



**UNITED STATES GOVERNMENT**  
***National Labor Relations Board***  
**Office of Inspector General**

## **Memorandum**

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From: Jane E. Altenhofen  
Inspector General

Subject: Inspection Report No. OIG-INS-29-04-02: Section 10(j) Filings

We initiated this inspection to analyze trends at the National Labor Relations Board (NLRB) in filing for temporary relief under Section 10(j) of the National Labor Relations Act, specifically whether a recent General Counsel memorandum achieved the purpose of assuring that all cases warranting interim relief receive full consideration. Injunctive relief would result in a district court ordering the respondent to do something or prohibit some act until the case is decided by the Board. Examples include reinstating an employee to prevent irreparable destruction to an organizational campaign or requiring unions to cease mass picketing activity that restrains or coerces employees from exercising their rights to refrain from participating in a strike.

The Regional Offices submitted, on average, 92 cases annually in Fiscal Years (FY) 2001 through 2003. Within these years, there was a decrease of 12 cases from FY 2001 to FY 2002, and then a slight increase of 3 cases from FY 2002 to FY 2003. The General Counsel submitted a smaller percentage of Regional Office requests for Section 10(j) relief to the Board in FY 2003 than in FY 2001. Further, the Board denied a larger percentage of the General Counsel's requests in FY 2003 than in FY 2001. Between FY 2001 and FY 2003, very few of the Board's requests for injunctive relief were denied by district courts.

The Chairman noted that when analyzing trends it is important to keep in mind that NLRB cases are highly differentiated and each case must be evaluated on its own merits. Further, that the number of Section 10(j) submissions may vary from year to year does not necessarily mean that the standards, or the application of those standards, have changed.

**SCOPE**

We interviewed officials in the Division of Operations-Management (Operations-Management) and the Division of Advice and reviewed General Counsel and Operations-Management memoranda for the years 1966 through 2003. We reviewed information collected and compiled by Operations-Management and the Division of Advice, Injunction Litigation Branch (ILB) that is used by each office to manage and monitor Section 10(j) activity.

We conducted this review in July through December 2003. The review was conducted in accordance with the Quality Standards for Inspections issued by the President's Council on Integrity and Efficiency.

## **BACKGROUND**

Section 10(j) of the National Labor Relations Act (Act) authorizes the Board to seek injunctive relief in U.S. District Courts in situations where, due to the passage of time, the normal adjudicative processes of the Board will likely be inadequate to effectively remedy the alleged violations. Such injunctive relief may be sought as soon as an unfair labor practice complaint is issued by the General Counsel and remains in effect until the unfair labor practice case is finally decided by the Board. To justify Section 10(j) relief, the Board must demonstrate how the alleged violations threaten statutory rights and the public interest while the parties await a final Board order.

Board agents must be aware of the types of situations where such relief may be appropriate, the requirement of the investigative process in those situations, and the internal procedures to be followed in such cases. Employer conduct that could be subject to Section 10(j) actions include interference with organizational campaigns, subcontracting or other changes to avoid bargaining obligations, or dissipation of assets to preclude the remedy of backpay. Union violations that could result in Section 10(j) actions include mass picketing and violence, strike activity without notices or waiting periods required by the Act, and union coercion to achieve unlawful objectives.

The General Counsel's policies for administering the Section 10(j) program have been consistent for nearly 30 years. Over this time, the General Counsel and Operations-Management issued memoranda to seek Section 10(j) relief when appropriate, provide instructions for the Regions to report on Section 10(j) activity, and to report on the use of Section 10(j). Initiatives to promote the program included the development of the Section 10(j) Manual and providing guidance on the ILB Bulletin Board regarding the types of cases that the General Counsel believes warrant Section 10(j) relief. This guidance includes posting the descriptions of all cases for which the General Counsel sought Section 10(j) relief.

## **PROCESS**

Agency policy states that the Regional Offices should evaluate every new charge to determine whether Section 10(j) relief may be appropriate. In some instances Regional Office submissions to ILB are mandatory. Either the charging party or the Board agent can identify potential Section 10(j) cases. As soon as it appears that Section 10(j) relief may be considered, the Region should immediately notify the parties to submit evidence and argument relevant to the Section 10(j) consideration. After the Region completes its Section 10(j) investigation, it should evaluate whether Section 10(j) proceedings are appropriate. The Region's evaluation generally should be made at the same time that it determines whether to issue a complaint on the allegations in the charge.

