Labor Law Reform: Do Labor Organizations Have Equal Access to the System?

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A. RANDALL VEHAR*

INTRODUCTION

Despite the right to freely associate, which is guaranteed by the first amendment of the Constitution, it has not always been clear that working men and women in this country have a legal right to engage in concerted activity, or to join together into labor organizations, in order to seek mutual aid, protection, and better conditions of employment. Once the right to organize into labor organizations and to engage in concerted activities was recognized, courts and legislative bodies remained reluctant to provide labor organizations with the legal tools necessary to enforce these rights. On the other hand, employers have not generally been found wanting when they have sought various legal tools with which to fight labor organizations and employees' concerted actions.

This article suggests that labor organizations generally have not had adequate, and certainly not equal, access to the legal system to protect their rights and the rights of their members. History tells us that fertile ground for militants is created when groups with strong economic differences have relatively unequal or inadequate access to dispute resolution mechanisms. As the effectiveness of the National Labor Relations Board (NLRB or Board), the primary government agency for protecting rights of employees to engage in concerted activities, is again called into question, we should not disregard too quickly the lessons of history.

Indeed, many labor leaders who recently testified before Congress called for the repeal of the National Labor Relations Act (NLRA or Act), suggesting the seeds of frustration, a breakdown in the system, and the eventual elevation of more militant labor leaders.5


1. Section 7 of the National Labor Relations Act, 29 U.S.C. § 157 (1982) provides: 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.


3. Failure of Labor Law, supra, at 2. In his testimony to the subcommittee, the Associate General Counsel for the United Brotherhood of Carpenters & Joiners of America, Robert Pleasure, testified on June 26, 1984, that: [When asked whether] we ought to return to the law of the jungle, through a repeal of the Act... our answer to that is that we are living under the law of the
After examining the proposition that labor organizations have not been granted equal or adequate access to the legal system for a redress of their grievances, the article will explore several areas for reform that deserve renewed attention and consideration. Instead of providing a comprehensive analysis of the numerous proposals for procedural and substantive labor law reforms advanced in recent years, the article will focus on three suggested procedural reforms which this author believes deserve increased attention: (1) availability of a private right of action to proceed against all unfair labor practices; (2) expansion of discovery procedures in unfair labor practice proceedings; and (3) authorization of the General Counsel of the National Labor Relations Board to seek Section 10(j) injunctions without prior Board approval. None of these suggested reforms deal with substantive provisions of the NLRA; however, considering the prevailing political climate, these may be the minimum reforms achievable and necessary to help re-establish a more equitable balance in the approach of the law to labor-management relations.

Increasingly, unions believe that their access to legal redress for violations of their rights is being effectively cut off. Whether correct or not, such perceptions defeat a belief that the law will treat each side fairly. This author suggests, as did the Anthracite Coal Strike Commission in 1902, that, rather than stressing more repressive approaches toward labor unions, we ought to consider providing fuller access to the legal system through which enforcement of rights can be sought. Ready access to the legal system for labor organizations is not only fair, but necessary and proper in order to re-establish the proper balance between labor and management in this country.

Obtaining such a balance in the approach of the law toward labor-management relations has been a continuing struggle for policy makers. A brief examination of the evolution of public policy in this country right now, except that unions are living in a cage and the employers are well armed.

Id. at 23. The President of the United Mine Workers of America, Richard L. Trumka, in a statement before the same subcommittee, warned:

It has been said that it takes two to make peace, but only one to make war. My experience is that corporate America has reignited the labor war which prompted the passage of the National Labor Relations Act. But, unlike the 30s, workers are now hamstrung by an act which prohibits secondary boycotts, hot cargo arguments, and many forms of picketing. In return, as I have described in detail, they have been afforded little protection from employer [sic] excesses.

The time has come for us to question whether the National Labor Relations Act, with its delay ridden procedures, token sanctions, and contorted perception of employee rights, has become an albatross on the labor movement. Without a major overhaul of the Act, I am convinced this is the case.

Among the many changes needed, we want: . . . (7) A labor law that provides a private right of action for workers and unions.

Considering today's political realities, we know these changes are not going to be made soon. But I close with a message to corporate radicals and their friends in the Federal Government: Those who make cooperation impossible, make confrontation inevitable.

Id.

4. See infra text accompanying note 29.

5. See supra note 2. While the House of Representatives has focused on employer abuses of labor's rights, the Senate, in examining relations between labor and manage-
try toward labor organizations illustrates the reluctance of the government to fully recognize and to fully protect the rights of employees, asserted through their own labor organizations.

The author hopes that this article will stimulate further discussion and analysis of these proposals as Congress continues to re-examine these areas.

I. THE LAW HAS ALWAYS BEEN RELUCTANT TO RECOGNIZE AND PROTECT CONCERTED ACTIVITY BY EMPLOYEES

Under the common law, as developed in England, even peaceful concerted activities by employees attempting to better their pay and working conditions was deemed to be a criminal conspiracy. The first labor conspiracy case in America was decided in 1806, and attempted to transplant the English common law to America. The court held that, while there was nothing illegal in each employee's individual objective of seeking higher wages, and nothing unlawful in the methods used to obtain this objective, the seeking of such goals by employees acting in concert, instead of individually, constituted an unlawful criminal conspiracy. The court, in justifying criminal conspiracy actions as a legal tool for preventing even the existence of effective labor organizations, stated, "a combination of workmen to raise their wages may be considered in a twofold point of view: one is to benefit themselves . . ., the other is to injure those who do not join their society. The rule of law condemns both." Thereafter, until 1842, there were seventeen trials in which labor unions were charged as being criminal conspiracies. Yet this did

