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NEED FOR A CEASEFIRE IN THE WAR ON THE WORKERS: RESTORING THE BALANCE AND HOPE OF THE NATIONAL LABOR RELATIONS ACT

MARY ANN LEUTHNER*

"I know the law gives us rights on paper, but where is the reality?"¹ Even though Ernest Duval spoke those words in reference to his being fired in 1994 for participating in union activity, that statement is commonplace to many workers who participate in union organizing drives.² The National Labor Relations Act [hereinafter "NLRA" or the "Act"], as amended, declares that the policy of the United States is to "protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing."³ But in reality, employers have waged war on workers who attempt to organize a union. Employers have an arsenal of weapons available to fight unionization including threatening to close plants,⁴ firing of union supporters,⁵ and other means of

* The author wishes to thank her parents, Tom and June, and Michael Sacco, for showing her the swing of Pleiades, and how to feel the passion of eternity. Jennifer Crawford, Tim Duda, Daniela Hott, David Webster, and the IBEW Local 21 Organizing Staff, for their insightful comments, patience and support. And especially the 763 Allied Industrial Workers (AIW L.U. 837) of A.E. Staley in Decatur, Illinois, who brought life to the words of the preamble of the United Mine Workers Constitution: "Step by step the longest march can be won. Many stones to form an arch, singly none. And by Union, what we will, can be accomplished still. Drops of water turn a mill, singly none, singly none."

1. HUMAN RIGHTS WATCH, *UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS* 10 (2000).

2. *Id.* at 18. Mr. Duval and six coworkers were fired from King David Center Nursing Home located in Palm Beach Florida. *Id.* See also PVM I Assocs., Inc., 328 N.L.R.B. 1141, 1144 (1999) (stating that the National Labor Relations Board ("NLRB") eventually ruled that all seven workers were fired for their union activity during the organizing drive and contract campaign). They were eventually offered reinstatement with back pay as the remedy for their illegal firing. *Id.*

3. 29 U.S.C. § 151 (2000).

4. Dr. Kate Bronfenbrenner, *Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing* 18 (2000) [hereinafter Bronfenbrenner, *Uneasy Terrain*]. Dr. Bronfenbrenner, Director of Labor

coercion.⁶ While these actions, if a threat is proven, are against the law,⁷ the available remedies serve as little or no deterrent.⁸

Education Research at Cornell University, found that employers made threats to completely or partially close their plants in fifty-one percent of 407 organizing campaigns that she studied. *Id.* at 18. In manufacturing organizing drives, seventy-one percent of her sample threatened to close all or part of their plant. *Id.* at 20.

5. *Id.* at 44. Dr. Bronfenbrenner's study also found that twenty-five percent of employers fired at least one worker for union activity during the course of the organizing campaign in violation of Section 8(a)(3) of the NLRA Act. *Id.* See also Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1781 (1983) (stating that Mr. Weiler, a Harvard University law professor, found an average of one in twenty workers were fired during the course of an organizing campaign in 1980).

6. Bronfenbrenner, *Uneasy Terrain*, *supra* note 4, at 44. Sixty-seven percent of employers force employees to attend one-on-one anti-union meetings with managers at least once a week. *Id.* Ninety-two percent of employers force employees to attend mandatory anti-union "captive audience" meetings. *Id.* at 73. Fifty-two percent of employers in organizing drives that have significant numbers of immigrant workers threaten to call the Immigration and Naturalization Service during the campaign. *Id.* at 44. There has also been a growth in the use of "management consultants" that are hired by some employers when a union petition has been filed. *Id.* at 38. See also MARTIN LEVITT, *CONFESSIONS OF A UNION BUSTER* 2-3 (1993) (commenting on tactics, both legal and illegal, that he and other union-busters use during an organizing campaign). See also *Swihart v. Pactiv Corp.*, 2002 N.L.R.B. LEXIS 376, *3 (2002) (noting that Tenneco Packaging in South Carolina called the local sheriff to have a pro-union employee arrested and placed in a mental institution on the belief that he was a threat to his coworkers). Prior to his support of the union in the organizing drive he was only written up once for insubordination in the seventeen years that he worked for the company. *Id.* at *9. Until the time he was taken to the mental institution at gunpoint, he was able to carry his own knife at work. *Id.* at *11. The Regional Director found there was an Unfair Labor Practice [hereinafter "ULP"] and issued a complaint. *Id.* at *1. An Administrative Law Judge [hereinafter "ALJ"] and the Board in Washington overturned the Regional Director. *Id.* at *2. See also *LCF, Inc.*, 322 N.L.R.B. 774, 784 (1996), *enforcement denied* 129 F.3d 1276 (stating that Sprint admitted to numerous ULP violations including threatening to close in avoid to avoid the union, and interrogating and spying on union supporters). Sprint Corporation fired all 235 employees at the La Conexion Familiar call center on July 22, 1994, eight days before the union election was supposed to occur. *Id.* at 777. While the ALJ affirmed the complaints on over fifty ULPs, he, nevertheless, held that the closing of the facility was for a legitimate business reason and refused to affirm a Section 8(a)(3) violation. *Id.* at 800. The Board in Washington affirmed the ALJ findings as a violation of Section 8(a)(1), but went further holding that Sprint was clearly motivated by union animus, and found a violation of Section 8(a)(3). *Id.* at 774. The Board's remedy was not to reopen the facility, but to order Sprint to give priority hiring to all LCF employees at other Sprint facilities when there was a job opening. *Id.* at 781.

7. 29 U.S.C. § 158 (2000).

8. *Ex-Cell-O Corp.*, 185 N.L.R.B. 107, 108 (1970). Both the majority and the dissents agreed the remedies that the Board prescribes are "inadequate." *Id.* See generally *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 196 (1941)

Part I of this Comment will explore the policy of the NLRA as expressed through the language of the Act itself, through subsequent court cases, and will demonstrate that workers' rights to organize are recognized as a worldwide fundamental human right. This section will also lay out the legal structure and remedies that are used to ensure that the policy is implemented. Part II will analyze three main problems with the Act: the growth in the number of violations, the long delays, and the weaknesses of the remedies. Part III will lay out two major proposals needed to begin to restore the balance and the original purpose of the Act. First, the National Labor Relations Board [hereinafter "NLRB" or the "Board"] should presume that a Section 10(j), injunctive relief remedy is appropriate in all violations of Section 8(a)(3) once the Board has found there is reasonable cause and issues a complaint. Second, the government should terminate and thereafter not renew contracts and corporate tax breaks with companies that do not follow U.S. labor law.

I. THE NLRA: THE PROMISE OF EXTENDING DEMOCRATIC RIGHTS INTO THE WORKPLACE

The NLRA was a revolutionary statute which declared that in order to promote "the free flow of commerce"⁹ it was the express policy of the United States to "encourag[e] the practice and procedure of collective bargaining and [to] protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual act or protection."¹⁰ Congress felt it had a duty to protect workers because employees have an "inequality of bargaining power"¹¹ and they "do not possess full freedom of association or actual liberty of contract."¹²

The Supreme Court has upheld the policy behind the Act.¹³

(holding that workers who are fired in violation of Section 8(a)(3) are only entitled to the wages they would have earned minus any money they earned in the years between the firing and Board order for damages). The fired employee has a duty to try to mitigate damages. *Id.* See also *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 148 (2002) (reducing the remedy for illegal immigrants even further).

9. 29 U.S.C. § 151 (2000).

10. *Id.*

11. *Id.*

12. *Id.*

13. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 29 (1937). In *Jones & Laughlin Steel Corp.*, the employer challenged Congress' power to create the NLRA and the power to create remedies for ULPs. *Id.* at 48. The Court not only held the Act constitutional, but also held that the right of workers to self-organization was as "fundamental" as the employer's right to organize a corporation and select officers. *Id.* at 33.

In *Jones & Laughlin Steel Corp.*, a workers' right to organize into a union was recognized as a "constitutional right."¹⁴ Not only was Congress within its power to safeguard workers' collective activities, the Court concluded that the choice of joining a union would be "a mockery" if Congress did not provide legal protection.¹⁵

Today, the protection of workers' rights to organize and to form unions are basic fundamental human rights recognized worldwide.¹⁶ The fundamental right of workers' freedom of association was recognized when the International Labour Organization [hereinafter "ILO"] passed ILO Conventions Nos. 87 and 98.¹⁷ Even though the U.S. has not formally ratified these two Conventions, they are still bound by their dictates because all ILO members, as a condition of membership, are bound to constitutional norms, one of them being the protection of the right of association.¹⁸

14. *Id.* at 29. The Supreme Court recognized the inequality of bargaining power and that workers organized out of necessity because individually they are helpless in bargaining for better working conditions; workers take what is given to them because they depend on the employer for their livelihood. *Id.* at 33.

15. *Id.* at 34. *See also* *Am. Ship-Building Co. v. NLRB*, 380 U.S. 300, 317 (1965) (reinforcing the policy of the Act and the need for Congress to protect workers organizing rights); *Mobil Oil Corp. v. NLRB*, 482 F.2d 842, 846-47 (7th Cir. 1973) (holding that the central purpose of the Act is to allow employees to organize and apply economic pressure to the employer).

16. *Universal Declaration of Human Rights*, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., at art. 20(1), U.N. Doc. A/810 (1948) [hereinafter *Universal Declaration*]. "Everyone has the right to form and to join trade unions for the protection of his interests." *Id.*

17. International Labour Organization, Convention No. 87, art. 2; ILO Convention No. 98, art. 1. [hereinafter ILO Conventions]. ILO Convention No. 87 art. 2 proclaims: Workers without distinction whatsoever, shall have the right to establish and . . . to join organizations of their own choosing." ILO Convention No. 98 art. 1 declares:

Workers shall enjoy adequate protection against acts of anti-union discrimination. . . . Such protection shall apply more particularly in respect of acts calculated to make the employment of a worker subject to the condition that he shall not join a union. . . (or) cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities.

Id.

18. International Labor Organization, ILO Declaration on Fundamental Principles and Rights at Work, art. 2, 1998. [hereinafter ILO Rights at Work]. This resolution, passed with U.S. support, proclaimed:

[A]ll members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the [ILO] Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:
(a) freedom of association and the effective recognition of the right to

The U.S., however, has supported and ratified the United Nation's International Covenant on Civil and Political Rights.¹⁹ This Covenant declares, "[e]veryone shall have the right to freedom of association with others, including the right to form and join trade unions."²⁰ This Covenant further requires that governments must "respect and . . . ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant."²¹ This Covenant also requires governments "to ensure that any person whose rights or freedoms . . . are violated shall have an effective remedy."²²

The U.S. enshrines these substantive NLRA and international human rights obligations in Section 7 of the NLRA. Section 7 of the NLRA declares:

[E]mployees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.²³

To give meaning to these Section 7 rights, Section 8 of the Act defines Unfair Labor Practices [hereinafter "ULP"].²⁴ If employers "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7"²⁵ or if they "discriminat[e] in regard to hire or tenure of employment"²⁶ it is an ULP and a violation of the law.²⁷ In order to protect these rights, the Act created the NLRB.²⁸ The NLRB has two primary functions: (1) the NLRB supervises representation elections²⁹ and (2) the NLRB is in

collective bargaining.

