Section 10(j) of the National Labor Relations Act: A Legislative, Administrative and Judicial Look at a Potentially Effective (But Seldom Used) Remedy

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SECTION 10(j) OF THE NATIONAL LABOR RELATIONS ACT: A LEGISLATIVE, ADMINISTRATIVE AND JUDICIAL LOOK AT A POTENTIALLY EFFECTIVE (BUT SELDOM USED) REMEDY

INTRODUCTION

In 1935, Congress enacted the National Labor Relations Act (NLRA),\(^1\) declaring that it would be the policy of this country to

eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when 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 negotiating the terms and conditions of their employment or other mutual aid or protection.\(^2\)

Pursuant to this policy declaration, Congress created the National Labor Relations Board (NLRB or the Board) and invested it with the power to investigate and to remedy charges of unfair labor practices (ULP's). One tool at the Board's disposal in carrying out its investigatory and remedial functions is section 10(j) of the National Labor Relations Act.\(^3\) Under section 10(j), the Board has the authority to seek a temporary injunction from a federal district court whenever it deter-

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   It is the purpose and policy of this chapter, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and prescribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

mines that temporary relief is necessary to effectuate the policies of the NLRA.4

In the past thirty years, the Board has used the broad congressional mandate of section 10(j) infrequently.5 In the first fifteen years of section 10(j)'s statutory life the Board sought the injunction an average of only three times per year.6 The infrequent use of section 10(j) can be traced in part to an administrative policy of "restricted use" which, until recent years, dominated the attitude of the Board's senior officers towards the injunction. In restricting the use of section 10(j) to what they generally considered only extraordinary situations, the officers based their attitudes not upon expressed congressional criteria or judicial interpretations, but upon their own interpretation of the legislative intent behind congressional enactment of section 10(j).7

The federal courts have also contributed to ineffective utilization of section 10(j) injunctions by their indecisiveness as to the standards which should be used in determining whether to grant or to deny a Board's petition for injunctive relief. Because so few section 10(j) injunctions were sought by the Board in the early history of the section, it was not until the last

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4. 29 U.S.C. § 160(j) (1970). Generally the cases brought under § 10(j) involve situations where the violations are clear and flagrant, and where immediate relief seems necessary because a subsequent Board order or court decree would be inadequate to remedy the injury. Congress was not explicit as to which violations of the Act they considered serious enough to warrant a § 10(j) injunction. But see S. Rep. No. 105, 80th Cong., 1st Sess. 8 (1947), reprinted in SUBCOMM. ON LABOR SENATE COMM. ON LABOR & PUBLIC WELFARE, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 1947, at 414 (1974) [hereinafter cited as LEGISLATIVE HISTORY, LMRA], where a glimmer of congressional intent is available:

[T]he Committee has concluded that five specific practices by labor organizations and their agents, affecting commerce, should be defined as unfair labor practices. Because of the nature of certain of these practices, especially jurisdictional disputes, and secondary boycotts and strikes for specifically defined objectives, the committee is convinced that additional procedures must be made available under the National Labor Relations Act in order adequately to protect the public welfare which is inextricably involved in labor disputes. (Emphasis added).


5. The scope of relief obtainable under a § 10(j) injunction is broad and may enjoin conduct by the employer, the union, or both. Douds v. Anhauser-Busch Inc., 99 F. Supp. 474 (D.N.J. 1951). See note 29 and accompanying text infra for the annual totals of § 10(j) petitions authorized by the Board.

6. 13 NLRB ANN. REP. (1948) to 26 NLRB ANN. REP. (1961). See note 29 and accompanying text infra for the annual totals of § 10(j) petitions authorized by the Board.

7. See notes 47-87 and accompanying text infra.
decade that appellate courts began to address themselves to the standards the district courts must use in determining the necessity of granting a Board's petition for section 10(j) relief.  

This comment will discuss the congressional intent behind the enactment of section 10(j), the evolution of its use by the NLRB, and the current revolution among the appellate courts to give meaning to the vague standards provided by the statute.

**Congressional Purpose in the Enactment of Section 10(j)**

In litigation arising from labor disputes, failure to obtain prompt action can often result in a denial of effective relief and can act to undermine the stated NLRA objectives—the encouragement of collective bargaining and the elimination of obstructions to the free flow of commerce created by labor-management strife. Most unfair labor practice cases follow a long and tortuous path to final remedy. Unless a case is settled at some stage of the proceedings, relief may be unavailable to the injured party for more than a year.

In 1957, the average time from the filing of a complaint alleging an unfair labor practice to a Board decision was 475 days, and another 396 days for judicial enforcement. In 1961 it took 393 days to process a ULP petition, and by 1975, the time had been reduced even further to 324 days but could take several years if the Board's decision was taken to the appellate courts.

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8. See notes 88-158 and accompanying text infra.
10. ADVISORY PANEL ON LABOR-MANAGEMENT RELATIONS LAW, REPORT TO THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, ORGANIZATION AND PROCEDURE OF THE NATIONAL LABOR RELATIONS BOARD, S. DOC. NO. 81, 86th Cong., 2d Sess. 1 (1960) [hereinafter cited as COX PANEL REPORT].
During that period, the employer or employees may continue to suffer the burden of illegal activity engaged in by the other. Recognizing that delays of such length make it difficult to carry out the policies of the NLRA and influenced by the economic disruptions caused by labor unrest in the post World War II period, Congress added section 10(j) to the NLRA.

**Congressional Guidance**

Congress, it would appear, intended to give the Board discretionary power in its use of section 10(j) by incorporating into the statute only one guideline for the Board and district courts to follow—section 10(j) provides for granting an injunction whenever "just and proper." The legislative history is equally void of standards or guidelines. As explained in the Senate Report on the bill which was to become section 10(j):

>[time is usually of the essence in these matters and consequently the relative slow procedure of the Board hearing and order, followed many months later by an enforcing decree of the circuit court of appeals, falls short of achieving the desired objective—the prompt elimination of the obstructions to the free flow of commerce and encouragement of the practice and procedure of free private collective bargaining. Hence we have provided that the Board, acting in the public interest and not in vindication of purely private rights, may seek injunctive relief in the case of all types of unfair labor practices . . . .

Experience under the National Labor Relations Act

Several years prior to the lengthy General Electric litigation, the Pucinski Subcommittee concluded its hearings expressing a finding in its final report that:

- there is much needless delay in enforcement of Labor Board orders [with the result that] the losing party delays, lingers, and waits because disobedience of a Labor Board order is not punishable until it is enforced by court action.

*PUCINSKI COMM. REPORT, supra note 11, at 2.*

Similarly, a year earlier the Cox Advisory Panel stated that an average of two years and four months is too long for a wronged party to endure denial of rights guaranteed by the Congress, since a remedy granted after such a time lapse "will bear little relation to the human situation which gave rise to the need for Government intervention." *Cox Panel Report, supra note 10, at 2.*

14. H.R. REP. No. 245, 80th Cong., 1st Sess. 3-6 (1947), reprinted in LEGISLATIVE HISTORY, LMRA, supra note 4, at 294-97. See also S. REP. No. 105, 80th Cong., 1st Sess. 8 (1947), reprinted in LEGISLATIVE HISTORY, LMRA, supra note 4, at 414. Section 10(j) was enacted to meet the relatively slow procedure of the Board's administrative process. See note 16 and accompanying text infra.

has demonstrated that by reason of lengthy hearing and litigation enforcing its order, the Board had not been able in some instances to correct unfair labor practices until after substantial injury has been done . . . . [I]t has sometimes been possible for persons violating the act to accomplish their unlawful objective before being placed under any legal restraint and thereby to make it impossible or not feasible to restore or preserve the status quo pending litigation.¹⁶

Except for the brief remarks of the members of Congress who opposed or supported the enactment of section 10(j),¹⁷ there is no other legislative history from which the congressional intent can be gleaned.

