ELECTRONIC REDACTED

SECTION 10 (j) MANUAL

USER'S GUIDE

Office of the General Counsel

September 2002

PREFACE

This Manual has been prepared by the General Counsel of the National Labor Relations Board pursuant to his authority under Section 3(d) of the Act. It is designed only to provide operational and procedural guidance for the Agency's staff in administering the National Labor Relations Act. It is not intended to be a compendium of substantive or procedural law, nor a substitute for a knowledge of the law, evidence, or procedure. The matters contained herein are not General Counsel or Board rulings or directives and are not a form of authority binding on the General Counsel or the Board.

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1.0 INTRODUCTION

This is the first major revision of the 10(j) Manual. The last revision, in June 1996, was partial; the current revision is comprehensive. The User's Guide has been completely rewritten and extensively expanded. Sample arguments have been updated to incorporate developments in recent 10(j) caselaw and theories regarding the need for injunctive relief. A wider variety of model papers are provided to assist the Regions in preparing and litigating their 10(j) cases in district court.

The 10(j) Manual is intended to be a general guideline for the processing of Section 10(j) cases. The Manual consists of two parts: the User's Guide and the Appendices which follow. The User's Guide will explain each step in the process, from identification and investigation through litigation in federal district court, instruct Board agents on their responsibilities in processing 10(j) cases, identify various issues that may arise in processing a case, and provide necessary information to successfully address those issues.

To assist in meeting those responsibilities, this guide contains material to help identify the situations in which interim injunctive relief under Section 10(j) may be necessary. It also explains how to conduct an investigation to elicit evidence relevant to determining whether Section 10(j) relief is "just and proper" in a particular case. This guide provides instruction on the procedure to follow once a Regional office has decided that a case warrants immediate injunctive relief, including the preparation of the memorandum recommending 10(j) relief, the preparation of papers for district court, how to argue the case in district court, and how to address any other litigation issues that may arise.

The appendices that follow the User's Guide contain material to support Board agents throughout the 10(j) process. Among other things, there are checklists, suggested questions for investigation, sample documents, model arguments, and citations to relevant research material. Of course, Board agents should use these documents to the extent they are relevant to their 10(j) case, and modify them as needed to fit the facts or particular legal theories in their case. For ease of use, Board agents can obtain access to many of these documents on the Agency's Intranet. This will allow Board agents to download into their computers the necessary documents for processing their 10(j) cases.

This manual was prepared by the Injunction Litigation Branch with the sole purpose of supporting the Regions in their efforts to achieve a prompt and effective remedy in those cases which require immediate 10(j) injunctive relief. The material was prepared based on the knowledge and experience of legions of Board agents who have litigated 10(j) cases throughout the country. Please contact the Injunction Litigation Branch if additional assistance is needed at any time.

1.1 General 10(j) Principles

Section 10(j) of the Act authorizes the Board to seek injunctive relief in U.S. District Court in situations where, due to the passage of time, the normal adjudicative processes of the Board likely will be inadequate to effectively remedy the alleged violations. Such injunctive relief may be sought as soon as an unfair labor practice complaint is issued by the General Counsel and remains in effect until the unfair labor practice case is finally disposed of before the Board. It may be requested by the charging party or sought by the Regional Office, sua sponte. It is imperative that Board agents be aware of the types of situations where such relief may be appropriate, the requirements of the investigative process in those situations, and the internal procedures to be followed in such cases.

Congress created Section 10(j) relief as a means to preserve or restore the lawful status quo ante, so that the purposes of the Act are not frustrated and the final order of the Board is not rendered meaningless by the passage of time. Congress recognized that a respondent's illegal acts could, in some cases, permanently alter the situation and prevent the Board from effectively remedying the violations by its final order. Thus, to justify Section 10(j) relief, the Board must demonstrate how the alleged violations threaten statutory rights and the public interest while the parties await a final Board order.

This involves two elements of proof:

1. a sufficient showing that an unfair labor practice has occurred; and

2. a sufficient showing that there is a threat that the Board's ultimate remedial order will be a nullity.