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9. J. TAYLOR & F. WHITNEY, supra note 8 at 21, quoting from J. Commons & Gilmore, 3 A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 233 (1910).
10. Id. At least two of the most important industrial states of the time, Pennsylvania and New York, accepted the common law view that a combination of workmen to raise wages constituted a criminal conspiracy. People v. Melvin, 2 Wheeler's Crim. Cases 262 (N.Y. 1810); People v. Trequier, 1 Wheeler's Crim. Cases 142 (N.Y. 1823); Philadelphia Cordwainers' Case, supra note 7. While there is some suggestion that the idea of a criminal conspiracy did not "take root in this country," Krystad, 400 P.2d at 77, the downplaying of this theory should be examined carefully. Those authors who argue that the criminal conspiracy theory was not generally followed prior to 1842, submit that these courts found the illegal conspiracy based upon the objective of the concerted activity or strike and not just upon the existence of the labor organization or the existence of the concerted activity in and of itself. Witte, Early American Labor Cases, 35 YALE L.J. 825 (1926). The court in Commonwealth v. Hunt, infra note 11, finally drew the distinction between the labor organization as a conspiracy in and of itself, as opposed to a conspiracy in which a labor organization, while lawful as an association, seeks to obtain illegal objectives or lawful objections
not stop the innate desire of employees to strive, through self-organization, for better working conditions. Finally, in 1842, doubts as to whether the English common law conspiracy theory would be transplanted to America were ended when Chief Justice Shaw, in Commonwealth v. Hunt, held that a labor union was a lawful and legitimate organization which could engage in a strike for higher pay without per se being found in criminal conspiracy.

Following Commonwealth v. Hunt, the theory that labor unions inherently constitute a criminal conspiracy began to lose its force in America. However, while employers lost the conspiracy tool to thwart employees' concerted activity they soon found courts friendly to the use of injunctions to serve the same purpose.13 Blanket injunctions often outlawed not only illegal activity, but lawful activity as well.14 Supreme Court Justice Felix Frankfurter, prior to taking his seat on the high Court, recognized how the effective, but unfair, use of the injunction could thwart legitimate, concerted activity:

In theory, the final injunction decree alone is an adjudication on the merits; temporary restraining orders and temporary injunctions are nominally provisional. In fact, however, the restraining order and temporary injunction usually register the ultimate disposition of a labor litigation, which seldom persists to a final decree. Lack of resources may frustrate pursuit on the litigation, or as is often the case, the strike is ended before the final stage is reached and ended not infrequently as a result of the injunction.15

At least some of the abuses of injunctive power were ameliorated when Congress passed the Norris-LaGuardia Act of 1932.16 This Act was intended to severely restrict the ability of employers to utilize the injunction to thwart legitimate employee activity. For awhile, the Norris-LaGuardia Act was the basis for decisions preventing federal or state courts from issuing an injunction against a labor organization or its members in the event of an alleged violation of an explicit no-strike clause, even for peaceful picketing.17 However, unions later discovered that the injunction was not totally unavailable as a management tool. In Boys Markets, Inc. v. Retail Clerks Local 770, the Supreme Court permitted an injunction, despite the dictates of the Norris-LaGuardia Act, through illegal means. However, Professor Cox argues that this distinction may have been a distinction without a difference, at least until 1932, when the Norris-LaGuardia Act was enacted, because courts took a very narrow view as to what constituted a lawful object of concerted activity. A. Cox, Law and The National Labor Policy 3, 44 (1960 & reprint 1983).

13. See A. Cox, supra note 10, at 3-4; J. Taylor & F. Whitney, supra note 8, at 29-47.
14. J. Taylor, supra note 8, at 37.
under highly specialized circumstances. Underlying the rationale of *Boys Markets* and its progeny is the Court's view that, when a union agrees to settle disputes through a mandatory grievance arbitration procedure, there is an implication that the union has also waived its statutory right-to-strike even when the labor contract does not have an explicit no-strike clause and the labor organization had previously negotiated an explicit no-strike clause out of the agreement.

The weakness of the injunctive approach to labor relations is that it normally only restricts activities, sometimes including lawful or peace-
ful activities of employees, without addressing the underlying issues of the dispute so that employees can be assured of equitable treatment from the courts.\textsuperscript{24}

For a number of years, the federal government was uncertain as to how this imbalance in treatment of employers and employees should be addressed. Initially, the government sided in strikes with the employers, even going to the extent of seizing and temporarily operating industrial property seventy-one times in this country’s history.\textsuperscript{25} In most of these cases, the government was siding with employers, or, at least, simply attempting to have production resume because of the government’s own needs, without giving effective attention to resolving the disputes that led to the strike. For instance, during the Civil War, President Lincoln, without regard to the merits of the employees’ grievances, seized the Philadelphia & Reading Railroad in July, 1864 and had the War Department replace strikers, so the railway could provide coal for the Army and Navy. Within a week after the Army began operation of the Railroad, more than a quarter of the strikers were fired, thereby breaking the strike and weakening the union.\textsuperscript{26}

The first peacetime use of presidential intervention in a labor dispute occurred in February, 1877 when President Hayes, through his attorney general, directed that the local strike leaders of the Brotherhood of Locomotive Engineers, who had struck and closed the Boston & Main Railroad, be arrested for conspiracy to obstruct the United States mail. This rather innovative, one-sided approach to labor relations was based on the theory that employees who agreed among themselves to strike prior to the end of their work day for better conditions, were interfering with delivery of the mail even though this interference was not directly intended and only incidental to the slowing down of rail traffic. The strike leaders were tried and found guilty in federal court.\textsuperscript{27}

The first use of presidential intervention in a labor dispute, which sought equitable treatment for employees, occurred in 1902 by President Theodore Roosevelt. During an anthracite coal strike in Pennsylvania, President Roosevelt learned that the employers would not voluntarily accept the decision of his fact finders on how to resolve the labor dispute. Contrary to previous governmental intervention into labor disputes, he threatened to seize the operations to force employer acquiescence to the fact finders’ report, which provided for a more equi-

\textsuperscript{24} While it is argued (once one accepts that the existence of a mandatory arbitration provision \textit{implies} a concomitant no-strike obligation) that violation of a no-strike clause justifies injunctive relief, because the employees’ actions are not legitimate, such a rationale has not prevented the Supreme Court from prohibiting an injunction sought by a private party under § 301 for a "political" strike, while permitting a damage action against the union for the same type of strike under § 305 (29 U.S.C. § 187 (1982)). Jacksonville Bulk Terminals v. International Longshoremen’s Assoc., 457 U.S. 702 (1982); International Longshoremen’s Assoc. v. Allied Int’l, Inc., 456 U.S. 212 (1982).

