more workers forming unions and more workers covered by collective bargaining agreements is apparently what has sparked corporate America's interest.

When it was first introduced in 2003 with little change of passage, the Employee Free Choice Act was largely ignored. Then on March 1 of last year, it passed the House with a 241 – 185 vote but was filibustered in the Senate on June 26, 2007, despite its majority support of 51-48. This legislative success, together with the anticipated change in our political landscape at the national level, has seemingly catapulted the Employee Free Choice Act to the top of the corporate agenda.

Although the Employee Free Choice Act focuses on three specific changes to the National Labor Relations Act, all are driven by a single impetus—the Board's well-documented inability to enforce the rights it promises. "[T]his system of remedies is so woefully inadequate that employers have little incentive to abide by the law."[1]

Legislators and witnesses speaking in support of the Employee Free Choice Act repeatedly cite the NLRA's failure to protect workers' rights as the basis for the proposed legislation.

> [T]he law isn't protecting workers, and it can't stop the anti-union tactics that take place every day. Penalties for misconduct are so minor that employers treat them as just another cost of doing business.
>
> Senator Edward Kennedy, D-MA[2]

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[1] Chirag Mehta & Nik Theodore, *Undermining the Right to Organize: Employer Behavior during Union Representation Campaigns*, A Report for American Rights at Work, 2005, p. 17. Available at: http://www.americanrightsatwork.org/dmdocuments/ARAWReports/UROCUEDcompressedfullreport.pdf

[2] March 27, 2007, available at: http://help.senate.gov/Maj_press/2007_03_27.pdf.

> It's time for Congress to stand with our nation's workers and give them their voice back by strengthening protections for workers to freely choose to join a union. The Employee Free Choice Act will make the promise of employee choice a reality.
>
> Senator Patty Murray, D-WA[3]

> Union organizers can no longer assure employees that the law will protect them if they support the union. … The employee does not get traditional compensatory damages or punitive damages, and no fines are assessed. In the meantime, the damage to the organizing effort has long been done, and the law does nothing to repair that.
>
> Cynthia Estlund, Professor of Law, New York University[4]

> An employer determined to get rid of a union activist knows that all it risks, after years of litigation if the employer persists in appeals, is a reinstatement order that the worker is likely to decline and a modest backpay award. For many employers, this is a small price to pay to destroy a workers' organizing effort.
>
> Kenneth Roth, Executive Director, Human Rights Watch[5]

> [EFCA] increases the protections for workers when they seek to exercise their right to associate and form unions. It is really indefensible that workers should be afraid—as they are—to exercise this fundamental right because to do so will likely cost them their jobs.
>
> David Brody, Professor Emeritus, UC Davis[6]

NLRA REMEDIES ARE INADEQUATE AND INEFFECTIVE

The failure of NLRB remedies is hardly new and hardly debatable. "Serious weaknesses have been identified—by scholars as well as by the Board itself—in the Board's traditional remedies…."[7] New York University Law School Professor Cynthia Estlund has characterized NLRB remedies as "paltry," "easy and cheap," and "the Achilles' heel of employee rights."[8] According to current NLRB Member Wilma Liebman, "the statute's weak remedies … fail both to deter wrongdoing and to compensate victims of unlawful discrimination."[9] A Human Rights Watch report in 2000 warned that "a culture of near-impunity has taken shape in much of U.S. labor law and

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[3] June 19, 2007, available at: http://murray.senate.gov/news.cfm?id=277282.
[4] Testimony, Hearing before the Senate Committee on Health, Education, Labor and Pensions, March 27, 2007, available at: http://help.senate.gov/Hearings/2007_03_27_a/Estlund.pdf.
[5] Testimony, Hearing before the Senate Committee on Health, Education, Labor and Pensions, June 20, 2002, available at: http://hrw.org/backgrounder/usa/ken-testimony-0602.pdf.
[6] David Brody, *A Case for Employee Free Choice*, available at: http://www.aflcio.org/joinaunion/voiceatwork/efca/upload/Brody_EFCA_Case.pdf
[7] Archibald Cox et al., *Labor Law: Cases and Materials* 253-54 (13th ed. 2001).
[8] Cynthia L. Estlund, *The Ossification of American Labor Law,* 102 COLUM.L.REV. 1527 (2002).
[9] Wilma Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, BERKELEY JOURNAL OF EMPLOYMENT & LABOR LAW Vol. 28:2 2007.

practice" because "enforcement efforts often fail to deter unlawful conduct" and "feeble remedies often embolden employers to further violate workers' rights." Companies have little incentive to respect workers' rights in the face of remedies so meager that they are treated by employers as "a minor cost of doing business."[10] This lack of meaningful remedies "has also rendered the Act ineffective and encouraged unscrupulous employers to abuse their employees…."[11]

The Board's standard remedies are fairly simple. An employer who has engaged in misconduct during a union organizing campaign, like threatening and spying on workers, is subject to a cease-and-desist order from any "like or related conduct" at that specific facility and is required to post an NLRB Notice to Employees promising not to engage in further violations.

Workers who are illegally discharged are entitled to reinstatement and backpay, but no compensatory or other forms of damages. Most employees never return to their jobs and none receive compensation for the economic and psychological devastation they and their families have had to endure.[12]

If the employer's misconduct has affected the results of an election, the Board may order a rerun election.

Employers that refuse to engage in bargaining with their workers' chosen representative are ordered to bargain some more. In certain extraordinary circumstances, an employer can be ordered to bargain with a union whose majority support has been destroyed by the employer's egregious and pervasive misconduct. The Board also has discretionary injunctive relief available in Section 10(j) of the Act.

These remedies have remained relatively constant over the decades since the Act's passage. They don't sound like much because they are not much. And delays often make them wholly ineffectual.[13] "If employment law has electrified employers, labor law has proven to be a rather low-voltage instrument. … the low-voltage quality of labor law rights lies largely in the enforcement procedures and remedies for the violation of those rights."[14] That these remedies are a resounding failure is well-documented in the sensational rise of employer unfair labor practices since the Act's passage.