When the Regional Office has decided that injunctive relief is appropriate, it submits a recommendation to ILB in favor of seeking Section 10(j) relief. The submission should be in the form of a memorandum that will be sufficient, in terms of form, comprehensiveness, and quality, to transmit to the Board if the General Counsel concurs with the recommendation. The memorandum should set forth the fact-findings to be relied on, the legal analysis establishing the violation, the reasons why Section 10(j) relief is considered necessary, and the specific interim relief to be requested.

ILB reviews the memorandum prepared by the Regional Office and, if appropriate, recommends to the General Counsel that injunctive relief should be pursued. A memorandum of their decision and the memorandum prepared by the Regional Office are forwarded to the General Counsel for his consideration. If the General Counsel determines that injunctive relief is appropriate, the General Counsel transmits to the Board the memorandum prepared by the Region with a covering memorandum prepared by ILB indicating concurrence.

The Solicitor reviews the memoranda prepared by the Regional Office and ILB and writes a memorandum for the Board recommending whether to seek injunctive relief. The full Board then votes on whether to seek an injunction in a district court. If Section 10(j) relief is authorized, the Regional Office files the petition.

## **SECTION 10(j) ACTIVITY**

### **Regional Office Submissions**

In General Counsel Memorandum 02-07, "Utilization of Section 10(j) Proceedings," dated August 9, 2002, the General Counsel noted a recent decline in the number of cases identified by Regional Offices and identified steps to assure that all cases warranting interim relief receive full consideration. The number of cases submitted by the Regional Offices remained relatively unchanged after the memorandum was issued.

The Regional Offices submitted, on average, 92 cases annually in FY 2001 through 2003. Within these years, there was a decrease of 12 cases from FY 2001 to FY 2002, and then a slight increase of 3 cases from FY 2002 to FY 2003. The percentage of Section 10(j) submissions from the Regional Offices submitted to the Board, however, decreased from 46 percent in FY 2001 to

28 and 32 percent in FYs 2002 and 2003. In FY 2003, 59 cases were not submitted to the Board. Of these, 46 percent were not submitted for procedural reasons such as the case settled, was mooted by a Board decision, the submission was premature, or because the factual situation changed. The other 54 percent were not submitted for substantive reasons such as the problems with merits of the case or because ILB determined that pursuing Section 10(j) relief was not just and proper.

The decrease in the percentage of Section 10(j) requests submitted to the Board was primarily due to a significant increase in ILB determinations that pursuit of Section 10(j) relief was not appropriate because an injunction was not just and proper. In FY 2001, 25 percent of Regional Office requests that were not submitted to the Board were for just and proper reasons. This increased to 47 percent in FY 2003.

In response to Regional Offices submitting fewer requests for Section 10(j) relief to ILB, an Assistant General Counsel in Operations-Management was assigned to review the submission level for six Regions with the lowest number of submissions. A report with recommendations for improved performance was issued to the General Counsel in October 2003.

ILB stated that the decline in the number of Regional Office requests to the Board to be the result of the strength of individual cases as viewed by the General Counsel. Management also stated that over the years, ILB has developed expertise in analyzing Section 10(j) requests and has consistently applied the same criteria in its screening process.

The General Counsel stated that a conclusion would best reflect the outcome of Section 10(j) cases if it was based on the total cases submitted by Regional Offices, and not the number of cases that were denied by the General Counsel. Our conclusion was based on cases denied by the General Counsel because of antithetical activity showing the percentage of cases being submitted to the Board declining while Regional Office requests were also declining.

#### Regional Office Requests

	FY 2001		FY 2002		FY 2003	
	No.	Percent	No.	Percent	No.	Percent
<b>Regional Office requests received by ILB</b>	99		87		90	
<b>Total ILB dispositions</b>	98	100	92	100	87	100
Cases not submitted to the Board	53	54	66	72	59	68
Cases submitted to the Board	45	46	26	28	28	32

#### Board Authorized Cases

Even though the General Counsel submitted substantially fewer requests for Section 10(j) relief to the Board in FY 2003 than in FY 2001, the Board denied a larger percentage of the General Counsel's requests in FY 2003 than in FY 2001 or FY 2002. The Board denied no

General Counsel requests in either FY 2001 or FY 2002, but denied 3 of 28 requests (11 percent) in FY 2003.