\textsuperscript{25} J. BLACKMAN, PRESIDENTIAL SEIZURE IN LABOR DISPUTES 3 (1967).

\textsuperscript{26} Id. at 8.

\textsuperscript{27} U.S. v. Stevens, 27 F. Cas. 1312 (C.C.D. Maine 1877) (No. 16,392); J. BLACKMAN, \textit{supra} note 25, at 8.
table solution to the employees’ grievances. The fact finders’ report succinctly states the thesis of this article:

Experience shows that the more full the recognition given to a trades union, the more businesslike and responsible it becomes. Through dealing with businessmen in business matters, its more intelligent, conservative, responsible members come to the front and gain general control and direction of its affairs. If the energy of the employer is directed to discouragement and repression of the union, he need not be surprised if the more radically inclined members are the ones most frequently heard.

Based upon the recognition that employers would have to be coerced into granting employees their rights, the federal government began to move slowly toward a more balanced approach in labor disputes. For instance, in 1918, President Wilson established the National War Labor Board (NWLB). The NWLB recognized the right of employees to organize in trade unions and to bargain collectively, without interference by employers. The NWLB conducted elections, ordered reinstatements with back pay, and directed employers to bargain. However, the NWLB had no express authority to enforce its findings, except through President Wilson’s moral backing. Wilson, however, gave some teeth to his moral authority by seizing the properties of Western Union Telegraph Company because the carrier discharged workers who joined the union, and by seizing the Smith & Wesson Arms Company because the employer would not bargain. Yet, labor unions had no formal legal tools to use to seek enforcement of their rights.

Congress then attempted to codify the right of employees to engage in concerted activities in Section 7(a) of the National Industrial Recovery Act of 1933. Contrary to almost every formal governmental policy before or since, the NIRA attempted to establish a role for government in addressing the substance of employee disputes through industrial codes, which were to establish working conditions for specific industries. However, massive resistance to the NIRA, as well as lack of an effective enforcement mechanism, shattered the dreams of those who had hoped that public policy was finally beginning to approach labor-management relations with an even hand.

30. J. Taylor & F. Whitney, supra note 8, at 139.
31. Id. at 140; see also U.S. DEPT. OF LABOR BULLETIN No. 1000, BRIEF HISTORY OF THE AMERICAN LABOR MOVEMENT 18-19 (1976) (discussing the creation of the NWLB, the first federal labor agency to set forth union organizations and collective bargaining rights of employees).
32. 48 Stat. 195 (1933).
33. A Board to enforce the NIRA was established by President Franklin Roosevelt by executive order on August 5, 1933, with Senator Robert F. Wagner as its chairman. However, it was not until December 16, 1933, that an executive order formalized the power of the Board. The authority of the Board was further formalized by an executive order on February 19, 1934. The Board, however, did not have statutory powers, or authority under the executive order, to enforce its own decisions. Instead, violations of a report of
Whatever effect the NIRA may have had in attempting to bring balance to the government's approach to labor-management relations ended when the Supreme Court found the Act unconstitutional in *Schechter Poultry Corp. v. United States*.\(^3\) Shortly thereafter, the National Labor Relations Act,\(^3\) also known as the Wagner Act, the Magna Carta of the labor movement, was passed. Section 7 of the NLRA\(^3\) clearly established the right of employees to engage in concerted activity for their mutual aid and protection, as well as for the purpose of bargaining for improved conditions of employment. This right was strengthened by the prohibitions listed as employer unfair labor practices in section 8 of the Act.\(^3\) Under the NLRA, as originally passed, the NLRB was continued as the primary administrative agency regulating public policy regarding labor-management relations.\(^3\) Section 10\(^3\) of the Act authorized the NLRB to investigate charges filed by private parties, to hold hearings, to issue cease and desist orders, and to require affirmative remedies. However, the Board's findings were not self-enforcing; the Board had to seek judicial enforcement of its orders. In addition, employees and unions had no private right-of-action to have their cases actually brought to litigation. Clearly, though, this was at least a step forward, since there was the clear statutory authorization for courts to enforce the Board's decisions.

Unlike the NIRA, however, the NLRA did not attempt to force the federal government into deciding the merits of labor disputes. The NLRA, as originally enacted, only attempted to provide and protect a private mechanism—collective bargaining between employees and labor organizations freely chosen by the employees—by which the parties would attempt to resolve their disputes. The government would statutorily recognize the right of employees to bargain collectively, the obligation of employers to bargain with recognized and certified unions, and it would protect employees who attempted to assert these rights through collective or union action. The government would not try to impose any specific terms or conditions of employment on labor or management but would leave the definition of such terms to the parties.

One might ask whether the weakening of the collective bargaining
mechanism will ultimately lead to renewed demands for federal intervention into the substance of labor disputes, as under the NIRA. For instance, as we see the Board and the Courts erode a union’s right to demand bargaining over plant closures or relocations, we see increased interest by the state and federal governments in plant closure legislation. Rather than moving toward more governmental intervention into the substance of labor disputes, increased attention should be given to making the private procedural system of collective bargaining work. To do that, there must be an effective mechanism to enforce the right to collectively bargain through freely chosen unions. Unfortunately, government policy has not always recognized the need to strengthen these procedural mechanisms as a way to avoid demands for more substantive intervention.

II. Even with the advent of the NLRA, the government was reluctant to give labor organizations access to the system

For a brief period in our country’s history, the government placed itself squarely on the side of protecting employees’ rights to engage in concerted activity for improvement of their working conditions. Passage of the Norris-LaGuardia Act, the NIRA, and the Wagner Act evidenced this changed perspective. However, between 1935 and 1947, there were

40. On the other hand, one might argue that the growth of federal intervention into pension matters with the passage of ERISA, and into health and safety matters with the passage of OSHA and MSHA, as well as the promulgation of various anti-discrimination statutes, have actually weakened the collective bargaining structure by undercutting part of the raison d’être for unions.

41. Milwaukee Spring, 268 N.L.R.B. No. 87, 1983-84 NLRB Dec. (CCH) ¶ 16,029 (1984). The Board held that an employer’s decision to relocate assembly operations from a unionized facility to a nonunionized one without the consent of the union was not unlawful. However, Member Zimmerman’s dissent pointed out that the employer’s actions were in derogation of its bargaining obligation under § 8(d), thereby violating § 8(a)(5).