The lack of congressional guidance in either the statute or the legislative history of section 10(j) is remarkable when considered in relation to the use of labor injunctions during the first half of this century.¹⁸ Prior to 1932, labor injunctions were frequently used by the federal courts to provide a cooling-off period in labor-management disputes.¹⁹ The flagrant abuses of the injunction, however, particularly against labor organizations,²⁰ led Congress in 1932 to impose severe restrictions on the scope of labor injunctions available to the federal courts. These restrictions are embodied in the Norris-LaGuardia Act.²¹

The congressional attitude which opposed the labor in-

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¹⁶. S. Rep. No. 105, 80th Cong., 1st Sess. 8, 27 (1947), reprinted in LEGISLATIVE HISTORY, LMRA, supra note 4, at 414, 433. These excerpts are the only parts of § 10(j)'s legislative history that substantively discuss the section. The House version of the Labor Management Relations Act did not contain § 10(j): the Senate version (S. 1126) contained § 10(j) in substantially similar language to that in which it was enacted. See Siegel, Section 10(j) of the National Labor Relations Act: Suggested Reforms for an Expanded Use, 13 B.C. INDUS. COM. L. REV. 457, 465 n.43 (1972); see also Comment, Temporary Injunctions Under Section 10(j) of the Taft-Hartley Act, 44 N.Y.U.L. REV. 181, 190-92 (1969).

¹⁷. See notes 25-27 and accompanying text infra.

¹⁸. For a comprehensive history of the use of the labor injunction prior to the 1930's, see generally F. Frankfurter & N. Greene, THE LABOR INJUNCTION (1930). For an excellent brief history of the use of labor injunctions in the last 100 years, see McCulloch, New Problems in the Administration of the Labor-Management Relations Act: The Taft-Hartley Injunction, 16 SW. L.J. 82, 84-90 (1962).

¹⁹. McCulloch, supra note 18; F. Frankfurter & N. Greene, supra note 18.

²⁰. Id.

²¹. Ch. 90, 47 Stat. 70 (1932), 29 U.S.C. §§ 101-115 (1970). The Act was passed to restrict the ability of the federal courts to issue injunctions against concerted activity in labor disputes. However, the Norris-LaGuardia Act's prohibitions against the use of injunctions in labor disputes have been found not to apply to temporary injunctions sought under § 10(j). Douds v. International Brotherhood of Teamsters, Local 294, 75 F. Supp. 414, 418 (N.D.N.Y. 1947). See also 29 U.S.C. § 160(h) (1970), which impliedly exempts § 10(j) injunctions from Norris-LaGuardia prohibitions.
junction, and supported the Norris-LaGuardia Act, is epitomized best in the words of Representative O’Connor of New York who, during the debate on the Norris-LaGuardia Act, stated “[s]uch an uncivilized and tyrannical procedure cannot possibly be longer tolerated.” The Act virtually eliminated federal court jurisdiction to enjoin specific conduct if the action involved or arose out of a labor dispute. The effectiveness of the Act in drastically reducing the number of injunctions is evidenced by the fact that prior to 1932 the federal courts had issued 508 labor injunctions; subsequent to the Act the number dropped to an average of less than two labor injunctions per year.

Because pre-Norris-LaGuardia injunctions were used primarily against labor organizations, the opponents of the proposed section 10(j) amendment to the NLRA raised old fears that the section 10(j) injunctions would be used to defeat employee organization. Visions that section 10(j) would “bring back once more the hated injunction from which labor through the Norris-LaGuardia Act had forever freed it” surfaced in congressional debates.

Other opponents of section 10(j) predicted that the Board’s effectiveness would decrease significantly because it would be “harrassed by demands that it seek immediate injunctive relief if unfair labor practices were alleged by either employees or employers.” The section’s supporters, however, appeared to be most concerned with reducing the time for granting relief to the sufferers of unfair labor practices as well as decreasing the time and money spent in processing ULP charges.

Neither the hopes of the section’s proponents nor the fear of its opponents materialized as each had envisioned. It was not until 1962 that the Board, with additional congressional prodding, began using the section 10(j) injunction with enough

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22. 75 Cong. Rec. 5463 (1932).
24. McCulloch, supra note 18, at 90.
28. Pucinski Comm. Report, supra note 11, at 1-3. These 1961 Committee hearings held by Congressman Pucinski appear to have been the catalyst to the Board’s authorizing more frequent use of the § 10(j) injunction. In making its recommendations for more frequent use of § 10(j), the Pucinski Committee was well aware of past abuses of injunctive relief.
frequency to make a dent in the Board’s case load. An additional fifteen years then elapsed before the injunction was used

The names of Norris and LaGuardia are constant reminders of the dangers inherent in conducting labor-management relations by way of injunction. Nevertheless, this subcommittee finds that injunctions are now utilized extensively against union activities and to an almost nonexistent extent against employer unfair labor practices.

Id. at 964.

29. The following table shows the number of § 10(j) authorizations approved by the NLRB during the past 30 years. It should be noted that not all § 10(j) authorizations granted by the Board are filed with the district courts either because of settlement or adjustment prior to petitioning to the courts.

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<th>Fiscal Year</th>
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<th>Sought Against Employer</th>
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in sufficient numbers to approach the scope envisioned by its early supporters.\textsuperscript{30}

Because section 10(j) not only fails to explicitly define the district court's role in granting an injunction, but also vests the Board with broad discretion to seek section 10(j) injunctions,\textsuperscript{31} it would appear that the section could be used as a swift, non-discriminatory labor remedy. Two hurdles have combined, however, to impede more effective utilization of the section. The first was the NLRB's own reluctance to use the injunction with any enthusiasm or consistency during the period between 1947 and 1962.\textsuperscript{32} The second hurdle was the lack of clear standards by which the district courts could test the necessity for relief.\textsuperscript{33} Contributing to the latter problem was the vague language (i.e., "just and proper") in the statute, and the inconclusiveness of the section's legislative history.\textsuperscript{34}

Before examining the evolution of the Board's policy on the use of section 10(j) injunctions and the current revolution among the federal courts to develop a standard for granting the injunction, this comment will briefly discuss the Board's procedures for seeking relief under the section. An outline of the procedures\textsuperscript{35} for processing an unfair labor practice complaint will demonstrate the potential impact of section 10(j).

**PROCEDURAL STEPS IN SEEKING 10(j) RELIEF**

*Processing a ULP*

Section 10(j) states that the Board shall have power, upon issuance of a complaint . . . charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such peti-

\textsuperscript{30} See note 29, supra. Especially note the years from 1962 to the present, when the petitions annually authorized increased six times over the previous fifteen-year period.


\textsuperscript{32} See notes 47-87 and accompanying text infra.

\textsuperscript{33} See notes 88-158 and accompanying text infra.

\textsuperscript{34} See notes 15-26 and accompanying text supra.

\textsuperscript{35} Compiled from NLRB, STATEMENTS OF PROCEDURES, §§ 101.2-.16 (1973); NLRB, CASEHANDLING MANUAL §§ 10310-10312 (1975); and Comment, The Use of Section 10(j) of the Labor-Management Relations Act in Employer Refusal-to-Bargain Cases, 1976 UNIV. OF ILL. LAW FORUM 845, 845-47.
tion the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.\(^\text{36}\)

A typical ULP action begins when a complaint is filed by a union or employer with an NLRB regional office. The regional director, as an agent of the General Counsel of the Board, investigates the charge and issues a complaint to the accused party. After a hearing, at which both parties involved in the dispute may present arguments, the presiding administrative law judge issues a decision. However, there are no legal sanctions through which the prevailing party can compel immediate compliance with the administrative decision. After the decision, the parties may file briefs, exceptions, and requests for oral argument before the Board. The Board, after considering the findings of the administrative law judge and hearing the arguments of both parties, issues an opinion and order. The Board order, however, is not self-enforcing. If a party fails or refuses to comply with the terms of the order, the Board must then seek an enforcement decree from a federal court of appeals. If the decree is granted, further failure or refusal to comply with the Board order subjects the violator to punishment for contempt. Thus, in proceedings to adjudicate ULPs, the issuance of an enforcement decree marks the first stage where the guilty party has an incentive to terminate the unlawful conduct. However, few ULP cases reach that stage of the proceedings within a year.\(^\text{37}\)

Section 10(j) gives the Board the discretionary power to petition a federal district court for relief from the effects of an ULP which the Board determines may continue during the course of the administrative and court proceedings.\(^\text{38}\)

The Board has sole authority to determine whether to petition the district court for section 10(j) relief. Private parties have no right to petition for relief under section 10(j).\(^\text{39}\) If the

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37. See notes 10-13 and accompanying text supra.
38. The Board’s petition must allege that the following conditions exist: (1) an unfair labor practice charge has been filed; (2) a complaint has been issued; (3) the facts presented support the charge; (4) there is a likelihood that the unfair labor practice will continue unless restrained; (5) the district court has jurisdiction; and (6) the persons sought to be restrained are subject to the Act. D. McDowell & K. HuHN, NLRB REMEDIES FOR UNFAIR LABOR PRACTICES 252-55 (1974).
39. The specific grant of authority to the Board to seek temporary injunctions has been interpreted by the courts to deny private parties standing to petition a district court for § 10(j) relief. See Squillacote v. International Union, United Auto., Aerospace
Board is granted a petition for section 10(j) relief, the initial complaint follows the normal procedures to a final Board order. During the course of the normal proceeding, however, the complaining party receives temporary relief from the alleged ULP.40