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[10] *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards*, Human Rights Watch Report (August 2000).
[11] Robert M. Worster, III, *Casenote: If It's Hardly Worth Doing, It's Hardly Worth Doing Right: How the NLRA's Goals are Defeated Through Inadequate Remedies*, 38 U. RICH. L. REV. 1073, 1090 (2004).
[12] *See* Brent Garren, "When the Solution is the Problem: NLRB Remedies and Organizing Drives," 51 *Labor L J.* 76, 78 (2000).
[13] Illustratively, one of the Bush Board's September 2007 cases involved backpay determinations for 202 workers who were denied reinstatement in 1990; 17 years later, none have received backpay. *Domsey Trading Corp.,* 351 NLRB No. 33 (2007) (reinstatement denied in 1990; original Board decision finding the employer's conduct unlawful reported at 310 NLRB 777 (1993); *enf'd* 16 F.3d 517 (2d Cir. 1994); Administrative Law Judge Decision on backpay issued October 4, 1999).
[14] Estlund, at 21.

Writing in 1983, Harvard Law School Professor Paul Weiler examined NLRB data and found that "the most remarkable phenomenon in the [NLRA] representation process in the past quarter-century has been an astronomical increase in unfair labor practices by employers."[15] He estimated that "about 10,000 employees were fired in 1980 for involvement in representation campaigns."[16] In 1994, the Commission on the Future of Worker Management Relations concluded that NLRB charges had risen six-fold and meritorious charges increased even more from the 1950s to 1990:

> The evidence reviewed by the Commission demonstrated conclusively that current labor law is not achieving its stated intent of encouraging collective bargaining and protecting workers' rights to choose whether or not to be represented at their workplace.[17]

Professor Charles Morris' review of NLRB records in 1998 disclosed a continuing rise in the number of workers suffering discrimination for their union activities, with the relative incidence of 8(a)(3) misconduct in relationship to organizing activity skyrocketing by almost 800% from 1969-'76 to 1984-'97.[18] Kate Bronfenbrenner's study at Cornell University's School of Industrial and Labor Relations reported a fivefold rise in the number of workers fired for union activity.[19] A recent study by the Center for Economic and Policy Research found that, in 2005, workers engaged in pro-union activism "faced almost a 20% chance of being fired during a union-election campaign."[20]

Equally compelling are statistics demonstrating the failure of first contract bargaining. These initial negotiations have become just another stage in the anti-union campaign waged by employers. "Consultants advise management on how to stall or prolong the bargaining process, almost indefinitely."[21] Delays "create employee dissatisfaction with the union."[22] If bargaining can be stalled for twelve months, such employee frustration can be leveraged into a decertification vote. NLRB General Counsel Ronald Meisburg issued a memorandum in April 2006 acknowledging that during first contract negotiations, employees "are highly susceptible to unfair labor practices intended to undermine support for their bargaining representative."[23] Indeed,

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[15] Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA,* 96 Harv. L. Rev. 1769, 1778 (June 1983).
[16] Weiler, *Promises to Keep*, at 1781.
[17] Report and Recommendations of the Commission on the Future of Worker-Management Relations, U.S. Departments of Commerce and Labor, December 1994, p. xviii; Fact Finding Report June 2, 1994, as reprinted in the Daily Labor Report, June 3, 1994 at WL* 191.
[18] Charles J. Morris, *A Tale of Two Statutes: Discrimination For Union Activity Under the NLRA and RLA*, 2 Emp.Rts.Emp.Pol.J. 317, 219-30 (1998).
[19] Kate Bronfenbrenner, *Final Report, The Effects of plant Closing or Threat of Plant Closing on the Right of Workers to Organize,* Exec. Sum. At 1 (1996).
[20] John Schmitt & Ben Zipperer, *Dropping the Ax: Illegal Firings During Union Election Campaigns*, Center for Economic and Policy Research (January 2007).
[21] John Logan, *Consultants, Lawyers and the "Union Free" Movement in the USA Since the 1970s*, Industrial Relations Journal, Vol. 33 2002. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=320664
[22] *Id*.
[23] Ronald Meisburg, *First Contract Bargaining Cases, General Counsel Memorandum*, GC 06-05, April

the numbers corroborate the effectiveness of this employer tactic. The Dunlop Commission Report reported that only 55.7% of unions reached a first contract between 1986 and 1993.[24] Weiler's studies verified a decline in first contract success rates from 86% to 63% from 1960 to 1980.[25] Recent studies document a first contract failure rate of up to 44%.[26]

STATUTORY AND DECISIONAL UNDERPINNINGS OF THE BOARD'S REMEDIAL SCHEME

The National Labor Relations Act addresses remedies in Section 10(c). It provides that the Board, upon a finding that an unfair labor practice has been committed, "shall issue … an order requiring such person to cease and desist form such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act…."

This remedial charge is strengthened by the legislative history of the Act. According to Senator Wagner, the intent of Section 10(c) was to prevent unfair labor practices.

> The result of all this nonenforcement of Section 7(a) has been to breed a wide-spread and growing bitterness on the part of workers, who feel with much justification, that they have been given fair words, but betrayed by the Government in the execution of its promises. Time and time employees who have sought to organize in pathetic reliance upon section 7(a) have found themselves discriminated against the employer, and appeals to the Government for redress have been in vain…. The only honest thing for the Congress to do, therefore, is to provide adequate machinery for its enforcement, which is the object of the present bill.[27]

With this broad statutory mandate, why have Board remedies so utterly failed? There is no single answer, but fingers can be pointed in at least three directions. The statutory remedial scheme is limited, dated and out-of-step with other worker protection legislation; the courts have narrowly interpreted the range of remedies available under the Act; and the Board itself has demonstrated an inexplicable unwillingness to utilize even the paltry remedies available to it.

The NLRA's enforcement mechanism provides for the resolution of alleged violations through an administrative complaint procedure that carries comparatively

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19, 2006.

[24] Dunlop Commission Report, at WL*197-98.

[25] Paul Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation,* 98 HARV.L.REV. 351, 353 (1984).

[26] John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives*, 1999-2004 (March 25, 2008)(unpublished working paper), cited by Wilma Liebman, Testimony, Subcommittee on Labor, Health & Human Services, Education & Related Agencies of the Senate Committee on Appropriations, April 2, 2008.

[27] Michael Weiner, *Can the NLRB Deter Unfair Labor Practices? Reassessing the Punitive-Remedial Distinction in Labor Law Enforcement,* 52 UCLA L. REV. 1579 (2005), at 1621-22, citing H.R. Rep. No. 74-972 at 5-6 (1935).

slight financial risk to the legal wrong-does. This approach was abandoned in later worker discrimination statutes in favor of judicial adjudication of rights and remedies. The administrative model adopted for the NLRA, while not without certain advantages, lacks a private right of action and limits the range of remedies available. Reinstatement, backpay and other equitable remedies are available, "but not compensatory or punitive damages of the sort that only juries could award."[28] Greater remedies and the availability of the federal judicial system enabled other worker rights statutes to have a beneficial impact on protected rights and change corporate behavior. That has not happened with the administrative scheme of the NLRA.

