RENAISSANCE AT THE NLRB — OPPORTUNITY AND PROSPECT FOR NON-LEGISLATIVE PROCEDURAL REFORM AT THE LABOR BOARD

Charles J. Morris

I. BACKGROUND

This author seems to be fond of using the dog as a metaphor for the National Labor Relations Board (NLRB), but certainly not in a pejorative sense. A few years ago, referring to “The NLRB in the Dog House,” the question was asked: “Can an Old Board Learn New Tricks?” Now, once again, this author uses the canine analogy; though not because the Labor Board should be treated like a dog, but because the Board, like a dog, should be deemed man’s — and woman’s — best friend, or at least the working man’s and the working woman’s best friend. One might also compare the Board to a sleeping dog, for there are many who would prefer to let this sleeping dog lie. That is indeed an appropriate analogy, but not because the Board will continue to sleep. This sleeping dog will soon stir. The National Labor Relations Board will be heard again, and its bark will be loud and clear. After all, every dog has its day, and the Board’s day is about to come. Many industry watchers seem to believe that in today’s economy the NLRB has become virtually irrelevant to employee-management relations. Such an appraisal is not wholly inaccurate, at least as to the recent past and the temporary present. But there are good reasons to believe that the new Board — which will inevitably be called the Clinton Board — will eventually stir, and that stirring can be expected to leave a lasting imprint on the changing shape of American labor relations.

So far, the political process essential to making this happen is...
just beginning to move. President Clinton has not been in a hurry to turn his attention to the Labor Board, just as Presidents Bush and Reagan before him were also slow in making their appointments to the Board. Although their delays mostly concerned the hurdle of ratification by a Democratic Senate, such delays also represented an attitude of relative indifference to the importance of the NLRB. Now, partially as a result of President Bush's procrastination in making his Board appointments, President Clinton has inherited a veritable bonanza of appointments. The seat vacated by Member Cracraft in 1991 was never filled, Member Raudabaugh's term expired last December, Member Oviatt's seat is now vacant, and General Counsel Hunter's term will expire in November. As a consequence of this juxtaposition of vacancies, President Clinton will, within his first year in office, have an unprecedented opportunity to make four appointments that are likely to effect a rapid change in the direction of the Labor Board. Never before in the Board's history has a President in his first year in office been able to appoint a majority of Members to the NLRB. Clinton will not only appoint a Board majority, he will also appoint a new General Counsel.

The closest historical parallel occurred at the beginning of the Kennedy administration. President Kennedy was able to achieve an effective Board majority during his first year in office when one incumbent Board Member, Joseph Jenkins, resigned to accept a newly created Regional Director's position, thereby opening a second vacancy. The President's two appointees, Democrats Frank W. McCulloch and Gerald A. Brown, then joined incumbent Democrat John H. Fanning and thereby instantly produced a philosophically like-minded majority. But President Kennedy had to wait until his


3. As of pre-publication time, the present Board consists of only three members: James M. Stephens, Chairman; Dennis M. Devaney; and John N. Raudabaugh, recess appointment. The National Labor Relations Act, 29 U.S.C. § 153(a) provides for a Board of five members.

4. Although Member Raudabaugh's term expired in December of 1991, President Bush immediately gave him a recess appointment, which will expire when his successor is appointed, or at the end of the Congressional term if no appointment has been made.

5. His term would ordinarily have expired in August of 1993, but he chose to resign effective May 28, 1993.

third year in office before he could appoint a General Counsel. Although the Kennedy Board reversed a number of key substantive decisions, it did not devote any special attention to the improvement of Board procedures. Because the members' tenure occurred shortly after the enactment of the Landrum-Griffin amendments, the Board's primary concern involved substantive interpretation of new changes in the law and their subsequent review in the courts. Thus, procedural changes were not on the front burner at that time.

Following the Kennedy/Johnson Boards, President Nixon made appointments which again, predictably, altered the Board's direction; but it was two years before those appointments constituted a majority, and a half-year longer before he was able to appoint a new General Counsel. Following the Nixon/Ford Boards, when President Carter made his first appointment, appointee John C. Truesdale joined Democrat Fanning and Republican Howard Jenkins, Jr. to create a reasonably like-minded working majority. However, it was almost three years before Carter was able to appoint a General Counsel. Though it is true that the Carter Board effected a number of changes in the substantive law, that Board was conspicuously uninterested in making any procedural changes that would alter the way the Board operated. This author believes that such reluctance was due primarily to the procedurally conservative attitudes which the members of the Carter Board carried with them from their prior governmental service.

President Reagan took two years to appoint his majority of Board Members. He then had to wait three-and-a-half years to ap-
point a General Counsel. As all Board watchers will recall, because memory is still fresh, there were clearly two different Boards under the Reagan administration, which may be referred to as Reagan Board I and Reagan Board II. A number of dramatic and highly controversial substantive law changes, many of which were subsequently reversed or remanded by the courts, occurred during Reagan Board I; this was the period that coincided with the first two years of the chairmanship of Donald L. Dotson. Since then, the Board, i.e., both Reagan Board II and the Bush Board with which it merged almost imperceptibly, has generally pursued a middle-of-the-road approach to substantive labor law. During much of this period the Board was headed by Chairman James M. Stephens.

This recent Board broke new procedural ground when it initiated the process of substantive rulemaking by utilizing that device to establish appropriate bargaining units in the health care industry. That action, which was affirmed by the Supreme Court, inched the Board a little bit closer to achieving the full range of procedural potential available under the statute.

If the new Clinton Board and the new General Counsel perform like the proverbial new broom, they could very well move that Agency a good deal further toward reaching that procedural potential. Compared to proposed changes in the substantive law, however, procedural changes have generally received little attention, both in the past and in the present. However, it is the rational use of administrative and judicial procedures that offers the Board its most promising opportunity to provide meaningful protection for the employee rights which the Act is supposed to guarantee. However, the importance of substantive law changes should not be minimized. The new Board may thus be expected to take a fresh look at such subjects as those which Chairman Stephens recently listed as prob-


11. His period of service began on November 1, 1985, and he was appointed Chairman on January 7, 1988.


13. In its American Hosp. Ass'n decision, the Supreme Court recognized the appropriateness of using rulemaking to further this basic policy. Id. It said: "[I]n regard to the Act's underlying policy, the goal of facilitating the organization and recognition of unions is certainly served by rules that define in advance the portions of the work force in which organizing efforts may properly be conducted." Id. at 1543-44.
able subjects for change, including (1) no-solicitation rules, (2) interrogation of employees, (3) misrepresentation of facts during election campaigns, (4) employer provision of financial information as part of the collective bargaining process, (5) bargaining duties in the context of plant relocation, (6) interpretation of no-strike clauses in relation to sympathy strikes, (7) expanded definitions of protected concerted activity, and (8) the extension of Weingarten rights to the nonunion workplace. One could easily add other subjects to that list, such as further developments in the law involving section 8(a)(2) employee committees, the expected progeny of the Board's Electromation decision. Notwithstanding the importance of all those substantive issues, this author believes that the most significant and lasting changes that the new Board will be in a position to effectuate will be the adoption of certain procedural reforms, which are long-overdue.