In the absence of temporary relief and prior to the issuance of an enforcement decree by a court of appeals, an employer or union could continue to engage in unfair labor practices without fear of legal sanction. For example, if an employer, either by intimidation or discriminatory discharges, interferes with his employees’ attempts to organize a collective bargaining unit, the employer could, without penalty, refuse to cease his activities. Even if the employees filed section 8(a)(1) and 8(a)(3) charges,41 the employer could continue his activities

and Agricultural Implement Workers of America, Local 578, 383 F. Supp. 491 (E.D. Wis. 1974), where the court stated that the power to initiate § 10(j) injunctive suits under the NLRA is restricted to the Board. The employer in Squillacote based its motion to intervene in the Board's petition for a § 10(j) injunction on FED. R. CIV. P. 24(a). The Court noted that Rule 24(a) requires the intervening party's interest to be inadequately represented by the existing parties. However, the court found that this requirement was not present in the case, and went on to say:

It is hard to conceive how the charging party's interest will not be adequately represented by the Board. The only real interest intended to be protected by 10(j) injunctive proceedings is the public's interest. The Board’s petition for injunction does not concern itself with the interests of the charging party.

383 F. Supp. at 492.

Private parties charging that a ULP has been committed, however, may request at the time they file the charge with the NLRB that the Board petition a district court for temporary relief in addition to issuing a complaint. NLRB, CASEHANDLING MANUAL, supra note 35, §§ 10310–1. However, the manual adds that “it should be kept in mind that such relief is discretionary, not mandatory.” Id. at § 10310. In a 1948 Fourth Circuit Court of Appeals case, the court in dictum said that perhaps in unusual cases private parties may sue for temporary injunctive relief from ULP's. Amazon Cotton Mill Co. v. Textile Workers Union of America, 167 F.2d 183, 190 (4th Cir. 1948). There appears to be no reported case which has relied on this dictum and allowed the issuance of a private party-petitioned § 10(j) injunction. See also S. REP. 105, 80th Cong., 1st Sess. 8 (1947), reprinted in LEGISLATIVE HISTORY, LMRA, supra note 4, at 414. “[T]he Board, acting in the public interest and not in vindication of purely private rights, may seek injunctive relief in the case of all types of unfair labor practices.” Id.

40. When temporary injunctive relief under § 10(j) is ordered, it remains in effect until final adjudication on the hearing of the charge and the issuance of the cease and desist order. However, the Third Circuit has established a rule in that circuit limiting the life of a § 10(j) injunction to six months, renewable upon petition by the Board for an additional six months if necessary to permit Board action on the administrative law judge’s decision. Eisenberg v. Hartz Mountain Corp., 519 F.2d 138 (3d Cir. 1975). The court also ruled that a § 10(j) injunction can be extended for 30 days at any time upon a showing that Board action is imminent.

41. Section 8(a) states that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in § 7, 29 U.S.C. § 158(a)(1) (1970), or to discriminate in regard to hire, or tenure of employment, or any term or condition of employment, or to encourage or discourage
without fear of legal sanction prior to the issuance of an enforcement decree by the court of appeals. In contrast, if a district court immediately after a complaint is filed grants section 10(j) relief, although the section 8(a)(1) and 8(a)(3) charges will be resolved through normal procedures, the employer is enjoined from continuing his conduct toward the employees in the interim.

Processing a Section 10(j) Injunction

In 1947, Congress granted the Board the power to seek injunctions under the terms of section 10(j). While the Board retains the ultimate authority to decide whether or not to seek an injunction, the decision is usually made by the General Counsel’s office. When a regional director believes that section 10(j) proceedings should be initiated in an unfair labor practice case, the director transmits his recommendations to the General Counsel’s office. If such relief appears to be warranted, a memorandum requesting such authorization is submitted by the General Counsel to the Board. The memorandum sets forth the facts, the legal analysis establishing the violation, the reasons why section 10(j) relief is considered necessary, and the specific interim relief to be requested. If the Board authorizes the seeking of injunctive relief, the regional office is immediately notified so that it may institute injunction proceedings.*42


42. Procedure described in NLRB, CASEHANDLING MANUAL, supra note 35, §§ 10310-10312. See also IRVING, Remedies and Compliance - Putting More Teeth Into the Act, in SOUTHWESTERN LEGAL FOUNDATION, LABOR LAW DEVELOPMENTS 1977, at 355, 359 (1977). Irving was appointed General Counsel of the NLRB in December, 1976. After the appointment, two changes were made by Irving in the manner in which the General Counsel’s office processes § 10(j) requests. The first change affects the way in which the regional office communicates the request for injunctive relief to the Division of Advice. As discussed by Irving, the traditional manner of processing § 10(j) cases involved the submission of a recommendation from the regional director, the review of that recommendation by the General Counsel’s Office (Division of Advice), and where injunctive relief was deemed to be warranted, the preparation of a memorandum to that effect by the Division of Advice. Assuming that the General Counsel concurred with the Division’s view, he would sign the memorandum and submit it to the Board. Id. at 359. In 1976, Irving instructed the regional directors to write their future recommendations for § 10(j) injunctive relief in a manner appropriate for direct submission to the Board. If the General Counsel concurs, the recommendation is then sent directly to the Board with little or no revision. This revised submission procedure is expected
The regional director may then go into a federal district court, which does not act on the merits of the case but only determines if there is reasonable cause to believe the NLRA has been violated, and, if so, whether injunctive relief is just and proper. Until recently, even when a regional director determined that temporary relief was warranted, the Board rarely authorized the institution of section 10(j) proceedings.

The primary hurdle in the administrative process appeared to be at the stage where the General Counsel's office received the regional director's request. In the fifteen years prior to 1962 fewer than sixty petitions were actually filed with the Board by the General Counsel, although requests by regional directors for section 10(j) authorizations were usually ten times that number. Since the Board rarely rejects the recommendations of the General Counsel's office, it would appear that the General Counsel's summary denial of the regional director's requests had been hampering the role of section 10(j) injunctions as envisioned by the legislative history. Recently, however, the General Counsel's office has significantly altered its position on section 10(j) injunctions, leading to their increased use. Since section 10(j) injunctions can play a pivotal role in disputes concerning labor practices, this change in philosophy could have far reaching consequences.

EVOLUTION OF THE BOARD'S PHILOSOPHY

Introduction

A major force in shaping the early attitude of the Board about section 10(j) injunctions was General Counsel Robert Denham. Apparently influenced by the fears that were expressed by the supporters of the Norris-LaGuardia Act, Den-
ham carried out a program that resulted in restricted use of the section 10(j) injunction. He sought only eleven section 10(j) injunctions during his term as General Counsel, leaving no record as to why he sought so few. A possible motive for his actions, can be gleaned from several comments made by him during the course of his administration. Speaking before the American Bar Association convention in 1947, Denham stated:

I find it difficult to believe that Congress intended that injunctive relief would be invoked as a preliminary cease and desist order every time a labor organization is charged with an unfair labor practice. The history of labor injunctions is too long and reveals too much the national desire to reduce government by injunction to a minimum to justify theory other than that this provision is placed in the Act for emergency purposes and only where loss or damage or jeopardy to the safety and welfare of a large segment of the public would result if injunctive action were not taken.

Similarly, in a 1948 speech before the Conference of Circuit and District Judges of the Fifth Circuit, Denham stated: "[w]e feel that this use [of section 10(j) injunctions] must be limited to instances where the activities sought to be restrained have wide repercussions and threaten results that affect the public welfare." The next year he underscored that belief by stating that

section 10(j) should be used with almost the same restraint that applies to the use of the national emergency injunctions. In other words, the problem has to be a widespread one; it has to be one that has heavy and meaningful repercussions.

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50. Id. quoting Office of the General Counsel, NLRB, Release No. R-87 (June 4, 1948).
51. NLRB General Counsel Reviews Taft Act Problems - Boycotts, Injunctions, 24 L.R.R.M. 44, 45 (1949). At the same time Denham noted "maybe I don't understand the law very well, but I don't believe that section 10(j) was intended to be used by the General Counsel just for anybody who happened to want something." Id.

