No Rights Without a Remedy: The Long Struggle for Effective National Labor Relation Act Remedies

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Human Rights Watch[1] and others[2] have criticized the National Labor Relations Act (NLRA) for having remedies so weak they fail to enforce the law and to protect employees. This issue is not new. In fact, there was a hard fought struggle over NLRA remedies during its drafting and, once it became law, in the courts.[3] The struggle over remedies continues today. In September and December 2010, Acting National Labor Relations Board (NLRB) General Counsel Lafe Solomon took up that challenge by building upon prior General Counsels' initiatives seeking to strengthen NLRA remedies.[4] In late 2010, Solomon issued memoranda ordering Regional Offices to seek effective remedies for employer violations that affected employees' rights to union representation.[5] In early 2011, Solomon issued three new

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[1] HUMAN RIGHTS WATCH, A STRANGE CASE: VIOLATIONS OF WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES BY EUROPEAN MULTINATIONAL CORPORATIONS (2010), http://www.hrw.org/en/node/92718/section/4; HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS' FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS (2000), http://www.hrw.org/sites/default/files/reports/uslbr008.pdf.

[2] *See, e.g.*, Nancy Schiffer, *Rights Without Remedies: The Failure of the National Labor Relations Act*, ABA Section of Labor & Employment Law, 2nd Annual CLE Conference (Sept. 10-13, 2008), http://www.abanet.org/labor/lel-annualcle/08/materials/data/papers/153.pdf; American Rights at Work, Why Stronger Penalties are Needed, http://www.americanrightsatwork.org/employee-free-choice-act/resource-library/why-stronger-penalties-are-needed.html (last visited May 25, 2011).

[3] Ellen Dannin, Hoffman Plastics *as Labor Law – Equality at Last for Immigrant Workers*?, 44 U.S.F. L. REV. 393 (2009), *available at* http://ssrn.com/abstract=1548082.

[4] General Counsel Meisburg's memoranda include, Memorandum from NLRB General Counsel, GC 08-09, Submission of First Contract Bargaining Cases to the Division of Advice (July 1, 2008); Memorandum from NLRB General Counsel, GC 08-08, Report on First Contract Bargaining Cases (May 5, 2008); Memorandum from NLRB General Counsel, GC 07-11, Mandatory Submissions to Advice (Sept. 25, 2007); Memorandum from NLRB General Counsel, GC 07-08, Additional Remedies in First Contract Bargaining Cases (May 29, 2007); Memorandum from NLRB General Counsel, GC 07-01, Submission of §10(j) Cases to the Division of Advice (Dec. 15, 2006); Memorandum from NLRB General Counsel, GC 06-07, Procedural Initiatives in Election Cases (Sept. 13, 2006); Memorandum from NLRB General Counsel, GC 06-05, First Contract Bargaining Cases (Apr. 19, 2006); *see also* Memorandum from NLRB General Counsel, GC 00-01, Guideline Memorandum Concerning Frontpay (Feb. 3, 2000); Memorandum from Division of Operations-Management, OM 99-79, Remedial Initiatives (Nov. 19, 1999).

[5] Memorandum from NLRB General Counsel, GC 11-01, Effective Remedies in Organizing Campaigns (Dec. 20, 2010); Memorandum from NLRB General Counsel, GC 10-07, Effective Section 10(j) Remedies for Unlawful Discharges in Organizing Campaigns Memorandum (Sept. 30, 2010); *see also* Memorandum from NLRB, Office of the General Counsel, Division of Operations-Management, OM 11-21, NxGen Training Timeline and Logistics, (Dec. 23, 2010), *available at* http://www.nlrb.gov/shared_files/OM%20Memo/2011/OM%2011-21%28NxGen%29%20%20NxGen%20Training%20Timeline%20and%20Logistics.pdf; Memorandum from NLRB, Office of the General Counsel, Division of Operations-Management, OM 11-20, NxGen Training Timeline and Logistics, NxGen Templates for Some Common Field Documents (Dec. 22, 2010), *available at* http://www.nlrb.gov/shared_files/OM%20Memo/2011/OM%2011-20%28NxGen%29%20NxGen%20Templates.pdf; Memorandum from NLRB, Office of the General Counsel, Division of Operations-Management, OM 11-11, Reporting on 10(j) Initiative Regarding Discharges During an Organizing Campaign (Nov. 23, 2010), *available at* http://www.nlrb.gov/shared_files/OM%20Memo/2011/OM%2011-

memoranda concerning remedies in first contract bargaining cases,[6] new methods for calculating backpay remedies to better effectuate the NLRA's remedial purposes,[7] and changes to the process of deciding whether the amount of backpay should be reduced because of a failure to mitigate damages.[8]

Solomon's remedial initiatives have the potential to better promote the NLRA's command with regard to remedies – that remedies "effectuate the policies" of the NLRA – than has been the case for decades. Unfortunately, the NLRA and NLRB have been plagued by ferocious attacks from their inception, and those attacks continue. This article describes the General Counsel's recent initiatives and then discusses longstanding problems that the NLRB's General Counsel must address if the NLRA is to achieve Congress' stated goals of promoting collective bargaining and employee rights to freedom of association.

I. The National Labor Relations Board General Counsel's 2010-2011 Remedial Initiatives

The first memorandum, issued on September 30, 2010, focused on employee discharges during organizing campaigns. These discharges are a barrier to enforcing the law, because the long absence of leaders discourages other employees from organizing.[9] The memorandum requires accelerated case processing at all stages. It also directs regional offices to continue processing cases even when the discharged employees and union have abandoned the organizing campaign, because loss of interest "is itself evidence of chill and does not remove the negative message that discharges have on employee statutory rights."[10] The memorandum also institutes case handling improvements,[11] including holding hearings no later than twenty-eight days after a complaint is issued and using investigative subpoenas to secure evidence and information from witnesses.[12] Until recently the NLRB rarely used subpoenas as part of its investigations.