Pay close attention to what this new Board and new General Counsel will do. Their actions — both substantive and procedural — will be more important in shaping the future patterns of American labor relations than anything Congress is likely to achieve during the early years of the new administration. The administration has announced the creation of a commission charged with examining the field of industrial relations and recommending changes in the nation's labor laws to encourage worker-management cooperation and higher productivity, and many voices have been heard in favor of major labor law reform. The news media and the labor relations
community have been obsessed with such proposed changes in statutory law, including for example, the efforts of organized labor to obtain repeal of section 14(b)\textsuperscript{20} and the efforts of some unionists to have Congress enact various Canadian practices, such as permitting certification upon a showing of a card majority without the necessity of an election and requiring first-contract arbitration when a newly certified union cannot obtain an agreement on a bargaining contract.\textsuperscript{21} And one must not overlook the quixotic efforts of Congressman Gunderson and Senator Kassebaum to reverse Electromation.\textsuperscript{22}

Despite this debate and activity about legislation, and despite a genuine need for labor law reform, it does not seem likely that any major labor legislation will attain passage any time soon, certainly not within the next two years. A possible exception may be the Striker Replacement bill, for which the AFL-CIO is exerting maximum efforts.\textsuperscript{23} That bill just might squeak through cloture. It is simply a fact of political life that most labor issues are too controversial, Republican filibusters are too likely, and the prospect of achieving sufficient consensus as to what major law changes will be deemed necessary or desirable is too remote. So with the possible exception of the Striker Replacement bill, the only changes in labor relations law and practice that we are likely to see in the near future are those changes which will emanate from the new Labor Board and the new General Counsel, not from the Congress.

Despite its flaws, there is an underlying strength in the National Labor Relations Act\textsuperscript{24} based on its premise, which is that the

\begin{itemize}
\item \textsuperscript{20} 29 U.S.C. § 164(b) (1988) (exempting parties in states with so-called “right-to-work” laws from the union security requirements of 29 U.S.C. § 158(a)(3) (1988)).
\item \textsuperscript{22} Electromation, Inc., 309 N.L.R.B. No. 163 (Dec. 16, 1992).
\begin{quote}
Reich reiterated President Clinton’s commitment for passage of striker replacement legislation [repealing rule of NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938)]. It is the intent of the administration, he said, to “restore a level playing field to ensure that workers aren’t retaliated against [for engaging in an economic strike]” and that collective bargaining is restored to the place it had in society before the 1980s.
\end{quote}
\item Id.
\end{itemize}
principles of democracy and freedom of choice should apply in the workplace. Unfortunately, however, the long term record of the Board in making those principles readily and reliably available to workers has been dismal. Most American employees either have never heard of the NLRB or they do not know what it does, and very few know how to initiate Board action. This means that for the most part, unions rather than individual employees file charges against employers under section 8(a) of the statute. When the Board finally does act, its remedial order is rarely strong or effective, and the process usually takes so long — more often measured in years rather than months — that the Board is perceived as a paper tiger. What American company is afraid of the NLRB? Certainly no employer is afraid of going to jail or even losing social standing in the community for having violated the National Labor Relations Act.25 Those unpleasant things do not result from the mild remedies which the Board ordinarily imposes.26 Posting cease-and-desist notices and occasionally paying a little back pay to some former employees is simply deemed the cost of doing business, or more specifically, the cost of maintaining a union-free environment. Realistically, workers rarely make unfettered choices as to whether they wish to be represented by a union or not. Under the law, the choice should be theirs,27 but in the real world of employment, that is not what usually happens.

The main problem has been the Board’s failure to enforce the law effectively and imaginatively, using all the tools which the statute provides. It would not serve the purpose of this Article to try to analyze why those tools have been so little used — whether because of a desire by some Board Members and some advocates to keep the Board relatively impotent, or because some Board members have simply succumbed to bureaucratic inertia, or because of other reasons. Whatever the reasons might have been in the past, this new
Board will have a unique opportunity to write upon an almost clean slate, an opportunity to implement Chairman Stephens' institutional boast in 1988, when he proclaimed in a public response to a chiding question:28 “Yes Charlie, This Dog Can Learn New Tricks.”29 Indeed, the Board has demonstrated that it can. The first trick which Chairman Stephens referred to was notice-and-comment rulemaking under the Administrative Procedure Act (APA), through which the Board promulgated a specific bargaining unit rule for the health care industry.31 This rule proved to be a phenomenal success. It was but the first of several possible new tricks.

If the new Board continues the learning process — as it most likely will — there are many procedural tricks ready for it to learn and use. If it will but seize the opportunity, a new metaphor will be appropriate. “Rebirth” should describe the process, for the Clinton Board will have ushered in a veritable “Renaissance” in the enforcement and administration of the National Labor Relations Act.

That Renaissance will undoubtedly include new substantive interpretations of the law and new models of remedial orders. It should also include certain changes in the way the Board operates — changes which may be characterized as non-legislative procedural reform. First, however, this Article will provide a short list of these procedural devices — which really should no longer be referred to as “tricks,” for most of them are based on highly respectable and long established legal procedures which the courts and other administrative agencies have used abundantly. Besides, it is to be hoped that it will soon be more fitting to call the Board a rejuvenated agency rather than an old dog.

Following is the list of procedural changes which are here proposed and discussed below:

1. Further expanding the use of substantive rulemaking.32
2. Reorganizing and streamlining representation procedures, including (a) broad promulgation, through APA

28. See supra note 1.
32. See infra notes 38-55 and accompanying text.
rulemaking, of a comprehensive set of appropriate bargain-
ing unit rules; (b) the use of show cause orders and sum-
mary judgment procedures in representation case ("R" case)
hearings; and (c) shortening the standard time-interval
between the direction of an election and the holding of that
election.33

3. Greatly increasing the use of section 10(j) injunctions
for temporary relief in the United States District Courts,
especially in section 8(a)(3) discharge cases, and also reor-
ganizing section 10(j) procedures in order to facilitate the
handling of such cases.34

4. Seeking and obtaining temporary injunctive relief
under sections 10(e) and 10(f) in the appellate courts when
the Board petitions for enforcement of many of its orders,
especially orders in section 8(a)(5) and 8(b)(3)
duty-to-bargain cases.35

5. Reorganizing the operation of the Division of Adminis-
trative Law Judges (ALJs), so that ALJs will function more
like traditional judges, including (a) assigning them to a
case immediately following the issuance of the complaint;
(b) providing them with authority to act upon all motions
relating to the case, including motions relating to discovery,
summary judgment, and initiation of section 10(j) interim
injunctive relief; and (c) further decentralizing their geo-
graphical home-base locations.36

6. Making discovery available when required, including
pre-complaint discovery.37

II. RULEMAKING

After only two years, the Board’s venture into rulemaking for
the health care industry38 has demonstrated how effective and effi
cient this Agency can really become in resolving questions concerning representation. Following are some of the things which a recent Bureau of National Affairs (BNA) study concluded about the health care industry's experience under the new rule. Surprisingly, it has not meant that unions necessarily win more elections. In fact, in acute care hospitals union representation continued to be rejected more frequently than accepted. But of greater importance to the viability of the Board as an effective agency, the study found that:

The rule has shortened the amount of time from when the petition is filed until the election is held except in cases where hearings are held, [and] the rule has achieved [the] NLRB's goal of eliminating delays and protracted hearings.