Apparently, the type of problem Denham viewed as "widespread" enough to warrant a § 10(j) injunction was to be based upon an arbitrary percentage basis. Shortly after the enactment of the 1947 amendments to the NLRA, Denham issued a policy statement indicating that he would not use § 10(j) "unless there was something happening that affected a large segment of the public." Pucinski Comm. Report, supra note 11, at 50. See also note 49 and accompanying text supra.
Even after Denham left the Board, his theories on the restricted use of section 10(j) were to dominate the Board's policy of infrequent utilization into the early sixties. An approach similar to that recommended by Denham in 1947 was echoed in 1962 by Board Chairman Frank W. McCulloch.\textsuperscript{52} Chairman McCulloch described the exercise of section 10(j) power "not as a broad sword, but as a scalpel, ever mindful of the dangers inherent in conducting labor management relations by way of injunction."\textsuperscript{53}

\textit{The Pucinski Committee Influence}

Even as Chairman McCulloch announced his position, the days of the philosophy of limited section 10(j) use seemed numbered. Late in the spring of 1961 Representative Roman Pucinski chaired a congressional subcommittee, which for a year conducted a series of hearings on the Board's effectiveness under the NLRA.\textsuperscript{54} The committee concluded its investigation in late 1962 indicating that it felt the "failure to utilize the 10(j) discretionary injunction sometimes results in irreparable injury."\textsuperscript{55}

During the Pucinski Committee public hearings, critics of the NLRA repeatedly asserted that section 10(j), along with the other injunctive provisions of the NLRA, were weighted unfairly against labor unions.\textsuperscript{56} The committee took note of the fact that during the first fourteen years of section 10(j)'s statutory life, the injunction had been used against labor unions thirty-two times, and against employers only eleven times.\textsuperscript{57} Though the committee rejected any notion that equitable justice can be measured by mechanically balancing the number of injunctions issued against two opposing factions,\textsuperscript{58} it did recommend that

\begin{quote}
[t]he Labor Board give careful consideration to greater utilization of the 10(j) injunction in situations when unfair labor practice charges are filed and the Board finds reason-
\end{quote}

\textsuperscript{52} Appointed as Board Chairman in March 1961; served until June 1970.
\textsuperscript{53} Address by Chairman Frank W. McCulloch, Eighth Annual Joint Industrial Relations Conference, Michigan State University (Apr. 19, 1962), \textit{reprinted in 49 L.R.R.M. 74, 83 (1962)}.
\textsuperscript{54} See note 28 \textit{supra}.
\textsuperscript{55} \textit{Pucinski Comm. Report, supra} note 11, at 915.
\textsuperscript{56} \textit{Id. at} 549.
\textsuperscript{57} \textit{Id. at} 527.
\textsuperscript{58} \textit{Id. at} 565.
able cause to believe that such unfair labor practice is continuing and will be continued unless restrained, and will cause irreparable property or personal injury or injury to the exercise of rights guaranteed by section 7.59

Furthermore, the committee, unlike its 1947 predecessor, that enacted section 10(j), gave the Board some guidance for determining if it should seek an injunction. The committee suggested that the section should be used in situations of flagrant and aggravated acts of picket line force and violence . . . repeated discharge of union adherents . . . employers or unions flagrantly refus[ing] to bargain in good faith, and the situations wherein the employer threatens to intimidate his employees by closing the plant or shifting work to affiliated factories.60

Shortly after the conclusion of the Pucinski Committee hearings, Chairman McCulloch announced that in the future the Board would seek more section 10(j) injunctions in order to provide for the more effective administration of the NLRA.61 In announcing the new Board policy, Chairman McCulloch reemphasized his earlier fears when he stated that:

the extraordinary remedy of injunction should not and cannot become the ordinary remedy in unfair labor practice cases. Congress delegated to the five-man National Labor Relations Board sitting in Washington, and not to the district courts, the duty to give an expert and experienced content and direction to the National Labor Relations Act.62

Following his new policy statement, McCulloch announced six guidelines which provided the first indication of what the Board would look to in deciding whether to grant injunctive relief. The factors to be considered included:

(1) Whether the case involves application of well-defined doctrines susceptible to “preemptory” judicial resolution by “ascertaining the facts” in contrast to those which require “thorough exploration of sophisticated imponderables concerning motive, conflicting legal principles, and rival policy factors;”
(2) The doctrine of clean hands;

59. Id. at 916.
60. Id.
61. McCulloch, supra note 18.
62. Id. at 97.
(3) Whether the charged party is a first offender or a repeater;
(4) The danger of irreparable injury to the parties and to the public;
(5) Whether failure to seek injunctive relief might "create disrespect for lawful processes, public agencies, or national policies;" and
(6) Whether injunctive relief is necessary to effectuate the policies of the NLRA.\(^3\)

One critic commented that there could be little quarrel with a statement of policy "so limited in explication and clothed in garments of irreproachable intent."\(^4\) Since the Board until recently did not publicly give its justification for seeking an injunction, it is difficult to speculate how much influence McCulloch's six policy considerations had on the Board's philosophy toward utilization of section 10(j). However, the Pucinski Committee recommendations must have had some influence, since in the years following the committee hearings, the Board sought six times as many injunctions as in the first fifteen years of section 10(j)'s statutory life.\(^5\)

**Expanded Use Philosophy**

During the mid-sixties and early seventies, attention again focused upon ways of improving the remedial provisions of the NLRA. In a departure from past improvement discussions, the courts entered this debate. The judicial concern was primarily directed at attempting to define standards by which courts

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\(^{63}\) Id. at 97-98.

\(^{64}\) Jay, *What is New in the Labor Injunction*, in 15th Annual N.Y.U. Conference on Labor 260, 267 (1962). A viewpoint similar to that expressed by Jay about McCulloch's policy considerations could have been made about the view of § 10(j) made by the General Counsel, Stuart Rothman (Rothman served as General Counsel under McCulloch from 1959 to 1963). In 1961 Rothman indicated that his office would consider using § 10(j) more frequently when its "use is necessary to maintain the status quo in order to safeguard the statutory rights of individuals." Rothman, *Some Law and Practice Problems Before the Office of the General Counsel NLRB*, in 14th Annual N.Y.U. Conference on Labor 163, 167 (1961).

\(^{65}\) See note 29 supra. Despite the increased use of § 10(j) injunctions during chairman McCulloch's administration, the Board's overall policy toward the use of § 10(j) appears to have remained similar to that expressed by earlier Board administrators. "The Board has tried, while responding to the criticism contained in the Cox Report and the Pucinski Committee Report, to keep in mind that the injunction is an extraordinary remedy which should be reserved for extraordinary situations." Address by Chairman McCulloch, Federal Bar Ass'n Labor Law Comm. Briefing Conference on Labor Management Relations (June 13, 1964), *reprinted in 56 L.R.R.M. 129, 130* (1964).
could issue 10(j) injunctions with consistency.66

One court, however, went beyond this quest for judicial standards and chastised the Board for its haphazard use of section 10(j). The district court in McLeod v. General Electric Company67 indicated its displeasure with the Board’s handling of section 10(j) cases by stating:

It seems desirable—it would surely be helpful—for the Board, after nearly twenty years of work with section 10(j), to formulate and state in some form more authoritative than random speeches by members the criteria by which it determines whether to proceed under this Section. Such a formulation would guide the public, the courts, the Agency itself, and give a measure of assurance that the action taken in individual cases is reasonably principled. This is not the first time, of course, that the Board . . . [has] been urged to tackle more widely the hard task of articulating intelligible and knowable rules of general applicability.68

In addition to the judicial concern with the need for consistency, these mid-sixties—early seventies reform discussions focused on the labor practitioners’ worries about the length of time which elapsed between the filing of a ULP and the ulti-

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66. Although the § 10(j) injunction has been available for use since 1947, it was not until the mid-sixties that the courts began to attempt to define proper standards for determining whether the relief was warranted. See notes 88-158 infra. The attitude of the courts toward the standards of § 10(j) before the sixties is best described below:

Many of the courts granting [§ 10(j)] injunctions have never confronted the issue of need for relief. Some courts have apparently assumed that given reasonable cause to believe a violation has been committed the issue is not open to judicial question. Others have explicitly stated that the court must defer to administrative judgment. Most of the cases which pass beyond the previous two situations nevertheless mechanically apply the statute to the facts. In many of the cases in which the issue of proper standards has been raised, and discussed, the need for injunction was so clear by any standard that no incisive analysis was needed for the holding; and the cases are easily restricted to their facts.