The inherent limitations of Section 10(c) of the Act have been exacerbated by a remedial philosophy heavily oriented toward the repair of harm inflicted on individual victims of employer antiunion action. The harm to the workers' organizing campaign and their support for their union, as well as the harm to the community and to the general enforcement needs of the Act are repeatedly ignored. Backpay and reinstatement, for example, are directed at the workers affected by unlawful discrimination. These remedies, occurring long after an organizing campaign has been defeated may "make whole" the workers directly affected, but they serve no remedial purpose for workers whose union support has been crushed and fail to serve an a deterrent for other employers contemplating similar wrong-doing. These difficulties illustrate the supremacy of the reparative policy favored in American labor law, to the detriment of a deterrent policy. Harvard Law School Professor Paul Weiler, in his seminal 1983 article, *Promises to Keep*, argues that one of the main reasons the NLRA has failed to keep its promise of securing workers' rights to self-organization is the "remedial philosophy" of the NLRA.[29]

What is the basis for this policy? Section 10(c)'s command to the Board to "effectuate the policies of the Act" is not easily read as containing such limiting language. Likewise, the legislative history supplies none. According to Senator Wagner, the intent of Section 10(c) was to prevent unfair labor practices. The "House and Senate labor committees used the heading 'Prevention of Unfair Labor Practices" to introduce the sections analyzing the Board's remedial authority."[30] The House report explains that the "Board is empowered, according to the procedure provided in section 10, to prevent any person from engaging in any unfair labor practice." The language makes clear that the "unfair labor practices listed are matters of public concern, by their nature and consequences" and that "the form of injunctive and affirmative order is necessary to effectuate the purpose of the bill…."[31]

Courts have recognized that "Congress has invested the Board, not the courts with broad discretion" to fashion remedial orders.[32] Section 10(c) leaves the Board with "broad discretion to devise remedies … subject only to judicial review."[33] Since

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[28] Estlund, 1580.
[29] Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1787-1790 (1983).
[30] Weiler, at 1619, citing S. Rep. No. 74-573, at 14 (1935).
[31] H. Rep. No. 74-1147 at 23 (1935), Committee on Labor.
[32] *NLRB v. Food Store Employees Union, Local 347*, 417 U.S. 1, 8, (1974).
[33] *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984).

Congress could not define "the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations [it] … met these difficulties by leaving the adaptation of means to end to the empiric process of administration."[34] "It is for the Board and not the courts to determine how the effect of prior unfair labor practices may be expunged."[35] The Supreme Court has acknowledged that Congress could not define "the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration."[36]

Yet this seemingly broad statutory authority and judicial deference have been tempered. The Board's remedies "merit the greatest deference" so long as they are not "a patent attempt to achieve ends" other than achieving the Act's objectives.[37] This language reflects the creation of a false dichotomy between permissible "remedial" measures and impermissible "punitive" measures. This judicial creation has both encouraged and been encouraged by a remedial philosophy that elevates individual reparations over deterrence. It is a policy shaped in large part by a series of court decisions which have informed Board and court decisions since the earliest days of the Act. It has unfortunately served to stifle and deny remedial initiatives.

The remedial/punitive dichotomy finds its source in *Republic Steel Corp. v. NLRB*.[38] Backpay was ordered for workers fired for refusing to support a company union and, instead, joining and assisting a CIO union. At issue was whether to deduct from their backpay and remit to the appropriate governmental agencies amounts they had received for work performed on "work relief projects." In reaching its decision that requiring payments to governmental agencies was beyond the Board's authority, the Court created a distinction between remedial actions, which the Board has the power to command, and punitive measures, which it concluded were not vested in the Board by Congress. Since the amounts in issue "were not needed to make the employees whole" they were "in the nature of penalties."[39] According to the Court, penalties or fines for the "vindication of public rights" [i.e., in this case, to a public agency not involved in the dispute] are outside the Act's purview as the Board's remedial discretion is limited to the "protection and compensation of employees."[40] An order cannot be justified solely on the grounds that it "would have the effect of deterring persons from violating the Act."[41]

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[34] *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).
[35] *International Ass'n of Machinists, v. NLRB*, 311 U.S. 83, 89 (1940).
[36] *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 194 (1941).
[37] *Virginia Elec. & Power Co. v. NLRB*, 467 U.S. 533, 540 (1943).
[38] *Republic Steel Corp. v. NLRB*, 311 U.S. 7 (1940).
[39] *Republic Steel*, at 9.
[40] *Republic Steel*, at 10.
[41] *Republic Steel*, at 12; *see also Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 235-36 (1938)("[T]his authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.").

The distinction between punitive remedies and remedial remedies has endured despite compelling contrary pronouncements by the Court. In *Phelps Dodge Corp. v. NLRB*,[42] the Court took an entirely different approach, rejecting a challenge to the Board's authority to order the reinstatement of workers who had obtained compensatory employment. To find otherwise, the Court held, "would confine the 'policies of this Act' to the correction of private injuries" and "thwart the central purpose of the Act, directed as that is toward the achievement and maintenance of workers' self-organization. The Board was not devised for such a limited purpose."[43] The Court in *Phelps Dodge* rejected the premise that the Board exists only for the "adjudication of private rights." Rather, it "acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining."[44]

Some years later, in *NLRB v. Seven-Up Bottling Co*.,[45] the Court appeared to have abandoned the punitive-remedial distinction altogether. It upheld the Board's method of computing backpay awards even though quarterly computations could have the effect of overcompensating unlawfully discharged employees. Justice Frankfurter, writing for the majority, said, "It is the business of the Board to give coordinated effect to the policies of the Act. We prefer to deal with these realities and to avoid entering into the bog of logomachy [argument about meaning of words], as we are invited to, by debate about what is 'remedial" and what is 'punitive.' It seems more profitable to sick closely to the direction of the Act by considering what order does, as this does, and what order does not, bear appropriate relation to the policies of the Act."[46]

This debate over the scope of the Act's remedial authority remains unsettled. In a UCLA law review article, Michael Weiner argues that the remedial/punitive distinction has not only resulted in confusion and inconsistency which has contributed to the Board's inability to devise effective remedies, but is contrary to Congressional intent and against the weight of authority.[47] Yet, as he catalogues, the Board and courts return to it again and again, particularly as an excuse for imposing a limited remedy.[48]