11%20Reporting%20on%2010%28j%29%20Organizing%20Campaign%20Discharges.pdf.

[6] Memorandum from NLRB General Counsel, GC 11-06, First Contract Bargaining Cases (Feb. 18, 2011), *available at* http://mynlrb.nlrb.gov/link/document.aspx/09031d4580446db6.

[7] Memorandum from NLRB General Counsel, GC 11-08, Changes to the Methods Used to Calculate Backpay in Light of Kentucky River Medical Center and to Better Effectuate the Remedial Purposes of the Act (Mar. 11, 2011), *available at* http://mynlrb.nlrb.gov/link/document.aspx/09031d458045d137; NLRB General Counsel, GC 11-08, Attachment, Daily Compound Interest (Mar. 11, 2011), *available at* http://mynlrb.nlrb.gov/link/document.aspx/09031d458045cc81.

[8] Memorandum from NLRB General Counsel, Guideline Memorandum Regarding Backpay Mitigation, GC 11-07 (Mar. 11, 2011), *available at* http://mynlrb.nlrb.gov/link/document.aspx/09031d458045d137.

[9] Memorandum from NLRB General Counsel, GC 10-07, Effective Section 10(j) Remedies for Unlawful Discharges in Organizing Campaigns (Sept. 30, 2010); *see also* Memorandum from NLRB General Counsel, GC 10-05(A1), (A2), 10(j) End-of-Term Report (June 15, 2010), *available at* http://www.nlrb.gov/shared_files/GC%20Memo/2010/GC%2010-05%20Attachment%201.pdf, http://www.nlrb.gov/shared_files/GC%20Memo/2010/GC%2010-05%20Attachment%202.pdf.

[10] Memorandum from NLRB General Counsel, GC 10-073, Effective Section 10(j) Remedies for Unlawful Discharges in Organizing Campaigns (Sept. 30, 2010).

[11] Paul Weiler proposed similar initiatives ten years ago. Paul C. Weiler, *A Principled Reshaping of Labor Law for the Twenty-First Century*, 3 U. PA. J. LAB. & EMP. L. 177, 189 (2001).

[12] Memorandum from NLRB General Counsel, GC 10-074, Effective Section 10(j) Remedies for Unlawful Discharges in Organizing Campaigns (Sept. 30, 2010); s*ee also* NLRB, ULP CASEHANDLING MANUAL–Part I, §§ 10054, 10058.5, 11770 (Dec. 2009), *available at* http://www.nlrb.gov/publications/manuals/ulp_casehandling_manual_%28I%29.aspx; Memorandum from NLRB General Counsel, GC 00-02, Investigative Subpoenas (May 1, 2000); Ellen Dannin, *Labor Law Reform: Is There a*

The focus of the December 20 memorandum is on providing effective remedies for threats, solicitation of grievances, promises or grants of benefits, interrogations, and surveillance connected with organizing campaigns. According to General Counsel Solomon, the NLRB has "an obligation to seek remedies that are designed to eliminate these coercive and inhibitive effects and restore an atmosphere in which employees can freely exercise their Section 7 rights."[13]

The first of the 2011 remedial initiatives concluded that experience under memoranda GC 06-05 and GC 07-08 supported authorizing NLRB Regions to seek specific remedies without having to submit each case to the Division of Advice.[14] These remedies include notice-reading, extending the certification-year to twelve months, and imposing bargaining schedules. Regions are also encouraged to seek § 10(j) authorization[15] in first-contract cases. For other remedies, such as reimbursement of bargaining and litigation expenses, Regions must continue to seek authorization through Advice in order to ensure consistent treatment in each case.

The second initiative concerned changes made to the Board's backpay mitigation doctrine in 2007[16] and, in particular, changes made to it in cases decided by the Board in 2007 that tended to lower backpay remedies by imposing new burdens on employees to prove that they had mitigated damages by adequately searching for new work.[17] The initiative also addresses longstanding problems with the calculation of back pay.

The norm in litigation, however, is to place the burden of proving an affirmative defense on the party that raises the affirmative defense, and failure to mitigate damages is a usually a defendant's affirmative defense to remedies. In 2007, however, the Board placed the burden on employees to prove that they had begun a search for replacement work within two weeks of losing their jobs and that their search had been sufficiently diligent. In the March 11 memorandum, General Counsel Solomon asks the Board to reverse the 2007 changes. The memorandum also discusses Regions' reliance on state unemployment job-search requirements and records as evidence of the diligence of a discriminatee's job search, rather than duplicating

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Baby in the Bathwater?, 44 LAB. L.J. 626 (1993) (advocating the use of investigatory subpoenas). Previously, Regional Offices had incentives not to seek investigative subpoenas. First, they would slow case processing and thus hurt the Region's and investigator's case processing time, one of the key factors on which both are evaluated. Second, charged parties tended to refuse to provide witnesses for affidavits or documents, and that made it less likely the Region would owe money under the Equal Access to Justice Act if the case was lost after a hearing.

[13] Memorandum NLRB General Counsel, GC 11-01, Effective Remedies in Organizing Campaigns 2, 4 (Dec. 20, 2010).

[14] Memorandum from NLRB General Counsel, GC 11-06, First Contract Bargaining Cases (Feb. 18, 2011), *available at* http://mynlrb.nlrb.gov/link/document.aspx/09031d4580446db6.

[15] After the General Counsel has issued a complaint, the NLRB may file a petition in federal district court seeking temporary relief or a restraining order as the court deems to be "just and proper." 29 U.S.C. § 160(j) (2010).