Between FY 2001 and FY 2003, very few of the Board's requests for injunctive relief were denied by district courts. No requests for injunctions were denied in FY 2003.

**Board Authorized Section 10(j) Action**

	FY 2001		FY 2002		FY 2003	
	No.	Percent	No.	Percent	No.	Percent
<b>Board authorized Section 10(j) action</b>	<b>43</b>		<b>16</b>		<b>17</b>	
Injunctions granted by district court	10	23	5	31	9	53
Case settled	25	58	3	19	3	18
Cases withdrawn prior to court decision	3	7	5	31	2	12
Cases pending in district court	0	0	0	0	3	18
Subtotal	38	88	13	81	17	100
<b>Injunctions denied by district court</b>	<b>5</b>	<b>12</b>	<b>3</b>	<b>19</b>	<b>0</b>	<b>0</b>

\* Figures do not match cases submitted to the Board because some cases were withdrawn by the General Counsel and others were acted on in the subsequent year.

**GOALS**

The Agency's Annual Performance Report required by the Government Performance and Results Act has one two-part performance measure related to the processing of Section 10(j) activity. The 2003 measure is to close all cases seeking Section 10(j) relief where there has been Board authorization within a median of 25 days of the receipt from Regional Offices, excluding deferral time. Additionally, 90 percent of these cases will be closed within 30 days by FY 2007, with an interim goal of 87 percent in FY 2003.

The first part of the goal was changed in FY 2002 from a calendar day to a median day measure. The FY 2003 plan does not identify the reason the performance goal was changed. Management stated that the median day measurement is consistent with other Agency time goals. As stated in previous OIG documents, median days measures are most appropriately used when data is skewed and you want to minimize this effect. NLRB data is generally right skewed; a median hides the extreme times that it takes to accomplish some actions and, therefore, is not the best measure for full disclosure.

The measure counts from the date the Regional Office request is received in ILB to the date of the ILB memorandum to the Board requesting Section 10(j) authorization. The measure states that it includes requests that were authorized by the Board. The measure, actually, includes all cases for which the ILB recommended pursuing Section 10(j) actions. These include cases declined by the Board, those withdrawn by the General Counsel, and those mooted by a Board decision.

The performance measure only captures the time the case is in ILB and excludes significant time in other offices. The time to dispose of the case in the Regional Office, up to 7 weeks, is not included. Any time that ILB is waiting for the Regional Office to provide additional information is also excluded. In FY 2003, cases had an average deferral time of 15 days and one case was deferred for 144 days. Also, the time required for Board action is excluded. The Board took an average of 70 days to authorize or deny authority to the Section 10(j) requests in FY 2003. We have commented in prior documents that goals would be more useful if they gave a picture of the overall time taken for the Agency to accomplish results.

The General Counsel stated that our use of an average number of days distorts the picture due to the processing times of three cases. The three cases were at the Board for 194 days, 189 days, and 98 days. If these three cases were not included in our calculation, the average number of days before the Board would be 49, rather than 70 days. This illustrates how medians hide extreme times, another comment that we have made in prior documents.

The Agency did not meet either part of the performance goal in FY 2002 or FY 2003. The FY 2002 Annual Performance Report said that several factors contributed to not meeting the goal, including the development of the Section 10(j) policy with the change in Agency leadership.

### Section 10(j) Performance Goals

Measure	FY 2002		FY 2003	
	Plan	Actual	Plan	Actual (Draft)
Close all Advice cases seeking Section 10(j) injunctive relief where there has been Board authorization within a median of 25 days of receipt from Regional Offices	60% closed w/in 25 days	46.2% closed w/in 25 days	100% closed w/in a median of 25 days	100% closed w/in a median of 30.5 days
Close all Advice cases seeking Section 10(j) injunctive relief where there has been Board authorization within 30 days of receipt from Regional Offices	84% closed w/in 30 days	53.9% closed w/in 30 days	87% closed w/in 30 days	50% closed w/in 30 days