In the few cases in which the requested injunction has been denied, the grounds for denial were almost always that the Board failed to show reasonable cause to believe a violation had been committed. The question of standards was never approached. In the very few instances in which an injunction has been denied for lack of need for that injunction, the court has failed to handle the problem in a clear and helpful fashion.

This is not to suggest that the judicial history of section 10(j) is devoid of any well-considered discussion of the problem. It is only to demonstrate that such discussion has not carried the day.


68. Id. at 708 n.14.
mate resolution of the dispute. A related discussion centered on how to improve the effectiveness of the NLRA's remedial provisions by preventing either party from enjoying benefits from their illegal activities while a case was being litigated through administrative and judicial proceedings.69

An example of this concern can be found in the words of former Board Chairman Edward B. Miller, who in 1970 stated "criticism that our remedies provide too little, too late is doubtless sometimes valid. But I think the emphasis is more properly placed on the 'too late' rather than the 'too little'."70

In what appears to have been a response to pressure to increase the effectiveness of remedies under the Act, in 1976 Board Chairman Betty Southard Murphy71 formed the Chairman's Task Force on the National Labor Relations Board charged with reviewing and evaluating the Board's structure and processes.72 Without making any recommendations as to the use of section 10(j), the Task Force's Interim Report issued in late 1976 indicated that its union members "take the position generally that the Board has used its discretionary power to authorize section 10(j) injunctions much too sparingly, given the express Congressional intent that such power be used."73 No further substantive reference to section 10(j) was made in the report.

In the interim between the Task Force's formation and its

69. See generally J. McDowell & K. Huhn, supra note 38, at 264.
71. Murphy served as Chairman from February 1975 to April 1977.
72. The Task Force was established on October 25, 1975, and terminated in Spring, 1978. As outlined in its charter, the Task Force's objectives were to: (1) review and evaluate existing structure, practices, procedures, rules, and regulations for the investigation, prosecution, hearing, decision, and enforcement of cases filed with the Agency; (2) advise the Board or the General Counsel, where appropriate, of its recommendations on the means and methods of improving the agency's processes; (3) make recommendations to the Board on the recruitment and productivity of administrative law judges; and (4) serve as a forum for exchange of ideas and opinions of interested persons. CHAIRMAN'S TASK FORCE ON THE NATIONAL LABOR RELATIONS BOARD, NLRB, INTERIM REPORT AND RECOMMENDATIONS, Charter Page (1976) [hereinafter referred to as 1976 INTERIM REPORT], reprinted in [1976] LAB. REL. Y.B. 327 (1976).
73. Id. at 81, [1976] LAB. REL. Y.B. at 364. The task force report also gave its tacit approval to the changes in the procedure for seeking authorizations adopted during 1976 by the General Counsel's office. Id. at 43-44 [1976] LAB. REL. Y.B. at 363. For further discussion, see note 42 supra, note 82 and accompanying text infra. In 1977 a supplemental report to the 1976 INTERIM REPORT was released and no further references or recommendations were made concerning § 10(j). See generally CHAIRMAN'S TASK FORCE ON THE NATIONAL LABOR RELATIONS BOARD, SUPPLEMENTAL REPORT AND RECOMMENDATIONS (1977), reprinted in [1978] 4 LAB. L. REP. (CCH) ¶ 9137.
first progress report, General Counsel Peter G. Nash\textsuperscript{74} issued his Report on 10(j) Proceedings.\textsuperscript{75} In the report, Nash disclosed that he authorized the report “in the interest of providing the fullest public awareness of the operation of this section 10(j) of the Act.”\textsuperscript{76} Beyond that explanation, Nash gave no public indication about why he issued the report. However, the implication in the first several explanatory pages is that Nash may have been responding to criticism leveled at the General Counsel’s office by the courts.\textsuperscript{77}

\begin{itemize}
  \item \textsuperscript{74} Nash served as General Counsel from 1971 to 1975.
  \item \textsuperscript{75} Office of the General Counsel, NLRB, Report on 10(j) Proceedings, August 1971 - July 1 1975 (1975), reprinted in [1975] Lab. Rel. Y.B. 310 [hereinafter referred to as Report on 10(j) Proceedings]. The report was divided into two sections. The first section consisted of a survey of the cases in which § 10(j) relief was authorized, combined with a discussion of the underlying reasons for the authorization request. The second part of the report consisted of a chart reflecting the history of each authorization from Board approval to, if appropriate, appeal court level.
  \item \textsuperscript{76} General Counsel Irving, the present General Counsel (appointed December, 1975), in the first General Counsel’s Office Quarterly Report issued after he was appointed, indicated that each future Quarterly Report will include a brief summary of the cases in which the General Counsel’s office sought section 10(j) authorizations. Office of the General Counsel, NLRB Release No. R-1460 (July 13, 1976).
  \item \textsuperscript{77} Id. at 2, [1975] Lab. Rel. Y.B. at 311. In the report, Nash stated that section 10(j) “reflects the congressional recognition that some unfair labor practice conduct results in substantial injury which may not or cannot be effectively corrected by the Board after lengthy litigation.” Id.
\end{itemize}

Nash then went on to point out that the Supreme Court had not yet given definition to the legislative phrase “just and proper,” an overdue task which needed to be undertaken. However, Nash was quick to state that his office had recently developed firm standards to determine whether or not to seek injunctive relief. Id. at 3, [1975] Lab. Rel. Y.B. at 312. These factors are: (1) the clarity of the alleged violation; (2) whether the case involves the shutdown of important business operations which, because of their special nature, would have an extraordinary impact on the public interest; (3) whether the alleged unfair labor practice involves an unusually wide geographic area, and thus creates special problems of public concern; (4) whether the unfair labor practice poses special remedy problems so that resorting solely to the Act’s regular enforcement proceedings would probably render it impossible either to restore the status quo or to dissipate effectively the consequences of the unfair labor practice; (5) whether unfair labor practice involves interference with the conduct of an election or constitutes a clear and flagrant disregard of Board certification of a bargaining representative or other Board procedure; (6) whether the continuation of the alleged unfair labor practice will cause exceptional hardship to the charging party; (7) whether the current unfair labor practice is part of a continuing or repetitious pattern; (8) whether, if violence is involved, the violence is of such a nature as to be out of control of local authorities or otherwise widespread and susceptible of control by 10(j) relief. Id. at 3, [1975] Lab. Rel. Y.B. at 312. These eight criteria are now incorporated in the NLRB, NLRB Internal Instruction and Guidelines Manual - Unfair Labor Practice Proceedings § 10310.2 (1977). The standards discussed by Nash replaced those announced by Chairman McCulloch in 1962. See text accompanying note 63 supra. Nash’s standards for determining whether the Board believes § 10(j) relief is appropriate emphasize the “public interest” or “public concern” more so than
John Irving, Nash's successor as General Counsel, labeled Nash's report on section 10(j) as being of "substantial importance in providing public awareness of how the Agency operates in an area which previously may not have been widely known," and commented that Nash's report "is of value not merely to the academic researcher, but to the labor law practitioner in providing in a context of actual cases a feeling of what considerations go into an authorization of section 10(j) injunctive relief."

Supported by a belief that the purpose of section 10(j) is succinctly set forth in the legislative history of the section, General Counsel Irving, after his appointment, began to seek 10(j) injunctions with unprecedented vigor. During the first year of his administration, Irving sought forty-four authorizations from the Board for section 10(j) injunctions; this compares with the yearly average prior to 1977 of only nine to ten authorizations per year. Additionally, Irving instituted changes in the procedure for obtaining the injunction which were designed to expedite and improve the way in which section 10(j) requests are processed through the Board bureaucracy.

The increased use of section 10(j) injunctions had been recommended for several years by the Board's present Chairman, John Fanning. In January, 1976, a year and a half before becoming Chairman, Fanning emphasized his concern with the increasing number of cases the Board has to process. In 1975, Fanning noted, there were 32,000 charges of unfair labor practices (corresponding to a 7-10 percent increase in the rate of

did McCulloch's 1962 standards. This increased concern for the public interest may be a reaction to the public interest discussion which appeared in McLeod v. General Elec. Co. See notes 133-47 and accompanying text infra.