[16] Memorandum from NLRB General Counsel, GC 11-08, Changes to the Methods Used to Calculate Backpay in Light of Kentucky River Medical Center and to Better Effectuate the Remedial Purposes of the Act (Mar. 11, 2011), *available at* http://mynlrb.nlrb.gov/link/document.aspx/09031d458045d137; NLRB General Counsel, GC 11-08, Attachment, Daily Compound Interest, (Mar. 11, 2011), *available at* http://mynlrb.nlrb.gov/link/document.aspx/09031d458045cc81.

[17] Memorandum from NLRB General Counsel, GC 11-07, Guideline Memorandum Regarding Backpay Mitigation (Mar. 11, 2011), *available at* http://mynlrb.nlrb.gov/link/document.aspx/09031d458045d137.

that work: "In these cases, compliance with state requirements serves as a well-grounded proxy for the 'reasonable search' that is required by mitigation law."

The memorandum for the third 2011 remedial initiative says, "It does not advance the purposes of the Act to require discriminatees to search for work and often incur expenses in their search and yet not reimburse them for those expenses because their search was unsuccessful." Indeed, that practice puts the NLRB at odds with the practice of the Equal Employment Opportunity Commission and the United States Department of Labor in dealing with similar cases. The memorandum also addresses other inequities that have long failed to make discriminatees whole, including higher income taxes owed on backpay when discriminatees are paid backpay owed for many years and for fewer years of Social Security credits accrued that will then affect a discriminatee's eventual eligibility for benefits.

The Board is frequently criticized for the length of time to secure remedies. These and other initiatives should promote the goals of more accurate and speedier investigations, decisions, hearings, settlements, and injunctive relief. However, although the General Counsel's office, Regions, Division of Judges, and Board can expedite cases, there will always be uncontrollable and even long delay in the small percentage of cases appealed to the courts of appeals. The most recent NLRB report shows that many cases are handled relatively quickly, while some cases, especially those that are appealed to the courts of appeals, may take years to resolve. In FY 2010, the median time from complaint to the start of the unfair labor practice hearing was 87 days. Approximately 73.3% of all unfair labor practice cases were resolved within 120 days; 84.6% of all meritorious unfair labor practice cases were resolved within 365 days; and 95.8% of all meritorious unfair labor practice cases settled. In FY 2010, Regional Offices recovered $86,557,684 on behalf of employees as backpay or reimbursement of fees, dues, and fines in FY 2010, compared to $77,611,322 in FY 2009. In FY 2010, a total of 2,250 employees were offered reinstatement, compared to 1,549 in FY 2009. Of these cases, 109 cases were taken to the courts of appeals."[18]

However, experience has shown that the Board's best efforts to seek enhanced remedies — and improved and speedier investigations, settlements, and prosecutions — have not ensured that NLRA rights are enforced so that all employees have full freedom of choice. Ensuring that these new initiatives succeed requires investigating why NLRA remedies have not been effective in the past.

II. Why NLRA Remedies Have Become Weak Remedies – A Brief History of Not Effectuating the Policies of the Act

In 1935, overwhelming majorities in both houses of Congress voted for the National Labor Relations Act. However, rather than requiring specific remedies for violations, the new

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[18]Memorandum from NLRB General Counsel, Summary of Operations (Fiscal Year 2010), GC 11-03, 2, 4, 5 (Jan. 10, 2011); *available at* http://www.nlrb.gov/shared_files/GC%20Memo/2011/GC%2011-03%20Summary%20of%20Operations%20FY%2010.pdf; *see also* NLRB General Counsel, Summary of Operations (Fiscal Year 2009) GC 10-01, 2, 6-7 (Dec. 1, 2009), *available at* http://www.nlrb.gov/shared_files/GC%20Memo/2010/GC%2010-01%20Summary%20of%20Operations%20FY%2009%20.pdf.

law required a benchmark – that remedies for unfair labor practices must "effectuate the policies of the Act." That is still the NLRA's requirement. Put another way, the statute does not limit illegally discharged employees to reinstatement, backpay minus interim earnings, a notice posting, and a cease and desist order,[19] nor does it limit remedies for bad faith bargaining to a notice posting, cease and desist order, and requirement to bargain in good faith in the future. To achieve effective remedies requires understanding how NLRB remedies were, and are still, limited, despite the statute's clear language.

A. What the NLRA Says About Remedies

Of remedies, the NLRA says:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order *requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act . . . .* [20]

In other words, since its enactment in 1935, the NLRA has established that:

(1) the standard for finding that an unfair labor practice was committed is proof by a preponderance of the evidence;
(2) the Board must state its findings of fact as to the existence of a violation;
(3) if the Board finds a violation, it must issue a cease and desist order;
(4) the Board must also take appropriate affirmative action, including reinstatement;
(5) the affirmative action can include backpay; and
(6) the remedies the Board orders must be remedies that effectuate the NLRA's policies.

The 2010 General Counsel (GC) initiatives acknowledge these requirements: "The Board has broad discretionary authority to fashion remedies that will best effectuate the purposes of the Act and are tailored, as much as possible, to undo the harm created by unfair labor practices."[21] The memo also goes one necessary step further:

> Implicit in this statement of the Board's authority is the obligation to articulate why additional remedies are necessary. In arguing for such remedies, Regions should articulate the lasting or inhibitive coercive impact inherent in the violations alleged, as explained above, use additional evidence adduced, where available, to

[19] ELLEN DANNIN, TAKING BACK THE WORKERS' LAW – HOW TO FIGHT THE ASSAULT ON LABOR RIGHTS (2006).
[20] National Labor Relations Act, 29 U.S.C. § 160(c), § 10(6) (emphasis added).
[21] Memorandum from NLRB General Counsel, GC 11-01, Effective Remedies in Organizing Campaigns 5 (Dec. 20, 2010).