The first element is often referred to as the "merits analysis," and the latter element is often referred to as a threat of "remedial failure." In most circuits these elements are tested under the two-prong analysis of whether there is "reasonable cause to believe" that the Act has been violated as alleged in the unfair labor practice complaint; and whether interim injunctive relief, pending a final Board order, is "just and proper." The First, Seventh, Eighth and Ninth Circuits have abandoned the "reasonable cause" test as the limit of a district court's inquiry into the merits of the unfair labor practice case and held that requests for Section 10(j) injunctions should be evaluated under traditional equitable principles. A more precise definition of the standards for each circuit is set out in the Model 10(j) standards for each circuit contained in Appendix D.

The merits analysis of a 10(j) case is the same as the merits determination of any unfair labor practice charge. What distinguishes a 10(j) case from other unfair labor practice cases is the threat of remedial failure. This threat may be demonstrated by the nature and extent of the alleged violations, and the anticipated and actual impact of the unremedied violations upon statutory rights that is expected to continue until a Board order issues. For instance, if an unfair labor practice complaint alleges that an employer unlawfully discharged an employee during a union organizing campaign, interim reinstatement of the discriminatee may be necessary to avoid "chilling" the remaining unit employees' support for the union or their willingness to engage in protected union activities during the Board proceedings.

Courts differ as to whether the Board must introduce direct evidence of "chill" to establish that such injury, or chill, is threatened. Generally, many courts have been willing to examine the very nature and extent of the particular unfair labor practices to determine, by inference or presumption, whether the violation will, over time, tend to chill or undermine remaining unit employee support for a union. Other courts appear less likely to infer a chilling effect on employee statutory rights; instead, they insist upon evidence that the violation is actually having a chilling effect. In either case, however, direct evidence of chill is always probative as to the need for Section 10(j) relief and should be sought in every Section 10(j) case.

The quantum of evidence required to establish the need for Section 10(j) relief varies depending upon the type of case involved, the applicable case law, and the judicial circuit in which injunctive relief is sought. The absence of direct evidence of impact in a particular case does not necessarily mean that Section 10(j)proceedings are inappropriate. The existence or absence of such evidence is always relevant to the evaluation of a case, however, and the Regions should always attempt to obtain such evidence.

2.0 IDENTIFYING POTENTIAL 10(j) CASES

Early identification of potential 10(j) cases is critical to avoid the threat of remedial failure. When a case warrants 10(j) relief, the longer it takes to obtain that relief, the greater the threat of remedial failure. For this reason, Board agents should evaluate every new charge to determine whether it might be a potential 10(j) case.

Most potential 10(j) cases are identified at the outset by the charging party who requests 10(j) relief. However, a substantial portion of 10(j) requests are sua sponte, i.e., the regions identify the case as requiring 10(j) relief even if the charging party does not. For this reason, Board agents should "think 10(j)" even if there is no specific request. In addition, although most 10(j) cases are identified around the time an initial charge is filed, in others the need for injunctive relief might not arise until the respondent has demonstrated a pattern of violations over a period of time. Therefore, Board agents should be alert at every stage of case processing for the potential need for a 10(j) injunction.

2.1 Categories of Section 10(j) Cases

The Board may seek Section 10(j) injunctions for any alleged violation of the Act, other than those enumerated in Section 10(l). The following categories of cases, however, are particularly likely to threaten the efficacy of the Board's order.[1]

[1] A separate list of the 10(j) categories in outline form is located in Appendix A of this Manual.

1. Interference with Organizational Campaign (No Majority Union Support)

In these cases the union has either not obtained a card majority from employees in an appropriate unit or the Region's complaint does not seek a remedial bargaining order for some other reason. Section 10(j) proceedings are authorized to prevent the irreparable destruction of a union's nascent organizational campaign. These cases usually involve an employer's response to an organizational campaign with serious, if not massive, unfair labor practices: threats, coercive interrogations, surveillance of protected activities, improper grant of benefits, and unlawful employee discipline, including discriminatory discharges. Such violations virtually "nip in the bud" the union's campaign or clearly threaten to do so if not immediately enjoined. Accordingly, an order is typically sought to enjoin the violations alleged, as well as an affirmative order to reinstate any discriminatees. See, generally, Schaub v. West Michigan Plumbing & Heating, Inc., 250 F.3d 962 (6th Cir. 2001); Sharp v. Webco Industries, Inc., 225 F.3d 1130 (10th Cir. 2000); Pye v. Excel Case Ready, 238 F.3d 69 (1st Cir. 2001); Pascarell v. Vibra Screw, Inc., 904 F.2d 874 (3rd Cir. 1990); Aguayo v. Tomco Carburetor Co., 853 F.2d 744 (9th Cir. 1988).