42. First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981); Textile Workers v. Darlington Co., 380 U.S. 263 (1965). The underlying rationale in Darlington may have been weakened by the holding in Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973). When an employer entirely closes its business in order to frustrate unionization it is normally a violation of § 8(a)(3) of the NLRA, but for the Darlington decision. The Court in that case determined that an anti-union employer had a right to totally close its business, but did not have a right to selectively close part of the business in order to stymie union activity. However, inGolden State Bottling, the Court subsequently recognized that even an innocent employer who purchased an operation knowing of a § 8(a)(3) violation by the predecessor, could be required to remedy the violation. The Court recognized that the purchaser who takes with notice, could take the unfair labor practice liability into account in negotiating the purchase price. There is no reason why this latter principle should not be recognized in cases of a complete closure and sale, as well as in cases of a partial closure and sale. Thus, if a company completely closes for anti-union reasons, this should still be considered a violation of § 8(a)(3). However, the company need not be ordered to resume operations, but any successor company takings with notice should be required to remedy that violation. Unfortunately, this theory will probably not be judicially tested, since the NLRB General Counsel has failed to date to issue such a complaint.

43. See Responsible Conduct Called Key to Avoiding Plant Closing Laws, Daily Labor Report (BNA), December 12, 1984, at A-7, E-1—E-6 for summary of proposed federal legislation and proposed legislation in nineteen states and summary of ten states with plant closing laws.
strong employer criticisms of the NLRB, in part based upon this change in the government’s approach to labor-management relations. This criticism led to the Taft-Hartley Amendments of 1947 and a significant shift toward strengthening employer rights, while restricting those of labor organizations. One need only examine the change in procedures available to enforce respective rights in order to recognize the heightened importance given to employer rights over rights of employees and unions.

In the Taft-Hartley amendments to the National Labor Relations Act, Congress established an independent General Counsel, a presidential appointee subject to senatorial approval with a term of four years, who would enforce the NLRA.\textsuperscript{44} Congress was concerned that the NLRB was acting as prosecutor, judge, and jury.\textsuperscript{45} Under the “old” NLRA, there was no independent prosecutor; the NLRB appointed its own legal staff to review and investigate charges and decide whether to issue a complaint, and hearing officers would meet privately with the NLRB after a public hearing to discuss the case. Employers argued that this led to a denial of due process and to unfair decisions.\textsuperscript{46} Now, after the amendments, there is still no private right-of-action for unions to seek a remedy for unfair labor practices by employers. The General Counsel retains sole, unreviewable discretion as to whether a complaint should issue against an employer. Thus, regardless of the merits of the charge against an employer, if the General Counsel decides not to issue a complaint,\textsuperscript{47} that decision may not be the subject of a successful writ.

\textsuperscript{44} 29 U.S.C. § 153(d) (1982).
\textsuperscript{45} 1 NLRB LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 292, 297 (1948) (hereinafter cited as “LEGISLATIVE HISTORY”).
\textsuperscript{46} Id. at 297, 426, 540-41; 2 LEGISLATIVE HISTORY at 1494; but see MILLIS & BROWN, supra note 33, at 66-75.
\textsuperscript{47} The General Counsel has delegated to various Regional Directors her authority to decide whether to issue a complaint. The Regional Director acts, inter alia, as an assistant prosecuting attorney and makes the initial decision whether to issue a complaint against an employer or labor organization. If the Regional Director decides not to issue a complaint, his decision may be administratively appealed to the NLRB General Counsel, who acts as the prosecuting attorney. 29 C.F.R. 102.19 (1984). The General Counsel has established an Office of Appeals to consider these administrative appeals from a Regional Director’s refusal to issue a complaint. However, one must question whether or not this “appeal” process is, or was ever intended to be, adequate. For instance, while the appealing party may request oral argument before the Office of Appeals, these arguments are rarely granted. Also, when the appeal has been dismissed based upon the administrative resolution of factual disputes, the appealing party has no right to examine affidavits submitted by the respondent in order to prepare an effective rebuttal. In fact, neither the appealing party nor the respondent are required to file their briefs with the other party. Indeed, a Regional Director’s refusal to issue a complaint is reversed by the Office of Appeals only about three to four percent of the time. NLRB General Counsel’s Summary of Operations for Fiscal 1983, reprinted in Labor Relations Yearbook 1983 (BNA), 226-27 (1984) (hereinafter cited as NLRB General Counsel’s Summary). Former chairman of the NLRB, now management attorney, Edward B. Miller, has stated that reversals by the Office of Appeals of a Regional Director’s decision do not occur:

in any substantial number of cases, but the opportunity for an appeal from the regional director’s determination is doubtless sound administrative practice and has helped blunt some of the criticism of the power invested in the General Counsel.

E. MILLER, AN ADMINISTRATIVE APPRAISAL OF THE NATIONAL LABOR RELATIONS BOARD
of mandamus to force the issuance of a complaint.48

Since rights created or recognized by the National Labor Relations Act are generally deemed to be public and not private rights, an employee whose "rights" under the NLRA have been violated by an employer has no control over whether or not his or her case may ever be put before a judicial officer for ultimate resolution. The Regional Director's decision not to issue a complaint is almost never administratively overturned. Thus, an employer against whom a charge has been filed knows that the employee or union has little or no control over whether the unfair labor practice charge will be aggressively pursued.

On the other hand, unions may be the subject of numerous private actions that can be controlled by the plaintiff. For instance, Congress in the Taft-Hartley amendments not only established that secondary boycott attempts to force an employer into an employer's group, certain recognition strikes and jurisdictional strikes were unfair labor practices,49 but it also provided employers with a private right-of-action to sue unions for damages in federal court for these unfair labor practices.50 While an employer does not have standing to seek a temporary injunction against alleged violations by unions of section 8(b)(4) or 8(b)(7) of the NLRA, the amendments mandate that once the Regional Director issues an 8(b)(4) or 8(b)(7) complaint, he must seek a temporary injunction from a district court.51 Moreover, when an employer files such charges against a union, these charges are given expedited treatment over all other types of charges,52 including charges alleging employer discriminatory action against employees.