> demonstrate the actual impact of the violations and, . . . explain how the remedy sought will remove that impact.[22]

In other words, rather than assuming that a specific type of violation is restricted to a specific remedy chosen from a limited list of remedies, NLRB Regions must seek remedies that will promote the Act's policies and must be prepared to demonstrate in each case how that remedy will ensure that employees can exercise their rights to organize a union, that genuine bargaining will take place, and that NLRA rights are promoted.

The GC initiatives, thus, require fundamental changes in the Board's unfair labor practice procedures starting from the filing of a charge. Those changes are rooted in the Act's language. As Judge Patricia Wald observed:

> Congress deliberately drafted section 10(c) to include all reasonable remedies consistent with the Act's purposes. The final version of section 10(c), authorizing "such affirmative actions . . . as will effectuate the policies of [the NLRA]" replaced earlier provisions that had enumerated specific types of remedies available to the Board. The broader language was intended to "delegate to the Board the primary responsibility for making remedial decisions that best effectuate the policies of the [NLRA]." The Board's choice of remedy "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." And, "[the court is] obliged to defer heavily to the Board's remedial decisions."[23]

Key to the success of this initiative is a new robust role for the NLRA's policies and a fundamental rethinking of the NLRB's operations. The starting point – and essential for the success of this remedial initiative – is studying the NLRA's policies. Their meaning must be understood in order to effectuate Congress' intent.

B. What are the NLRA's Policies?

Ensuring that remedies promote the NLRA's policies requires becoming familiar with the NLRA's policies set out in §§ 1, 7, and 13.

Section 1, the NLRA's policy statement, says:

> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when

[22] *Id.*; *see also* DANNIN, *supra* note 19.

[23] Unbelievable, Inc. v. NLRB, 118 F.3d 795, 810 (D.C. Cir. 1997) (Wald, J., dissenting in part) (footnotes and citations omitted). Although Judge Wald was dissenting in part, the dissent did not concern this principle.

> they have occurred by encouraging the practice and procedure of collective bargaining and by protecting 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 aid or protection.

Section 7, the statement of employee rights, says:

> Employees 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, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 13 states:

> Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right.

How these policies are manifested depends on the issues and evidence in each case, which affect the remedies required to effectuate the Act's policies. Proving the connections between the Act's policies and remedies will require new approaches to analyzing, investigating, trying, and deciding every case.

The General Counsel's remedial initiatives can be successful only if the evidence demonstrates that a specific remedy promotes the NLRA's policies. To achieve that goal, particularly in the early days of these initiatives, cases may benefit from using social science evidence and expert witnesses. Some useful research may already exist, but the NLRB may find it helpful to inform researchers of issues where research is needed.

C. Who is Protected by the NLRA?

The NLRA's definition of employee is of critical importance to the success of the General Counsel's remedial initiative. Congress recognized that using the common law definition of employee (that an employee is limited to the employee of an employer), would have made it impossible to enforce the statute and ensure that § 7 rights were promoted. Congress struggled for months before finally settling on a broad definition of employee, one that did not

link employee status with an employer-employee relationship.[24] The Supreme Court in *Phelps Dodge* said:

> The problem of what workers were to be covered by legal remedies for assuring the right of self-organization was a familiar one when Congress formulated the Act. The policy which it expressed in defining "employee" both affirmatively and negatively, as it did in § 2(3), had behind it important practical and judicial experience. *"The term 'employee'," the section reads, "shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise . . . ."* This was not fortuitous phrasing. It had reference to the controversies engendered by constructions placed upon the Clayton Act and kindred state legislation in relation to the functions of workers' organizations and the desire not to repeat those controversies. The broad definition of "employee," "unless the Act explicitly states otherwise," as well as the definition of "labor dispute" in § 2(9), expressed the conviction of Congress "that disputes may arise regardless of whether the disputants stand in the proximate relation of employer and employee, and that self-organization of employees may extend beyond a single plant or employer."[25]

The difference in the effects of the common law definition of employee as solely an employee of an employer and § 2(3) can be seen in *New York, New York Hotel & Casino*.[26] In that case, the Board majority found that: (1) the employees of the Ark, an entity whose employees worked for the Ark on New York New York's premises, were protected by the NLRA and, (2) even though not employed by it, New York New York's actions could violate the Ark employees' NLRA rights.[27] The dissent in that case ignored the NLRA's definition of employee as relevant to its analysis and argued for a complex test that would have limited protections provided by the NLRA. Employee labor rights were limited in other recent cases by narrowing the definition of who is an employee, as in the Brown University graduate student case,[28] and through other restrictive interpretations during the final days of the Republican NLRB majority in late 2007.[29]

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[24] Ellen Dannin, *Not a Limited, Confined, or Private Matter – Who is an 'Employee' Under the National Labor Relations Act*, 59 LAB. L.J. 5 (2008), *available at* http://ssrn.com/abstract=1115434; Ellen Dannin, *Understanding How Employees' Rights to Organize under the NLRA Have Been Limited: The Case of Brown University,* AMERICAN CONSTITUTION SOCIETY ISSUE BRIEF (2008), http://www.acslaw.org/sites/default/files/Dannin%20Issue%20Brief.pdf [hereinafter Dannin, *Brown University*].

[25] Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 192-93 (1941) (emphasis added) (citations omitted).

[26] New York, New York Hotel & Casino, 356 N.L.R.B. No. 119 (Mar. 25, 2011).

[27] *Id.* at 5.