A third significant contributor to the failure of the Act's remedial efforts is the Board's own reluctance to pursue remedial initiatives. NLRB Member Wilma Liebman has charged that the Board "has refused to exercise the full remedial discretion it does have."[49] This has not always been so. During the 1990s, the Board and General Counsel

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[42] *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).
[43] *Phelps Dodge Corp*., at 192-193.
[44] *Phelps Dodge Corp*., at 193, citing *National Licorice Co., v. NLRB*, 309 U.S. 350, 362, 364, 366 (1940)(NLRB proceedings are "not for the adjudication of private rights;" the "Board acts in a public capacity to give effect to the declared public policy of the Act;" and the Act "contemplates … the protection of the public rights.").
[45] *NLRB v. Seven-Up Bottling Co*., 344 U.S. 344 (1953).
[46] *NLRB v. Seven-Up Bottling Co*, at 348.
[47] Michael Weiner, *Can the NLRB Deter Unfair Labor Practices? Reassessing the Punitive-Remedial Distinction in Labor Law Enforcement,* 52 UCLA L. REV. 1579 (2005).
[48] *See e.g., Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).
[49] Wilma Liebman, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board,* BERKELEY J. OF EMPLOYMENT & LABOR LAW, Vol. 28:2 (2007), p. 535

developed an increasing array of remedies for 8(a)(1) violations during organizing campaigns, discriminatory discharges, and refusals to bargain. But these efforts came to an abrupt halt with the installation of the Bush Board in 2002. Instead of working towards making the Act more effective through more meaningful remedies, the Bush Board seemed bent on stripping it bare.

NLRB REMEDIAL INITIATIVES: A GIANT STEP FORWARD

Notwithstanding these limitations on the Board's ability to safeguard the protections of the Act, the well-documented increases in illegal employer conduct would presumably cause the Board to reevaluate, revise and update its remedial strategies. And, indeed, during the 1990s, such efforts are evident. Existing remedies were applied and the Board directed its efforts towards crafting additional effective remedies. Below are listed many of them:

Remedies for Organizing Interference[50]

- Posting of Notice: Publish, in all appropriate languages; publish in the company's internal newsletter; mail copies to the employee's homes; publish in a local newspaper.
- Reading of Notice: Convene all employees during working time and have the company's chief operating officer OR an NLRB agent read the Notice in the presence of the company's chief operating officer; allow the union to be present.
- Access to Bulletin Boards: Supply the union reasonable access to company bulletin boards and all places where notices to employees are customarily posted.
- Access to Nonwork Areas: Grant the union access to nonwork areas during employees' nonwork time and allow them to meet with employees, without surveillance, during these times.
- Equal Time: Give the union notice of, and equal time and facilities to respond to any address made by the company regarding the issue of representation.
- Employee Meeting: Afford the *union the right to deliver a 30-minute speech* to employees on working time prior to any Board election.

Remedies for 8(a)(3) Violations

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[50] *Fieldcrest Cannon, Inc. v. NLRB*, 97 F.3d 65 (4th Cir. 1996), enforcing in relevant part 318 NLRB 470 (1995); *Dynatron/Bondo Corp*., 324 NLRB 572 (1997): *Three Sisters Sportswear Co*., 312 NLRB 853 (1993), enf'd 55 F.3d 684 (D.C. Cir. 1995), cert. denied 516 U.S. 1093 (1996); *Monfort of Colorado, Inc*., 298 NLRB 73 (1990), enf'd in relevant part, *sub nom Food & Commercial Workers v. NLRB*, 965 F.2d 1538 (10th Cir. 1992)(president to read notice, reasonable access to bulletin boards and non-work areas, equal time to respond to employer speeches, 30-minute speech before election); *S. E. Nichols, Inc*., 284 NLRB 556 (1987), enf'd 862 F.2d 952 (2d Cir. 1988)(access); *Avondale Industries, Inc.,* 329 NLRB No. 93(1999)(special mailing and publication of the notice and access); *U.S. Service Industries,* 319 NLRB 231, enf'd 107 F.3d 973 (D.C. Cir. 1997)(notice read by employer representative or Board agent with employer representative present; access to bulletin boards); *Reno Hilton,* 319 NLRB 1154 (1995); *Domsey Trading Corp*., 310 NLRB 777 (1993)(manager to read notice); *Labor Ready, Inc*., 327 NLRB 1055, fn. 1 (1999)(nationwide posting of notice); *Jo-Del, Inc*., 326 NLRB 296, fn. 4 (1998)(mailing of notice to employees); *Indian Hills Care Center*, 321 NLRB 144 (1996)(mail notices).

Frontpay – not a replacement for reinstatement, but appropriate where the employer's unlawful conduct has impaired the discriminatee's ability to work by causing emotional of physical impairment; the employer and employees are hostile to the employee and the union in no longer seeking representation; the discriminate is close to retirement; as a substitute for preferential hiring rights.[51]

Compensatory Damages – When backpay does not fully "make whole" a discriminate for all losses attributable to the discrimination suffered, such as the loss of a car or even a house when it is a likely consequence of a discriminatee's loss of income.[52]

Other:

Broad Cease-and-Desist Order – Remedial notice language provides that employer will not "in any other manner" (instead of customary "in any like or related manner) violate the Act where respondent has shown a proclivity to violate or misconduct is egregious or widespread.[53]

Cost of Negotiations – Where an employer's substantial unfair labor practices warrant reimbursement for negotiation expenses to make the charging party whole for resources wasted because of the unlawful conduct and to restore the economic strength necessary to ensure a return to the status quo ante at the bargaining table.[54]

Litigation Costs and Attorneys Fees – Where the respondent has necessitated frivolous litigation by continuing previously determined and willfully unremedied unlawful conduct.[55]

Piercing the Corporate Veil and Imposing Personal Liability – When "the shareholder and corporation have failed to maintain separate identities" and when "adherence to the corporate structure would sanction a fraud, promote injustice, or lead to an evasion of legal obligations."[56]

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[51] GC Memorandum, GC 00-01, February 3, 2000; OM Memorandum 99-79, November 19, 1999 (instructing Regions to consider frontpay in appropriate circumstances).