78. Irving, Current Developments in the Office of the General Counsel-Substantive, Procedural, Administrative, in SOUTHWESTERN LEGAL FOUNDATION, LABOR LAW DEVELOPMENTS 1976, 68, 73-74 (1976). Two months after the Nash report was issued, Irving (the Board's current General Counsel), while still the Deputy General Counsel, singled out the increased use of § 10(j) proceedings as a significant contribution being made by the General Counsel's office during the "aggressive" interim period between the conclusion of General Counsel Nash's term of office, which took place shortly before the issuance of the report, and the expected appointment of a new General Counsel (an appointment which was to go to Irving). Id. at 72.

79. Id. at 73-74. An update through September 30, 1977, on Nash's 10(j) report will be released sometime during the second half of 1978.

80. Irving, supra note 42, at 357-58.

81. Note 29 supra.

82. For a discussion of the changes instituted by Irving, see note 42 supra.

83. Appointed Board Chairman April, 1977.

84. Fanning, We are Forty - Where Do We Go?, 27 LAB. L.J. 3, 4-5 (1976).
filing the ULPs per year) which were investigated and processed.\textsuperscript{85} His concern was that the Board's effectiveness in taking care of those cases would be better served by accelerating the Board's administrative procedures, which would include more frequent use of section 10(j).\textsuperscript{86}

In 1969, while serving as a member of the Board, Fanning commented that

\begin{quote}
[t]he Board's increasing consideration of the 10(j) injunction has been inhibited, perhaps, by the procedural implications as well as by the substantive problems emerging from the General Electric case. Nevertheless, the holdings in both the Minnesota Mining and Angle cases . . . offer substantial guidelines which will undoubtedly be of assistance to the Board in the future exercise of its discretionary authority to seek injunctive relief.\textsuperscript{87}
\end{quote}

The actions taken by General Counsel Irving, and supported by Board Chairman Fanning, to improve the Board's administrative proceedings will perhaps do much to help increase the use of the section 10(j) injunction. However, the substantive problems raised by the cases mentioned by Fanning in his 1969 address remain, and if uncorrected by the courts, will do much to defeat the Board's attempts to increase the effectiveness of section 10(j).

\section*{Judicial Approaches to 10(j) Injunctions}

The NLRB's implementing of a policy of expanded use of the section 10(j) injunction is only the first step in achieving a more effective enforcement of the NLRA. Once the Board files a petition for injunctive relief, the focus of attention shifts to the courts. The standards to be used by the district courts in applying section 10(j) to controversies involving unfair labor practices vary between the district and appellate courts, and as of yet have not been passed upon by the United States Supreme Court.\textsuperscript{88} However, the federal appellate courts, rely-

\textsuperscript{85} Id. at 4-5.
\textsuperscript{86} Id. at 7.
\textsuperscript{87} Fanning, New and Novel Remedies for Unfair Labor Practices, 3 Ga. L. Rev. 256, 277 (1969). In the same article Fanning noted:

\begin{quote}
Under section 10(j) . . . the Board is authorized to seek an injunction in any case of unfair labor practice charges against an employer or union. No mention is made in this section of "reasonable cause," and no other definitive guideline is provided.
\end{quote}

\textsuperscript{88} The issue did come before the Supreme Court once, but the case was settled
ing on vague statutory language and meager legislative history, have attempted to formulate standards for district courts to use in reviewing petitions for section 10(j) injunctions. Unfortunately, there is no agreement among the appellate courts on what the correct standards should be. This lack of agreement is viewed by both jurists and Board members as contributing to the ineffective and infrequent application of section 10(j). 88

Standards for 10(j) Relief

In order to obtain an injunction under section 10(j) the Board need not prove that the unfair labor practice complained of actually occurred. 89 Courts relying upon the statutory language and legislative history of section 10(j), however, have required that a two-prong test be satisfied.

First, the Board must show that there is "reasonable cause" to believe that an unfair labor practice has occurred. 90 This prerequisite is usually satisfied when the Regional Director demonstrates to the district court that sufficient evidence exists to show there is a likelihood of a statutory violation. 91 However, it is crucial to the request for section 10(j) injunctive relief that the Board show more than "reasonable cause" to believe that the NLRA has been violated. 92 That second and

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88. See generally REPORT ON 10(j) PROCEEDINGS, supra, note 77 at 2-3.
89. See McLeod v. General Elec. Co., 385 U.S. 533 (1967). For a discussion of the General Electric case, see notes 133-147 and accompanying text infra. It should be noted that there are severe practical difficulties in presenting the Supreme Court with a case or controversy. Since the § 10(j) injunction only remains in effect pending Board adjudication of the underlying unfair labor practice charges, the § 10(j) issue would typically be mooted before the Supreme Court would be able to issue a decision.
92. Boire v. Intn'l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 479 F.2d 778, 789 (5th Cir. 1973). The Boire court found "reasonable cause" to exist "so long as the legal theories are not insubstantial or frivolous." Id. at 792. See also Sachs v. Davis & Hemphill, Inc., 71 L.R.R.M. 2126 (4th Cir. 1969). The court in Davis & Hemphill stated: "[I]n regard to the 'reasonable cause' element, the standard on review is the usual one applicable to district court findings of fact: the finding will stand unless clearly erroneous." Id. at 2128.
93. Commenting on the subject, one commentator has noted:

...must be predicated on something more than reasonable cause to believe that an unfair labor practice has been committed.

Roth, Injunctive Relief on the NLRB, 43 St. John's L. Rev. 383 (1969). See also
more vital prong is that all courts and specific statutory language require the Board to demonstrate that, based on the evidence offered, an injunction would be "just and proper." Although it would appear that the Board must satisfy a two-prong test, the "reasonable cause" requirement of that test is often overshadowed by courts in their analysis of the more vital question of what constitutes "just and proper" relief.

There is no unanimity of opinion in the appellate courts on what makes injunctive relief "just and proper." The courts frequently mention that there is a need to restore the parties to the status quo. They generally recognize that a primary objective of the enactment of section 10(j) was the preservation of the status quo pending the issuance of final Board orders or the completion of litigation in the courts. However, courts often do not agree on the question of what status must be preserved, and unfortunately no settled definition of status quo exists.

An example of this conflict and confusion became apparent in 1975 when conflicting definitions of the status quo emerged in the Second and Fifth Circuits. In Seeler v. Trading Port, Inc., the Second Circuit found that the status quo was the situation that "existed before the onset of unfair labor practices." The Fifth Circuit, in Boire v. Pilot Freight Carriers, Inc., took the opposite position, defining status quo as "the last uncontested status which preceded the pending controversy."

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95. Minnesota Mining and Mfg. Co. v. Meter, 385 F.2d 265, 270 (8th Cir. 1967); Johnston v. J.P. Stevens & Co., 341 F.2d 891, 892 (4th Cir. 1965); but see Angle v. Sacks, 382 F.2d 655 (10th Cir. 1967), where the court noted that after a finding of "just and proper" circumstances "preservation and restoration of the status quo are then appropriate considerations in granting temporary relief pending determination of the issues by the Board." Id. at 660.
97. 517 F.2d 33 (2d Cir. 1975).
98. Id. at 38.
99. 479 F.2d 778 (5th Cir. 1973).
100. Id. at 789. In Angle v. Sacks, 382 F.2d 655 (10th Cir. 1967), the court indicated that a determination for the need to grant injunctive relief is first considered,
The differing definitions of the status quo may be reflective of differences in policy rather than judicially interpreted doctrines. Nevertheless, they have added confusion and inconsistency to judicial determinations of whether injunctive relief is "just and proper." The need for relief will depend on the nature of the injury suffered by the complaining party. The nature of the injury will necessarily be defined in terms of what the status quo should be. Thus, the courts' inclination to order injunctive relief may be linked to its perceptions of the relevant status quo. However, like the reasonable cause analysis discussed supra, the "status quo" difficulty is usually also glossed over by the courts in their attempts to articulate a "just and proper" standard.

What is Just and Proper

Before granting an injunction under section 10(j) a court must be satisfied that, under the facts before it, equitable relief is "just and proper." Few appellate cases have attempted to define this statutory requirement. However, those which did so have found the requirement satisfied in three distinct situations, when

1. The alleged unfair labor practice was of a "serious" and "extraordinary" nature;
2. The purposes of the national labor policy and the NLRA would be frustrated if injunctive relief was not granted; and
3. Irreparable harm has been caused to the parties involved, or the public interest has been damaged by the illegal activity.