[28] In this particular case, the NLRB held that graduate student teaching /research assistants were not employees and thus, were not protected under the NLRA. *See* Dannin, *Brown University*, *supra* note 24.

[29] Anne Marie Lofaso, *September Massacre: The Latest Battle in the War on Workers' Rights Under the National Labor Relations Act*, AMERICAN CONSTITUTION SOCIETY ISSUE BRIEF (2008), *reprinted in* A FRESH START FOR A NEW ADMINISTRATION: REFORMING LAW AND JUSTICE POLICIES (2008).

D. How NLRA Remedies Became Weak Remedies

Over seventy-five years ago, Congress mandated that NLRA remedies be effective remedies, but that command has never been followed. If the General Counsel's remedial initiatives are to meet Congress' goals for the NLRA, the agency must take into consideration why NLRA remedies have not been as effective as Congress intended.

In 1935 both houses of Congress voted for the NLRA by large margins. The legislators, however, knew that the law might well be held unconstitutional, as had been the case with other New Deal legislation.[30] The two years between the NLRA's enactment and the affirmation of its constitutionality were a challenging time for the NLRB. NLRB staff had to develop procedures for handling election and unfair labor practice cases, set up a national system of offices, hire and train staff, and lay the groundwork for defending against a constitutional challenge – all in the midst of the Great Depression.

During this critical period, the American Liberty League, a coalition of wealthy industrialists petitioned for injunctions against NLRB operations across the country.[31] When the Supreme Court declared the constitutionality of the NLRA in 1937 in *NLRB v. Jones & Laughlin Steel Corporation*,[32] attacks on the new law did not end. Judges created doctrines that: (1) determined NLRA remedies could not be punitive, (2) increased the number of deductions allowed from employee back pay remedies, and (3) expanded the class of injured individuals deemed not to be employees, and thus ineligible for remedies. Courts and even the Board have continued to pare away NLRA rights.[33]

In 2001, Professor Paul Weiler observed, "The major features of present-day labor law are actually the work of the Supreme Court rather than Congress."[34] Weiler's observation is certainly true of remedies. "The employer's financial liability was limited to just net, rather than gross, back pay lost by the fired union supporter, and only after the latter had taken all reasonable steps necessary to find alternative work. That calculation has had the result of placing the onus on the injured employee, rather than the party found to have violated the law. The result is that, by the 1990s, the median NLRB damage award against employers was less than $3,000 apiece (and even that amount is a tax-deductible corporate expense)."[35] The successive weakening of remedies has particularly impaired the NLRA, for, as the maxim goes, there can be no right without a remedy.

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[30] JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 35-43 (1983).
[31] Dannin, *supra* note 3.
[32] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).
[33] *See* Anne Marie Lofaso, *The Persistence of Union Repression in an Era of Recognition*, 62 ME. L. REV. 200 (2010) (overview of the NLRB "Saturday Night Massacre"); Dannin, *Brown University*, *supra* note 24.
[34] Paul C. Weiler, *A Principled Reshaping of Labor Law for the Twenty-First Century*, 3 U. PA. J. LAB. & EMP. L. 177, 179 (2001).
[35] *Id*. at 188.

1. Remedial, Not Punitive

It was in the 1938 *Consolidated Edison* case[36] that the Supreme created the requirement that remedies not be punitive toward a wrongdoing employer. The problem is that wrongdoers are likely to find any remedy to be punitive. This judge-made rule has made it impossible to enforce § 10(c)'s mandate that remedies must promote the NLRA's policies. The Court majority also ignored Congress' decision to place authority in the NLRB to craft remedies when the Court said, "We think that this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order."[37]

However, remedies that would deter employers from committing future violations would naturally have a punitive effect.[38] As a result, the Court's new limitation created grounds for striking down remedies that would enforce and promote the NLRA's policies. As one scholar has noted:

> An employer who discharges union activists hopes to secure the economic benefit of a non-union workplace. The employer removes the most important supporters of unionization from the workplace and sends a message to the other employees that they may not safely support the union. The discharges may break the organizing drive and prevent unionization. It is unrealistic to expect that employers will abstain from such discharges, unless the NLRA's remedial scheme fulfills one of two conditions. Either the remedies for such violations must be sufficiently costly to deter the employer from committing the violations in the first instance, or the scheme must restore the discharged employees to the workplace before the union vote, thus depriving the employer of the desired benefit.
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> The NLRA's remedial scheme fails on both counts. The ultimate monetary remedy is too small to offset the economic benefit the employer derives from defeating the union. Moreover, employees do not secure reinstatement remedies until long after the group impulse for unionization has been broken.[39]

Unfortunately, not only has the Supreme Court's non-punitive requirement become part of the standard by which NLRA remedies are measured, it has been expanded. In 1940,

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[36] Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938).
[37] *Id.* at 235-36.
[38] Joel Rogers, *Divide and Conquer: Further "Reflections on the Distinctive Character of American Labor Laws"*, 1990 WIS. L. REV. 1, 120 (1990).
[39] Michael H. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 YALE J. ON REG. 355, 363-64 (1990).

Republic Steel[40] cut the amount of backpay owed to an illegally discharged employee. The Court held that money paid to the discharged employee for work through the government funded Works Progress Administration must be subtracted from the employee's backpay remedy. Subtracting the WPA money decreased the backpay owed by the employer, lowered the remedy's deterrent effect, and put the government in the position of subsidizing the employer's wrongdoing.