[52] *Virginia Electric & Power Co. v. NLRB,* 319 U.S. 533 (1943); *NLRB v. Fansteel Metallurgical Corp*., 306 U.S. 240 (1939); *Minette Mills, Inc*., 316 NLRB 1009, 1011 (1995) (remedy for permanent losses sustained when discriminate had to pawn personal items rejected by ALJ); *Laborers Local 38 (Hancock-Northwest*), 268 NLRB 167, 170 (1983), modified 738 F.2d 1001 (5th Cir. 1984)(ALJ concluded that capital losses are not recoverable in compliance proceedings).

[53] *Hickmott Foods, Inc*., 242 NLRB 1357 (1979).

[54] *Unbelievable, Inc., d/b/a Frontier Hotel & Casino,* 318 NLRB 847 (1995), enf'd sub nom. *Unbelievable, Inc.,* 118 F.3d 795 (D.C. Cir. 1997).

[55] *Lake Holiday Manor*, 325 NLRB 469 (1999)(partial award of litigation costs and attorney fees after respondent reneged on two settlements); *Alwin Mfg. Co., Inc*., 326 NLRB No. 63 (1998), enf'd 192 F.3d 133 (D.C. Cir. 1999); *Unbelievable*, *supra*.; *Care Manor of Farmington, Inc.,* 318 NLRB 330 (1995).

[56] *Bufco Corp. v. NLRB*, 147 F.3d 964 (D.C. Cir. 1990), enforcing 323 NLRB 609 (1997); *West Dixie Enterprises, Inc*., 325 NLRB No. 23 (1997*); AAA Fire Sprinkler, Inc*., 322 NLRB 69 (1996); *White Oak Coal,* 318 NLRB 732 (1995).

Criminal Contempt – For respondent's "knowing and willful violation of three Sixth Circuit orders.[57]"

Regional or Corporatewide Cease-and-Desist Orders – Due to the continuing involvement of high-level officials at facility after facility and/or systemwide, coordinated violations.[58]

Reinstate Business Functions – When an employer relocates its business in violation of the Act.[59]

NLRB REMEDIAL INITIATIVES: A GIANT LEAP BACKWARDS

The Bush Board virtually abandoned the remedies listed above. Broad cease-and-desist orders were often rejected.[60] The Board turned its back on special remedies.[61] Section 10(j) injunction action fell "into virtual disuse."[62]

The Bush Board virtually eliminated the bargaining order as a remedial tool,[63] with only mass discharges qualifying for a bargaining order remedy.[64] The Board has authority, in cases where an employer's illegal conduct has destroyed the union's majority support, to issue what is known as a *Gissel* bargaining order, which directs the employer to bargain with the union on the basis of its earlier, actual and demonstrated majority support.[65] Yet the Bush Board regularly refused bargaining order remedies, despite recommendations from its own Administrative Law Judges.[66] Instead, the Bush

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[57] *U.S. v. Hochschild*, 129 F.3d 1266 (6th Cir. 1997), cert denied, 523 U.S. 1032 (1998).
[58] *Beverly California*, Corp., 326 NLRB No. 30 (1998).
[59] *Lear Siegler, Inc*., 295 NLRB 857 (1989); Westchester Lace, 326 NLRB 1227 (1998); *Douglas Food Corp. v. NLRB,* 330 NLRB No. 147, enf'd in part, 251 F.3d 1056 (D.C. Cir. 2001).
[60] *Intermet Stevensville*, 350 NLRB No. 93 (2007*) (Intermet II*) (refusing a broad order where the employer unlawfully laid off four workers because of their union support despite prior case, *Intermet Stevensville*, 350 NLRB No. 94 (2007) (*Intermet I*), which found numerous violations by the employer during its anti-union campaign, including threats of plant closure and job losses; demotion, reassignment and reduction in wages for a suspected union supporters, the confiscation of union literature; and other worker abuses.
[61] *Albertson's Inc.,* 351 NLRB No. 21 (2007) (rejecting its Administrative Law Judge's recommendation for a broad order and special remedies despite numerous violations for failure to furnish information, unilaterally changing terms and conditions of employment, bypassing the union, maintaining unlawful rules and unlawfully disciplining workers).
[62] Rick Valliere, *Organized Labor Would Fare Better Under State Labor Laws, Professor Says*, Daily Lab. Rep. (BNA) at A-7 (Jan. 11, 2006) (quoting former NLRB Chairman William B. Gould); a recent up tick in the number of Section 10(j) injunctive actions coincides with the delegation of authority to file Section 10(j) petitions with the General Counsel in 2008.
[63] Brudney, *Neutrality Agreements and Card Check Recognition*, 90 Iowa L. Rev. at 871-872 (footnotes omitted; quoting *Gissel*, 395 U.S. at 612). *See id.* n. 262 ("stunning decline of 85% . . . substantially exceeded the 50% decline in election activity over the same period;" increased number of unfair labor practices charges filed belies any inference of "heightened levels of law-abiding conduct by the employer community.").
[64] *Compare National Steel Supply, Inc.,* 344 NLRB 973 (2005) (bargaining remedy granted) with *Desert Toyota*, 346 NLRB 132 (2005), *Abramson, LLC*, 345 NLRB 171 (2005) and *The Register Guard*, 344 NLRB 1143 (2005) (bargaining order remedies denied).
[65] *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 (1969).
[66] *Desert Toyota*, 346 NLRB 132 (2004) (the employer discharged the principal employee organizer and

Board blindly clung to a belief that the employer's promise not to violate workers' rights again could eliminate fear in the workplace and that a notice posted on a bulletin board could erase coercion and intimidation and allow a fair and free election.[67] This approach to the NLRA's remedial scheme not only demonstrated a disconnect with what workers face when they try to form a union but a serious misunderstanding of workplace realities. What remained of the bargaining order remedy? Seemingly, the Board restricted its application to mass discharges[68] where the unit size is small[69] and the employer's highest-ranking officers are involved.[70] Absent evidence of such decimation of the workforce, the Board turned its back on this critical remedy.

Injunctive relief pursuant to Section 10(j) of the Act all but disappeared during the Bush Board's tenure.[71] Section 10(j) empowers the NLRB to petition a U.S. district court for immediate, temporary injunctive relief pending final disposition of the underlying unfair labor practice case by the Board. Congress enacted this provision in recognition of the harm to the Act's remedial scheme caused by delay. Section 10(j) relief "is designed to fill the considerable time gap between the filing of a complaint by the Board and issuance of its final decision, in those cases in which considerable harm may occur in the interim."[72] If granted, a 10(j) injunction can force an employer to rehire illegally terminated workers or to bargain with a union it has illegal refused to recognize.