According to General Counsel Hunter, for the six-month period ending March 31, 1993, the “median length of time from the filing of the petition until the election [was only] 52 days;” and when hearings were held, instead of lasting for weeks or months, the “median number of days . . . was two.” Most of the observers interviewed by the BNA reported that the rule has generally worked the way the NLRB intended. And Chairman Stephens confirmed that the Board achieved its goal of eliminating delays and protracted hearings in the health care industry. The Clinton Board will now have the opportunity to build upon that experience, for rulemaking can be used for a variety of purposes.

The Board's second attempt at substantive rulemaking, a proceeding to implement the Supreme Court's Beck decision, is now pending before the Agency. This rule would require unions to post notices to inform represented employees of their rights regarding...
membership, non-membership, and limitations on the representa-
tional fees that a union may impose on non-members under a
union-shop agreement. The Clinton Board will not only have that
rule to decide but also another petition for rulemaking which this
author filed as an interested person in connection with the Beck
rule. This proposed rule would require all employers and unions
subject to the Board's jurisdiction to post notices advising employees
of the basic rights and duties under the Act and how they can con-
tact the NLRB, including an 800 telephone number. The notices
would be similar in format to the standard notices of other employee
rights routinely required by other federal agencies. Professor Sam-
uel Estreicher of New York University School of Law has joined in
this petition. The petition states in part:

Employees . . . are generally unaware of their rights under the Act;
indeed, it appears that most are even unaware of the existence of
the Board and have no knowledge of what it is supposed to do. This
is especially true of unorganized employees, notwithstanding that
they are granted important and extensive rights under section 7 of
the Act: to form, join, or assist labor organizations, to engage in
concerted activities for the purpose of collective bargaining or other
mutual aid or protection, or to refrain from any such activities. In
view of the vast numbers of unorganized employees and the general
misperception among unorganized employees that they possess few
if any rights of the kind protected by this Act, there is a greater
need for a general notice and posting requirement regarding section
7 and related unfair labor practices than for a specific notice re-
quirement applicable only to a relatively small number of employ-
ees who work under collective bargaining agreements where their
union and their employer have agreed to a union shop contract.

This is not to suggest that notice of Beck rights is not impor-
tant. Such notice is important, but the tail should not wag the dog.
All rights and duties under the Act are important, and all employ-
ees, employers, and unions should have ready access to information
about those rights.

47. The petition was filed pursuant to NLRB rule 29 C.F.R. § 102.124 (1992) & 5
48. Labor Law Professor Asks NLRB to Issue General Notice of Rights, Daily Lab.
Rep. (BNA) No. 28, at A-1 (Feb. 12, 1993). This petition may also be treated independent
of the Beck rule, inasmuch as it was so alternatively submitted.
49. See, e.g., bulletins required by the Wage and Hour Division of U.S. Department
of Labor and Equal Employment Opportunities Commission.
50. See supra notes 47-48.
If the Board is to reasonably succeed in making its process available, employees must know what their rights are and how to enforce those rights. In the forthcoming new age of labor-management relations, many different forms of legal labor organizations — many of which will not be initiated by traditional affiliated unions and may not even resemble traditional unions in their structure and function — may be organized and established. For this to occur, employees must know what their rights are and have a realistic expectation that the Board can protect them in the exercise of those rights. Those goals are attainable, but only if the Board and the General Counsel have the courage to make use of the full range of procedural devices that Congress provided in the statute.

APA rulemaking is one of those devices. With regard to a wide variety of substantive rules which the Board periodically announces and enforces under the statute, notice-and-comment rulemaking is a more suitable procedure than adjudication. However, because the Board has finally taken the plunge and ventured into the rulemaking process, it is not the intent of this Article to discuss the many reasons favoring that process. The advantages of the process have been fully treated elsewhere. For present purposes, a summary of some of those advantages suffices: Rulemaking (1) improves the Board’s data sources, (2) emphasizes policy rather than fact-specific situations, (3) disseminates critical information, (4) provides better articulation of reasons for a rule, (5) enhances predictability, (6) reduces litigation and administrative delay, (7) optimizes agency resources, (8) avoids the General Counsel barrier and a due process problem, (9) improves the appellate process, (10) fosters the prevention of unfair labor practices, (11) provides a rational means to achieve necessary interstitial lawmaking, and (12) assists in Congressional oversight.

It should be noted, however, that APA “notice and comment” rulemaking, as such, does not require the kind of overkill which the


52. For an explanation of each of these items, see this author's discussion in NLRB Rulemaking: Promise and Prospects, supra note 51, most of which are also discussed in Morris, supra note 1.
Board understandably chose to use for its first ventures into the rulemaking process, when it held prolonged and protracted hearings on the health care and the Beck rules. For most prospective rules, comment through written submissions may be sufficient, without the necessity of formal hearings. Although this Article is not intended to provide a compendium of suitable rulemaking subjects, now may be the appropriate time for interested parties among the Labor Board's constituency to begin compiling such lists. One such list, prepared by an ad hoc group of labor law professors at the urging of Board Member Raudabaugh, has in fact already been submitted to the Board.

III. REORGANIZING AND STREAMLINING REPRESENTATION PROCEDURES

What the Board has already done for representation cases ("R" cases) in the health care industry suggests various possibilities, including the proposals that follow, for additional means to rationalize and speed up the processing of most "R" cases. The use of these devices should result in quicker elections.

A. Promulgation of a Set of Bargaining Unit Rules

The Board should promulgate, through Administrative Procedure Act notice-and-comment procedures, a comprehensive set of appropriate bargaining unit rules. After more than half a century of "R" case precedents, almost all unit rules are now well-settled and no longer controversial. They could easily be compiled into a set of specific rules applicable to most industries and establishments. But because the employment world of business and industry is continually changing, no one should expect such rules to apply universally. Therefore, provision must also be made for exceptional cases, as was done with the health care rule. Where appropriate, entirely new

53. See Grunewald, supra note 38, at 297-301.
55. See infra Appendix for the text of that list.
56. See supra notes 38-44 and accompanying text.
bargaining unit rules should also be proposed. The Board might also use rulemaking to clarify the definitions of supervisors, thereby making it easier and faster to resolve supervisory placement issues when they arise in “R” case hearings.\(^{59}\)

\section*{B. Show Cause Orders and Summary Judgment Procedures}

There is no good reason why formal “R” case hearings should be held if there is no genuine issue of law or fact in controversy. The insistence on such hearings delays the representational process. Show cause orders and summary judgments, aided by previously promulgated notice-and-comment substantive rules for bargaining units and perhaps also for supervisory and employee placement, would greatly speed up the hearing and election process.\(^{60}\) Likewise, encouraging the parties to present evidence by pre-hearing affidavits, coupled with appropriate summary judgment type motions, could aid the decisional process in certain cases. Needless to say, there will always be cases where hearings will be required, but they should be the rare exceptions. And when hearings do occur, their resolution will proceed faster if undisputed facts have been disposed of summarily and if most of the legal issues have already been settled by rulemaking.