Id.

19. *International Covenant on Civil and Political Rights*, G.A. Res. 2200A(XXI), U.N. GOAR, at art. 22 (1966) [hereinafter *UN Covenant*].

20. *Id.*

21. *Id.* at art. 2.

22. *Id.*

23. 29 U.S.C. § 157 (2000).

24. *Id.* § 158.

25. *Id.*

26. *Id.*

27. *Id.* Section 8(a)(2) of the Act also creates a ULP if an employer dominates, interferes with, or financially supports a labor union. *Id.* If an employer discriminates against anyone who files a charge or is a witness in a Board proceeding it is a violation of Section 8(a)(4). *Id.* Section 8(a)(5) creates a ULP if an employer does not bargain in good faith with a certified union. *Id.* After the Taft-Hartley Amendment in 1947, ULPs were also created against unions. *Id.* § 158. They are listed in Section 8(b) of the Act. *Id.* Among these are provisions prohibiting unions from coercing employees, refusing to bargain in good faith and participating in secondary boycotts. *Id.*

28. *Id.* § 160.

29. *Id.* § 159.

charge of investigating and preventing ULP violations.³⁰

Case law and Board precedence have developed an elaborate election procedure.³¹ In a typical union representation campaign, the union submits a petition to the Board once a minimum of thirty percent of a proposed bargaining unit sign authorization cards or a petition.³² The NLRB then tries to negotiate a stipulated election agreement.³³ If the employer raises a question of whether the unit is appropriate or if some employees have been improperly excluded or included, the NLRB will conduct a hearing to resolve those issues.³⁴ Eventually, an election date will be set and the NLRB will conduct an election by secret ballot.³⁵ If a majority of the appropriate unit vote in favor of the union and the results are not challenged, the union is then certified as the exclusive bargaining agent for all unit employees.³⁶ The employer is now under an obligation to “bargain in good faith” with the workers.³⁷

The other primary function of the Board is to prosecute ULPs.³⁸ The Act empowers the Board “to prevent any person from engaging in any unfair labor practice.”³⁹ The Supreme Court has given much deference to the NLRB to establish their own

30. *Id.* § 160.

31. *See* 29 U.S.C. § 160 (2000) (requiring only that the union be “designated or selected” by a majority without specifically mandating how it is to be determined). *See also* Weiler, *supra* note 5, at 1804 (noting that early in the history of the NLRA, the Board relied on the union authorization card to determine majority support of the union). *But see* NLRB v. Gissel Packing Co., 395 U.S. 575, 596 (1969) (noting that the Board and the U.S. Supreme Court prefers the secret ballot election for assessing whether the union has majority support); Linden Lumber Div. v. NLRB, 419 U.S. 301, 307 (1974) (allowing any employer to insist on a secret ballot election regardless of the number of signed union authorization cards). *Linden Lumber* held that the union has the burden of proving their majority status through an election and cannot strike for recognition without filing a petition for an election. *Id.*

32. 29 U.S.C. § 160 (2000).

33. *See* NLRB, *The NLRB, What it is What it Does*, 4 (2002) at <http://www.nlr.gov/publications/whatitis.html> (last visited Sept. 24, 2002) (citing that over 80% of elections are stipulated elections).

34. 29 U.S.C. § 160.

35. *See* NLRB, *Your Government Conducts an Election*, 2-3 (2002) at <http://www.nlr.gov/publications/election.html> (last visited Sept. 24, 2002) (explaining the secret ballot process and the procedure for resolving challenged ballots).

36. 29 U.S.C. § 159 (1974).

37. *Id.* § 157. The winning of the union election is only the first step to accomplish the goals of the Act since one of the ultimate goals of the legislation is to achieve industrial peace through a bargained contract. *Id.* § 151. *But see* Bronfrenbrenner, *Uneasy Terrain*, *supra* note 4, at 64 (noting that only sixty-eight percent of union certification elections lead to a negotiated first contract).

38. 29 U.S.C. § 160 (2000).

39. *Id.*

proceedings and to fashion their own remedies.⁴⁰ Unlike other employment law regulations, if the regional office of the NLRB does not issue a complaint, the victim cannot proceed individually to the Board or to the courts.⁴¹ The Board's orders are also not self-enforcing.⁴² If the Board and the employer do not reach a settlement, the Board must go to a U.S. Court of Appeals to have the order and remedy enforced.⁴³

The NLRB has several remedies available that are frequently implemented to try to correct the harm done both to the individual worker whose rights were violated and the injury to the organizing drive.⁴⁴ Whenever there is any violation of a worker's rights, the Board will order the employer to post a "cease and desist order."⁴⁵

40. *Sure-Tan, Inc. v NLRB*, 467 U.S. 883, 898-99 (1984). *See also*, NLRB, *Fact Sheet on the National Labor Relations Board*, at: <http://www.nlr.gov/facts.html> (last visited Sept. 24, 2002) [hereinafter *Board Fact Sheet*] (commenting on the Board's elaborate system of administrative procedures to find violations of employees' Section 7 rights). The process begins when a party files a charge with the regional office where the alleged violation occurred. *Id.* The Board will never act on its own initiative, and throughout the process Board is pushing settlement. *Id.* The Regional office will investigate and either dismiss the case if it lacks merit or, if there is "reasonable cause" to find a violation, the Regional Office will issue a formal complaint. *Id.* After this complaint, the case goes before an ALJ for a formal hearing. *Id.* The ALJ's decision is then appealable to the five-person Board in Washington D.C. for a final decision from the agency. *Id.* That final agency decision is appealable to a U.S. Court of Appeals. *Id.*

41. Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 476-77 (1992). If the Regional Director refuses to issue a complaint, one can appeal to the NLRB's Office of Appeals. *Id.* at 476. However, they routinely uphold the Regional Director's decision and reverse it "less than" or under four percent of the time. *Id.* On average, two-thirds of the complaints are rejected at this early stage, sometimes for political reasons or because of a limited budget. *Id.* at 476-78. Mr. Summers also points out that these dismissals could have serious consequences for the public as well. *Id.* at 477. At one time Regional Directors, under order from the General Counsel, refused to issue complaints when African-Americans complained of unequal treatment by their union representatives. *Id.*

42. 29 U.S.C. § 160 (2000).

43. *Id.*

44. *Phelps Dodge Corp.*, 313 U.S. at 187-88.

45. *PVM I Associates*, 328 N.L.R.B. at 1164. Cease and desist orders must be posted for sixty days in "conspicuous places including all places where notices to employees are customarily posted." *Id.* A cease and desist order usually consists of an admission that the Board has found that the employer violated the NLRA and has ordered the posting. *Id.* The company does not have to admit guilt. *Id.* The notice will also recount the Act's Section 7 rights of the employees "[T]o organize, to form, join or assist any union, to bargain collectively through representatives of their own choice to act together for mutual aid and protection." *Id.* at 1164. The next section of the posting lists everything the company will not do in order to remedy the harm done to the organizing campaign. *Id.* The last section is the affirmative remedies the company is ordered to accomplish. *Id.* *See also* Op. Gen. Counsel of the NLRB

However, even the Board recognizes that this remedy is inherently weak and needs vast improvement.⁴⁶ Not only is the language vague and written in legal jargon, the employer never has to read the notice to the employees.⁴⁷

There are other substantial and fundamental weaknesses with the cease and desist orders. The Board will not impose this remedy without finding that the employees were threatened and intimidated.⁴⁸ Posting a notice that admittedly some employees may not be able to read or understand will not assure the workers that they have redress for their rights.⁴⁹ Unfortunately, this posting is often the only written promise and the only assurance that violations will not occur in the future.⁵⁰

Another remedy the Board frequently uses is to rerun the union election if either side disturbed the "laboratory conditions" in the election.⁵¹ It is not necessary for the Board to find that an ULP was committed; all that is needed is objectionable conduct that taints and prevents the true wishes of the employees from being expressed.⁵² However, there is no guarantee that the employer will not taint or violate the law in the rerun election.⁵³

If the Board determines that the ULPs are so pervasive that a fair election cannot be held, the Board will grant a Gissel Bargaining Order.⁵⁴ This order will only be granted upon showing that at one time the union had a majority of the bargaining unit sign single purpose authorization cards. The Board will certify the union as the exclusive bargaining representative of the unit of employees and order the company to begin bargaining in good

Memorandum OM 99-79, (Nov. 19, 1999) available at <http://www.nlr.gov/ommemo/om99-79.html>. (last visited Sept. 23, 2002) [hereinafter Board November 1999 memo] (commenting on the general use of cease and desist orders).

46. Board November 1999 memo, *supra* note 45.

47. *Id.*

48. *Cf.* Avondale Indus., Inc., 329 N.L.R.B. 1064, 1073 (1999) (proclaiming employer conduct as egregious).

49. *Before the Subcommittee on Employer-Employee Relations of the House Committee On Education and the Workforce*, 106th Cong. 25-26 (2000) (statement of James B. Coppess, Associate General Counsel, AFL-CIO) at <http://edworkforce.house.gov/hearings/106th/ee/nlr91900/coppess.htm> (last visited Mar. 30, 2004).

50. *Id.*

51. General Shoe, 77 N.L.R.B. 124, 127 enforced, 192 F.2d 504 (1951).

52. *Id.* at 126.

53. *Cf.* PCC Structurals, Inc., 330 N.L.R.B. 868, 868 (2000) (finding numerous and more extensive ULPs in the rerun election).