2. Interference with Organizational Campaign (Majority Union Support)

These cases are the same as those in the previous category, except that the union has obtained a card majority in an appropriate unit, and the Region's complaint pleads that the unfair labor practices are sufficiently egregious to preclude the holding of a fair election and thus warrant the imposition of a remedial bargaining order under NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).[2] In such cases, the relief typically sought includes a broad cease and desist order, an affirmative order to reinstate any discriminatorily discharged employees and, to ensure that the Board's ultimate remedial Gissel bargaining order will not be a nullity--i.e., for the benefit of a union totally bereft of employee support--an interim bargaining order will also be requested. See, generally, Scott v. Stephen Dunn & Assoc., 241 F.3d 652 (9th Cir. 2001); NLRB v. Electro-Voice, Inc., 83 F.3d 1559 (7th Cir. 1996); Seeler v. The Trading Port Inc., 517 F.2d 33 (2d Cir. 1975). Accord: Levine v. C&W Mining Co., Inc., 610 F.2d 432 (6th Cir. 1980); Asseo v. Pan American Grain Co. Inc., 805 F.2d 23 (1st Cir. 1986).

3. Subcontracting or Other Change to Avoid Bargaining Obligation

These cases involve an employer's implementation of a major entrepreneurial-type decision which impacts adversely on unit employees: for example, subcontracting or relocating entire plants, departments, or product lines. Such changes may be discriminatorily motivated--i.e., designed either to interfere with an organizational campaign or to escape from an incumbent union--and, therefore, may violate Section 8(a)(3). In addition, these changes can independently violate Section 8(a)(5) if undertaken without bargaining over the decision, when required, with the incumbent union. In these types of cases, the Board seeks Section 10(j) relief, including the affirmative restoration of operations, because of the devastating impact such decisions can have on the affected bargaining units--namely, elimination of all or a substantial part of the unit and termination of unit employees. The injury done to the union, either the incumbent or the one

[2] All Gissel cases must be submitted to the ILB for 10(j) consideration. See Memorandum GC 99-8 Guideline Memorandum Concerning *Gissel*. Also, for guidance on preparing the court papers for a Gissel 10(j), see Appendix G-2 of this Manual.

seeking recognition, is very often fatal unless injunctive relief is obtained. Moreover, by restoring and preserving the status quo ante, injunctive relief freezes the circumstances, thereby permitting the Board to issue a final restoration order which will not be judged later by an enforcing circuit court as too burdensome on the respondent because of the passage of time or the alienation of the old facility or equipment. See, generally, Hirsch v. Dorsey Trailers, 147 F.3d 243 (3d Cir. 1998); Maram v. Universidad Interamericana de Puerto Rico. Inc., 722 F.2d 953 (1st Cir. 1983); Aguago v. Quadrtech Corp., 129 F.Supp.2d 1272 (C.D. CA 2000); Dunbar v. Carrier Corp., 66 F.Supp.2d 346 (N.D.N.Y. 1999).