\section*{C. Shortening the Time-Interval Before Union Elections}

The Board sets the date of the election at least twenty-five days following the direction of election,\(^{61}\) often later. There is nothing magic about twenty-five days. The Clinton Board might wish to consider reducing that period, perhaps to seven or fourteen days; although the parties, as in stipulated and consent agreement elections, might voluntarily choose to agree to a longer or different pe-

\(^{59}\) Supervisory employees, as defined in § 2(11) of the Act, are excluded by § 2(3) from the Act’s coverage. 29 U.S.C. § 152(3) & (11) (1988).

\(^{60}\) See Schwartz, supra note 54, at 228. Professor Bernard Schwartz noted therein that “[a]s a general proposition, hearings [in administrative proceedings] are not required when no disputed issues are raised. In such situations, the rationale is that Congress does not intend administrative agencies to perform meaningless tasks.” Id. (citing and quoting National Indep. Coal Operators’ Ass’n v. Kleppe, 494 F.2d 987 (D.C. Cir. 1974), aff’d, 423 U.S. 388 (1976)).

The foregoing suggested changes in the manner in which the Board handles its “R” cases are primarily designed to alleviate problems of delay, but they would also tend to reduce legal costs both to the government and to the parties. That happened with the health care industry, and there is no reason why it cannot happen in other industries.

IV. IMPROVING “C” CASE PROCEDURES

As everyone who works with the NLRA knows well, “R” case procedures are intimately connected with unfair labor practice complaint (“C” case) procedures. Proper functioning of the representational process is ultimately dependent on the Board’s enforcement of its unfair labor practice jurisdiction. This symbiotic relationship between these two dissimilar procedures is critical to the mission of the Agency. With that in mind, certain aspects of the enforcement process of the Board’s unfair labor practice jurisdiction will be examined and some recommendations will be offered as a means to improve that process.

A. Increasing the Use of Section 10(j) Injunctions

It is both easy and popular to complain about the Board’s lack of self-enforcing orders and lack of punitive remedies. Although correction of those apparent deficiencies may be high on some legislative agendas, there is no sufficient reason why the Board should not make better use of alternative devices that are presently available. Chief among these are the injunctive remedies, principally sections 10(e) and 10(j) of the National Labor Relations Act. This Article will first examine section 10(j).

In contrast to section 10(l) mandatory injunctions, which are applicable to certain union unfair labor practices, primarily second-
ary boycotts, section 10(j)\textsuperscript{66} injunctions are discretionary. And 10(j) injunctions must be authorized by the Board rather than the General Counsel.\textsuperscript{67} In practice, the General Counsel initiates the process, requests the Board’s authorization, and makes the presentation to the district court on behalf of the Board.\textsuperscript{68}

Both sections 10(j) and 10(l) became part of the statute with the Taft-Hartley Amendments of 1947. Section 10(j) injunctions were little used during the early Taft-Hartley years,\textsuperscript{69} but gradually and cautiously the Board began to experiment with this device, and with much success. Two of the Board’s former General Counsels, Peter Nash and John Irving, deserve credit for publicizing the viability of the procedure.\textsuperscript{70} Both issued memoranda demonstrating the utility of this injunction and recorded their appraisals of the process. Irving’s analysis\textsuperscript{71} noted the high success rate in court and observed that the very act of filing for the injunction frequently produced a settlement not only of the section 10(j) issue, but also the underlying unfair labor practice case.\textsuperscript{72} Such settlements were occurring in cases where the respondent had previously shunned the Region’s efforts to obtain a settlement.\textsuperscript{73} Irving’s study covered a five-year period, from mid-1975 through mid-1979, and showed a success rate of eighty-one percent.\textsuperscript{74} That commendable rate has actually improved in recent years. In the latest five-year period for which published data are available, the success rate climbed to eighty-seven percent,\textsuperscript{75} and General Counsel Hunter’s office has advised that for

\textsuperscript{67} 29 U.S.C. §§ 153(d), 160(j) & (l) (Supp. 1991). See CASEHANDLING MANUAL ¶¶ 10310, 10310.1, 10310.2-6 (June 1989) [hereinafter CASEHANDLING MANUAL]. See also NORRIS & SHESHIN, supra note 26, at app. 825, 826.
\textsuperscript{68} CASEHANDLING MANUAL, supra note 67, at ¶ 1031.1.
\textsuperscript{69} Franklin McCulloch, New Problems in the Administration of the Labor-Management Relations Act: The Taft-Hartley Injunction, 16 S.W. L.J. 82, 94-95 (1962).
\textsuperscript{71} See Irving, supra note 70.
\textsuperscript{72} Id. at 4 n.3.
\textsuperscript{73} Id. at 5. Settlements are deemed of major importance to the functioning of the Board. For a further discussion of settlement procedures and requirements, see CASEHANDLING MANUAL, supra note 67, at ¶¶ 10124-10194.
\textsuperscript{74} This success rate recognizes cases where the Board’s 10(j) objectives were accomplished in whole or in substantial part.
\textsuperscript{75} The 87% success rate is compiled from statistics provided in NLRB Annual Reports over the past years. See 51 NLRB ANN. REP. 169 (1988); 52 NLRB ANN. REP. 149 (1989); 53 NLRB ANN. REP. 149 (1990); 54 NLRB ANN. REP. 149 (1991); 55 NLRB ANN.
the 1992 fiscal year, the Board was successful in ninety-one percent of its 10(j) cases.\footnote{76}

Although the statistics noted above are impressive, they do not evidence satisfactory usage, for they are applicable to only a few of the cases which could and should have been filed under 10(j). In 1979, the last year of General Counsel Irving's tenure, the Board filed seventy-three section 10(j) actions. In 1992, only twenty-four such petitions were filed.\footnote{77} With proper procedures and the necessary will, the Board could multiply its number of filings of meritorious section 10(j) injunction cases several-fold.

These injunctions may be used, and in fact are used in many types of cases, against both employers and unions, where the appropriate standards for temporary relief pending formal Board decision can be met.\footnote{78} They should be used almost as standard practice in

\begin{flushright}
\end{flushright}

\footnote{76} Oct. 15, 1992 NLRB Memorandum from Associate General Counsel Robert E. Allen to David B. Parker, Director, Division of Information.

\footnote{77} Id.