54. *Gissel*, 395 U.S. at 596-97. In *Gissel*, the Board allowed the Teamsters to be the certified bargaining representative for the unit on the basis of signed cards. *Id.* at 580. From the very beginning of the organizing drive, the employer interrogated, spied on, and fired union supporters. *Id.* at 580-82. The employer told employees that if they were caught talking to the Teamsters, "you God-damned things will go." *Id.* at 582.

faith with the union.⁵⁵ According to the Supreme Court, the Board must prove two elements to justify a bargaining order as a remedy.⁵⁶ First, the Board must find that the employer's ULP violations made it unlikely that a free election reflecting the true choices of the employees could be held.⁵⁷ Second, the Board must find that at some point in the campaign the union was supported by a majority of bargaining unit members.⁵⁸

Although Gissel Bargaining Orders are a powerful remedy to protect the true choice of workers, they are rarely used.⁵⁹ In a four-year study from 1979-1982, the Board ordered a bargaining order in only 176 cases⁶⁰ of 4,502 ULP cases.⁶¹

The timing of the Gissel Bargaining Order is essential. Courts have recognized that employee interest in a union can diminish or become stagnant if working conditions remain the same.⁶² In *Gissel*, the Board decision, which was affirmed by the Supreme Court, imposed a Bargaining Order because they felt workers were so scared and coerced that a true election could not have occurred.⁶³ Furthermore, the ultimate goal of equality at the bargaining table is hindered when workers are scared, time passes, and they see that the union is ineffective in alleviating their fear.⁶⁴ Essentially workers do not effectively trust the law

55. *Id.* at 583.

56. *Id.* at 614.

57. *Id.*

58. *Id.* The Board accomplishes this by confirming a majority of bargaining unit members signed authorization cards that clearly stated that they wished the union to represent them in contract negotiations. *Id.* at 602-03. In *Gissel*, the Court, in dicta, allows the Board to issue a bargaining order, even when the union has not proven majority status, when the ULPs are so outrageous and pervasive that the holding of a free election would be impossible. *Id.* See also WILLIAM B. GOULD IV, *AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW* 177 (MIT Press 1996) (1993) (advocating that Gissel Bargaining Orders should be extended to cases where the union has not yet achieved majority status because this would prevent the employer from benefiting from his early illegal coercion before the union has time to obtain majority status). See *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1574 (7th Cir. 1996) (holding that the Board does have the authority to issue non-majority bargaining orders). *But see* *Gourmet Foods, Inc.*, 270 N.L.R.B. 578, 620 (1984) (holding that the Board does not have the authority to issue non-majority bargaining orders).

59. Terry A. Bethel & Catherine Melfi, *The Failure of Gissel Bargaining Orders*, 14 HOFSTRA LAB. & EMP. L. J. 423, 432 (1997).

60. *Id.*

61. *Id.*

62. *IUE v. NLRB*, 502 F.2d 349, 362 (D.C. Cir. 1974).

63. *Gissel*, 395 U.S. at 596-97.

64. *IUE*, 502 F.2d at 362. Here, the Court of Appeals for the Circuit held that the policy of good faith bargaining is "too important to be vindicated only through *in futuro* relief." *Id.* See also *Angle v. Sacks*, 382 F.2d. 655, 659 (10th Cir. 1967) (asserting that the court believes that Congress recognized "that the purposes of the National Labor Relations Act could be defeated in particular

when justice is delayed for several years.⁶⁵ Without a quick Bargaining Order, the protection of the NLRA has no meaning for employees of relentlessly anti-union companies.⁶⁶ The ruthless employer benefits from his own illegal actions by creating a ULP quagmire.⁶⁷

Another very effective, but rarely used remedy, is Section 10(j) injunctive relief. Section 10(j) of the NLRA provides that after the Board issues any ULP complaint, the Board "shall have power" to petition a U.S. District Court for temporary relief or a restraining order.⁶⁸ Once a petition is filed in a U.S. District Court, the court must notify the parties and "grant to the Board such temporary relief or restraining order as it deems just and proper."⁶⁹

When Congress enacted Section 10(j) provisions as part of the Taft-Hartley Amendments to the NLRA, they also passed Section 10(l).⁷⁰ The difference between Section 10(j) complaints and Section 10(l) complaints is that the Board must seek 10(l) relief for certain ULPs, while 10(j) requests can be issued at the Board's discretion.⁷¹ The standard for review in the District Court in either petition is to issue relief that is deemed "just and proper."⁷²

The U.S. Courts of Appeal, however, have developed different standards for granting relief in 10(l) cases and 10(j) cases.⁷³

cases by the passage of time.").

65. Leonard Page, *New Directions for the Next National Labor Relations Board*, 2001 L. REV. OF MICH. ST. U., DET. C.L 1063, 1067 (2001).

66. GOULD, *supra* note 58, at 177.

67. *Id.*

68. 29 U.S.C. § 160 (2000).

69. *Id.*

70. *Id.*

71. *Id.* For limited ULPs that are covered by Section 10(l), if the Board finds "reasonable cause to believe [the] charge is true" and issues a complaint, the Board "shall" petition a U.S. District Court for relief. *Id.* The U.S. District Court is empowered to grant such relief as it deems "just and proper". *Id.* Section 10(l) injunctions are usually limited to boycotts and strikes by unions. *Id.* See also George Schatzki, *Some Observations About the Standards Applied to Labor Injunction Litigation Under Section 10(j) and 10(l) of the National Labor Relations Act*, 59 IND. L.J. 565, 569 (1983). Section 10(j), which encompasses any other ULP violations, grants the Board the power to authorize such relief; it does not compel them to do so. *Id.* at 569.

72. 29 U.S.C. § 160 (2000); Schatzki, *supra* note 71, at 576.

73. Schatzki, *supra* note 71, at 571. Even though the courts disagree about standards for granting injunctive relief, Mr. Schatzki notices that there is no circuit court that makes it more difficult to obtain a 10(l) injunction than a 10(j) injunction. *Id.* In the author's informal study of injunctive relief cases from 1976-1983, there were twenty-four Section 10(l) cases; the Board obtained all the relief it sought in twenty-two of these twenty-four cases. *Id.* at 571. In the sixteen Section 10(j) cases, the Board obtained the relief it sought in eight of the cases. *Id.* But see Bethel & Melfi, *supra* note 59, at 464 (noting that the success rate for Section 10(j) injunctions has dramatically improved and that by 1994, eighty to ninety percent of the Section 10(j)

Virtually every court of appeals has a similar three-tier standard for a 10(l) injunction case.⁷⁴ First, the evidence must support some reasonable interpretation for the Board's position in seeking this injunction.⁷⁵ Second, the Board must have a legal, non-frivolous theory in seeking the relief.⁷⁶ Finally, the injunction must be "just and proper," which has been interpreted by the courts as "reasonable cause to believe."⁷⁷ Most courts do not hold additional evidentiary hearings for 10(l) relief petitions and accept the evidentiary hearings of the Board unless clearly erroneous.⁷⁸ If the court of appeals applies a stricter standard for 10(j) cases, it will usually require the Board to show more "reasonable cause to believe" and therefore have additional evidentiary hearings.⁷⁹

The power in the Section 10(j) remedy is in the speed of the remedy.⁸⁰ Once the Board finds that there is "reasonable cause to believe" that a ULP has been committed, the Board can seek the remedy in federal court.⁸¹ The Courts, Congress, and the NLRB leadership understand that an injury could be irreparable if not addressed for a substantial period of time.⁸²

injunctions sought were approved of by the courts).

74. Schatzki, *supra* note 71, at 572.

75. *Id.* at 575.

76. *Id.* at 572-73.

77. *Id.* at 573.

78. *Id.* at 574.

79. *Id.* See also *Minn. Mining & Mfg. Co. v. Meter*, 385 F.2d 265, 270 (8th Cir. 1967) (explaining that Section 10(j) is only for serious ULPs that cannot be otherwise remedied); *Eisenberg v. Hartz Mountain Corp.*, 519 F.2d 138, 142 (3d Cir. 1975) (explaining the different standards was because Section 10(j) was for only serious ULPs and that the public and commerce is not necessarily impacted by employer violations). See also *Board Fact Sheet*, *supra* note 40. (commenting on the official Board position). The official Board position is that when determining if an injunction is proper, the Board will look towards their ability to remedy the situation and whether the alleged violator is benefiting from delay. *Id.*

80. HUMAN RIGHTS WATCH, *supra* note 1, at 24. The Section 10(j) injunctive relief accomplishes three things. *Id.* First, it would alleviate the impact the illegal actions had on the overall organizing campaign. *Id.* Second, the complaint is already deemed meritorious and injunctive relief would only be an inconvenience to the employer to reinstate the worker pending appeals. *Id.* Finally, it would discourage employers from filing frivolous appeals with the sole motive of delaying reinstatement. *Id.*

81. *Board Fact Sheet*, *supra* note 40. The employer has a temporary restraining order against his behavior and is ordered to restore the status quo. *Id.* The opponent of the injunction can still appeal but the injunction returns the status quo pending the full review of the case by the Board. *Id.*

82. *NLRB v. Gissel*, 395 U.S. 575, 612 (1969). See also S. REP. NO. 80-105, at 8 (1947). The Senate debated the Sections 10(j) and 10(l) injunctive relief with the Taft-Hartley Amendments, and wrote "time is usually of the essence in these matters, and consequently the relatively slow procedure of Board hearings and order, followed many months later by an enforcing decree of the Circuit Court of Appeals, falls short of achieving the desired objectives. . . of free and private collective bargaining." *Id.* See also Remarks of NLRB

Even though recent Board Chairmen and General Counsel have urged more frequent use of 10(j) injunctive relief, it is still rarely utilized.⁸³ Ex-Chairman Gould and his General Counsel, Fred Feinstein, were strong proponents of the use of 10(j).⁸⁴ In the second half of fiscal year 1994 there were sixty-seven Section 10(j) injunction cases.⁸⁵ Since then the use of Section 10(j) has still been advocated by Board members, but its use has declined.⁸⁶

The NLRA grants both collective and individual rights, however, the remedies are used only to repair the individual harm.⁸⁷ An individual worker's rights are protected from intimidation and coercion and the individual employee has the power to vote.⁸⁸ However, the worker also has collective rights.⁸⁹ Concerted activity protects the individual and the group when it acts on behalf of fellow workers.⁹⁰ A certified union must be elected by a majority of the bargaining unit, but then represents the entire unit in negotiations.⁹¹ However, the remedy for a Section 8(a)(3) violation, reinstatement with back pay, is a remedy to repair the individual harm.⁹² This remedy never addresses the

Chairman Gould to the Commonwealth Club, in SAN FRAN. DAILY LAB. REP. (BNA), June 13, 1994 at 111 (declaring that if the NLRA is to live up to its "promise of freedom of association . . . prompt relief must be available.").

83. Weiler, *supra* note 5, at 1801. In 1979, the General Counsel actively supported the use of the relief and the pace at which the petitions were filed more than doubled to an average of more than fifty a year. *Id.* But still only one Section 10(j) proceeding was instituted for every 1,700 Section 8(a)(3) charge that was filed. *Id.*

84. Op. Gen. Counsel of the NLRB Memorandum GC 98-10, (July 23, 1998), at http://www.nlr.gov/nlr/shared_files/gcmemo/gcmemo/gc98-10.asp.