Alternatively, the Court could have avoided a double recovery by the discharged employee by requiring the employer to reimburse the WPA. The Court's majority, however, held that not allowing that deduction from backpay was an illegal exaction from the employer and, therefore, not supported by the Act's policies:

> We think that affirmative action to "effectuate the policies of this Act" is action to achieve the remedial objectives which the Act sets forth. Thus the employer may be required not only to end his unfair labor practices; he may also be directed affirmatively to recognize an organization which is found to be the duly chosen bargaining-representative of his employees; he may be ordered to cease particular methods of interference, intimidation or coercion, to stop recognizing and to disestablish a particular labor organization which he dominates or supports, to restore and make whole employees who have been discharged in violation of the Act, to give appropriate notice of his compliance with the Board's order, and otherwise to take such action as will assure to his employees the rights which the statute undertakes to safeguard. These are all remedial measures. *To go further and to require the employer to pay to governments what they have paid to employees for services rendered to them is an exaction neither to make the employees whole nor to assure that they can bargain collectively with the employer through representatives of their own choice. We find no warrant in the policies of the Act for such an exaction.*[41]

Thus, the majority's analysis overwrote the requirement that remedies make the Act's policies effective with a tautology that remedies could only be remedial.

The *Republic Steel* dissenters, Justices Black and Douglas, chided the majority for distorting Congress' language "by labeling the Act's purpose or the Board's action as either 'punitive' or 'remedial.'"[42] Their explanation as to why and how paying full back pay effectuated the Act's policies provides a helpful guide to thinking about remedies today:

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[40] Republic Steel Corp. v. NLRB, 311 U.S. 7, 12 (1940).
[41] *Id*. at 12-13.
[42] *Id*. at 14-15.

> The statute commands that the Board must order "back pay" if the policy of the Act will thereby be effectuated. At least two persons are immediately involved in "back pay," as here used; one who pays and one who receives. The propriety of a "back pay" order as an instrumentality for effectuating the Act's policies, must therefore be determined by the manner in which it influences the payor and payee, one, or both. The central policy of the Act is protection to employees from employer interference, intimidation and coercion in relation to unionization and collective bargaining. We cannot doubt but that a back pay order as applied to the employer will effectually aid in safeguarding these rights. *We believe, as did the Board and the court below, that it may well be said that the policies of the Act will be effectuated by denying to an offending employer the opportunity of shifting to government relief agencies the burden of supporting his wrongfully discharged employees*. The knowledge that he may be called upon to pay out the wages his employees would have earned but for their wrongful discharge, regardless of any assistance government may have rendered them during their unemployment, might well be a factor in inducing an employer to comply with the Act.[43]

One year later, in *Phelps Dodge*, the Supreme Court faced the question as to whether backpay could be owed for refusing to hire an employee for anti-union reasons or whether backpay was restricted to discrimination based on firing, because § 10(c) of the NLRA speaks only of reinstatement.[44] Justice Frankfurter observed that "discrimination in hiring is twin to discrimination in firing," and the Board must require "discrimination to cease not abstractly but in the concrete victimizing instances." Thus § 10(c) empowered the Board to restore employment to a person when that employment had been wrongfully denied.[45] The key, according to Frankfurter, was to pursue "the central clue to the Board's powers – effectuation of the policies of the Act."[46] Nothing in the Act, including § 10(c), limits that command.[47]

Frankfurter also took issue with the Court's characterization of NLRA rights as purely private matters: "To deny the Board power to neutralize discrimination merely because workers have obtained compensatory employment would confine the 'policies of this Act' to the correction of private injuries. The Board was not devised for such a limited function . . . . But to limit the significance of discrimination merely to questions of monetary loss to workers would thwart the central purpose of the Act, directed as that is toward the achievement and maintenance of workers' self-organization."[48]

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[43] *Id*. at 14 (emphasis added).
[44] Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 183 (1941).
[45] *Id*. at 189.
[46] *Id*. at 191.
[47] *Id*. at 192.
[48] *Id*. at 192-93.

The problem of "judicial amendments" that limited NLRA rights and remedies was recognized and criticized as early as the 1930s. Cincinnati attorney J. Louis Warm observed in 1938, "Judicial interpretation has done much to emasculate the efforts of the federal Congress and the state legislatures."[49] Osmund K. Fraenkel, former general counsel of the American Civil Liberties Union, said,

> Courts have often struck down laws designed to aid labor, by conservative construction of the constitution and have emasculated them by interpretation. The most useful weapon in their varied armory has been the doctrine that the legislature intended merely to enact the law as it had already been handed down by the courts. As if the labor pains of law-making were readily undergone for any such futile purpose![50]

The problem of shrinking rights has extended far past remedies and the NLRA. For example, judges in the 1930's created stumbling blocks to ordering the disestablishment of company unions used by employers to prevent employees from securing genuine union representation.[51] More recently, Congress has had to amend Title VII in 1978, 1991, and 2009, and the Americans with Disabilities Act in 2008, in order to overturn judicial amendments and reinstate the laws Congress originally wrote. Many more workplace statutes, including the Occupational Safety and Health Act and the Family Medical Leave Act have been made less effective by judicial amendments but have lacked sufficient support and attention to overrule their judicial amendments.

2. <u>What is to be learned?</u>

When Congress considered the NLRA it was aware of the pernicious effect of judicial amendments of workplace laws. It was for that reason that Congress included policy statements and a standard for remedies. In 1947, Justice Felix Frankfurter observed:

> Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government. That aim, that policy is not drawn, like nitrogen, out of the air; it is evinced in the language of the statute, as read in the light of other external manifestations of purpose. That is what the judge must seek and effectuate, and he ought not to be led off the trail by tests that have overtones of subjective design.[52]

Even as remedies were being limited in the 1930s, the question of what remedies met the requirements of § 10(c) was being explored. For example, a 1938 law review article analyzed remedies appropriate for a runaway plant, an issue that still bedevils us:

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[49] J. Louis Warm, *A Study of the Judicial Attitude Toward Trade Unions and Labor Legislation*, 23 MINN. L. REV. 256, 354 (1938-1939).
[50] Osmond K. Fraenkel, *Judicial Interpretation of Labor Laws*, 6 U. CHI. L. REV. 577, 579 (1938-1939).
[51] Harry B. Merican, *The Federal Courts and the National Labor Relations Act*, 26 GEO. L.J. 740, 746 (1938-1939)
[52] Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538-39 (1947).