Extraordinary circumstances standard. In essence, the extraordinary circumstances standard requires the district court to grant section 10(j) relief if circumstances exist which merit temporary relief. Such a nebulous and inherently circulatory guide is difficult to apply on a broad basis, since it requires a case-by-case analysis to determine its applicability. This limitation probably explains why it has been adopted by only one circuit.102

followed by a consideration of the "(p)reservation and restoration of the status quo." 101


102. The Second Circuit in McLeod v. General Elec. Co., 366 F.2d 847 (2d Cir. 1966), adopted a similar standard when it overruled a District Court's granting of a § 10(j) injunction upon the basis of a "public interest" standard. The Supreme Court granted a writ of certiorari to resolve the conflict between the district and circuit
In adopting the extraordinary circumstance standard, the Eighth Circuit, in *Minnesota Mining and Manufacturing Co. v. Meter*,\(^{103}\) reversed a district court which had enjoined the Minnesota Mining and Manufacturing Company from refusing to bargain collectively with its employees' bargaining representative.\(^{104}\) The company had refused to bargain because the representative included, as part of its committee, individuals who were non-voting advisors and who normally represented other unions which had bargained with the company in the past.\(^{105}\) The Eighth Circuit's decision, which was limited to the injunction issued by the district court, took note of the irreparable harm and public interest standards adopted in other circuits, but reasoned that section 10(j) was meant to be "reserved for a more serious and extraordinary sets of circumstances where the unfair labor practices, unless contained, would have an adverse and deleterious effect on the rights of the aggrieved party . . . ."\(^ {106}\)

The court concluded that the district court record was devoid of any evidence which would support a finding that an extraordinary set of circumstances existed to warrant injunctive relief.\(^{107}\) Although the court relied upon an extraordinary circumstances standard to reverse the district court injunction, it did indicate that even if it had applied standards employed by other courts to the circumstances (e.g., the employer's refusal to bargain posed a serious threat to the public interests or that the employer's refusal would result in irreparable injury to the union unless enjoined), it would not have been able to stay the injunction based on the facts in the record.\(^{108}\)

The extraordinary circumstances standard apparently conditions the Board's decision to seek relief on the fortuity that a court will deem "extraordinary" the particular circumstances.
stances presented to it for review. The inability of the Board to look into the future and foretell how each district court might view a set of circumstances is obvious. Therefore, the only real value of this standard may be that it serves as a reminder to courts that the opposite extreme—granting section 10(j) relief in every case in which quick relief might conceivably be helpful—would be just as difficult for the Board to engineer. Therefore, to expand the standard from one circuit's decision into a general rule applicable to all district courts would probably put a halt to the recently expanded use of section 10(j).

*Frustration of the NLRA purpose standard.* The Tenth Circuit in *Angle v. Sacks,* 109 upheld a district court's granting of a section 10(j) injunction based upon a showing by the Board that the employer confronted with a union organizational drive, interfered with his employees' rights under the NLRA through interrogations, discriminatory discharges, and a selected wage increase, all designed to destroy employee interest in union representation.110

The court found sufficient cause existed to believe that the purposes of the NLRA would be defeated if temporary relief were not granted. This reasonable apprehension, the court concluded, satisfied the "just and proper" requirement of the statute.111

Basing its decision on the same legislative history analyzed by the *Minnesota Mining*112 court, the *Angle* court113 could find nothing in that history which suggested that section 10(j) injunctions were applicable only to situations of "heavy and meaningful repercussions"114 or ones in which a "demonstrably prejudicial impact"115 on the public might occur.

On the contrary, the court postulated that the Board may seek relief if the "circumstances call for such relief."116 This would include, the court reasoned, cases where the mere passage of time might defeat the purposes of the NLRA117 or

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109. 382 F.2d 655 (10th Cir. 1967).
110. Id. at 658.
111. Id. at 660-61.
112. 385 F.2d at 269-70.
114. Id. at 659.
115. Id.
116. Id. at 660.
117. Id. at 659. See *NLRB v. Aerovox Corp.*, 389 F.2d 475 (4th Cir. 1967). In *Aerovox* the circuit court adopted a "frustration of the statute" analysis of the term "just and proper" in NLRA § 10(e), 29 U.S.C. § 160(e) (1964). Section 10(e) provides for temporary relief after the Board has made a final determination but before the appropriate circuit court has granted enforcement. Although the specific function of
"where the continuance of illegal activities would hinder the Board's determination of issues or the implementation of its decision in ULP proceedings."[116]

In 1969 the Fourth Circuit, in Sachs v. Davis & Hemphill, Inc.,[117] employed the same standard adopted by the Angle court in affirming a district court's granting of a 10(j) injunction. [120] In Davis & Hemphill the employer had withdrawn recognition from the union at a time when it did not have a reasonable basis for a doubt of the union's majority status and had begun hiring replacements for his employees striking in protest of his action. [121]

Relying heavily on the legislative history section reported in Angle,[122] the court found the "just and proper" requirement for granting section 10(j) relief turned on "whether there exists a probability that the purposes of the Act will be frustrated unless temporary relief is granted."[123]

The court reasoned that the NLRA was intended to promote industrial peace by encouraging collective bargaining as a substitute for industrial strife. [124] It noted that if the employer is permitted to continue its refusal to bargain until the Board can decide the issues presented by the case, he will be able to wear down the support for the union. [125] The court concluded that if this is allowed to continue, the Act's purpose of protecting employees, as well as the normal procedures used by the Board in resolving conflicts, will have been frustrated. [126]

The Angle and Davis & Hemphill courts' rulings that the district court need not find "heavy and meaningful repercussions" in order to grant a section 10(j) injunction are clearly contrary to the Minnesota Mining court's finding "a more serious and extraordinary set of circumstances" must exist for a district court to grant section 10(j) relief. [127] The fact that each court relied on the same two paragraphs in the Senate reports

this section differs from that of § 10(j), the Fourth Circuit felt that the "just and proper" clause should be read the same way in both sections. This reading caused the court to deny the relief requested.

118. Angle v. Sacks, 382 F.2d at 660.
121. 71 L.R.R.M. at 2126-27.
122. Id. at 2127, citing Angle v. Sacks, 382 F.2d 655, 660 (10th Cir. 1967).
123. 71 L.R.R.M. at 2128.
124. Id. at 2129.
125. Id.
126. Id.
points out the confusion which exists among the circuits.\textsuperscript{128}

The "frustration of the NLRA purpose" standard shares the same weakness as the "extraordinary circumstances" test. No judicially desirable formula can predict when any action by an employer or union will frustrate the purposes of the NLRA. Therefore, unlike the extraordinary circumstances test which would appear to deny section 10(j) relief in all but the most unusual situations, the test postulated by the Angle and Davis & Hemphill courts would make every ULP case susceptible to a section 10(j) injunction because every ULP case not immediately settled arguably defeats the purpose of the NLRA. Such a broad interpretation of the use of section 10(j) could not have been the intent of Congress in 1947, particularly when viewed from the perspective of congressional abhorrence of the pre-1930 abuses of the labor injunction.\textsuperscript{129}

\textit{Irreparable harm or public interest standard?} Johnston \textit{v. J.P. Stevens & Company},\textsuperscript{130} a case which came before the Fourth Circuit in 1965, was one of the first appellate court cases to wrestle at length with the problem of determining the requirements a district court must follow in satisfying section 10(j)'s statutory "just and proper" standard. In a cautious per curiam opinion, the court agreed with the district court that the "correct rule"\textsuperscript{131} for determining the standards to use in section 10(j) hearings centers upon congressional intent to give the Board power to seek injunctions when it is in the public interest, particularly, the court indicated, when it is necessary to "prevent persons who are violating the Act from accomplishing their unlawful purpose . . . ."\textsuperscript{132}

The next year a district court in \textit{McLeod v. General Electric Co.}\textsuperscript{133} reached a similar conclusion and in so doing provided the Supreme Court with an opportunity to articulate the standards district courts should apply in granting section 10(j) injunctions. Unfortunately, the Supreme Court declined to pass on the merits when the issue being litigated had been mooted.

\textsuperscript{128} For the two paragraphs relied upon by the Angle, Davis & Hemphill and Minnesota Mining courts, see text accompanying note 36 supra.

\textsuperscript{129} For a discussion of pre-1930 labor injunction abuses, see text accompanying notes 18-24 supra.

\textsuperscript{130} 341 F.2d 891 (4th Cir. 1965).

\textsuperscript{131} \textit{Id.} at 892.

\textsuperscript{132} \textit{Id.} In the Fourth Circuit's short per curiam opinion there was no explanation for what it considered the public interest to be, which status quo was to be restored, or what Congress intended by the term "just and proper." The court, however, did deny the Board's appeal. Thus it did not grant the injunction sought.