85. *Id.*

86. *Id.* Former General Counsel Fred Feinstein was a vocal supporter of Section 10(j) injunctive relief. *Id.* He realized "that in certain cases the Board's normal remedies will be insufficient to effectuate the purposes of the Act." *Id.* He set up a system to identify possible Section 10(j) cases early and to give them priority. *Id.* See also Op. Gen. Counsel of the NLRB Memorandum GC 01-03 (Feb. 5, 2001) (advocating the continued and expanded use of the Section 10(j) relief by Leonard Page, Mr. Feinstein's successor). See also Op. General Counsel of the NLRB Memorandum GC 02-07 (Aug. 9, 2002) (advocating the continuing use of Section 10(j) relief by Arthur Rosenfeld the current General Counsel). Mr. Rosenfeld believes that "Section 10(j) . . . is, and must continue to be, an important tool in administering the Act." *Id.* Mr. Rosenfeld advocates a two prong reviewing process to evaluate if Section 10(j) is justified. *Id.* First, the Board must examine whether the remedy is effective in protecting Section 7 rights. *Id.* Second, the Board must look at the "strength of the alleged violations." *Id.*

87. Weiler, *supra* note 5, at 1788. Gissel Bargaining Orders and Section 10(j) injunctive remedies are aimed towards fixing the group harm, but they are rarely used. *Id.*

88. 29 U.S.C. § 159 (2000).

89. Weiler, *supra* note 5, at 1788.

90. 29 U.S.C. § 157 (2000).

91. *Id.* at § 159.

92. Weiler, *supra* note 5, at 1788.

specific injury to the momentum of the organizing drive.⁹³

II. THE PROMISE BETRAYED

The right to join a union is a fundamental human right.⁹⁴ A report by Human Rights Watch noted that not only have United Nations' Declarations and ILO Conventions recognized this right, but regional human rights agreements have also recognized this right.⁹⁵

Governments have an obligation to protect and provide adequate remedies for this right.⁹⁶ In *Jones & Laughlin Steel Corp.*, the Supreme Court held that Congress must provide legal protection for worker's constitutional right to join a union.⁹⁷ The International Covenant on Civil and Political Rights, ratified by the U.S. in 1992, recognizes the right to form a union and requires that governments, "ensure that any person whose rights or freedoms . . . are violated have an effective remedy."⁹⁸

The NLRA and the NLRB were created to protect these

93. *Id.* Professor Weiler notes that in *Gissel*, the Court and the Board could have given individual remedies to each of the workers who were discriminated against. *Id.* However, they issued a Bargaining Order because they recognized the distinct injury of the erosion of the union support that was accomplished by the employer's illegal activity. *Id.*

94. *Universal Declaration*, *supra* note 16, at art. 20(1). *ILO Conventions*, *supra* note 17, at art. 2 and art. 1.

95. *ILO Conventions*, *supra* note 17, at art. 2 and art. 1. See also HUMAN RIGHTS WATCH, *supra* note 1, at 43 (citing American Declaration of the Rights and Duties of Man, 1948, 9th International Conference of American States, Article 21, 22 which declared that "every person has the right to associate with others to promote . . . his legitimate interests of a political, economic . . . labor union or other nature."); See also American Convention on Human Rights, Nov. 22, 1969, T.S.N. 36, art. 16 (proclaiming that "everyone has the right to associate freely for ideological, religious, political, economic, labor, social . . . or other purposes."); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 5 art. 11 (declaring "[e]veryone has the right . . . to freedom of association with others, including the right to form and join trade unions for the protection of his interests."); Community Charter of Fundamental Social Rights of Workers, 1998, European Union at art. 11-13 (proclaiming "workers shall have the right of association in . . . trade unions of their choice for the defense of their economic and social interest."). See also Sheldon Friedman, *Remarks at the IRRA Presidential Address Ensuring Respect for Human Rights in Employment* (Jan. 6, 2001), at http://www.irra.uiuc.edu/meetingsNO-2001/pres_addr_text.htm. (citing Hoyt Wheeler, past president of the Industrial Relations Research Association ("IRRA") declaring that a fundamental human right "means that it is a moral right that prevails over considerations of convenience or efficiency and gives way only to other moral rights. . . . It trumps mere economic interests of employers or the public.").

96. *Jones & Laughlin Steel Corp.*, 301 U.S. at 33-34; *UN Covenant*, *supra* note 19, at art. 22.

97. *Jones & Laughlin Steel Corp.*, 301 U.S. at 33-34.

98. *UN Covenant*, *supra* note 19, at art. 22.

fundamental rights.⁹⁹ However, the U.S. admits in a 1999 compliance report to the ILO that “there are aspects of [U.S. labor law] that fail to protect the rights to organize and bargain collectively of all employees in all circumstances.”¹⁰⁰ Former NLRB General Counsel, Leonard Page, admitted that U.S. law is not being obeyed and the U.S. is “committing fraud on workers.”¹⁰¹ Workers are facing a “gauntlet” of ULP violations and the remedy of a cease and desist order three or four years down the road is “certainly not the rule of law.”¹⁰²

A. “Gauntlet” of ULPs

The Act creates a secret ballot election and tries to create “laboratory conditions” so that workers can exercise their democratic rights to decide whether or not to form a union.¹⁰³ But there are three main differences between a union certification election and a political election. First, there is an inherent element of intimidation and imbalance in communication in a union election.¹⁰⁴ Second, in a union election a non-voter, the employer, believes it has a right to campaign.¹⁰⁵ Finally, a certified result in a union election can be appealed and even overturned years later.¹⁰⁶

First, there is an inherent imbalance in communication power.¹⁰⁷ The employer can advocate against the union in captive audience meetings on work time, while at the same time implement rules that limit pro-union solicitation to non-work areas on non-work time.¹⁰⁸ Also, the employer, unlike a politician, has a direct effect on a worker’s wages and working conditions.¹⁰⁹

Second, the employer has a mistaken belief that it has a right to actively campaign in the election which will decide who will bargain with the employer.¹¹⁰ The Act gives voting and decision

99. 29 U.S.C. §§ 151, 160 (2000).

100. HUMAN RIGHTS WATCH, *supra* note 1, at 47-48 (quoting the 1999 ILO Annual Report). Before 1999, U.S. compliance reports to the ILO noted that U.S. labor law “appears to be in general conformance with Conventions 87 and 98.” *Id.*

101. Page, *supra* note 65, at 1067.

102. *Id.*

103. *General Shoe*, 77 N.L.R.B. at 127.

104. Coppess, *supra* note 49; HUMAN RIGHTS WATCH, *supra* note 1, at 19.

105. Weiler, *supra* note 5, at 1814.

106. *Avondale Indus. Inc. v. NLRB*, 180 F.3d 633, 634-35 (5th Cir. 1999).

107. Coppess, *supra* note 49; HUMAN RIGHTS WATCH, *supra* note 1, at 19.

108. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 804 (1945). *See also J.C. Penney Co.*, 266 N.L.R.B. 1223, 1235 (1983) (allowing department stores to ban solicitation and distribution of union literature at any time in public areas).

109. Weiler, *supra* note 5, at 1814.

110. *Id.*

rights to employees—not employers or outside union organizers.¹¹¹ Paul Weiler, a noted labor law professor, suggests that an appropriate political analogy would be the power a foreign country would have on a U.S. presidential election.¹¹² Since the President represents U.S. citizens in dealing with foreign countries, it would be improper for foreign countries to be involved in a U.S. election, even though these countries do have an interest in the outcome of the U.S. election.¹¹³

Finally, if the employer loses in a union certification election it can refuse to bargain with the workers for years.¹¹⁴ Board election determinations are not final orders and therefore are not directly appealable.¹¹⁵ However, the employer can refuse to bargain with the certified union, thereby prompting the union to file a Section 8(a)(5) refusal to bargain charge.¹¹⁶ The employer can raise the validity of the Board's representation action as a defense to the complaint in the court of appeals.¹¹⁷ For example, workers at the Avondale Shipyards in Louisiana voted to join the Metal Trades Council of the AFL-CIO in 1993.¹¹⁸ The Avondale workers voted for the union because they were concerned about workplace safety; four workers died in accidents at Avondale in the three years prior to the election.¹¹⁹ Avondale refused to bargain with the certified union; the union filed a Section 8(a)(5) charge.¹²⁰ In 1999, six years after the election, the Fifth Circuit Court of Appeals overturned the election results and ordered a new election to be held.¹²¹

Unlike a political election, employers are routinely violating the law thereby creating organizing campaigns and contract

111. 29 U.S.C. § 159 (1974). The Act's union certification election is merely to decide whether the employees would like a certain union to represent them in collective bargaining with the employer. *Id.* The employer does not have to agree to the union proposals. *Id.*

112. Weiler, *supra* note 5, at 1813.

113. *Id.*

114. *See generally Avondale*, 180 F.3d at 633-35 (summarizing the history of the Avondale dispute, and revealing that the employer has refused to bargain with employees for six years).

115. 29 U.S.C. § 160 (2000).

116. *Avondale*, 180 F.3d at 636.

117. *Id.*

118. *Id.* at 634.

119. AFL-CIO, *IT'S TIME FOR JUSTICE AT AVONDALE 15* (1998) [hereinafter *JUSTICE AT AVONDALE*]. During this time period, three times as many workers died at Avondale than at any other of the Navy shipyards. *Id.* at 6.

120. *Avondale*, 180 F.3d at 633-34.

121. *Id.* at 641. The Fifth Circuit ordered a new election at Avondale because the list of eligible voters included only the first initial, middle initial and full last name of the voters. *Id.* at 637-38. For a proper list, the full first name of the eligible voters is required. *Id.* The company, however, created the problem by providing the inadequate list to the NLRB and the union. *Id.* at 635.

negotiations that are increasingly becoming more intense and bitter.¹²² In the 1950s, the number of ULPs was under one thousand per year.¹²³ By 1969, the number of reinstated workers had grown to 6,000.¹²⁴ By the 1990s, that number skyrocketed to over 20,000 firing victims every year.¹²⁵ In 1998 alone, 23,682 workers were illegally terminated because they attempted to exercise their fundamental human right to join a union.¹²⁶ The investigation and prosecution of ULPs have become the bulk of NLRB caseloads.¹²⁷ Prosecutions of ULPs were forty percent of the Board's caseload in 1948, but by 1998 it comprised eighty percent.¹²⁸

There is an entire billion-dollar industry whose objective is to thwart workers' organizing efforts.¹²⁹ Martin Levitt wrote his memoirs from his years in the industry and exposed the industry's main goal—to destroy the collective spirit of the workers.¹³⁰ Levitt noted that when digging through personnel or medical records that did not provide an attack on the character of union activists, consultants would create rumors.¹³¹

Union busters often use the delay and weaknesses of the NLRA to design their campaign.¹³² Employers increasingly threaten to close to avoid unions.¹³³ Employers can legally "predict" dire economic consequences as a result of a union

122. HUMAN RIGHTS WATCH, *supra* note 1, at 71. Professor Theodore St. Antoine, President of the National Academy of Arbitrators and former dean of the University of Michigan School of Law, said, "[t]he intensity of opposition to unionization which is exhibited by American employers has no parallel in the western industrial world." *Id.*

123. 45 NLRB ANN. REP. at 263 (1980).