But seeking 10(j) relief lies within the discretion of the Board.[73] The five years of the Bush Board witnessed a precipitous decline in the use of this highly effective remedy. From a yearly average of 40-50 Board authorizations during the 1990's, there

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made statements to another employee linking the discharge to the worker's union support; maintained an unlawful no-solicitation rule, created the impression of surveillance, interrogated non-bargaining unit employees and solicited them to report union activities by others); *Abramson, LLC*, 345 NLRB 171 (2005) (a co-owner made repeated threats of plant closure, threatened employees with loss of jobs and benefits, and unlawfully denied recall to the leading union supporter following a post-election layoff); *The Register Guard*, 344 NLRB 1143 (2005) (employer unlawfully granted a unit-wide wage increase during the union campaign, conducted meetings in which it solicited and addressed employees' grievances and sent workers a letter with a form addressed to the union withdrawing their union authorization cards); *Hialeah Hospital*, 343 NLRB 391 (2004) (high level officers of the employer embarked on a course of discharge, threats of discharge, spying, and other illegal conduct within hours of learning of a union's organizing effort in a small unit of twelve employees; the employer warned the entire workforce that it would discover the identities and get rid of those employees who had contacted the union and told them that it would "not allow" a union).

[67] This, of course, assumes that the discharged worker will ever return to work, or be able to do so prior to a second election.

[68] *California Gas Transport, Inc.,* 347 NLRB No. 118 (2006); *National Steel Supply, Inc*., 344 NLRB 973 (2005) (the employer unlawfully refused to reinstate 27 of its 32 workers).

[69] *California Gas Transport, Inc.,* 347 NLRB No. 118 (2006); *Center Construction Co., Inc., d/b/a Center Service System Division*, 345 NLRB 729 (2005).

[70] *Evergreen America Corp*., 348 NLRB No. 12 (2006); *see also California Gas Transport*, 347 NLRB No. 118; *Center Construction*, 345 NLRB 729 (2006); *Smoke House Restaurant*, 347 NLRB No. 16 (2006); Concrete *Form Walls, Inc.*, 346 NLRB 831 (2006).

[71] 29 U.S.C. § 160(j).

[72] S. Rep. No. 105, 80th Cong., 1st Sess. 27 (1947).

[73] Although Section 10(l) requires the Board to seek injunctive relief for certain illegal conduct by unions, NO provision of the Act *requires* the Board to seek immediate, injunctive relief for violations by employers of workers' rights.

were 14-17 between 2002 and 2007. Even the percentage of General Counsel requests compared to the total number of requests received from the regional offices declined after 2002 from almost 50% to about 33%.[74] Of significance is the success rate of the Section 10(j) petitions filed in federal court: between 80% and 95% in the 1990's and closer to 100% in FY2003 – FY2007.[75] The high success rate suggests that this valuable remedial tool is being underused and undervalued. Not surprisingly, there has been an up tick in the number of Section 10(j) injunctions sought since such authority was delegated to the General Counsel in 2008.

In case after case, the Bush Board elected to reject a more meaningful remedy and impose a lesser remedy. It refused to find that two companies were alter egos for liability purposes where the principals lived together but were not married.[76] It would not pierce the corporate veil to impose liability for violations even, in one case, where the co-owners had distributed all of the company's funds to themselves because, the majority held, the distributions occurred before the unfair labor practice charges were filed.[77] The U.S. Court of Appeals for the District of Columbia Circuit was harsh in its disagreement: "The corporate conduct at issue here is the labor-law equivalent of a daylight robbery."[78]

Special remedies were unwarranted according to the Bush Board despite egregious employer retaliation during an organizing campaign where workers who tried to form a union were fired, threatened with discharge, threatened that the facility would close, forced out of their job by being made to sign independent contractor agreements, and offered bribes to give up their union support.[79] The Board's failure to grant remedies specifically designed for recalcitrant employers was especially appalling in this case as the employer had predicted to its workers that the NLRB "brings that order to us and we say 'fuck your order' and then they have to … take their petition to federal court …[a]nd that goes on for years…."[80]

Even minor remedial adjustments were rejected by the Bush Board. It denied a tax adjustment remedy for discriminates who incur increased tax burdens due to their receipt of a lump sum backpay award.[81] Electronic posting of remedial notices was rejected.[82] In a case involving virtually all Chinese speaking workers who had limited proficiency in reading English, the Board rejected as "not warranted" a request that management read aloud its Notice to Employees at an assembly as well as a request to translate into Chinese the final decision in the case.[83]

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[74] These figures are based on NLRB documents obtained pursuant to a request under the Freedom of Information Act, NLRB Annual Reports, and General Counsel *Summary of Operations* Memoranda GC 08-01, 07-03, 06-01, 05-01, and 04-01.
[75] In FY 2005, the success rate was 93%.
[76] *US Reinforcing, Inc*., 350 NLRB No. 41 (2007).
[77] *A.J. Mechanical, Inc*., 345 NLRB 295 (2005).
[78] *Carpenters & Millwrights, Local Union 2471 v. NLRB*, 481 F.3d 804 (D.C. Cir. 2007).
[79] *First Legal Support Services*, 342 NLRB 350 (2004).
[80] *Id*., at 361.
[81] *Hotel Employees, Local 26*, 344 NLRB 567 (2005).
[82] *International Business Machines Corp.,* 339 NLRB 966 (2003).
[83] *Chinese Daily News*, 346 NLRB No. 81 (2006); John Logan, *The Long, Slow Death of Workplace*

All of this narrowing of the Act's remedial impact preceded the September massacre, when the Board issued 61 decisions, approximately 20% of its annual total, most of which reflect a transparent anti-worker, anti-union and anti-collective bargaining bias. As part of this attack on workers' rights, the Bush Board made radical changes in long-standing rules regarding backpay which serve to further diminish already paltry remedies. These decisions created an extremely restrictive and narrow view of what constitutes remedial relief, the necessity for remedial relief, and the process for obtaining remedial relief.