In contrast to the mandatory 10(l) injunction against unions, actions against employers brought under section 10(j) permit but do not require the pursuit of temporary relief by federal district courts, pending Board processing of a section 8(a) violation. Also, unlike section 10(l), a Regional Director has no authority on his own to pursue a 10(j) injunction. He must first refer the matter to the General Counsel's Division of Advice, who must then obtain approval from the five-member Board before the Regional Director may go to court for the injunction.53

One may also look to the remedies provided by the Taft-Hartley

(1977). Thus, it appears that the existence of the Office of Appeals, which almost always "rubber stamps" the Regional Director's decision, is more for appearance than to provide actual fairness to the charging party.

48. See Meat Cutters Union v. Jewel Tea Co., 381 U.S. 676, 687 (1965); Vaca v. Sipes, 386 U.S. 171, 182 n.8 (1967); Baker v. International Alliance of Theatrical Stage Employees, 691 F.2d 1291, 1293-95 (9th Cir. 1982).
   If, after [a § 8(b)(4)(A), (B), or (C), or § 8(b)(7)] investigation, the . . . regional attorney . . . has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf the Board, petition . . . for appropriate injunctive relief pending the final adjudication of the Board.
amendments for a violation of section 8(d) of the Act in order to see the more punitive approach taken toward employees who violate the employer's right not to have a contract strike unless notification requirements are met. Employees who violate section 8(d) are not only subject to normal Board remedies but also automatically lose their status as "employees" and thus all protection under the Act. However, an employer who locks out employees in violation of 8(d) is not faced with corresponding sanctions.

One need look no further than the statutory priority for remedying certain union unfair labor practices and the employers' right to seek private remedies before realizing that employee and union rights have lesser legal importance than employer rights. Yet some of the most important rights enjoyed by employees and unions involving labor-management relations are those protected by sections 7 and 8(a) of the NLRA. The union though, must rely on the Regional Director or General Counsel for judicial enforcement of these rights. Contrary to the wishes of the union, an action may not be pursued for any number of reasons. For instance, if the Board has taken a certain position regarding an interpretation of the Act, the General Counsel will follow the Board's interpretation and may dismiss a case, even though the Board's decision has been overturned by one or more courts of appeal. The Regional Director will continue to follow the Board's position, at least until the Board acquiesces in the position taken by the appellate court,

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54. 29 U.S.C. § 158(d) (1982) requires labor and management to bargain in good faith over wages, hours, and other terms and conditions of employment.

55. Id.

56. See A. Cox, supra note 53, at 930. Employers also enjoy the use of other effective alternative weapons to protect their interests, while union access to the tools to protect their interests are often blunted. For instance, while mass picketing or picket line violence violate § 8(b)(1)(A) of the NLRA, employers need not be limited to filing an unfair labor practice charge, but may also independently pursue state court injunctive relief, damages, and contempt. Youngdahl v. Rainfair, 355 U.S. 131 (1957); Consolidation Coal, supra note 19. In addition, the employer who, in this commentator's experience, is often able to obtain an ex parte restraining order or preliminary injunction with little or no evidence of union involvement, despite the "clear proof" requirement of Norris-LaGuardia (see Ramsey v. UMW, 401 U.S. 302 (1971)), has the full use of available discovery mechanisms to pursue its court case. Similarly, while the violation by a union of the duty of fair representation is an unfair labor practice under § 8(b)(1)(A), there is also a private right-of-action against a union for such a violation under § 301. Vaca v. Sipes, supra note 48. On the other hand, many coercive actions of employers against employees cognizable under § 8(a)(1) and (2) may only be pursued before the NLRB. For instance, while a union can be sued for damages for attempting to force an employer into an employer's group, 29 U.S.C. §§ 158(b)(4)(ii)(A) and 187 (1982), a union has no such private right-of-action for an employer's interference with the formation of a labor organization, but can only file an unfair labor practice charge, 29 U.S.C. § 158(a)(2) (1982).

Likewise, § 301 ex parte restraining orders are frequently issued against unions with the possibility of substantial damages looming over their heads, while employers may refuse to abide by grievance/arbitration procedures or awards without great risk. And while employers may easily establish standing to bring an anti-trust suit against a union with the possibility of treble damages; Connell Co. v. Plumbers & Steamfitters, 421 U.S. 616 (1975); UMWA v. Pennington, 381 U.S. 657 (1965), unions for all practical purposes have been denied access to this remedy, even when the employers have conspired among themselves to prevent unionization. Associated Gen. Contractors v. California State Council of Carpenters, 459 U.S. 519 (1983).
or until the Supreme Court resolves the issue.\textsuperscript{57}

It is often more difficult for unions to prove their charges against employers in an unfair labor practice proceeding than for employers to prove their charges against a union in a section 301 or section 303 court proceeding in which the Federal Rules of Procedure allow full discovery. While the Regional Director is required to investigate a charge once it is filed, there are no statutory provisions which facilitate full discovery. In complicated cases, such as an alter-ego case or a secondary boycott case in which the union is claiming the ally-doctrine as a defense, the Board agent in practice rarely engages in an aggressive investigation of the interconnections between the various companies involved.\textsuperscript{58} Instead, the charging party is responsible for finding evidence and presenting it to the Board agent in order to establish the prima facie case. The problem, of course, is that the union is rarely privy to necessary information. For example, in an alter-ego situation the employer is generally attempting to avoid its statutory bargaining or contractual obligations by establishing a sham transaction or sham corporation, thereby hiding the true identity of the employer. Because the Board has not adopted by regulation pre-trial discovery procedures similar to the Federal Rules of Civil Procedure, though authorized to do so,\textsuperscript{59} the employer is not discouraged from attempting to escape its bargaining obligations by establishing a sham transaction because it can frequently hide such a transaction from a charging party. In such a case, there will not normally be enough information readily available to the charging party to establish a prima facie case for the Regional Director. Since the Board agent often does not aggressively develop the evidence necessary to establish such a relationship,\textsuperscript{60} the charge may be dismissed, allowing the employer to suc-