124. *Id.*

125. 63 NLRB ANN. REP. at 137 (1998).

126. *Id.*

127. *Id.* at 20.

128. *Id.*

129. LEVITT, *supra* note 6, at 5. The opening sentence of Mr. Levitt's book reads: "Union busting is a field populated by bullies and built on deceit." *Id.* at 1. Mr. Levitt worked on over 200 anti-union campaigns, losing only five. *Id.* at 4.

130. *Id.* at 2. He states, "I poisoned it [the employee's collective spirit], choked it, bludgeoned it if I had to, anything to be sure it would never turn into a united work force." *Id.*

131. *Id.* at 3. Mr. Levitt remembers how he personally would start a rumor a pro-union worker was gay or cheating on his wife. *Id.* He was particularly haunted by a United Auto Workers campaign where the employer fired a respected pro-union employee on the belief that she was the anonymous caller in a bomb threat. *Id.* Even though Levitt denied participation in the firing, he testified at trial that he did not believe it was her and this was a common trick consultants would use to kill an organizing campaign. *Id.* at 5.

132. *Id.* at 13.

133. DR. KATE BROFENBRENNER, FINAL REPORT: THE EFFECTS OF PLANT CLOSING OR THREAT OF PLANT CLOSING ON THE RIGHT OF WORKERS TO ORGANIZE 9 (1996). [hereinafter BROFENBRENNER, PLANT CLOSING REPORT].

campaign, as long as the prediction is based on objective fact and it is not a threat.¹³⁴ The NLRB and the courts create a legal fiction that there is a difference between a prediction and a threat, but the result remains the same—workers are afraid and do not have freedom to exercise their democratic rights.¹³⁵ Alfred DeMaria, a partner at Clifton, Budd & DeMaria in New York, admits that an employer can get the message of fear across, but can avoid a ULP by creatively wording the speech.¹³⁶

Because of the interdependent economic relationship between employer and employee, job loss either through plant closings or firings of union supporters is a frequently used powerful message.¹³⁷ Employers used threats to move or close factories in twenty-nine percent of organizing drives in 1986-87, and that increased to fifty one percent of employers in organizing drives

134. NLRB v. Village IX, 723 F.2d 1360, 1368 (7th Cir. 1983).

135. *Id.* In *Village IX*, the Seventh Circuit declared that the line between a prediction and a threat is blurred. *Id.* See also Eldorado Tool 1996 NLRB LEXIS 506, at *11 (1996) (holding that the employer did not threaten a plant closing). In *Eldorado*, the employer posted a “Wall of Shame” complete with tombstones listing names of union companies that had closed. *Id.* at *7-8. The day before the election, the company posted the last tombstone with their name on it followed by a question mark. *Id.* at *8. Because there was a question mark it was held to not be a threat. *Id.* at *11. *But see* David Kusnet, Union Advantage: The Case for Organized Labor and Democracy in the Workplace, TOMPAINE.COM, Aug. 28, 2001, at <http://www.tompaine.com/feature.cfm/ID/4502> (noting that federal judges, which have a lifetime appointment, may see a prediction or a joke, but a person who is dependent on their employer for their livelihood would see a clear threat). Judge Learned Hand said in 1941,

Language may serve to enlighten a hearer . . . but the light it sheds will in some degree be clouded if the hearer has no power. . . What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which is not safe to thwart.

Id. See also HUMAN RIGHTS WATCH, *supra* note 1, at 83-85 (explaining worker’s reaction to illegal firings). Workers at the King David Nursing Home voted for the union in August 1994 because they wanted respect in the workplace. *Id.* at 82. Soon after the union victory, the nursing home repeatedly fired union supporters. *Id.* at 83. Ernest Duval, a leader of the organizing committee and a fired worker, can not get a bargaining committee together. *Id.* at 84. According to Mr. Duval, “[p]eople are scared. Everything they see is a disincentive to get involved.” *Id.* Mario Ramirez, a worker who was illegally fired for organizing at MK Collections said, “I need a guarantee that I won’t be fired. As long as there is no law to protect us better I don’t think it is likely that I will organize again.” *Id.* Again, workers at MK Collections joined a union for respect. *Id.* When asked why Mr. Ramirez personally joined the union he said, “[b]ecause the owners screamed at people.” *Id.*

136. Kim Phillips-Fein, *A More Perfect Union Buster*, MOTHER JONES, Sept.-Oct. 1998, at 32, 34.

137. *Cf. Gissel*, 395 U.S. at 575; BRONFENBRENNER, PLANT CLOSING REPORT, *supra* note 133, at 9.

occurring in 1998-99.¹³⁸ Not surprisingly, workers voted for the union in only thirty-eight percent of elections where the employer threatened to close.¹³⁹

Firing of union supporters is another powerful weapon whose use has been steadily increasing since 1957.¹⁴⁰ After a rash of firings in the 1930s soon after the passage of the Act, the illegal actions reached a low in 1957.¹⁴¹ By 1980, 10,033 employees were reinstated.¹⁴² By 1998, the number of victims of illegal firings reached an all-time high of 23,682.¹⁴³ Also the number of employers using this illegal tactic is greatly increasing. The Dunlop Commission reported that firings were used in one in every twenty campaigns in the early 1950s.¹⁴⁴ By the late 1980s, the tactic was used in one of every four elections.¹⁴⁵

The firing of union supporters has three immediate effects. First, union supporters are excluded from the workplace and therefore cannot solicit for the union anywhere on company property.¹⁴⁶ Second, they cannot vote or their vote will be challenged.¹⁴⁷ Finally, their firing has a chilling effect on the organizing campaign.¹⁴⁸ While workers see the firing, they might not see the intricate Board investigation and remedial process.¹⁴⁹

The growth of ULPs and the suppression of human rights is even more troubling when the government financially supports the union-busting company through contracts or corporate welfare.¹⁵⁰ For example, Avondale Shipyards' largest buyer is the U.S.

138. AFL-CIO, ISSUE BRIEF: THE SILENT WAR: THE ASSAULT ON WORKER'S FREEDOM TO CHOOSE A UNION AND BARGAIN COLLECTIVELY IN THE UNITED STATES 5 AFL-CIO (2002) [hereinafter SILENT WAR].

139. *Id.* The rate was even lower when the employer threatened to move to a foreign country. *Id.* In these cases, the union only won in twenty-four percent of elections. *Id.*

140. Weiler, *supra* note 5, at 1779.

141. *Id.* In 1939, the NLRB reinstated 7,738 employees. *Id.* The numbers have been decreasing, reaching a low point in 1957 of only 922 employees reinstated because of illegal termination. *Id.*

142. *Id.* Prof. Weiler notes this is a 1,000% increase from the 1957 figure. *Id.* at 1780.

143. 63 NLRB ANN. REP. at 137. *See also* Weiler, *supra* note 5, at 1779 (noting that even though the unions are filing more charges, more charges are held to be meritorious). In 1958, twenty-one percent of cases were deemed to have merit, compared to thirty-nine percent in 1980. *Id.*

144. U.S. Department of Labor, U.S. Department of Commerce on the Future of Worker-Management Relations, *Fact Finding Report* at 42 (May 1994).

145. *Id.*

146. Weiler, *supra* note 5, at 1778.

147. *Id.*

148. BRONFENBRENNER, PLANT CLOSING REPORT, *supra* note 133, at 10.

149. *Cf.* Human Rights Watch, *supra* note 1, at 36.

150. Greg Leroy, *The Terrible Ten: Corporate Candy Store Deals of 1998*, THE PROGRESSIVE, May 1999, at 23.

Navy.¹⁵¹ In the company's seven-year fight against union certification, they billed the U.S. government for \$5.4 million in legal fees.¹⁵² Titan Wheel was found guilty of violating Section 8(a)(5) and threatened to relocate to Brownsville, Texas because Texas offered a \$30 million tax incentive package to relocate.¹⁵³

B. *Employees' Rights in the Deep Freeze*

Not only is there a huge growth in ULPs, they are consuming more of the Board's docket and therefore contributing to long delays that hamper the remedial effects of the Act.¹⁵⁴ The ability to delay is present throughout the entire union certification and bargaining process. The delay not only hinders the Board's ability to provide effective relief, but the employer benefits from the delay that he himself has caused.¹⁵⁵

An employer who desires to delay the collective bargaining negotiations has ample opportunity to delay even before the election. The employer, even without a good faith doubt about the union's majority status, can insist on a secret ballot election.¹⁵⁶ The employer can also insist on a hearing regarding the composition of the bargaining unit.¹⁵⁷ On average, there is a two-month period between the filing of the petition and an election.¹⁵⁸ By requesting a pre-election hearing, the time is increased from an

151. JUSTICE AT AVONDALE, *supra* note 119, at 3. From 1993-1998, when the company refused to bargain with the certified union, the U.S. Navy had spent almost \$3 billion in contracts with Avondale. *Id.* See also Leroy, *supra* note 150, at 25 (noting that Avondale also received state property tax abatements worth over \$119 million). These include \$9.7 million in "enterprise zone" benefits and \$4.5 million savings in tax-exempt bonds. *Id.* Avondale also received \$40 million for a design center and \$1.5 million for an office building. *Id.*

152. AFL-CIO, *Avondale's Price for Union Busting: \$5.4 Million-Plus*, AMERICA@WORK, July 2001, at 19 [hereinafter AMERICA@WORK]. Avondale was found guilty of 141 federal labor law violations and were ordered to pay back the millions. *Id.* Avondale appealed still never admitting they violated the law. *Id.*

153. See Leroy, *supra* note 150, at 25 (explaining that Titan Wheel received a \$30 million corporate welfare package from the Brownsville Economic Development Council in 1996). The deal included subsidies for land, infrastructure, and a testing lab for their product. *Id.* They also received property tax reductions and a refund on sales tax. *Id.*

154. Coppess, *supra* note 49 (citing Daily Labor Report BNA January 10, 2000). The Chairman's announced goals for fiscal year 2000 were to decide 173 ULP cases that have been pending for more than thirty months and seventy-two representation cases that have been pending for more than twenty months. *Id.*

155. Cf. LEVITT, *supra* note 6, at 13.

156. *Linden Lumber Div. v. NLRB*, 419 U.S. 301, 308 (1974).