\footnote{78} CASEHANDLING MANUAL, supra note 67, at ¶ 10310.2 provides the following guidelines for the utilization of § 10(j):

There is no statutory delineation of criteria governing the use of Section 10(j), nor has case law developed a definitive, governing formula. However, experience has developed some guidelines that are helpful. The following factors have been considered in determining whether proceedings under Section 10(j) would be appropriate in a given case:

\begin{enumerate}
\item The clarity of the alleged violations
\item Whether the case involves the shutdown of important business operations that, because of their special nature, would have an extraordinary impact on the public interest
\item Whether the alleged unfair labor practices involve an unusually wide geographic area, thus creating special problems of public concern
\item Whether the unfair labor practices create special remedy problems so that it would probably be impossible either to restore the status quo or effectively dissipate the consequences of the unfair labor practices through resort solely to the regular procedures provided in the Act for Board order and subsequent enforcement proceedings
\item Whether the unfair labor practices involve interference with the conduct of an election or constitute a clear and flagrant disregard of Board certification of a bargaining representative or other Board procedures
\item Whether the continuation of the alleged unfair labor practices will result in exceptional hardship to the charging party
\item Whether the current unfair labor practice is of a continuing or repetitious pattern
\item Whether, if violence is involved, the violence is of such a nature as to be out of control of local authorities or otherwise widespread and susceptible of control by 10(j) relief.
\end{enumerate}

These factors are not all inclusive.
It is an unfair labor practice under 29 U.S.C. § 158(a)(3) (1988) for an employer to discriminate against an employee “in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization.”


An example of a case involving only a single discharged employee is Zipp v. Shenanigans, 106 L.R.R.M. (BNA) 2989 (C.D. Ill. 1980).

See, e.g., Eisenberg v. Wellington Hall Nursing Home, 651 F.2d 902 (3d Cir. 1981) which involved the discharge of employees following union certification but prior to any official bargaining session.

See, e.g., Kaynard v. Palby Lingerie, Inc., 625 F.2d 1047 (2d Cir. 1980).

651 F.2d at 907. See also Pascarell v. Vibra Screw, 904 F.2d 874, 878-79 (3d Cir. 1990); Aguayo v. Tomco Carburetor Co., 853 F.2d 744, 749 (9th Cir. 1988). The purpose of this Article is not to discuss the finely tuned differences among some of the Circuits regarding § 10(j) standards. It suffices to note that under any of the prevailing standards, most of the discharge cases here described would merit temporary injunctive treatment.

Indeed, a violation of § 8(a)(3) is automatically deemed a violation of § 8(a)(1) according to 29 U.S.C. § 158(a)(1) (1988), which provides that it is an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.” Section 7 guarantees, inter alia, employees the right to “form, join, or assist labor organizations.” 29 U.S.C. § 157 (1988). From its earliest days, the Board “has held that a violation by an employer of any of the four subdivisions of Section 8, other than subdivision one, is also a violation of subdivision 1.” 3 NLRB ANN. REP. 52 (1939).
should consider such factors as the need for an injunction to prevent frustration of the basic remedial purpose of the act and the degree to which the public interest is affected by a continuing violation as well as more traditional equitable considerations such as the need to restore the status quo ante or preserve the status quo.86

Fear of discharge is a powerful influence on employee conduct. The fact that the Board may eventually order reinstatement and backpay to discharged union adherents several years after the event, and long after the organizational campaign has been defeated, leaves unremedied the immediate impact of the discharge on fellow employees in the bargaining unit. In most cases, discharge for union activity presents the classic fact situation requiring injunctive relief, where "it would probably be impossible either to restore the status quo or effectively dissipate the consequences of the unfair labor practices"87 by conventional remedial action following a Board order.

The potential of section 10(j) has hardly been touched. The Board's ultimate success in obtaining backpay and reinstatement offers in thousands of cases each year, albeit usually after lengthy delay and after the organizational effort has long been dissipated, provides some inkling of the vast number of cases, probably several hundred, which should have merited section 10(j) treatment.88

There are two main reasons for the low number of section 10(j) filings: First, there has never been an institutional commitment to broad use of the injunction remedy to protect the organizational process at its earliest stages. Second, there has never been a coordinated effort between the Board and the General Counsel to establish an expedited mechanism for the filing of such cases.89 Courts have frequently criticized the Board for its foot-dragging in section 10(j) cases, and some courts have even indicated that the Board's delay in filing the 10(j) petition is a factor which may be considered in determining whether issuance of the injunction is "just and proper."90

86. 534 F.2d 735, 744 (7th Cir. 1976).
87. 1 NLRB CASEHANDLING MANUAL ¶ 10310.2(d) (June 1988).
88. See, e.g., 55 NLRB ANN. REP. 143-44 (1992), Chart No. 9 & Table 4, at 14.
89. For an outline of current § 10(j) procedures, see CASEHANDLING MANUAL, supra note 67, at ¶¶ 10310-10312 (June 1989).
90. See Gottsfried v. Frankel, 818 F.2d 485 (6th Cir. 1987); Solien v. Merchants Home Delivery Serv., 557 F.2d 622 (8th Cir. 1977); Boire v. Pilot Freight Carriers, Inc., 515 F.2d 1185 (5th Cir. 1975). But according to the court in Gottfried v. Frankel, delay by itself is not a determinative factor. 818 F.2d at 495. See also Aguayo v. Tomco Car-
In one such case, Boire v. Pilot Freight Carriers, Inc., the Fifth Circuit, wrote that "[a]lthough the time span between the commission of the alleged unfair labor practices and filing for § 10(j) sanctions is not determinative . . . , it is some evidence that the detrimental effects of the discharges have already taken their toll on the organizational drive."

The section 10(j) injunction is a powerful instrument. Properly used, it can be the means by which the Board demonstrates to American workers that its process is adequate to protect their rights under the Act. It is disgraceful that in the American system of justice, discharges for the purpose of discouraging union membership — section 8(a)(3) cases — continue to be the most numerous category of cases filed with the Board. Section 8(a)(3), unlike other non-discrimination-in-employment laws (such as Title VII of the Civil Rights Act) has had little deterrent effect. The thousands of such cases filed every year suggest how widespread is the fear which many nonunion employees harbor about exercising section 7 rights. In contrast to the public sector, it is a fact of life in the private sector under the jurisdiction of the NLRB that most employees are afraid to openly express any pro-union sentiments or to engage in the most benign forms of supposedly protected concerted activity. That is not the case, however, under the Railway Labor Act (RLA), because airline and railway employees do have direct access to federal district court injunctions to protect them from discharge for union activity, which seems to have made a difference in employer behavior under that statute.

The Board could do much to change the state of fear and insecurity among non-union employees by proceeding to protect them with the 10(j) instrument that Congress especially provided for "cire-
cumstances [that] call for [injunctive] relief." As General Counsel Irving pointed out many years ago, this device "provides a means for assuring that the remedial purposes of the Act will not be frustrated by the delays inherent in the statutory framework of litigation." But because this remedy is still used only sparingly, too many employers, as the Board's impersonal statistics indicate, continue to use the weapon of discharge — whether by action or by threat, implied or overt — to restrain free expression of employee choice of representation.