\textsuperscript{57}. For instance, the Board originally took the position that an employee on sick leave could be considered a striker, even if incapable of working, if she declared support for the strike, thereby permitting the employer to stop her disability payments. This position of the Board was overturned by the Third Circuit, though the Board did not immediately acquiesce to the court’s view of the law. \textit{Compare} E.L. Weigand Div. v. NLRB, 650 F.2d 463, 474 (3d Cir. 1981) (court did not approve the Board’s order which permitted stoppage of payment to employees on basis of public support of strike) with Conoco, Inc., 265 N.L.R.B. No. 116 (1982) (Board ruled that termination of employee’s benefits based on public support for strike violated employees’ § 7 rights, following \textit{Weigand}). During the 20 months between the Third Circuit decision and the Board’s general acquiescence to the court’s position in \textit{Conoco}, this commentator had a charge dismissed by the Regional Director and the Office of Appeals based on the Board’s original position, due to the Board’s lagging acceptance of \textit{Weigand}. (For a full analysis of this doctrine, see Remarks on \textit{NLRB v. The Courts by Tracy H. Ferguson Before New York University’s 35th National Conference on Labor Law}, Daily Labor Report, June 17, 1982, at D-1). Thus, the employee, whose statutory right was violated, was left without a remedy simply because the Regional Director followed the “Board’s” position, rather than the prevailing court decision. Although motions for reconsideration were then filed with the Office of Appeals, there has been no action on this matter.


\textsuperscript{59}. 29 U.S.C. § 156 and 160(b) (1982). While NLRB rules do provide for pre-trial depositions, 29 C.F.R. § 102.30 (1984), the private party must first obtain the Regional Director’s approval. In practice, such approval is rarely, if ever, given.

\textsuperscript{60}. While the Regional Director is authorized to seek investigative subpoenas and subpoena duce tecum prior to the issuance of the complaint, 29 U.S.C. 161(1) (1982), such authority is rarely used in alter ego cases.
ceed in skirting the law.\textsuperscript{61}

The union's lack of access to information or to pre-trial discovery is particularly harmful during a strike in which a secondary boycott\textsuperscript{62} charge is filed against a union. Under the Act, the Regional Director is \textit{required} to seek an injunction against the strike\textsuperscript{63} if he has a reasonable belief that a violation of the secondary boycott provisions has occurred. Frequently, an employer who has a reprehensible alter ego or ally relationship, will initially only file secondary boycott charges under section 8(b)(4) and hold off on its damage suit which would expose it to discovery in federal court. Since the union does not have ready access to the information to prove its alter ego or ally defense to the section 8(b)(4) charge and the Region may not adequately investigate the defense,\textsuperscript{64} the Regional Director may have sufficient reason to believe that a violation of section 8(b)(4) has occurred so as to support the issuance of a section 10(l) injunction against the union. Thus, an 10(l) injunction may issue against the strike, even though the union may ultimately prevail in its defense when the case is fully litigated before an administrative law judge. Meanwhile, the employees' rights to concerted activity may have been severely damaged. Subsequently, the union is left with inadequate discovery procedures, which are critical in determining the interrelationships necessary to establish defenses. Instead, the union may only subpoena witnesses and documents for production on the day of the trial. This does not, however, permit the type of follow-up discovery through depositions, further subpoenas, and interrogatories that is allowed by the Federal Rules of Civil Procedure. Nevertheless, if the union should lose in the 8(b)(4) proceeding, it may be collaterally estopped in a subse-
uent section 303 damage action on the liability question. Thus, while the union would have had full use of the discovery mechanisms to prove its ally doctrine or alter ego defense had the section 303 trial been held prior to the section 8(b)(4) hearing, the union, which was prevented from obtaining full pre-trial discovery in the 8(b)(4) case, can no longer establish a defense to the damages action.

III. PROCEDURAL CHANGES IN THE NATIONAL LABOR RELATIONS ACT THAT SHOULD BE RECONSIDERED

As we have seen, there exists a private right-of-action for most of the major legal weapons that can be used against unions regarding labor-management disputes: secondary boycott damage actions, damages for efforts to force an employer into an employer's group, section 301 breach-of-contract injunctions and damage actions, state tort actions for picket line conduct, duty of fair representation violations, and treble damage actions in anti-trust suits. However, unions find that no such private right exists by which they can protect the employees' rights to engage in concerted activity for their mutual aid and protection, to bargain collectively through freely chosen labor organizations, to engage in union activity, and to engage in lawful strikes—all without fear of employer retaliation or discrimination. We have seen that pre-trial discovery procedures are available to employers, although such necessary tools are rarely available to unions in unfair labor practice proceedings. And we have seen that injunctions or temporary restraining orders against unions can be quickly obtained through private section 301 actions or mandated, expedited NLRB section 10(l) actions, while unions do not have the same ability to expeditiously obtain such relief against employers.

This commentator suggests that it is these structural defects in the NLRA, not just the present political climate or makeup of the membership of the Board, which underlie the growing frustration in some quarters that the promises of the Wagner Act are becoming even harder to fulfill. While others have suggested such changes as repealing the Wagner and Taft-Hartley Acts, creating a labor court, or substantive...
tively changing the NLRA, these proposals do not appear to be politically possible in the foreseeable future. This does not mean, however, that several procedural changes in the NLRA designed to better protect rights already recognized in the law should not be reconsidered, such as: (1) a private right-of-action for all and not just some unfair labor practices; (2) pre-trial discovery for unfair labor practice hearings; and (3) expedited 10(j) proceedings.

Since the Wagner Act was enacted, a number of other anti-discrimination statutes have also been passed. In almost every situation, either by statute or case, a private right-of-action exists for employees alleging racial, religious, sexual, or ethnic discrimination, for certain employees alleging employment discrimination based on a handicapping condition, for veterans seeking re-employment rights, for employees alleging age discrimination, and for some employees alleging discrimination or retaliation based on their attempts to enforce health and safety requirements. While the original version of H.R. 77, the Labor Law Reform Act of 1977, contained a provision requiring the General Counsel to issue a complaint, unless no genuine issue of any material fact existed and the charge failed to state an unfair labor practice, this provision, which still did not provide for a private action, was quickly dropped by its sponsors when President Carter endorsed the bill.