Through its *St. George Warehouse* decision on September 30, the Board made it even cheaper for employers to violate the law and made it even harder for workers to collect backpay.[84] Reversing 45 years of established precedent, it held that the General Counsel and illegally terminated workers have the burden, in a proceeding to determine backpay following a finding of illegal conduct, to come forward with evidence that the illegally terminated workers took reasonable steps to look for work after being fired.[85] If a worker does not present evidence of an adequate search for work, the employer has no backpay obligation. While the Board has long held that a claim of failure to mitigate is an affirmative defense, the burden of producing evidence in support of such a claim of failure to mitigate was on the employer. This approach was consistent with the Supreme Court's view that 'the most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created."[86] The Bush Board's approach turns this precept on its head. The Board remanded the eight year-old case involving two leaders of an organizing drive and put the burden on the General Counsel and workers to produce sufficient evidence to negate unsupported assertions that fired workers failed to conduct an adequate job search.

In *Grosvenor Resort*,[87] The Board further undercut the likelihood of backpay by announcing a new rule that employees who wait "an unreasonably long time before initially seeking interim work," i.e., more than 2 weeks, will be denied backpay for that period because to do otherwise would "reward idleness."[88] Application of a 2-week rule in this case was particularly egregious because 44 workers of a Florida resort hotel had been illegally terminated while they were on strike over the employer's failure to bargain in good faith. They had continued to picket after their employer fired them, trying to get their jobs back. The Board's newly established requirement punishes employees for the

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Democracy at the Chinese Daily News, available at http://www.americanrightsatwork.org/docUploads/burke%20report.pdf .

[84] *St. George Warehouse*, 351 NLRB No. 42 (2007) (the illegal discharges occurred in 1999; the decision of the NLRB Administration Law Judge finding wrong-doing issued in 2002).

[85] *Mastro Plastics Corp*., 136 NLRB 1342, 1346 (1962); *see also* NLRB Compliance Manual §10550.1: "In the event of a dispute concerning interim earnings, it is the respondent's legal burden to prove interim earnings and other facts that may mitigate the loss resulting from its unlawful action;" and Compliance Manual §10558.1: "It is the respondent's burden to establish that the discriminatee [illegally terminated worker] failed to make a reasonable effort to seek interim employment."

[86] *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946).

[87] *The Grosvenor Resort*, 350 NLRB No. 86 (2007) (employees were denied backpay for the period of time that they were engaged in picketing to get their jobs back).

[88] *Id*., p. 3.

very protected activity for which they were illegally fired, i.e., striking to protest illegal conduct by their employer. In its decision, the Board "effectively declared 'idle' those engaged in the fundamental right to strike."[89]

The new rule forces workers to choose between picketing, itself an effort in support of regaining employment, and abandoning the strike so as to protect their entitlement to back pay. The employer, which has violated the Act, is rewarded by this strike-breaking scheme which forces workers to abandon the strike in order to preserve their backpay remedy. But the employer wins either way; if they continue to picket, the employer owes them nothing.

In addition to reducing backpay for workers who delay beginning their job search for more than two weeks, the Board held that fired workers who had applied and been hired for a new job that would start in another month were ineligible for backpay for the period between their hiring and their start date because they had failed to try to find temporary jobs to cover the few weeks before their new job started. As the dissent noted, this new rule requires a search for "interim interim" employment and is without precedent.[90]

The 18 year-old case of *Domsey Trading Corp*., involving 202 workers fired during an organizing campaign in Brooklyn provided another means to reduce the amount of backpay owed by employer law-breakers.[91] The Board held that statements or omissions on unsworn compliance forms that victims of discrimination are given the NLRB Regional office to help them keep track of their efforts to find employment automatically override sworn testimony by the victim.

Another new rule, announced in *Toering Electric Co*., 351 NLRB No. 18 (2007), shifts the burden to the General Counsel and workers to prove that applicants who were denied employment had a "genuine interest" in working for the employer who illegally refused to hire them.[92] This builds on a prior burden shifting case in which the Board created a second class of discriminatees – those illegally denied employment because the employer suspected they were union organizers, seeking work to organize its

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[89] Anne Marie LoFaso, *September Massacre: The Latest Battle in the War on Workers' Rights Under the NLRA*, prepared for the American Constitution Society, May 2008, p. 11.

[90] This new rule contradicts instructions in the existing NLRB Compliance Manual, §10558.3 which advises that "the Board has found that a brief period during which the discriminate undertook no activities to seek employment did not constitute a failure to mitigate, citing *Saginaw Aggregates*, 198 NLRB 598 (1972) *and Retail Delivery Systems*, 292 NLRB 121, 125 (1988).

[91] *Domsey Trading Corp*., 351 NLRB No. 33 (2007).

[92] *Toering Electric Co*., 351 NLRB No. 18 (2007)(backpay proceeding in which refusal to hire occurred in 1995-96; NLRB Administrative Law Judge decisions finding illegal conduct issued in 1997 and 2000). Guidelines issued by the General Counsel, GC Memorandum 08-04, February 15, 2008, discuss the sort of evidence needed to meet the burden of proving that the applicant actually applied for employment or authorized someone to do it for him or her and that the applicant had a "genuine interest" in becoming employed (if the employer raises "a reasonable question as to the applicant's actual interest"). Also included are guidelines for investigating and pleading such a violation and a directive to submit to the Office of Advice cases in which retroactive application would "work a manifest injustice."

workforce.[93] Despite the historical presumption, still applicable to all other discriminatees, that an applicant would have continued working indefinitely if not for the employer's illegal conduct in denying them employment, this new subclass of discriminatees is now required to present affirmative evidence to prove that, if hired, they would have worked for the employer for the entire backpay period. According to the dissent, in promulgating this new rule, the Board rejected "precedent endorsed by two appellate courts and rejected by none, without any party having raised the issue, without the benefit of briefing, and without any sound legal or empirical basis." The dissent points out that the rule being changed by the Board was established "in the Board's first reported case" in 1935.[94]

These recent decisions will not only significantly reduce the back pay obligations of adjudicated labor law violators, they will have a profound effect on how cases involving back pay are investigated and litigated.[95] Not only is it now cheaper for employers to violate the law, as a result of these new decisions, but the Agency itself is now required to help the wrongdoer determine how it can reduce the back pay it is required to pay its victims. Workers who file unfair labor practice charges will now spend less time with Board Agents investigating the circumstances of the unlawful termination, and correspondingly more time on what they did or did not do regarding a bona fide application for interim employment and subsequent mitigation of damages. These radical changes divert the Board's resources away from enforcing the Act and, instead, toward saving money for law-breakers, who on average have paid back pay awards amounting only to $3,500 even before these burden-shifting new rules took effect.[96i] The end result of these new rules is that this Board is making it cheaper for employers to violate the law and using Agency resources to do so.

