OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 10-07 September 30, 2010

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

FROM: Lafe E. Solomon, Acting General Counsel

SUBJECT: Effective Section 10(j) Remedies for Unlawful Discharges in Organizing Campaigns

An important priority during my time as Acting General Counsel will be to ensure that effective remedies are achieved as quickly as possible when employees are unlawfully discharged or victims of other serious unfair labor practices because of union organizing at their workplaces. When an employer commits such unfair labor practices, it "nips in the bud" all of the employees' efforts to engage in the core Section 7 right to self-organization.

Discriminatory discharges are among the most serious nip-in-the-bud violations of the Act. An unremedied discharge sends to other employees the message that they too risk retaliation by exercising their Section 7 rights. As one court has characterized employees' reaction, "no other worker in his right mind would participate in a union campaign in this plant after having observed that other workers who had previously attempted to exercise rights protected by the Act have been discharged and must wait for three years to have their rights vindicated." *Silverman v. Whittall & Shon, Inc.*, 1986 WL 15735, 125 LRRM 2152 (S.D.N.Y. 1986). In addition, the continued absence from the workplace of unlawfully discharged union leaders means not only that the negative message from the unfair labor practices persists but also that the remaining employees are deprived of the leadership of active and vocal union supporters. And with the passage of time, the discharged employees are likely to be unavailable for, or no longer desire, reinstatement when ordered by the Board. Given all of these consequences, employee resumption of union organizing is unlikely, and the ultimate Board order is ineffective to protect rights guaranteed by the Act.

Over the years, the Agency has developed a variety of very effective strategies for minimizing these consequences. First, we have focused on prompt investigation of "nip-in-the-bud" cases and prompt settlement of meritorious charges. Such settlements are a timely and highly effective remedy. In addition, in some of the meritorious nip-in-the-bud cases which did not settle, the Board authorized Section 10(j) proceedings and we obtained injunctions. Like settlements, these Section 10(j) injunctions have provided a substantial and relatively swift remedy by requiring employers to offer interim reinstatement to unlawfully discharged employees pending the Board's order.

My goal is to give all unlawful discharges in organizing cases priority action and a speedy remedy. For years the Agency has been committed to a vigorous Section 10(j) injunction program as a highly effective tool for achieving meaningful real time remedies. As Acting General Counsel, I am committed to continue and enhance this important program for nip-in-the-bud cases. In addition, I am committed to the most expeditious administrative litigation possible for such cases. The program outlined below has been developed to streamline the processing of nip-in-the-bud cases involving discharges to assure that the passage of time does not undercut our ability to provide effective remedies in these cases.

This program covers all stages of case processing—from identification of cases as potential Section 10(j) cases by Regional Offices through Board authorization and litigation of Section 10(j) cases to trial and decision of the merits cases. This program has been developed with invaluable input from all offices of the Agency, especially from the field. I intend to continually monitor whether the program is successful in achieving effective and timely remedies in organizing cases and to see how these priorities actually function in the context of the day-to-day work of your offices. In consultation with you, I will evaluate what, if any, modifications are needed.

Set forth below is what I consider the optimal timeline for processing nip-in-the-bud cases and additional procedures to facilitate these streamlined procedures. The timeline and procedures should be considered as best practices by all branches and regional offices in handling these cases.

<u>Optimal Timeline for Processing Nip-in-the-bud Discharge Cases</u>

- Potential Section 10(j) organizing campaign discharge cases should be identified as soon as possible after the filing of the charge and tracked by the Region until their resolution. In addition, it is critically important that Regions identify such cases in CATS, and subsequently in NxGen, by adding “discharge organizing campaign” in Notes, which will permit reporting on the number and handling of these cases.

- Where possible, the lead affidavit should be taken within 7 calendar days from filing of charge in all nip-in-the-bud discharge cases.

- Regions should attempt to obtain all of the charging party’s evidence within 14 calendar days from the filing of the charge.

- If charging party’s evidence points to a *prima facie* case on the merits and suggests the need for injunctive relief, the Region should notify the charged party in writing that the Region is seriously considering the need for Section 10(j) relief and request that a position statement on that issue

be submitted to the Regional Office within 7 calendar days after the written notification. This letter can be combined with the letter putting the charged party on notice of the allegations raised by the charge and should generally be sent within 21 days from the filing of the charge.

- A Regional Director will normally make a determination on the merits of the case within 49 calendar days from the filing of the charge. If the decision is to issue complaint, the decision with respect to the need for Section 10(j) relief should be made at the same time.

- Regions will endeavor to quickly issue complaints in these nip-in-the-bud discharge cases and to set prompt administrative hearings. When estimating the length of a trial for purposes of trial schedules, Regional Attorneys should allow sufficient time to finish a trial and to avoid the possibility of a continuance. If Regions encounter any problems with obtaining early and continuous hearing dates, they should immediately contact Operations Management.

- Regions must submit to the Injunction Litigation Branch (ILB) all meritorious 8(a)(3) discharge nip-in-the-bud cases, including those currently pending in Regions and those pending before an administrative law judge, that do not settle. I will personally review and decide whether Section 10(j) authorization should be sought in all such cases. Neither discriminatees' lack of desire for interim reinstatement nor a union's abandonment of its organizing campaign are, in themselves, grounds to decline to seek Section 10(j) relief. A union's abandonment of an organizing campaign is itself evidence of chill and does not remove the negative message that discharges have on employee statutory rights. And a court order offering interim reinstatement may cause the resumption of employee interest in organizing with the previous or a new union, whether or not the offer is accepted.