In granting a private right of action for unfair labor practices, Congress would only be extending enforcement authority to employees and unions similar to that which has already been extended to employers for secondary boycotts, hot cargo contracts, certain coercive activities on
picket lines, jurisdictional strikes, strikes to force recognition or bargaining with the union where another union has been certified as the exclusive representative, and actions attempting to force an employer into an employers' group.\textsuperscript{75} In view of Congress' and the Courts' recognition of a private right-to-sue for numerous other types of discrimination or retaliatory actions, the primary reasons at this time (other than political reasons) for not extending this right so employees may seek to protect themselves from coercive, restraining or discriminatory acts of employers in response to concerted or union activity, would appear to be the potential that administrative costs for the NLRB would escalate or that such a right would discourage the high settlement rate which the NLRB has been able to achieve.\textsuperscript{76}

These legitimate administrative cost concerns, however, might be minimized by pursuing other methods for "screening out" non-meritorious charges, or encouraging the settlement of cases. For instance, increased access to pre-trial discovery tools may expedite hearings by reducing the number of contested issues and by focusing the issues prior to trial. In addition, evidence developed in discovery may help encourage settlement, by exposing the weaknesses of each side.

A procedure similar to that utilized in civil rights cases might be used in unfair labor practice cases to discourage pursuit of non-meritorious cases.\textsuperscript{77} The charging party and the respondent could first be required to submit to an investigation by the Regional Director. Now knowing (1) that a private right of action may exist if the matter is not settled (which would block the private action) or dismissed by the Regional Director; (2) that discovery tools will become available upon the proper filing of a private action; (3) that the Regional Director's dismissal letter, while not dispositive, may be given some weight by the Administrative Law Judge in the event a private action is filed;\textsuperscript{78} and (4) that

\begin{itemize}
\item \textsuperscript{75} 29 U.S.C. §§ 158(b)(4), 158(e), 187 (1982).
\item \textsuperscript{76} Approximately ninety-four percent of unfair labor practice charges are "settled," according to the General Counsel. NLRB General Counsel's Summary, supra note 47, at 227. However, about one-third of the charges are withdrawn by charging parties (normally after the Region advises that the charge will be dismissed if it is not withdrawn), another one-third are dismissed by the Region, and one-fourth are actually settled. Fortieth Annual Report of NLRB, Fiscal Year 1981, reprinted in Labor Relations Yearbook 1983, supra note 47, at 208. Only about three to four percent of all unfair labor practices go to Board decision, and only about six percent are heard by an Administrative Law Judge. E. Miller, supra note 47, at 16.
\item \textsuperscript{77} After a party files a charge with the Equal Employment Opportunity Commission (EEOC), she may bring a private action if the EEOC has not issued a complaint within a set time period, has not obtained a conciliation agreement with the respondent, or has dismissed the charge. 42 U.S.C. § 2000e-5(f)(1) (1982). Some courts have held that the EEOC's findings and dismissal letter may be given consideration by the trial court. Nulf v. International Paper Co., 656 F.2d 553, 563 (10th Cir. 1981). A successful defendant may be eligible for attorneys' fees and costs, if the plaintiff's claim is or becomes "frivolous, unreasonable, or groundless." Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978); Keys v. Lutheran Family & Children's Services of Missouri, 668 F.2d 356, 359 (10th Cir. 1982). Successful plaintiffs are ordinarily awarded attorneys fees absent special circumstances in EEOC cases. Christiansburg Garment Co., supra at 417.
\item \textsuperscript{78} In order to continue to protect confidential sources, matters developed by the Region during investigation could be exempted from discovery, even if a private action
\end{itemize}
attorneys' fees may be available against either party in the private action,79 all private parties may become more amenable to settling the case without further litigation.80

If the charge is still not settled81 and the Region dismisses it, the charging party then must decide whether or not to file a complaint,82 taking into consideration the risk that the charge may be frivolous. A more stringent "standing" requirement would probably be necessary for filing private actions than for filing charges.83 On the other hand, in complex, difficult cases, such as alter ego, "runaway plant," or secondary boycott cases,84 the private party may determine (1) that access to pre-trial discovery tools, which often may be more effective than the Region's investigation, is important enough to risk an award of attorneys fees if it should lose its private action,85 (2) that even though court decisions favor the charging party, they have not yet been acquiesced to by the Board, thus precluding the General Counsel from relying on the court's different interpretation of law; or (3) that factual disputes could be erroneously resolved by the Regional Director. All of these may argue in favor of filing a private action, despite the risks, and expenses, of losing.

Employers, faced with these new procedures, may no longer find it worth the risk to set up an alter ego relationship, to "run away" from a union organizing campaign, or to fire union supporters, since they could

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79. Attorneys fees might not be available to either side if the General Counsel files a complaint, except against the General Counsel, as provided for in the Equal Access to Justice Act, 5 U.S.C. § 504 (1982). Various standards, other than the difficult-to-meet "bad faith" American rule, have been adopted for various types of discrimination actions, sometimes using a different standard for prevailing plaintiffs than is used for prevailing defendants. See 5 U.S.C. § 7701(g)(1) and (2) (1982); 5 U.S.C. § 504(a)(1) (1982).


81. Since the Charging Party now could file its own action, there would be no need for the General Counsel's Office of Appeals, which now simply "rubber stamps" the 4,500 appeals from a Regional Director's dismissal. See NLRB General Counsel's Summary, supra note 47, at 228. Resources saved by eliminating this office could be used to hire more Administrative Law Judges, if these new private rights create more litigation.

82. Under present procedures, the Region may settle a charge with the respondent, even if the charging party objects to the settlement. NLRB FIELD MANUAL, § 10134.2(b). Retaining such a right on behalf of the Region, which effectively could block a private action or parts of the action if a partial settlement were entered into, may also be an effective "screening" device.

83. Presently, any "person," regardless of whether they have an interest in the matter, may file and pursue an unfair labor practice charge, except possibly for certain § 8(a)(5) actions. A more stringent standing requirement for private actions would also be an "screening" device.