Despite the relatively low number of section 10(j) cases, years of experience with that remedy amply demonstrate its effectiveness. Clearly, most employers in the midst of a union organizational campaign do not want to be forced by a federal court to reinstate any pro-union employee, for that action would appear to affirm the union's position. The known availability of the section 10(j) remedy and the Board's willingness to use it would thus have a substantial deterrent effect. If the Board would but demonstrate a consistent policy of filing such cases, greater respect for both the law and the Board would be bound to follow. There would be fewer discharges for union activity, fewer unfair labor practice charges would be filed, and when complaints were issued, settlements would be more likely to occur.

Furthermore, when a district court decides to grant interim relief, a repeat unfair labor practice hearing before an Administrative Law Judge (ALJ) might never need to be convened. But if a hearing is convened, it would probably be relatively short because of the prior presentation of evidence in the district court. As previously noted, the entire unfair labor practice case is often settled as a direct result of the filing of the section 10(j) petition. Consequently, once this revised and expanded section 10(j) policy is established, there should be fewer, not more, section 10(j) actions. Therefore, the courts would not be flooded with such cases.

How can this new policy be achieved? The first requirement must be an institutional intent to make full use of the section 10(j) remedy. Hopefully, the Clinton Board and General Counsel will have such an intent. The second requirement must be to establish

98. See Irving, supra note 70, at 1.
99. See supra notes 70-71 and accompanying text.
100. See supra note 70 and accompanying text.
an appropriate procedure to expedite the section 10(j) process. That procedure might consist of the Board undertaking the following actions:

1. Establish and widely disseminate the new standards for the filing of section 10(j) injunctions.

2. On the printed unfair labor practice charge-form, provide specific questions to determine whether interim injunctive relief might be required.

3. Provide for expedited treatment of all potential section 10(j) cases.

4. Provide for an express delegation of authority to the Regional Directors to handle decisions and judicial filings relating to section 10(j) cases, subject to routine but full notification to the Board, so that the Board will be exercising its actual statutory discretion either to file or not to file.

5. Provide a rotating three-Member Board panel on a continuing stand-by basis and designate one Member, also on a rotational basis, to be primarily responsible for the 10(j) docket.

6. Provide a means — but not an easy bypass — for the charging party to petition the Board directly for the exercise of section 10(j) jurisdiction whenever the General Counsel or Regional Office fail to move promptly enough on such cases, or when the General Counsel declines to recommend section 10(j) relief when such relief is appropriate. Under the statute, the Board, not the General Counsel, must make the final determination of whether or not to file for such relief.

7. Authorize Administrative Law Judges to recommend section 10(j) relief when evidence of the need for such relief is demonstrated, either on an interim basis while the case is pending at the pre-hearing or hearing stage, or as part of the ALJ decision following the conclusion of the hearing.

8. Provide procedures for ALJs to recommend section 10(j) injunctions when the evidence before them demonstrates the need for such interim relief.

The foregoing procedures and standards, or the equivalent, should replace the present loosely structured section 10(j) process.\textsuperscript{101} With a combined effort of the Board and the General Counsel to

\textsuperscript{101} Casehandling Manual, supra note 67, at ¶ 10310-12 (June 1989).
streamline the section 10(j) process, these cases could move almost as fast as section 10(l) mandatory injunction cases.\textsuperscript{102} It is simply a question of institutional intent.

B. Using Section 10(e) and 10(f) Injunctions in the Appellate Courts

Section 10(e) of the Act provides the Board with authority to petition the courts of appeals for enforcement of its orders.\textsuperscript{103} Cross-petitioning for enforcement is also available under section 10(f)\textsuperscript{104} when the respondent initiates appellate action to reverse the Board's order. Both subsections authorize the court to issue "such temporary relief or restraining order as it deems just and proper."\textsuperscript{105} Efficiently employed, this provision could serve some of the same purposes as an appeal bond or a self-enforcing administrative order. The prospect of an injunction pending exhaustion of the appellate process would tend to discourage invocation of unnecessary and delaying appellate review. Unfortunately, however, the Board rarely seeks section 10(e) injunctive relief.

The device has been in the statute since the original Wagner Act of 1935, but it has been used in relatively few cases. Writing in 1962, then Board Chairman Frank W. McCulloch commented as follows on the provision:

\begin{quote}
The Board has used the 10(e) injunctive remedy very sparingly, on an average, not more than three or four times a year . . . .

The Board has had a good record of success in the courts, particularly since the enactment of Taft-Hartley. It has been suggested
\end{quote}

\textsuperscript{103} 29 U.S.C. § 160(e) (1988) provides that:
The Board shall have power to petition [the court of appeals] for the enforcement of [its] order and for appropriate temporary relief or restraining order . . . . Upon the filing of such petition, the court . . . shall have power to grant such temporary relief or restraining order as it deems just and proper.
Id.
\textsuperscript{104} 29 U.S.C. § 160(f) (1988) provides that:
Any person aggrieved by a final order of the Board . . . may obtain a review of such order [in a court of appeals] . . . . Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.
Id.
that more extended use be made of this injunctive power, particularly against those activities which could be enjoined under sections 10(l) and (j).\textsuperscript{106}

Apparently there has been no extensive use of the section 10(e) injunction except perhaps for section 10(l) and section 10(j) cases. The Board’s reporting about such cases provides little information. Although the Annual Reports highlight, with detailed discussion, developments under section 10(l) and section 10(j), no such treatment is given to injunction requests involving section 10(e) or section 10(f).\textsuperscript{107} However, since fiscal year 1963, the Board’s Annual Reports have included\textsuperscript{108} raw statistics which show the number of requests for section 10(e) injunctions filed each year and their dispositions. Because no other information is provided, one cannot determine how many such cases were simply continuations of section 10(j) or section 10(l) injunctive relief, for those injunctions would otherwise expire automatically when the Board issues its order.\textsuperscript{109} The raw statistics indicate only that from 1963 through 1990, a period of thirty-eight years, injunctive relief under section 10(e) was sought in eighty-five cases and that relief was granted in forty-six cases; five cases were settled, relief was denied in thirty-one cases, and the request was withdrawn in three cases.\textsuperscript{110} The last Annual Report record of section 10(e) usage was in 1986, when such relief was sought and granted in two cases.\textsuperscript{111}