\textsuperscript{133} 257 F. Supp. 690 (S.D.N.Y. 1966).
The district court in *General Electric* enjoined an employer from refusing to enter into contract-renewal negotiations with a union because the employer viewed as unacceptable and impermissible the union’s asserted right to designate as non-voting members of its negotiating committee seven individuals who normally would represent other unions in bargaining with the employer for other employees.\(^{134}\)

Although the district court conceded that a section 10(j) injunction is a drastic remedy which “ought to be reserved for situations of special need,”\(^{135}\) it rejected the employer’s contention that injunctive relief under section 10(j) was only available to obtain relief in cases of “flagrant” violations.\(^{136}\) Instead the court reasoned that “the remedy of section 10(j) is surely appropriate and available when the impact upon the public interest is grave enough to justify swifter corrective action than the normal process of Board adjudication and court enforcement.”\(^{137}\) The court found the case before it “clearly” qualified under that standard.\(^{138}\)

Upon appeal, the Second Circuit reversed and vacated the injunction.\(^{139}\) In reversing the district court decision, the circuit court concluded that temporary injunctive relief prior to the Board’s hearing and decision was available only where demonstrably “necessary . . . to prevent any irreparable harm.”\(^{140}\) The court did not find this standard satisfied in the instant case.

To support its ruling, the court noted that section 10(j) is one of the few exceptions to the almost blanket prohibition against the issuance of injunctions in labor disputes, an exception which was to be used only in extraordinary circumstances.\(^{141}\) It did not elaborate on what it considered to be extraordinary circumstances or irreparable harm except to say that it did not exist in the present case.\(^{142}\)

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134. *Id.* at 693.
135. *Id.* at 707.
136. *Id.* at 708-09. The district court indicated that it could find nothing in the language of the statute or its legislative history to support the restrictive use view proposed by the employer.
137. *Id.* at 708.
138. *Id.*
140. *Id.*
141. *Id.* at 849.
142. *Id.* at 850. In addition to not demonstrating that a § 10(j) injunction was necessary to prevent irreparable harm, the court found that the Board did not prove the injunction was needed to preserve the status quo. *Id.* That two-prong test is
The Board then petitioned the Supreme Court for a writ of certiorari to review the court of appeals decision and was granted a stay of the court of appeals’ judgment pending the certiorari proceedings. As a result of the bargaining which took place while the injunction was in effect when the case was pending on certiorari, the parties reached an agreement on the terms of a new collective bargaining agreement. The Supreme Court subsequently granted the petition for certiorari but, in view of the supervening execution of a contract, declined to pass on the proper construction of section 10(j). It remanded the case to the district court to determine the effect of the contract execution upon the appropriateness of injunctive relief.

The Supreme Court did, however, note that the district courts’ “impact upon the public interest” test differed from the court of appeals’ “irreparable harm” standard, without expressing its support for either one.
It would appear obvious that an employer's refusal to bargain with an employees' union, as in *General Electric*, could produce irreparable harm to the union or erode union support. However, since prediction of irreparable harm would depend upon such dynamic, indiscernible criteria as the strength of a union's support, the effect of an employer's actions on employee morale or the intimidation power that a union may have over employees, determining when they are not present may prove difficult.

In addition to difficulties in application, the irreparable harm standard may be inconsistent with the legislative intent of section 10(j). Section 10(l) directs the Board to seek temporary injunctive relief in order to remedy certain union ULP's.\(^1\) Furthermore, section 10(l) provides that a district court shall not issue a temporary injunction order without notice unless the petition alleges that "substantial and irreparable injury to the charging party will be unavoidable."\(^2\) Had Congress intended that the irreparable harm standard apply to petitions for section 10(j) relief, it could easily have embodied that standard in the language of that section. However this did not occur; such an absence supports an inference that Congress did not consider the irreparable harm standard appropriate for circumstances covered by section 10(j).

One purpose of the NLRA is to protect the rights of the public from infringement caused by labor disputes.\(^3\) Therefore, the public interest standard presented by the district court may be more consistent with congressional intent than any of the standards discussed above.

However adoption of the public interest standard could preclude temporary relief in cases involving a relatively small number of persons who are threatened with irreparable injury.\(^4\) Perhaps in response to this drawback, one commenta-
tor has suggested that if the existence of unfair labor practices is certain, the district court should grant section 10(j) injunctive relief upon a showing of even slight harm to the public. In contrast, if the existence of unfair labor practices is less certain, the court should require proof of a substantial impact upon the public interest.\textsuperscript{152}

A solution. It may be possible to harmonize the conflicting interpretations of the appellate courts by adopting a hybrid similar to the one used by the Fifth Circuit in \textit{Boire v. International Brotherhood of Teamsters}.\textsuperscript{153} In \textit{Boire}, the court found the granting of a section 10(j) injunction "just and proper" in order to "prevent frustration of the remedial purposes available to the Board, to protect the public interest, and to prevent irreparable harm."\textsuperscript{154}

In affirming the district court order granting a section 10(j) injunction, the \textit{Boire} court found there was reasonable cause to believe the Teamsters and four of its local unions violated their bargaining obligation under the NLRA.\textsuperscript{155} The labor unions had insisted, over the protest of a trucking firm, that the firm extend the provisions of the collective bargaining contract to its four newly established terminals. In order to force compliance with their demand, the unions invoked the grievance arbitration provisions of the contract and struck and picketed the trucking firm.\textsuperscript{156}

The circuit court noted that if the trucking firm had resisted the union's demands, there would be widespread strike activity which would result in severe financial loss and impairment of important public services.\textsuperscript{157} Thus, the court invoked the public interest standard as outlined by the district court in \textit{McLeod}. However, if the trucking firm capitulated to the union

\textsuperscript{152} Comment, \textit{The Use of Section 10(j) of the Labor-Management Relations Act in Employer Refusal-To-Bargain Cases}, 1976 U. ILL. L. Rev. 845, 850-52 (quoting from \textit{Note, A Temporary Injunction of an Unfair Labor Practice Shall Issue Only On a Showing That It Is Necessary To Preserve the Status Quo or To Prevent Irreparable Harm}, 45 Texas L. Rev. 358, 363 (1966)).

\textsuperscript{153} 479 F.2d 778 (5th Cir. 1973). The standards set out by that decision were affirmed two years later in \textit{Boire v. Pilot Freight Carriers, Inc.}, 515 F.2d 1185 (5th Cir. 1975). In \textit{Pilot Freight} the court noted "writing on a virtual tabula rasa, the \textit{Boire v. Teamsters} decision, . . . set the boundaries of section 10(j) relief in this circuit." \textit{Id.} at 1188.

\textsuperscript{154} 479 F.2d at 789.

\textsuperscript{155} Id.

\textsuperscript{156} Id. at 783, 785.

\textsuperscript{157} Id. at 788.
demands, the union would become so entrenched in the state that any ultimate Board decision would be of no value to the trucking firm or to the firm’s employees who may not have wanted to vote for a union. That not only would circumvent and frustrate the Board’s remedial provisions (e.g., the Angle and Davis & Hemphill standard), but would also cause possible irreparable harm (e.g., the circuit court’s standard in McLeod) to the firm’s employees by denying their rights under the Act to choose, without restraint or coercion, a bargaining representative.

The Boire court was successfully able to use a combination of standards to find the granting of a section 10(j) injunction to be “just and proper.” However, the court’s decision points out the lack of agreement between the circuit courts in defining the “just and proper” requirement of section 10(j).

CONCLUSION

Whenever possible, private machinery should be encouraged to settle disputes. However, it should be realized that those situations where an employer or union is engaging in obviously unlawful conduct the injunction has proven to be an efficient means of enforcing this country's labor policies.

It is the duty of the National Labor Relations Board and the courts to interpret and to apply the provisions of the National Labor Relations Act. Congress has declared that the policy of this country is to eliminate industrial strife and any obstructions to the free flow of commerce, be they employee or employer initiated. Acting pursuant to its congressional mandate as well as expressed advice, the National Labor Relations Board has indicated that it plans to use section 10(j) injunctions in a greater role in the solution of future labor disputes. The assumption of an active role by the courts in the implementation of the Board's new policy will require the creation of more concrete standards than have been necessary under the Board's previous policy of restricted use of section 10(j). The creation of more concrete standards does not require rigid guidelines to be established but instead would insure more uniformity between the several circuits than now presently exist. If those standards do not eventually come from the United States Supreme Court, the future of a valuable tool to promote the policies of the Act will remain in doubt.

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158. Id.