

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 14-03

April 30, 2014

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

FROM: Richard F. Griffin, Jr., General Counsel

SUBJECT: Affirmation of 10(j) Program

An important priority of mine is to ensure that we continue our efforts to obtain immediate relief in those unfair labor practice cases that present a significant risk of remedial failure. Section 10(j) of the Act provides the tool to ensure that employees' Section 7 rights will be adequately protected from such failure. During my tenure as General Counsel, I intend to aggressively seek 10(j) relief where necessary to preserve the status quo and the efficacy of final Board orders, and I thank you for your continued dedication and effort in working to achieve this goal.

I am pleased to follow the most recent General Counsel and Acting General Counsel in emphasizing the need to seek 10(j) relief in particular types of cases. Specifically, in 2006, former General Counsel Meisburg instructed Regional Offices to "focus particular attention on remedies for violations that occur during the period after certification when parties are or should be bargaining for an initial collective bargaining agreement."¹ Similarly, former Acting General Counsel Solomon re-affirmed that priority, instructing Regional Offices in 2011 to "continue to consider the propriety of 10(j) relief in all first-contract bargaining cases,"² and he also initiated a program "to ensure that effective remedies are achieved as quickly as possible when employees are unlawfully discharged or [become] victims of other serious unfair labor practices because of union organizing at their

¹ Memorandum GC 06-05, "First Contract Bargaining Cases," April 19, 2006.

² Memorandum GC 11-06, "First Contract Bargaining Cases: Regional Authorization to Seek Additional Remedies and Submissions to Division of Advice," February 18, 2011, p. 1 n.2.

workplaces,” establishing specific timelines to streamline processing of those cases.³

These initiatives have led to extremely positive results. For instance, in fiscal years 2012 and 2013, we sought 10(j) relief in 19 first-contract bargaining cases and obtained bargaining orders in 16 of those cases for an average success rate of 84%. During the same two fiscal years, we sought 10(j) relief in 39 cases involving discharges during an organizing campaign with an average success rate of 80%. As a result of your collective efforts, the Agency obtained offers of reinstatement for 454 discharged employees and a total of \$5,410,534 in backpay and interest from ULP and 10(j) litigation and settlements during those two fiscal years. and we are on track for similar results in fiscal year 2014. You can be justifiably proud of this significant record of accomplishment on behalf of America’s workers.

I fully endorse the initiatives of my predecessors and, based on the prior successes, I expect to obtain similar results. Regions should continue to adhere to the policies enunciated in Memoranda GC 06-05, 11-06, and 10-07, and send a recommendation to the Injunction Litigation Branch regarding the need for 10(j) relief in all meritorious cases involving a discharge during an organizing campaign or arising during negotiations for a first contract. In addition to considering immediate injunctive relief, Regions should also seek specific remedies in their administrative complaints and 10(j) recommendations that will most effectively restore the pre-violation conditions and ensure that employee Section 7 rights are restored.⁴ Effective enforcement of the Act requires that we protect employees’ right to exercise their free choice regarding unionization, to participate in an election free of coercion, and to have their elected representative negotiate a first contract unencumbered by the impact of unfair labor practices. Cases involving a discharge during an organizing campaign or arising during negotiations for a first contract frequently require the most expeditious relief to ensure that employees are not irreparably deprived of those rights.

³ Memorandum GC 10-07, “Effective Section 10(j) Remedies for Unlawful Discharges in Organizing Campaigns, September 30, 2010.

⁴ Effective remedies are addressed in the following GC Memoranda:

- Memorandum GC 11-06, *supra*.
- Memorandum GC 11-01, “Effective Remedies in Organizing Campaigns,” December 20, 2010
- Memorandum GC 08-09, “Submission of First Contract Bargaining Cases to the Division of Advice,” July 1, 2008
- Memorandum GC 06-05, *supra*.

Of course, the need for 10(j) relief is not limited to cases involving discharges during a union organizing campaign or to protect bargaining for a first contract. Early in the investigation of every case, Regions should maintain the practice of considering whether there is a potential need for injunctive relief. The touchstone is always whether there is a threat of remedial failure, that is, whether, in that particular case, the unfair labor practices are having an impact on employees' Section 7 rights or the bargaining process such that a final Board order will come too late to effectively restore the lawful status quo.

I have a particular interest in seeking injunctive relief in appropriate cases involving a successor's refusal to bargain and, more importantly, successor refusal-to-hire cases. In many ways, successor cases present the same need for protection as those with a newly certified union. In both, the status of the employees' chosen collective-bargaining representative is particularly vulnerable to unfair labor practices. With regard to a successor's refusal to bargain, unlawful conduct by a new employer that undermines the representative will lead to employee disaffection, concomitant loss of bargaining power, and loss of employee benefits that cannot be restored by a final Board order. And in cases where a successor employer refuses to hire employees to avoid bargaining with an incumbent union, the potential scattering of those employees creates an even greater risk that a final Board order will not effectively restore the parties to establish a good faith bargaining relationship. Because these types of cases should be given special emphasis, Regions should submit to the Injunction Litigation Branch a recommendation with respect to whether to seek 10(j) relief in all successorship cases in which a determination has been made to issue complaint.

Regions currently do a good job examining every charge at the outset of an investigation to determine whether there is a potential need to seek injunctive relief under Section 10(j) of the Act. This is an extremely important step because early identification of a 10(j) case leads to an expedited investigation, including early efforts to obtain evidence of the impact of the unfair labor practices on employees' Section 7 rights and/or the collective-bargaining process. As we know, delays in processing a Section 10(j) case diminish the effectiveness of any relief obtained and could preclude relief where the situation has so changed that restoration of the status quo is impossible or would be no more effective than the Board's order in due course. Further, even if a case is not identified early in the case-handling process, Regions should continue the practice of examining whether injunctive relief is necessary throughout the investigative and prosecutorial process because the impact of the unfair labor practices on employees' Section 7 rights may change at any time.

To assist you with this important function, the Injunction Litigation Branch, together with the Division of Operations, is rolling out a program to provide the training of field personnel that is necessary to maintain a strong and effective 10(j) program. In particular, all new field employees will be trained to identify 10(j) cases and understand the fundamental 10(j) concept of the need to avoid remedial failure. Experienced field attorneys will receive training geared toward litigating 10(j) cases in district court. In connection with these efforts, the ILB website on the Insider has been updated to provide a wealth of training material and resources for investigating and litigating 10(j) cases. In particular, the Section 10(j) Manual is on the website with updated circuit court standards and a list of 10(j) cases for each of the 15 Section 10(j) categories. Apart from the model papers and samples already in the Manual, ILB will post documents from current cases to allow Regions to share their work product and expertise. And, as always, the ILB staff is available to answer any questions you may have at any stage of processing your 10(j) cases.

Thank you again for ensuring that our 10(j) program remains robust and successful so we can continue to provide timely, effective relief to the victims of unfair labor practices.



R.F.G.