The Board may have been discouraged by the standards enunciated by the Fourth Circuit in \textit{NLRB v. Aerovox Corp}.\textsuperscript{112} The court

\begin{itemize}
\item \textsuperscript{106} See McCulloch, \textit{supra} note 69, at 91.
\item \textsuperscript{107} This author has found no record of injunctive relief ever being invoked under § 10(f).
\item \textsuperscript{108} See Table 20 of Volumes 28-55 NLRB ANNUAL REP.
\item \textsuperscript{109} 29 U.S.C. § 160(l) (1988) expressly provides that the injunctive relief may be sought “pending the final adjudication of the Board with respect to such matter.” The courts have similarly limited injunctions under 29 U.S.C. § 160(j) (1988). See Levine v. Fry Foods, Inc., 596 F.2d 719 (6th Cir. 1979); Barbour v. Central Cartage, Inc., 583 F.2d 335 (7th Cir. 1978); Johansen v. Queen Mary Restaurant Corp., 522 F.2d 6 (9th Cir. 1975).
\item \textsuperscript{110} This figure represents a compilation of figures from Table 20 of Volumes 28-55 NLRB ANNUAL REP.
\item \textsuperscript{111} See Table 20 of Volume 51 NLRB ANNUAL REP. 269 (1988).
\item \textsuperscript{112} 389 F.2d 475 (4th Cir. 1967). In \textit{Aerovox}, management refused to bargain with the newly elected union. The NLRB subsequently filed an order requiring such bargaining. While further court proceedings were pending, the Board moved for an order under § 10(e) requiring the company to bargain with the union. The court denied such relief based on the Board’s failure to show that the union’s strength would be undercut while await-
there postulated two prerequisites for 10(e) interim relief: (1) There must be reasonable cause to believe that the Act has been violated, and (2) “[i]t must appear from the circumstances of the case that the remedial purposes of the Act will be frustrated unless relief pendente lite is granted.” This second requirement may simply necessitate that the Board engage in serious advance planning for such relief, which evidently rarely happens. Furthermore, the Board’s failure to seek interim relief at the district court level under section 10(j) may have an adverse effect when a belated effort is made to obtain the same kind of relief from the appellate court, for it stands to reason that if early interim relief was required, the Board should have sought it at the district court level under section 10(j).

In 1976, then General Counsel John Irving observed that “arguably preliminary relief should be the norm, rather than the exception, when there is non-compliance with a Board order pending the completion of court of appeals enforcement or review proceedings.” However, he recognized the general reluctance of some of the courts of appeals to grant such relief. Irving disagreed with the view of the Fourth Circuit in the Aerovox case, that the standard for section 10(e) interim relief should be the same as that for section 10(j) relief. Instead, Irving reasoned that because of the limited review permitted by the “substantial evidence” review standard and the requirement of section 10(g) that unless specifically ordered by the court, commencement of enforcement or review proceedings in the appellate courts does not operate as a stay of the Board’s order unless specifically ordered by the court, “the Board’s decision is entitled to a presumption that it is enforceable, and that the standard for 10(e) relief should not only be different, but less rigid, than the standard for 10(j) relief.” Because of the paucity of decisions
under sections 10(e) and (f), a broadly applicable standard for relief under those provisions cannot yet be defined.121

Regardless of any perceived difficulty in obtaining section 10(e) relief, Congress made it available. Therefore, in every appropriate case, the Board should prepare the necessary record to obtain this temporary relief in order to cover the lengthy period involved in obtaining final appellate enforcement and review. Although such injunctions may be suitable for many types of cases, they ought to be sought in practically every section 8(a)(5)122 and 8(b)(3)123 case.

In some cases, as part of the Board’s decision, the Board may deem it appropriate to effect a partial remand to the ALJ who originally heard the case so that specific fact-findings can be made to establish need, if indeed such need exists, for this special remedy. In other cases, however, it may be more appropriate for such evidence to be submitted to the ALJ prior to the time the case is submitted to the Board for review, with the ALJ making a recommendation as to the propriety of interim relief.124 Such recommended relief might take the form of either a section 10(j) injunction or a section 10(e) injunction, contingent upon Board review and appellate enforcement, or both. Regardless of the sequence of the procedure, it will be advantageous to have the same ALJ hear all of the issues, including issues relating to interim relief.125

John Irving understood that “[o]vercoming the reluctance of the courts to grant 10(e) relief would be a significant step in achieving the remedial purposes of the Act.”126 That is still true. Only the fault may lie more with the Board than with the courts. The Board should make a determined effort to present section 10(e) injunction requests in many more of its enforcement cases, regardless of the standards applied by the courts of appeals. And if the Board were also to speed up its own case-handling process, the courts might be more amenable to the granting of section 10(e) injunctive relief.

its which usually accompanies a Board decision provides additional basis for a temporary order to bargain [under § 10(e)].

121. See 2 Morris, supra note 7, at 1652.
124. See infra text accompanying notes 132-33.
125. The ALJ who hears the unfair labor practice case is the most knowledgeable objective person concerning the facts of the case, therefore he or she could make additional fact-findings without requiring any new education about the basic nature of the case.
126. See Irving, supra note 115, at 381.
C. Reorganizing Administrative Law Judges’ Operations

According to the Board’s last published statistics, the median time for obtaining an ALJ’s decision from the filing of the charge to the issuance of the decision is one year, or more specifically, 357 days. 127 Almost all of that time — 309 days — occurs following the issuance of the complaint. 128 That process could be expedited if ALJs were permitted to function more like traditional judges.

In its adjudication of unfair labor practices, the Board is a court. It is as much a court as the United States Tax Court. 129 Both are Article I legislative courts, 130 but the Tax Court is perceived as a court, whereas the Board is not. Administrative Law Judges used to be called Trial Examiners; but now calling them “judges” is not enough to improve their function. They should also perform more like judges, at least to the extent allowed by the Act. There are sound reasons to believe that the changes in ALJ procedures here proposed will improve the Board’s efficiency and enhance its status.

1. Assigning ALJs to a Case Immediately
   Following the Issuance of the Complaint

As soon as a complaint issues, the case should be assigned to a designated ALJ. This assignment could be changed later, if necessary, but to the extent possible the same ALJ should handle every motion and ruling made on the assigned case until the case reaches the Board, and possibly even afterward, when and if the Board remands any matter for further hearing. Under the present practice, the ALJ assignment is not made until shortly before the case is heard. The parties might not learn the identity of the ALJ until the opening of the hearing. 131 Pre-trial requests or motions are ad-

---

128. Id.
129. 29 U.S.C. § 160 (1988). The Board is empowered to issue complaints and to conduct hearings regarding unfair labor practices in accordance with the rules of evidence and procedure applicable in U.S. District Court.
131. NLRB MANUAL, DIV. OF JUDGES ¶ 17112.1 (June 1984), expressly provides that “[p]arties have no right to advance notice of designation.” The formal notice of hearing in a “C” case provides the time and place but not the designation of the ALJ. CASEHANDLING MANUAL, supra note 67, at ¶ 10267.
dressed and handled by faceless Regional Office personnel, faceless personnel in the Washington, San Francisco, or Atlanta offices of the Administrative Law Judges, or, in the case of motions for summary judgment or dismissal, directly by the Board itself.\textsuperscript{132}

2. Providing ALJs With Authority to Act Upon All Motions Relating to the Case, Including Motions for Discovery, Summary Judgment, and Initiation of Section 10(j) Interim Injunctive Relief

Pre-hearing conferences, in-person and/or by tele-conferencing, should be standard practice in all cases. The parties should know from the beginning that they are in a court in which a real, live judge is on call and available to hear their motions, their claims, and their arguments. Such access, particularly for early pre-trial conferences, with the attendant disclosure of facts, exchange of documents, and opportunities for stipulations, should encourage settlements and, at the very least, shorten the formal hearings. A traditional motion-practice should be encouraged, with ALJs giving consideration to such matters as discovery, summary judgment — including partial summary judgment — and interim relief. As suggested earlier, the ALJ should respond to motions for invocation of section 10(j) recommendations either before, during, or after the evidentiary hearing, because critical facts might then be available which were either not previously available or were not sufficiently recognized when the complaint was issued.\textsuperscript{133} The Board should give much deference to an ALJ's recommendation for interim relief, for it would be coming from the very person who, at that stage of the proceeding, is in the best position to make an objective assessment of the need for extraordinary remedial action. The median time for issuance of ALJ decisions, following hearings, is 155 days, and after that, it is an additional 314 median days to the Board's decision.\textsuperscript{134} In other words, more than a year and a half may pass before the case will reach the enforcement stage. Because of this lengthy time frame, in many cases, interim relief will be appropriate.