> Can the Board, besides ordering the employer to cease-and-desist and to reinstate with back pay, compel the employer to return his plants to their former place of business? It has seemed more simple for the Board to order the employer to transport its employees and their families to the new place, or any other place it continues operations. Possibly, this transcends the Board's power to "act affirmatively," but since it is clearly essential to protect the worker under the Act, it appears warranted. Without such an order the employer could only be compelled to reinstate those workers able and willing to bear the burden of moving their homes to the new location. In many cases this would eliminate all but a few employees, who go to the nonunion area knowing what to expect if organization activities are renewed. Thus the employer in mobile industries would be presented with a weapon effective to nullify all the consequences of the Act.[53]

Such a remedy for runaway plants was a genuine issue and not just speculations by a law review author.

> The interest and importance of the Remington Rand case lies in the great number and wide variety of acts violative of the statute for the prosecution of which the proceedings were instituted and in the number and nature of remedies supplied by the Board. With one exception, all the remedies have been reviewed by the Supreme Court and have been deemed to be proper, at least in the specific instances in which they were employed in the cases before the Court. *The Second Circuit Court of Appeals appears to have recognized the power of the Board to order that moving expenses of workers be assessed against the employer, but here denied enforcement of such an order in part, on the ground, that the particular application of this sanction would constitute punishment rather than reestablishment of the status quo*.[54]

By ignoring the language of the NLRA and its policy statements, the Court undermined congressional intent and unfairly limited productive thinking about appropriate remedies. Of course, courts were not the only force limiting NLRA rights and remedies inside its early years. Both before and after the NLRA was enacted, proposals were made to restrict the right to strike by narrowing the Act's definitions of labor dispute, commerce, collective bargaining, and company dominated union. Others proposed modifying its remedial provisions, for example, by

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[53] Note, *The Labor Board and the Courts: Unfair Labor Practices of the Employer*, 32 U. ILL. L. REV. 586, 587 (1937-1938); *see also* Ralph F. Fuchs & Walter Freedman, *The Wagner Act Decisions and Factual Technique in Public Law Cases*, 22 WASH. U. L. Q. 510 (1936-1937); Darlington Mfg. Co., 139 N.L.R.B. 241 (1962), *enf. den*., 325 F.2d 682 (4th Cir. 1963), *dec. vacated*, 380 U.S. 263 (1965); Textile Workers Union v. Darlington, 380 US 263 (1965).

[54] Merican, *supra* note 51, at 748 (italics added).

prohibiting reinstatement of employees against the will of the employer.[55] These proposals, however, went nowhere.[56]

III. The Struggle to Provide Effective Remedies

The 2010 and 2011 NLRB General Counsel's remedial initiatives are part of an ongoing effort to enforce labor rights. Placing them in that context provides insights into the process and substance of labor law reform, including explaining what affected their success and failure. For example, in 1999, the General Counsel proposed securing effective remedies by focusing on making discriminatees whole:

> There are times when our backpay calculations do not fully "make whole" the discriminatee because the calculations include only lost wages and not other damages attributable to the discriminatee's job loss, such as a loss of a car or a house due to the discriminatee's inability to make monthly payments. Because of this, the General Counsel would like to present to the Board test cases in which the General Counsel specifically seeks as part of the remedy a requirement that respondent make the discriminatees whole for all compensatory damages.
>
> It is well settled that the Board is not limited to one type of affirmative order, namely reinstatement with or without backpay, but may compensate for any definite loss suffered as a result of the respondent's unfair labor practices . . . . The failure to cover these compensatory damages means that the discriminatee will not be placed in the position in which the discriminatee would have been but for the discrimination.[57]

In addition, reformers have long targeted the problem of delay in enforcing NLRA rights. Much of the delay between the commission of a violation to the issuance of a remedy occurs when litigation is involved. As a scholar has observed:

> Delay undermines the make-whole strategy for workers and unions for the simple reason that they, unlike the employer, typically need quick action to hold their place in the arena from which the dispute arises. A worker fired illegally during a representation election typically cannot afford to wait for justice. She needs to find a new job. A union blocked by an employer refusal to bargain typically cannot wait indefinitely either. It needs to show effectiveness at the worksite in question if its existence at the site is to continue.

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[55] Note, *The Proposed Amendments to the Wagner Act*, 52 Harv. L. Rev. 970, 970 (1938-1939).

[56] For more information on judicial amendments in the years immediately following the enactment of the NLRA, *see* Dannin, *supra* note 3.

[57] Memorandum from Office of the General Counsel, Division of Operations-Management, OM 99-79, Remedial Initiatives (Nov. 19, 1999).

> For the employer facing delayed enforcement of an order against a union, the situation is typically quite different. After all, the employer owns the operation, and can continue operating pending the resolution of the dispute. It thus does not need to win immediately (or ever) to retain its power position, and can be made whole at a later point because it will exist at the site at a later point. Management can continue to act even as labor grieves.[58]

The attempt to ensure that proper remedies exist for violations of rights under the NLRA is particularly important because often the NLRA is interpreted as preempting the availability of remedies available through other mechanisms. The preemptive power of the NLRA, in an area where the Act provides no remedy, can leave injured workers wholly without justice. In these rare cases, the result is to undermine, not effectuate, the Act's policies. For example, in *Ackers v. Celestica Corp.*,[59] employees sued their employer for fraud and fraudulent inducement when they were laid off, despite a promise to keep the plant open for five years in return for wage concessions. The court found that the fraud claims were preempted by the NLRA.