84. If access to discovery procedures are expanded for use in certain unfair labor practice proceedings, they should be available for § 8(b) charges for which a private action already exists under § 303, due to the possible collateral estoppel effects of the NLRB proceeding on the § 303 action, regardless of whether the General Counsel or the employer files the 8(b) complaint.

85. It should be noted that, while most Regions now require the charging party's witnesses to sign sworn oaths subjecting them to possible perjury charges, respondent's witnesses are often only interviewed and not put under oath during the investigation stage.
no longer hope that the Region might not do a thorough investigation, that the union might not be able to ascertain all relevant facts without discovery, and that the union could do little, if anything, about its "rights" in the event its charge were dismissed.

Granting a private right-of-action with expanded discovery rights, though, may create other concerns. However, many of these concerns can be readily addressed. For instance, an Administrative Law Judge (A.L.J.) should be assigned more quickly to each case, since pre-trial discovery disputes could arise requiring his attention. However, many discovery issues could be handled, as some pre-trial conferences are now handled, by a telephone conference call between all parties and the A.L.J. after pre-trial motions and briefs are filed on the matter, or verbally argued during the conference. Also, by being involved in earlier stages of the proceedings, the judge may be able to help the parties focus issues or settle all or part of the matter sooner.86

Granting the right to discovery in a private unfair labor practice action need not result in further delay of most litigation, as some fear. Expedited discovery rules, such as those adopted by the Federal Mine Safety and Health Review Commission which apply to safety discrimination,87 and other cases, could be adopted by the NLRB to require that discovery procedures be initiated within twenty days of filing of the complaint by the private party and be completed within sixty days of such filing, unless the A.L.J. otherwise permits.

While the A.L.J. would not have authority to enforce any of his orders requiring responses to discovery,88 he could more vigorously enforce the present rule that failure to produce non-privileged evidence will cause an adverse inference to arise against the non-complying party.89

Some have argued that expanded discovery in NLRB cases will lead to more tampering with witnesses or less cooperation in the investigation stage by potential witnesses or confidential sources who fear retaliation. However, these concerns can be moderated if witness lists are not required to be disclosed until two days before trial, as in safety discrimination cases;90 if the section 8(a)(4) procedure is expedited; and if the 10(l) injunction is made available for section 8(a)(4) violations, in order to obtain quick action against a party who is tampering with the discov-

88. As presently, an action would have to be entertained in federal district court for enforcement of such orders. Enforcement of discovery rulings by the Administrative Law Judge could proceed as enforcement of subpoenas is now handled, the responsibility for which remains primarily in the hands of the private party. 29 C.F.R. § 102.31(d) (1984).
89. Zapex Corp., 235 N.L.R.B. 1237 (1978). The Administrative Law Judge found that Zapex had violated the rule that "when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an adverse inference that the evidence is unfavorable to him." Id. at 1239. See also International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW v. NLRB, 459 F.2d 1329, 1335 (C.A.D.C. 1972).
90. 29 C.F.R. Sec. 2700.59 (1982).
ery or trial process. Confidential sources developed by the Region during investigation, who will not be witnesses, need not be disclosed. Thus, since the right to pre-trial discovery would not arise until the General Counsel had completed his investigation and dismissed the matter, there should not be any significant interference with the government's investigation of the matter. By providing that confidential information obtained by the General Counsel be non-discoverable, as well as demanding a stricter standing requirement for private actions and other "screening" mechanisms, such as attorneys' fees and pre-trial discovery, there may not be an unacceptable increase in the case load for the Board.91

It should be recognized, though, that granting a right to a private action and pre-trial discovery will not eradicate the inequity that now exists. Section 10(j) and 10(l) of the NLRA were added by the Taft-Hartley Amendments to provide expedited temporary relief, pending completion of the administrative process. However, the Regional Director, who is authorized to seek a 10(l) injunction against a union upon issuance of an 8(b)(4) or 8(b)(7) complaint, does not have such authority upon issuance of an 8(a) complaint against an employer. Instead, the Regional Director must first seek permission from the Division of Advice, who, in turn, must obtain permission from the five-member Board before the Regional Director may go into federal district court to seek a 10(j) injunction.

If the Regional Director is capable of acting on his own to seek temporary relief for certain union unfair labor practices, he should also be granted such authority, either statutorily or by delegation from the Board, to seek 10(j) relief from employers for at least some employer unfair labor practices.92

IV. CONCLUSION

While the procedural reforms suggested in this article, particularly those regarding a private right of action, may raise other concerns not addressed here, they do suggest a somewhat different approach to labor law reform, when considered as a package, than those advanced by others in recent years. The suggestions are drawn from actions taken by Congress in anti-discrimination and health and safety acts passed since the enactment of major labor legislation.

91. One might argue that all actions under Section 303, 29 U.S.C. 2187, and possibly some under section 301, 29 U.S.C. § 185, including fair representation cases, should only be litigated before the NLRB, rather than federal courts, since the Board has the labor expertise to address these matters. While increasing the Board's workload, this suggestion would result in a corresponding drop in federal district court workloads, while bringing more uniformity to the application of labor law.

92. Certainly, such temporary relief should be available where a violation of 8(a)(4), regarding the tampering with an NLRB witness, is alleged by the General Counsel. Allegations involving substantial 8(a)(3) discharges and unfair labor practice strike complaints, which often tend to involve many persons in the unit, should result in the authorization for the Regional Director to pursue a 10(j) injunction on his own motion should he deem it appropriate.
This article, hopefully, will stimulate more thought about the approaches suggested, further discussion of the merits of such suggestions, and additional consideration of the problems that such reforms might raise, as well as ways to address these concerns. The suggestions are designed to help rebuild faith and trust in the labor law system, through approaching union and employer unfair labor practices similarly. Until both labor and management recognize that the Natural Labor Relations Act is still the law of the land and that it will be enforced equitably and even-handedly, respect for the system by both sides will continue to wane.

93. Professor Paul Weiler also recently examined whether or not the law equitably approaches labor-management relations. He concluded that it does not and suggested three reforms not discussed here that are designed to better equalize the approach of the law toward labor and management. Weiler, Striking a New Balance: Freedom of Contract and the Prospects for Union Representation, 98 Harv. L. Rev. 351-420 (1984).