\textsuperscript{132} See NLRB Rules and Regulations, Series 8, 29 C.F.R. \S 102.24-.25 (1992).
\textsuperscript{133} See ¶ 7 in proposed changes in \S 10(j) procedures, supra note 101.
\textsuperscript{134} 55 NLRB ANN. REP. 196 (1992), app. Table 23.
3. Further Decentralizing ALJ Geographical Home-Base Locations

So that the parties will have reasonable access to these judges while their case is pending, ALJ home-base locations should be widely decentralized. Individual ALJs should be permanently located, and hence reside in, the major metropolitan areas where NLRB services are frequently needed; although individual ALJs would be subject to both temporary and permanent geographical transfer to meet the needs of the Agency's docket. The parties and their attorneys, will thus have easy access to the judges, their chambers, and their courtrooms, all of which should facilitate the case-handling process.

Under the foregoing plan of reorganization, ALJs would not only seem more like traditional judges, they would likely act more like traditional judges. Such procedures should result in speedier and more efficient disposition of the Board's “C” case docket.

D. Making Discovery Available When Required

Attorneys who do not regularly practice before the Labor Board may be surprised to learn that this Agency prefers to operate without any pre-trial discovery, either by the General Counsel's attorneys (except on a very limited basis) or by the attorneys for the parties. This author believes, however, that interrogatories, depositions, prehearing subpoenas, and other discovery devices, when used under proper supervision, could facilitate the enforcement pro-

---

135. “For administrative convenience the administrative law judges are [currently] based in Washington, D.C., San Francisco, New York City, and Atlanta.” Norris & Shershin, supra note 26, at 35.

136. Such transfers would normally be made by the Chief ALJ.

137. Pre-complaint investigative subpoenas may be used by the General Counsel (through the Regional Office) in limited circumstances, 2 NLRB CASEHANDLING MANUAL ¶ 11770-11770.2 (June 1989), but “[t]here is no comparable right to an investigative subpoena available to parties other than General Counsel.” Id. at ¶ 11770.

138. NLRB MANUAL, DIV. OF JUDGES ¶ 17230.1 (June 1984) which states: “[T]he Board's procedures make no provision for pretrial discovery depositions . . . and pretrial depositions are not available for such purposes.” (citations omitted). Paragraph 17228 of the Manual also notes: “[U]se of depositions for pretrial discovery is not authorized by Board's Rule 102.30.” See also Sackett Transportation, 169 N.L.R.B. 346 n.3 (1968). In addition, “depositions may not be used merely for purposes of pretrial discovery. They may be taken only for good cause shown after issuance of complaint.” CASEHANDLING MANUAL, supra note 67, at ¶ 1052.1.
cess. Post-complaint supervision could be provided by the ALJ assigned to the case, and pre-complaint supervision by the General Counsel's internal procedures.

The ordinarily unreviewable discretion of the General Counsel to issue complaints and dismiss unfair labor practice charges can be justified under strict due process standards only if all reasonable efforts are made by the General Counsel — or are made available to the charging party — for gathering evidence relating to an unfair labor practice charge that has been filed in good faith. Discovery can be a means to ferret out evidence that the charging party or the Regional Attorney has reason to believe is available but is unobtainable without compulsory process.

Discovery will also facilitate settlement of cases. A high settlement rate is consistent with vigorous enforcement, but only settlements that reflect the likelihood of successful litigation are fully consistent with the objectives of the Act. Achieving such settlements requires a realistic appraisal of available evidence by both sides. Discovery can thus lead to settlements, and it may also lead to shorter hearings.

The often expressed fear that employees may be intimidated through depositions is groundless, for discovery can be controlled and protected; indeed, it is important that it be limited to genuinely good-cause situations. Furthermore, employee witnesses who testify in depositions are more visible and thus less likely to be targets of discrimination because of that visibility. However, it is here emphasized that discovery should not be granted without restrictions, for the process can indeed be abused. But discovery can be regulated and protected by requiring a showing of a realistic need for the discovery device sought. Administrative Law Judges are the logical persons to provide most of the post-complaint oversight and protection. With their prompt assignment to cases immediately following issuance of the complaint, they would be in an ideal position to control the use of discovery and prevent its abuse.


140. See supra text accompanying note 131.
V. CONCLUSION

Since hope springs eternal, one can foresee a relatively unified collegial body, i.e. the Members of the Board, acting in cooperation with the General Counsel, making significant strides toward rationalizing the Board's procedural processes. Such efforts would indeed produce a refreshingly effective Agency, one which is capable of providing American workers with the kind of protection of their rights that Congress intended. If that should happen, Americans generally, including employers, will in the long-run stand to benefit.

High productivity by American workers will be a key element in the nation's efforts to achieve effective competitiveness in the world marketplace. But high productivity cannot be sustained without recognition of the essential dignity of the worker in the employment system. But whether for purposes of competitive international trade, or for purely domestic manufacturing or services, jobs and job-holders in a vibrant democratic economy are entitled to be treated with dignity and respect. Democratic values should be the rule rather than the exception in the American workplace. The National Labor Relations Act, whether in its present form or with the addition of amendments, can be the natural medium under which new and improved forms of worker participation and labor-management cooperation can evolve. A Labor Board fully committed to the basic principles of that Act and willing to utilize the enforcement and remedial tools which Congress has already provided — and may even further provide in the future — can play an important and positive role in the system. Such a Board could help the parties to shape new or modified organizational forms, where the emphasis would be on cooperation and participation rather than polarization and animosity. Such forms must be carefully developed and nurtured in relations between workers and management, between workers and their unions when union representation has been chosen, and among workers themselves. Hopefully, the Clinton Board will rise to the occasion and achieve the Renaissance which is now possible.

This Article has focused on only one phase of that Renaissance, the non-legislative procedural reform which is waiting to happen. The other parts of the Renaissance — the correction of certain substantive interpretations of the law and the development of more effective remedial orders — are also of critical importance to the
Board's statutory mission. But inasmuch as those subjects have frequently been addressed elsewhere, this Article only addresses the procedural part, because that is the “sleeper” in the Board's future.