157. 29 U.S.C. § 159 (2000).

158. Weiler, *supra* note 5, at 1777.

average of two months to three and a half months.¹⁵⁹

This delay benefits the employers and provides them time to conduct their anti-union campaign.¹⁶⁰ For example, Precision Casting Corporations lost a close election in the Spring of 1995.¹⁶¹ Because of objectionable conduct by the employer, the Board ordered the election to be re-run.¹⁶² Of the 1,600 employees in the bargaining unit, 1,100 signed union authorization cards within the first three weeks of the campaign.¹⁶³ The employer delayed and forced a hearing to add several hundred employees to the bargaining unit.¹⁶⁴ During this five-month delay, the company held three or four anti-union meetings per day, showing videos of abandoned factories.¹⁶⁵ They specifically targeted workers who had young children or new mortgages.¹⁶⁶ The union lost the election 573 to 1,127.¹⁶⁷

The employer can also appeal the election results to the Board for any reason.¹⁶⁸ In *PVM I Associates*, the employer appealed the results of an election and held up the certification and the bargaining negotiations for over a year.¹⁶⁹ Even though the company asserted three grounds for objection, the ALJ dismissed all of them for lack of evidence and ordered the union to be certified.¹⁷⁰

159. *Id.* Even if they do not insist on a pre-election hearing, this can be used as a negotiation chip in trying to reach a stipulated election agreement. *Id.*

160. LEVITT, *supra* note 6, at 13. See also James Prosten, *The Longest Season: Union Organizing in the Last Decade, a/k/a How Come One Team Has to Play With Its Shoelaces Tied Together?*, 31 PROCEEDINGS ANN. MEETING INDUS. REL. RESEARCH 240, 243 (1978) (noting that studies have shown that the union victory rate decreases by 2.5 percent for each additional month between petition and the election).

161. Marc Cooper, *Busting the Unionbusting*, THE NATION, Mar. 2, 1998, at 18. Precision Castparts Corporation is located in Portland, Oregon and produces jet engines parts for General Electric. *Id.*

162. *Id.*

163. *Id.* at 18.

164. *Id.*

165. *Id.* In one of the videos the consultants created a skit with two actors who looked like the lead organizer in the plant. *Id.* In the skit, the actors discussed how the drive would mean big perks for union big shots. Cooper, *supra* note 161, at 18.

166. *Id.*

167. *Id.*

168. See *PVM I Assoc.*, 1995 N.L.R.B. LEXIS 767, *19-20 (dismissing the employer's objections to the election).

169. *Id.* The ALJ decision was announced a year after the union won the election by a vote of 48-29. *Id.*

170. *Id.* The first objection, and supported by only one witness, was the union used voodoo to coerce the mostly Haitian immigrants. *Id.* The witness heard a union supporter on the Creole radio station say that the union is "good for your life" and "you might get good benefits and things." *Id.* at *14. The second objection was that the union impersonated a Fed-Ex worker to gain access to an employee's home. *Id.* at *16-17. The only evidence was that a

Sometimes, even if the union is certified and there is a bargaining order, the company still refuses to negotiate.¹⁷¹ For example, Workers at Acme Die Casting voted 69-39 in favor of joining the United Electrical Workers ("UE") in 1987.¹⁷² The Board dismissed the company's objections to the election without a hearing and ordered the company to bargain.¹⁷³ The company refused to bargain for twelve years in spite of several court orders.¹⁷⁴ Finally, in March, 1999, the UE sent a letter to Acme and the NLRB disclaiming all representations rights.¹⁷⁵

The ULP process is also full of delays.¹⁷⁶ The Board takes a median time of three months to determine whether to issue a complaint.¹⁷⁷ There is an additional median time of six months between the issuance of the complaint and the actual ALJ trial.¹⁷⁸ After the ALJ's trial is completed, another median of ten months passes before the Board issues their decision.¹⁷⁹ There is still an opportunity to appeal to the U.S. Court of Appeals.¹⁸⁰ According to NLRB data, 658 days passes between the issuance of the complaint and the final Board decision.¹⁸¹

These delays benefit the company in three ways. First, the union victory rate declines the longer the election is delayed.¹⁸² Second, the employer often uses the delays it creates and fosters in

worker received a phone call from a person identifying themselves as Fed-Ex. *Id.* Fed-Ex never arrived, but two union organizers arrived. *Id.* The third objection was a union supporter made a death threat, commenting to a person who refused to wear a union button that "[she] will be in big trouble" if the union did not get in. *Id.* at *17-18. The woman to whom the comment was made testified that she did not feel threatened by this comment. *Id.* at *18. The ALJ found this statement was too vague and ambiguous to constitute a death threat. *Id.* There was a fourth objection but it was withdrawn before the hearing. *Id.* at *19.

171. Acme Die Casting, 1988 N.L.R.B. LEXIS 443, *4 (Aug. 31, 1988).

172. *Id.*

173. *Id.* at *7.

174. HUMAN RIGHTS WATCH, *supra* note 1, at 117-18.

175. *Id.*

176. Coppess, *supra* note 49.

177. HUMAN RIGHTS WATCH, *supra* note 1, at 69. Median time means that half of all cases take longer than this time period. *Id.*

178. *Id.* This time frame does not take into account the time spent for the ALJ hearing. *Id.* Depending on the case, it can take a few days or many months. *Id.*

179. *Id.* Cases that are more controversial or first impression may take up to two to three years for a final Board decision. *Id.*

180. 29 U.S.C. § 160 (2000).

181. HUMAN RIGHTS WATCH, *supra* note 1, at 69.

182. Prosten, *supra* note 160, at 243. See also *Gissel*, 395 U.S. at 597 (acknowledging that a union can lose support when victims do not have efficient remedies); *IUE*, 426 F.2d at 249 (recognizing that an organizing drive can become stagnant with the passage of time and delays); *Angle*, 382 F. 2d at 659 (recognizing "that the purpose of the National Labor Relations Act could be defeated by the passage of time").

the election process to commit ULPs.¹⁸³ Finally, because the back pay remedy is mitigated by wages that the employee earns after the illegal firing, the passage of time does not necessarily increase the damage owed.¹⁸⁴

C. *Winning a Battle, But Losing the War*

Not only do the long delays frustrate the remedies of the NLRA, but the remedies are so weak they do little to solve the devastating effect of the employer's illegal action.¹⁸⁵ The remedies that are the most frequently used, namely cease and desist orders and reinstatement with back pay, do little to restore the collective rights of the surviving pro-union workers at the company.¹⁸⁶

The employer's anti-union campaign and specifically the threat of job loss is a strong predictor of election results.¹⁸⁷ A survey by Phil Comstock and Maier Fox showed that thirty-six percent of no voters in union elections say their vote was a reaction to employer pressure.¹⁸⁸ Eighty-six percent of these no voters specifically mentioned the biggest motivation was fear of job loss.¹⁸⁹ Millions of Americans want to join unions, but the percentage of union-represented workers has declined in the 1990s.¹⁹⁰ A 2000 study by Richard Friedman and Joel Rogers found that more than thirty million Americans want to join a union.¹⁹¹ The authors estimate that if workers were given a free choice in the election, forty-four percent of American workers would be union members.¹⁹²

The frequently used remedies for ULPs do not address the collective wrong that occurred in the organizing drive.¹⁹³ If the NLRB issues a complaint in an illegal firing, the workers see the immediate effect of the disappearance of co-workers but they do not have tangible proof that the NLRB is protecting them.¹⁹⁴ Workers at the King David Nursing Home (PVM I) voted 48-29 in favor of the union, but the union is having a hard time finding a

183. Cooper, *supra* note 161, at 18.

184. SILENT WAR, *supra* note 138, at 7.

185. Phillips-Fein, *supra* note 136, at 34. Mr. DeMaria admits that the remedy for firing union supporters is weak and some companies just accept the nominal penalties as part of the cost of doing business. *Id.*

186. Weiler, *supra* note 5, at 1788.

187. PHIL COMSTOCK & MAIER B. FOX, RESTORING THE PROMISE OF AMERICAN LABOR LAW 98 (1994).

188. *Id.*

189. *Id.*

190. Kusnet, *supra* note 135.

191. RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 89 (2002).

192. *Id.*

193. Weiler, *supra* note 5, at 1788.

194. Coppess, *supra* note 49.

negotiating committee because people are scared.¹⁹⁵

Nowhere is the distinct injury to the collective rights of employees' free right to join a union clearer than in cases similar to *PCC Structural Inc.*¹⁹⁶ In *PCC*, 1,100 people signed union authorization cards in the first three weeks of the campaign.¹⁹⁷ The company then began an intense anti-union campaign of mandatory meetings, threatening retaliation for union activity.¹⁹⁸ On the day before the union vote, the company president met with all employees in small groups and recounted what he told the Governor: "Quite frankly, I don't think we can [keep the plant open] if the Steelworkers are brought in."¹⁹⁹ Reiner, a union supporter, commented later, "you could hear the devastating silence in the room. . . . You couldn't have walked out of the room without getting the clear message."²⁰⁰ The union lost the election 573-1,127, even though they had over two-thirds of workers sign cards before the petition was filed.²⁰¹ The union filed charges, but has not attempted to organize because the workforce is too scared.²⁰²

The NLRB admits that the cease and desist orders are weak and employers sometimes treat them as laughable.²⁰³ In *LCF*, Sprint admitted, and the ALJ found, that *LCF* and Sprint committed over fifty violations of the law when they closed the call center.²⁰⁴ The remedy that the ALJ recommended was to post a cease and desist order and to mail a copy to all of the former employees.²⁰⁵ The ALJ that heard *Avondale Shipyards* numerous ULPs described the employer's behavior as "egregious misconduct,

195. HUMAN RIGHTS WATCH, *supra* note 1, at 84. Dale Ewart, the union representative further stated that, "[e]verything [the workers] see is a disincentive to get involved." *Id.*

196. *PCC Structural Inc.*, 330 N.L.R.B. 868 (2000).

197. Cooper, *supra* note 161, at 18.

198. *PCC Structural Inc.*, 330 N.L.R.B. at 896.