The real problem, though, is that the NLRA's remedial mandate has never been fully enforced. Consider, for example, the remedy for an employee who has been fired for concerted or union activity. Even under the General Counsel's new initiatives, the Board's remedy continues to be limited to backpay, reinstatement, and a notice posting. There are two problems with this approach: (1) the troubling way that backpay is commonly calculated, and (2) the individual nature of the backpay remedy, which fails to address the collective harm suffered when an employee is fired for concerted or union activities.

First, backpay is the sole monetary remedy, even if an employee has suffered additional financial harm as a direct result of an illegal action. According to the way backpay is commonly calculated, any money the fired worker receives during the period for which backpay is owed is deducted from backpay the employer owes the employee. In addition, failure to mitigate damages by engaging in a sufficiently diligent job search may bar all backpay. This remedy does not make an injured employee whole, because it fails to take into account harms that flow directly from losing a job and income, such as losing a home or medical coverage. Although deductions from backpay are not mentioned by the statute, this remedy has been used for so long that many believe – incorrectly – that the Act itself mandates this remedy. It does not. Rather, it requires that remedies be effective remedies.

Second, the traditional remedy does nothing to address the harm an illegal firing causes other workers. As a result, limiting the remedy only to the discharged worker is ill-suited to a

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[58] Rogers, *supra* note 38, at 120-21. In FY 2010, the NLRB settled 96% of unfair labor practice cases, most of which were settled before a complaint was issued. Memorandum from Office of the NLRB General Counsel, GC 11-03, Summary of Operations (Fiscal Year 2010) (Jan. 10, 2011), *available at* http://www.nlrb.gov/shared_files/GC%20Memo/2011/GC%2011-03%20Summary%20of%20Operations%20FY%2010.pdf.

[59] *See, e.g.*, Ackers v. Celestica Corp., No. 07-3511 (6th Cir. Apr. 17, 2008), *available at* http://www.ca6.uscourts.gov/opinions.pdf/08a0205n-06.pdf.

statute that is built on promoting and protecting employee collective action. The Board took this position in its 1938 *Republic Steel* decision, when it discussed deductions from backpay:

> However proper such set-offs or recoupments might be in a controversy between private litigants over private rights, there is no basis for such a claim in a controversy, such as this, of a public character, where conformance is sought with the public policy of the United States, as expressed in a statute, and where those to whom the Board has awarded back pay are not private litigants in the cause.[60]

Although the Board did not win that point on appeal, an individual backpay award does not address collective harms suffered when an employee is terminated for union activity or protected acts of solidarity. Congress intended the rights and protections in the NLRA to be collective.[61] Thus, rather than promoting the NLRA's policies, this constrained remedy may discourage employees and their co-workers, family, and friends from asserting their NLRA rights. As a result, it may affirmatively interfere with the legitimate rights of employees and thus undermine a Taft-Hartley policy.

Indeed, rather than removing harm to employee collective action and union union support caused by employer illegal action, co-workers may become afraid of the consequences of asserting their legal rights to organize, support one another, or bargain collectively. At a minimum, then, both the injured worker and co-workers need remedies that will make them feel free to exercise their legal rights. The only collective remedy the Board orders is requiring employers to post notices for a short period telling employees what their rights are and promising not to violate the law. It is useful to tell employees about their NLRA rights, but notices are unlikely to remove the harm done to fellow workers of an employee whose NLRA rights have been violated. And to the extent these remedies do not meet the requirement that NLRA remedies be effective, they fail to comply with the statute Congress enacted.[62]

What is needed and what the NLRA requires are remedies that ensure a fired worker, his/her co-workers, and other employees feel free to choose representatives for collective bargaining and to assert their other NLRA rights. To be effective, remedies must be crafted with an eye to each situation and the law's requirements.

IV. Conclusion

In short, the NLRB faces many challenges in seeking to ensure that the Act's promise to protect employees' rights to organize and act collectively to seek better working conditions is honored. To achieve that goal requires studying how these rights have been so undermined, leaving injured employees without a meaningful remedy. The GC's new initiatives represent a step in the right direction, but much more needs to be done if the NLRA is to live up to

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[60] Republic Steel Corp., 9 N.L.R.B. 219, 415-16 (1938), *rev'd* 311 U.S. 7 (1940); *see also* Merican, *supra* note 51, at 747.
[61] Dannin, *supra* note 24.
[62] *See* Dannin, *NLRA Values, Labor Values, American Values*, 26 BERKELEY J. EMPL. & LAB. L. 223, 235 (2005).

congressional intent at the time of the Act's passage. At a moment when the NLRB is being inaccurately criticized for being overly expansive in its decision to issue a complaint against Boeing,[63] I argue that the problem is not that the NLRA is being interpreted too expansively, but rather the opposite — for too long, the Act has been interpreted in a manner that robs it of the flexibility and robust array of remedies intended by those who passed this landmark legislation.

[63] Complaint and Notice of Hearing, NLRB Region 19, The Boeing Company v. International Association of Machinists and Aerospace Workers, Case 19-CA-32431, *available at* http://www.nlrb.gov/sites/default/files/documents/443/cpt_19-ca-032431_boeing__4-20-2011_complaint_and_not_hrg.pdf; *see also* Steven Greenhouse, *Labor Board Tells Boeing New Factory Breaks Law*, N.Y. TIMES, Apr. 21, 2011, at B1, *available at* http://www.nytimes.com/2011/04/21/business/21boeing.html.