- Regions may use the Expedited Hearing Procedures (GC Memorandum 94-17 and OM Memorandum 06-60) in lieu of immediately seeking Section 10(j) authorization if a non-cooperating respondent has raised a significant *Wright Line* or economic defense or if proceeding to the administrative hearing would seriously facilitate settlement. Expedited hearings in such cases should be scheduled not later than 28 calendar days after issuance of complaint. If the Region is unable to obtain a 28-day hearing from the Division of Judges, please immediately contact Operations Management.

- A short form memorandum regarding Section 10(j) relief in nip-in-the-bud cases should be submitted to ILB. Absent unusual circumstances, this memorandum should be submitted to ILB not later than 7 calendar days from the merit determination or close of an expedited hearing. Regions

will also submit to ILB the parties' position statements, if any, and party representative information.

- ILB will decide all nip-in-the-bud Section 10(j) cases within 2 business days after receipt of the Region's memorandum and will notify the Region as to whether it agrees that Section 10(j) relief is warranted. If ILB has questions for the Region before it is able to decide the Section 10(j) request, it will seek this information as soon as possible after reviewing the case.

- In these cases, ILB will prepare a 1-2 page cover memorandum, addressing briefly only relevant new facts obtained from the Region and issues not addressed by the Region that might be of interest to the Board. ILB will send this memorandum to the Acting General Counsel within 7 calendar days after receiving the last information it needs from the Regional Office. ILB will also forward a copy to the Region.

- I will review and decide the Section 10(j) case, and if I agree, I will sign the memorandum requesting Section 10(j) authorization within 2 business days of receipt from ILB. Upon my approval, ILB will submit the Section 10(j) request to the Board and notify the Region.

- Within 10 business days after receiving notice from the ILB that it agrees Section 10(j) relief is warranted in these nip-in-the-bud cases, the Region will draft its Memorandum of Points and Authorities and Proposed Order and send it to ILB for review. Within 3 business days of receipt, ILB will complete its review, make substantive comments and provide additional/different arguments, case support, and any modifications to the order and return the papers to the Region for filing with the court if the Board so authorizes.

- Regions will file papers with the District Court within 2 business days from notification that the Board has authorized Section 10(j) relief or receipt from ILB of its review of draft court papers, whichever is later. As in the past, if the Region believes that the time for filing should be postponed for good reason, such as settlement discussions, it should consult with ILB regarding whether additional time for filing should be allowed.

<u>Additional Best Practice Procedures to Facilitate Timely Processing of Nip-in-the-bud Discharge Cases:</u>

- When it is clear that documentary evidence or the testimony of neutral witnesses is needed during an investigation, the Region should make a request for the documents or witnesses and if it is not forthcoming, investigative subpoenas should be issued. Regions should not wait for the decision-making agenda to issue necessary subpoenas.

- Regions are encouraged to assign more than one agent, when needed, to investigate and prepare Section 10(j) cases involving nip-in-the-bud discharges.

- "Just and proper evidence" should be taken at the same time in the investigative process as obtaining the evidence on the merits of the charge.

- Because multiple charges are filed as new events unfold, the time for making a Regional 10(j) determination may become protracted. Consistent with OM 01-33, Regions should focus on the core allegations for which Section 10(j) is needed in organizing campaign discharge cases. By proceeding with the Section 10(j) case before opening the administrative hearing, including using affidavits rather than the administrative transcript, the Region may complete its investigation of later-filed non-10(j) charges and avoid *Jefferson Chemical* problems while at the same time seeking Section 10(j) relief on the core violations.

- When considering whether Section 10(j) relief is appropriate, the Region should inform the parties that the Region is prepared to seek Section 10(j) authorization seeking reinstatement of discharged employees. These conversations should be documented in the investigative file.

- To avoid adjournments and postponements, when scheduling the administrative hearing, the Region should liberally estimate the number of days required for the case to be heard.

- Once before an administrative law judge, the Region should oppose any request for postponement or extensions of time for filing documents. If a postponement is granted, the Region should contact ILB to evaluate whether a special appeal contesting the postponement should be filed with the Board.

- Regions generally should consult with ILB if Regions desire to use the administrative record instead of affidavits to try the Section 10(j) case. However, if a Region is confident that the administrative record will close within 2-3 weeks after receiving Board authorization, the Region may independently decide to try the case on the administrative record and move the court to do so when filing its Section 10(j) petition. The Region should notify ILB of its decision to do so.

The key to success of this program is the free flow of information and communication between the Region and ILB throughout the process. Regions should not hesitate to contact ILB for advice and assistance at all phases of their Section 10(j) work.

These cases can drain resources in the field. As soon as you identify a Section 10(j) case where the adequacy of your resources is an issue, please notify your Deputy or AGC in Operations Management and assistance will be provided. In addition, in evaluating your staffing needs overall, if you have an active Section 10(j) program which you believe has not been sufficiently factored in to your staffing, please consult with your Deputy or AGC. I also ask that you advise your local Practice and Procedure Committees of this program and request their full cooperation in expediting these very important cases.

I trust that you will embrace this critical program with the same high level of enthusiasm and commitment with which you perform all of your duties so that, together, we can enhance our ability to effectuate the Agency's mission.

/s/
L.S.

cc: NLRBU
NLRBPA
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