These recent decisions will not only reduce backpay obligations, they will have a profound effect on how cases involving backpay are investigated and litigated. Workers

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[93] *Oil Capitol Sheet Metal, Inc.*, 349 NLRB No. 118 (2007) (carving out less favorable rules when employers unlawfully refuse to hire workers intent on organizing the workforce by applying a new evidentiary requirement that in order to be entitled to continuing backpay, the General Counsel and worker have the burden of proving by affirmative evidence that the worker would have continued to work for the employer but for the employer's unlawful discrimination). OM 08-29, February 15, 2008, contains case handling instructions for *Oil Capitol* cases, including and an acknowledgement that the decision "will significantly affect the General Counsel's investigation and litigation of such cases." Issues discussed in this memorandum include who is a salt, proving a salting discriminatee's applicable backpay period and right to instatement and the application of *Oil Capitol* to new and pending cases. It advises that the General Counsel has developed model pleadings in support of a manifest injustice argument for cases pending at various stages of the process.

[94] *Id*., slip op. 10, referencing *NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 347 (1953), citing *Pennsylvania Greyhound Lines*, 1 NLRB 1, 51 (1935)

[95] *Mastro Plastics Corp*., 136 NLRB 1342, 1346 (1962); *see also* NLRB Compliance Manual §10550.1: "In the event of a dispute concerning interim earnings, it is the respondent's legal burden to prove interim earnings and other facts that may mitigate the loss resulting from its unlawful action;" and Compliance Manual §10558.1: "It is the respondent's burden to establish that the discriminatee [illegally terminated worker] failed to make a reasonable effort to seek interim employment."

[96] Historically, it has been the responsibility of the General Counsel to calculate the amount of backpay owed and the obligation of the adjudicated wrong-doer to present evidence to reduce that amount. *See* n. 92 , *supra*.

who file an unfair labor practice charge will meet with a Board Agent about being fired or denied employment and, instead of spending their time talking about what the employer did that violated their rights, they will be interrogated about what they did or did not do regarding a bona fide application for employment and subsequent mitigation of damages. These radical changes divert the Board's resources away from enforcing the Act and, instead, towards saving money for law-breakers. Board agents are now required to do what, in the past, was the employer's burden regarding the paring down of already pathetic backpay obligations.[97] The end result under these new rules is that this Board has made it even cheaper for employers to violate the law and it is using Agency resources to do so.

NLRB REMEDIAL INITIATIVES: THE GENERAL COUNSEL

Notwithstanding the Bush Board's determination to make the rights guaranteed by the Act and their enforcement as trivial and insignificant as possible, the General Counsel has introduced certain measures consistent with a commitment to the protect workers' rights. Perhaps the most significant is his initiative for first contract bargaining cases.[98] In 2006, General Counsel Meisburg noted that "initial contract bargaining constitutes a critical stage on the negotiation process" and acknowledged that when workers are bargaining for their first contract "they are highly susceptible to unfair labor practices intended to undermine support for their bargaining representative. Citing NLRB records that more than a quarter of all newly-certified units involve meritorious refusal to bargain charges and almost half of all refusal to bargain charges occur in initial contract bargaining situations.

Meisburg recommended more aggressive remedies "to protect these new bargaining relationships, and therefore protect employee free choice." Specifically, the Regional Offices are asked to consider Section 10(j) injunctive relief and special remedies in such cases. Those remedies specifically aimed at bargaining violations include periodic reports on the status of bargaining and recovery of bargaining and/litigation expenses. In a subsequently issued memorandum, General Counsel Meisburg listed remedies to "directly and effectively address the consequences of bad-faith bargaining" and "more adequately restore the pre-violation conditions and relative positions of the parties."[99] Regional Offices are instructed to consider prescribed or compressed bargaining schedules; periodic status reports; a minimum six-month extension in the certification year; reimbursement of bargaining costs; and Section 10(j) injunctive relief. His 2008 "Report on First Contract Bargaining Cases," notes that special remedies have been authorized in certain cases since issuance of the 2007

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[97] Historically, it has been the responsibility of the General Counsel to calculate the amount of backpay owed and the obligation of the adjudicated wrong-doer to present evidence to reduce that amount. *See* n. 33, *supra*.

[98] Memorandum GC 06-05, April 19, 2006, *First Contract Bargaining Cases*

[99] Memorandum GC 07-08, May 29, 2007, *Additional Remedies in First Contract Bargaining Cases*, p. 3.

memoranda.[100] Despite some positive statistical changes, he concludes that assigning a causal connection to the changes would be premature.

General Counsel Meisburg has also had a positive impact on the Board's a long-standing policy of paying simple interest on backpay awards. On May 2, 2007, the General Counsel announced that complaints seeking monetary awards should include pleading a remedy of quarterly compounded interest.[101] Regions have also been directed to look at electronic posting remedies and to investigate whether and how respondents regularly communicate with employees by email or other electronic means and, in appropriate cases, to specifically plead the remedy in a complaint.[102] Some electronic posting remedies have been included in settlement agreements.[103]

CONCLUSION:

Absent effective enforcement, the guarantees of the NLRA will continue to be illusory. Significant changes in the level of unlawful conduct directed against workers' union support will require much more than mere tinkering. Even innovative remedial initiatives have not worked and, as we have seen, the sway of politics can quickly erase decisional gains. Virulent anti-union campaigns will continue to be the norm and the rights guaranteed by the Act will remain outside the grasp of American workers absent an aggressive, concentrated effort to change, not just the remedial scheme, but the structure under which workers exercise their rights and the process by which they achieve union representation and collective bargaining agreements.

This paper has outlined remedial measures undertaken in the past. Much more is needed. Workers deserve a Labor Board that will uphold the statutory mandate of the National Labor Relations Act and protect their rights to organize and bargain. They deserve a statute that provides a pathway to collective bargaining that works to bring workers into the middle class and provides them the opportunity to stay there. These changes which can be accomplished by passage of the Employee Free Choice Act.

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[100] Mamorandum GC 08-08, May 15, 2008, *Report on First Contract Bargaining Cases.*
[101] Memorandum GC 07-07, May 2, 2007, *Seeking Compound Interest on Board Monetary Remedies*.
[102] Memorandum GC 06-82, August 15, 2006.
[103] Memorandum GC 08-05, April 17, 2008*, Report on the Mdiwinter Meeting of the ABA Practice and Procedure Committee of the Labor and Employment Law Section*, p. 6.