199. Cooper, *supra* note 161, at 18.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Board Fact Sheet*, *supra* note 40; *SILENT WAR*, *supra* note 138, at 11. For example, one employer was ordered to post a cease and desist order for ULPs that occurred in a representation election seven years before. *Id.* at 19. When the employer finally complied with the order, he posted the cease and desist order on the toilet seat. *Id.*

204. *LCF, Inc.*, 322 N.L.R.B. 774, 784, *enforcement denied* 129 F.3d 1276 (D.C. Cir. 1997).

205. *Id.* at 800. The ALJ never specified where the notice was to be posted since *LCF* closed. *Id.* The Board on review found a violation of Section 8(a)(3) and ordered that Sprint did not have to reopen the plant, but they must provide preferential hiring to all *LCF* employees at other Sprint call centers in the San Francisco area. *Id.* at 781. *But see LCF Inc.*, 129 F.3d at 1277 (reversing the Board's finding of a Section 8(a)(3) violation and prescribing no remedy).

demonstrating a general disregard for employee's fundamental rights."²⁰⁶ As the remedy, he ordered the twenty-eight fired workers reinstated and the cease and desist order to be read aloud by the company president.²⁰⁷ Avondale appealed; it was never read.²⁰⁸

Even in situations where back pay is awarded and the employee is reinstated, the remedy never really addresses the intimidation purpose behind the illegal firing.²⁰⁹ Back pay awards are usually too small to be an effective deterrent.²¹⁰ For example, the average back pay distribution in 1998 was only \$3,715 per employee.²¹¹ Moreover, reinstatement is also ineffective for two basic reasons.²¹² First, many employees find new employment before the Board finally orders and enforces a reinstatement remedy.²¹³ Second, the reinstated employee still has a fear of employer retaliation.²¹⁴

A final whittling down of the back pay award occurred in *Hoffman Plastics*.²¹⁵ The Supreme Court, in a 5-4 decision in July 2002, reversed the Board's back pay award to Jose Castro, an undocumented worker.²¹⁶ The majority justified the employer paying no monetary damage for his illegal actions because Mr. Castro was not legally able to work in the U.S.²¹⁷ In this case, the Court emphasized that Mr. Castro knowingly provided false documents to the company and therefore should not benefit from his deception.²¹⁸ However, it is unclear if the U.S. Courts of Appeal will apply this rule when the employers knowingly hire undocumented workers.²¹⁹

206. Avondale Indus. Inc. I, 329 N.L.R.B. 1064, 1073 (1999).

207. *Id.*

208. HUMAN RIGHTS WATCH, *supra* note 1, at 127.

209. Weiler, *supra* note 5, at 1788; Friedman, *supra* note 95. See 29 U.S.C. § 158 (2000). As part of the prima facie case for proving an illegal discharge the General Counsel must prove that the employer was motivated to fire in order to discourage membership in a union. *Id.* Therefore the prima facie case acknowledges that the employer acts to intimidate the whole workforce. *Id.*

210. Weiler, *supra* note 5, at 1788-89.

211. 63 NLRB ANN. REP. 137 (1998); Coppess, *supra* note 49.

212. Summers, *supra* note 41, at 477.

213. *Id.*

214. *Id.* Almost eighty-seven percent of workers who are reinstated leave within a year. *Id.* An overwhelming majority, seventy-four percent, leave because of continual unfair treatment or dismissal. *Id.*

215. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

216. *Id.* at 1279.

217. *Id.* But see HUMAN RIGHTS WATCH, *supra* note 1, at 76 (noting that Congress has established a visa category, known as "S" for undocumented persons who are witnesses in criminal proceedings).

218. *Hoffman Plastics*, 535 U.S. at 142.

219. Op. Gen. Counsel of the NLRB Memorandum GC 02-06 (July 19, 2002). The General Counsel states that the undocumented immigrants will still be treated as "employees" for definition of the Act. *Id.* The Board will also push

III. A CALL TO AWAKEN THE PURPOSE OF THE NLRA

Labor law in the United States is certainly “not the rule of law.”²²⁰ Thirty million Americans want to exercise their basic human right to bargain as equals with their employer.²²¹ But because of fear, intimidation, threats and delays, they are denied this right.²²² Union elections, which should be conducted in “laboratory conditions”²²³ are often intense battles²²⁴ with employers firing union supporters and threatening to close plants.²²⁵

In any other democratic context, the denial of free elections and a basic human right would prompt outrage. If this was a political election, all free people would find it repulsive if anyone told a voter, “If you vote for this candidate, you will lose your livelihood.” But in a political election, the stakes are not as high as in a union election.²²⁶ Regardless of the winner in a political election, democracy will always survive.²²⁷ But in a union election, each worker decides whether to accept democracy, a bargained for contract, or authoritarianism, the rules are decided by only the employer.²²⁸

The lawbreaker benefits from the delays and weak remedies built into the law. Usually the worst thing that could happen to this outlaw would be to rerun the election. There is nothing to prevent the employer from continuing the abuse.²²⁹ Worse yet, there is nothing to prevent the outlaw from receiving government contracts and using tax money to support its ruthless behavior.²³⁰

settlement to try to obtain some remedy for the worker. *Id.* Further, he advocates that the cease and desist order should be read aloud. *Id.*

220. Page, *supra* note 65, at 1067.

221. FREEMAN & ROGERS, *supra* note 191, at 89.

222. HUMAN RIGHTS WATCH, *supra* note 1, at 133-34. Mario Ramirez, a worker who was illegally fired for organizing at MK Collections said, “I need a guarantee that I won’t be fired. As long as there is no law to protect us better I don’t think it is likely that I will organize again.” *Id.*

223. General Shoe, 77 N.L.R.B. 124, 127, *enforced*, 192 F.2d 504 (1951).

224. HUMAN RIGHTS WATCH, *supra* note 1, at 71. Professor Theodore St. Antoine, President of the National Academy of Arbitrators and former dean of the University of Michigan School of Law, said, “[t]he intensity of opposition to unionization which is exhibited by American employers has no parallel in the western industrial world.” *Id.*

225. Bronfenbrenner, *Uneasy Terrain*, *supra* note 4, at 18. More than half of all employees who exercise their rights have to endure plant closing threats. *Id.* A quarter of all employers fire at least one worker to discourage union activity. *Id.* at 44.

226. DAVID L. CINGRANELLI, DO UNION REPRESENTATION ELECTIONS MEET INTERNATIONAL STANDARDS FOR FREE, FAIR AND GENUINE POLITICAL ELECTIONS? 11-12 (2002).

227. *Id.* at 12.

228. *Id.*

229. PCC Structural, Inc., 330 N.L.R.B. 868 (2000).

230. JUSTICE AT AVONDALE, *supra* note 119, at 2-3.

But the tide is turning.²³¹

There are two fundamental changes in labor law that must be made to enable the government to begin to restore the balance and the original purpose of the Act. First, the NLRB should presume that injunctive relief under Section 10(j) is appropriate in all violations of Section 8(a)(3) where a complaint of an illegal termination has been issued. Second, the federal and state government, should terminate their contracts and corporate tax breaks with companies that violate this basic human right.

A. Restoring the Promise of the Section 10(j) Remedy

Once the Board issues a complaint confirming a Section 8(a)(3) illegal termination, the Board should presume it is appropriate to begin proceedings in a Federal District Court to seek a Section 10(j) injunctive relief. The employer can overcome this presumption by showing that the employer would experience an undue hardship if he restores the worker pending appeals. Even if the Section 10(j) relief is granted, the employer still has a right to file an appeal.²³² However, the illegally terminated worker should be restored to the status quo and his job while the appeal is pending. The discriminated worker is guaranteed all his fundamental human rights until final determination of the case.

Although Section 10(j) relief is already in the Act, the Board is reluctant to use it.²³³ This reluctance is unjustified.²³⁴ The

231. Nancy Amdur, *Grad Students get Organized; As Teaching Workloads Increase, Union Movement Catches On*, CHI. TRIB., Oct. 1, 2000, at 16c. Graduate Students at University of Illinois at Chicago have formed the Graduate Employees' Organization, following the lead of other schools like University of California and University of Michigan. *Id.* New York University may be the country's first private university to become union. *Id.* See also Mary Williams Walsh, *A Lesson for the Booming '90s in Hard-Won Union Triumph*, L.A. TIMES, Sept. 7, 1999 at A1 (commenting on the revitalization of the union movement through the participation of lower wage workers). See also Stuart Silverstein, *Unions Putting Hard Labor Into Recruitment*, L.A. TIMES, Feb. 18, 1997, at D1 (noting that unions are actively recruiting organizers). In 1996, the AFL-CIO began Union Summer, patterned after the Freedom Summers of the Civil Rights Movement. *Id.* Because of the success recruiting college students, the AFL-CIO expanded the program to retirees in Senior Summer. *Id.*

232. HUMAN RIGHTS WATCH, *supra* note 1, at 24. An employer's right to appeal an adverse judgment is also a fundamental right and nothing in the Section 10(j) relief lessens this right. *Id.*

233. Weiler, *supra* note 5, at 1802. See also Board November 1999 memo, *supra* note 45 (noting that in fiscal year 1994, there were only sixty-seven Section 10(j) injunction cases). Former General Counsel Fred Feinstein advocated that in certain cases the Board's normal remedies will be insufficient to effectuate the purposes of the Act. *Id.*

234. Board November 1999 Memo, *supra* note 45. Former General Counsel Fred Feinstein advocated for greater use of the relief because in certain cases the Board's normal remedies will be insufficient to effectuate the purposes of

legislative intent behind the passage of the Section 10(j) and 10(l) is clear: "time is usually of the essence in these matters."²³⁵ Waiting until a final decree by a U.S. Court of Appeals does not achieve the objectives and purpose of the Act.²³⁶ The statute clearly allows that the Board "shall have power" after a ULP complaint has been issued to petition a court for "appropriate temporary relief or restraining order."²³⁷ A District Court has jurisdiction "to grant to the Board such temporary relief or restraining order as it deems just and proper."²³⁸

There are two main arguments against the proposed solution. First, there should be different standards for Section 10(j) and Section 10(l) because they are in two different sections of the Act.²³⁹ Second, allowing an injunction pending the appeal of the case is a usurpation of the appeal process.²⁴⁰ Neither of these arguments are persuasive.

The mere separation of Section 10(j) and 10(l) does not necessarily mean that different standards should be applied.²⁴¹ Both sections of the statute impose a "reasonable cause to believe"²⁴² standard on the petitioning Board and allows the judge to order what is "just and proper."²⁴³ Section 10(j) is discretionary.²⁴⁴ The relief encompasses a wide range of ULPs and not every violation justifies an injunction. The court and the Board have recognized the inherently destructive nature of firings and threats of plant closing on the workers' attempts to organize.²⁴⁵ Finally, when the 1947 amendments were passed, the

the Act. *Id.*

235. S. REP. NO. 80-105, at 8 (1947).

236. *Id.* See also 29 U.S.C. § 151 (2000) (stating that the purpose of the act is to "protect[] by law . . . the right of employees to organize . . . and [to] restor[e]equality of bargaining power between employers and employees.").

237. 29 U.S.C. § 160 (2000).

238. *Id.*

239. *Minn. Mining & Mfg. Co. v. Meter*, 385 F.2d 265, 272 (8th Cir. 1967); *Eisenberg v. Hartz Mountain Corp.*, 519 F.2d 138, 144 (3d Cir. 1975).

240. *Minn. Mining & Mfg. Co.*, 385 F.2d at 273.

241. Schatzki, *supra* note 71, at 571.

242. 29 U.S.C. § 160.

243. *Id.*

244. *Id.* The wording in the statute reads that the Board "shall" petition a District Court in all cases that fall into the Section 10(l) provision. *Id.* Under Section 10(j) the Board "may" petition a District Court for relief. *Id.*

245. *Gissel*, 395 U.S. at 596. In *Gissel*, the employer fired union supporters and threatened to close if the workers voted for the Teamsters. *Id.* Even though the Court could have ordered the Board to reinstate and compensate fired workers, the court realized the harm was irreparable. *Id.* See also SILENT WAR, *supra* note 138, at 5 (noting that when employers threatened to close, the union won in only thirty-eight percent of elections as compared to fifty one percent when there was not a threat). When an employer threatened to move to another country, the union won in only twenty-four percent. *Id.*

Board was not faced with the plethora of illegal firings.²⁴⁶

The Section 10(j) injunctive relief does not usurp the appellate process.²⁴⁷ Appeals are not hindered; the only change is that the worker is reinstated to the status quo pending the final determination. An injunction will not be sought unless the Board's Regional Office issues a complaint.²⁴⁸ Also, the statute allows the Board to go to any federal district court where the "unfair labor practice in question is *alleged* to have occurred."²⁴⁹ The statute does not require a complete showing of proof.

The purpose of this change is threefold. First, this remedy will alleviate the collective injury to the campaign. One of the motivating reasons for the illegal firings is to chill union support in the drive.²⁵⁰ This remedy would provide a visual reminder that the Board and the government are protecting worker's rights. An election takes an average of two months; without this remedy, the firings and intimidation will inevitably have an impact on the election results.²⁵¹ Second, this remedy will alleviate the economic hardship on the illegally fired worker and allows him the right to participate in the campaign. Finally, this remedy will serve as a deterrent for frivolous appeals.²⁵² Currently, because the back pay award is mitigated by wages that are earned in the interim, there is no incentive to not appeal.

B. The Government Should Not Be a Participant in Employers' Human Rights Abuses

The second remedy should require the government to terminate its contracts and corporate tax breaks for companies

246. Weiler, *supra* note 5, at 1780. In the 1950s, the number of ULPs was under a thousand a year. *Id.* But see 63 BOARD ANN. REP. at 137 (noting that in 1998, 23,682 workers were illegally fired). See also Bronfenbrenner, *Uneasy Terrain*, *supra* note 4, at 44 (noting that twenty-five percent of employers fire at least one worker during an organizing drive).

247. HUMAN RIGHTS WATCH, *supra* note 1, at 24. The reinstatement of a fired worker may be an inconvenience. *Id.* Cf. Friedman, *supra* note 95 (noting that a mere inconvenience to an employer is not enough to hamper a human right). Unless the employer can demonstrate an undue hardship, there are some principles in society that we uphold higher than the employers unfettered attempt at realizing a profit. *Id.*

248. 29 U.S.C. § 160 (2000). The burden of proof is "reasonable cause to believe" that a violation has occurred. *Id.*

249. *Id.* (emphasis added).

250. SILENT WAR, *supra* note 138, at 5.

251. COMSTOCK & FOX, *supra* note 187, at 98. Their survey showed that thirty-six percent of no voters in union elections say their vote was a reaction to employer pressure. *Id.* Eighty-six percent of these no voters mention the biggest motivation was fear of job loss specifically. *Id.* See also FREEMAN & ROGERS, *supra* note 191, at 89 (concluding in their 2000 study that more than thirty million American workers want to join a union).

252. HUMAN RIGHTS WATCH, *supra* note 1, at 23.

that violate the law. Congress should adopt the proposed rules for federal contracts that former President Clinton installed by executive order on December 19, 2000.²⁵³ These regulations would require federal contracts officials to examine whether potential contractors have any adverse criminal convictions, court judgments, or administrative judgments over the past three years.²⁵⁴ Each potential federal contract would be decided on a case-by-case basis.²⁵⁵ A single violation would not bar a contract, however a repeated pattern of “pervasive or significant violations” would potentially bar the employer from government contracts for up to three years.²⁵⁶ Additionally, the decision should not be based on mere allegations, but should only include final judgments.²⁵⁷

This legislation is crucial for three reasons. First, a free government has an obligation to protect human rights even when the violator is a private employer.²⁵⁸ At the very least, governments should not be providing monetary support to companies who abuse workers. Second, companies that violate federal law should not receive federal government benefits. This much is fundamental; if a company or a person takes the benefits of living in the U.S. or a particular state, they must follow the law.²⁵⁹ Finally, the government has a responsibility to ensure that their contractors are trustworthy and reliable.²⁶⁰

Although the opposition has three main arguments in opposition to these proposals, all have been addressed in the proposed regulations. First, the regulations might politicize the procurement process.²⁶¹ However, every potential contractor will be investigated on an individual basis.²⁶² Every contractor will be

253. See Steven Greenhouse, *U.S. Contract Rules May Bar Companies that Violate Laws*, N.Y. TIMES, Dec. 20, 2000, at A1 (noting that the federal government has almost \$200 billion in federal contracts).

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. See notes 17-23 and accompanying text.

259. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). “When a corporation purposefully avails itself of the privilege of conducting activities within the forum state, it has clear notice that it is subject to suit there.” *Id.*

260. Greenhouse, *supra* note 253, at A18. The rules already require the federal government to only contract with businesses that have a “satisfactory record of integrity and business ethics.” *Id.* Joshua Gotbaum, controller of the Office of Management and Budget and a drafter of the new rules said, “we view this fundamentally as empowering the government to do what every business in the world does, which is not [to] be forced to do business with people it doesn’t trust.” *Id.*

261. National Petrochemical & Refiners Association, *Washington Bulletin*, NPRAONLINE, Aug. 20, 1999 available at: <http://www.npradc.org/publications/wb/8-20-99.html> [hereinafter *NPRA newsletter*].

262. Greenhouse, *supra* note 253 at A18.

eligible unless they violate the law and demonstrate that they are not trustworthy. Second, the proposed regulations have been criticized for being vague and up to the whim of the contract officers.²⁶³ However, the companies already have full notice of what is expected to fully comply with the new rules that they cannot break the law in a repeated, systematic way. The obligation to follow the law is expected from every person and corporation in the United States.²⁶⁴

Finally, opponents of the regulation are afraid of unsubstantiated charges.²⁶⁵ It is important to note that the contract officers will be researching only final administrative and judicial decisions.²⁶⁶ Each case will be evaluated on a case-by-case basis and the officers will only bar a repeat offender or someone who completely disregards the law.²⁶⁷

Federal and state corporate tax abatements and corporate welfare should be treated with the same general philosophy.²⁶⁸ If one wishes to receive the protection and benefits of doing business in the U.S., they must adhere to core fundamental values enshrined in our constitution, one of them being the right of

263. *NPRA newsletter*, *supra* note 261.

264. Transportation Trades Department, *AFL-CIO, Our Government Should Hold Companies Responsible for Their Conduct*, Sept. 11, 1999 available at <http://ttd.org/resolutions/sept1999/092999no.2print.htm>. "It is offensive that a company that uses every trick in the book to deny its workers the federally protected right to join and form a union thinks nothing about turning to the same government when it wants a competitive advantage over its rivals." *Id.*

265. *NPRA newsletter*, *supra* note 261.

266. *Greenhouse*, *supra* note 253, at A18. *See also* *Sure-Tan Inc. v. NLRB*, 467 U.S. 883, 898 (1984) (noting that the NLRB should be regarded as experts in the field of prosecuting and enforcing ULPs).

267. *Greenhouse*, *supra* note 253, at A18. *See Avondale Indus., Inc.*, I 329 N.L.R.B. 1064, 1069 (1999) (finding Avondale guilty of 141 federal labor law violations). *See also Avondale*, 180 F.3d at 634-35 (5th Cir. 1999) (reversing the election six years ago for an improper employee list that Avondale itself provided). *See also AMERICA@WORK*, *supra* note 152, at 19 (noting that Avondale billed the U.S. government for \$5.4 million of legal costs in their fight against the union).

268. *Cf. Responsible Wealth, Choosing the High Road: Businesses that Pay a Living Wage and Prosper.* (2000) available at http://www.responsiblewealth.org/living_wage/living_wage_report_pdf. Since 1995, over sixty-seven local governments in thirty-six states have passed legislation requiring firms that receive government subsidies to provide quality jobs. *Id.* *See also* ACORN, *Living Wage Successes: A Compilation of Living Wage Policies on the Books* (2002), available at <http://www.livingwagecampaign.org/LivingWageWins.htm>. (last visited Oct. 30, 2002) (listing over eighty-two city and county ordinances requiring state contractors to pay a living wage). While the wage differs with each ordinance, the legislatures have made the commitment to support good jobs. *Id.* The cities are diverse including Bozeman, Montana and Chicago, Illinois. *Id.*

workers to form trade unions for collective bargaining.²⁶⁹

IV. UNION RIGHTS: THE NEW CIVIL RIGHTS MOVEMENT

Thirty million Americans are denied a basic human right.²⁷⁰ Workers have no assurance that their rights will be protected when the government itself provides endless tax abatements and government contracts despite a company's human rights abuses. Any remedy they receive will fall far short of addressing the actual injury suffered by the individual worker and his co-workers.

The only way to adequately protect these rights is to have immediate remedies as soon as a violation is substantiated by the issuance of a complaint and to ensure that the government will in no way monetarily support union busters. The enforcement of Section 10(j) relief and the enforcement of ethical rules for government contractors is the beginning to restoring the promise of freedom of association.

269. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937).

270. *FREEMAN & ROGERS*, *supra* note 191, at 89. If there was a free and not coercive ability to join a union, more than forty-four percent of American workers would be unionize. *Id.*