4. Withdrawal of Recognition from Incumbent

These cases involve an employer's withdrawal of recognition from, or its refusal to bargain a new agreement with, an incumbent union, where the employer is unable to prove an actual loss of the union's continued majority status. Very often, such a withdrawal of recognition is accompanied by other independent unfair labor practices designed to undermine employee support for the incumbent union. This category includes withdrawal of recognition from a newly certified union, when the union is first attempting to establish itself among the employees. Section l0(j) relief is sought in these cases, including affirmative bargaining orders, to ensure that the employees will not be denied the benefits of union representation for the entire period of litigation before the Board and to prevent the irreparable injury to the union's support among the employees which predictably would occur if the union were unable to represent them. See, generally, Dunbar v. Park Associates, Inc., 23 F. Supp.2d 212, 218, 159 LRRM 2353 (N.D.N.Y.), affd. mem. 166 F.3d 1200 (2d Cir. 1998); Brown v. Pacific Telephone & Telegraph Co., 218 F.2d 542 (9th Cir. 1955); D'Amico v. Townsend Culinary, Inc., 22 F. Supp.2d 480, 492 (D. Md. 1998); Overstreet v. Tucson Ready Mix, Inc., 11 F. Supp.2d 1139, 1148-49 (D. Ariz. 1998); De Prospero v. House of the Good Samaritan, 474 F.Supp. 552 (N.D. N.Y. 1978); Sachs v. Davis & Hemphill. Inc., 295 F.Supp. 142 (D. Md. 1969), affd. 71 LRRM 2126 (4th Cir. 1969), vacated as moot and opinion withdrawn, 72 LRRM 2879 (4th Cir. 1969);.

5. Undermining of Bargaining Representative

This category closely resembles the previous category in that the cases involve a variety of employer unfair labor practices designed to undermine employee support for an incumbent or newly certified union; however, in this category, the employer has not literally withdrawn recognition from the union but has taken action which belittles the union in the eyes of employees and impairs the union's authority to effectively represent employees. The violations can include threats, the discharge of key union officers or activists, or implementing important changes in working conditions either discriminatorily or without bargaining with the union. The need for Section l0(j) relief is to prevent the predictable, irreparable erosion of employee support for the incumbent union. See, generally, Arlook v. Lichtenberq & Co., 952 F.2d 367 (llth Cir. 1992); Pascarell v. Vibra Screw Inc., 904 F.2d 874 (3d Cir. 1990); Eisenberg v. Wellington Hall Nursing Home. Inc., 651 F.2d 902 (3d Cir. 1981); Morio v. North American Soccer League, 632 F.2d 217 (2d Cir. 1980); Overstreet v. Thomas Davis Medical Centers, 9 F.Supp.2d 1162 (D. Ariz. 1997); Silverman v. Major League Baseball Player Relations Committee, Inc., 880 F.Supp. 246 (S.D.N.Y.), aff'd 67 F.3d 1054 (2d Cir. 1995).

6. Minority Union Recognition

Cases in this category typically involve alleged violations of Section 8(a)(2) and 8(b)(1)(A) where an employer grants exclusive recognition to a union that does not represent an uncoerced majority of employees in the unit. The cases can also include a wide variety of illegal assistance to and/or domination of a labor organization. The danger posed by such cases is that, absent interim relief, the assisted union will become so entrenched in the unit that the affected employees will be unable freely to exercise their Section 7 right to select or reject union representation. See, generally, Kaynard v. Mego Corp., 633 F.2d 1026, 1033-1035 (2d Cir. 1980); Fuchs v. Jet Sprav Corp., 560 F.Supp. 1147, 1156 (D. Mass. 1983), aff'd per curium 725 F.2d 664 (1st Cir. 1983). Accord: Zipp v. Dubuque Packing Co., 112 LRRM 3139 (N.D. Ill. 1982).

One court rejected this theory as grounds for interim relief because, under the status quo, employees enjoyed the benefits of a fair contract and the result of an injunction would have been to leave employees unrepresented during the time the Section 8(a)(2) case was pending before the Board. Eisenberg v. Hartz Mountain Corporation, 519 F.2d 138 (3d Cir. 1975). A Section 10(j) injunction to withdraw recognition from a minority union may be appropriate notwithstanding such considerations where the injunction makes an election possible before the Board decision issues. Thus, we have sought Section 10(j) if the petitioning union indicates it will, upon issuance of an injunction, make a request to proceed to an election and agree to withdraw the 8(a)(2) charge if the allegedly assisted union wins (cf. Carlson Furniture Industries, 157 NLRB 851 (1966)), and the Regional Director is satisfied that the injunction will restore the conditions necessary to a free and fair election.

7. Successor Refusal to Recognize and Bargain

In this category, an employer acquiring a business and becoming the legal "successor" to an existing bargaining relationship under NLRB v. Burns International Security Services, 406 U.S. 272 (1972), and Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987), has refused to recognize and bargain with the predecessor employer's incumbent union. In some cases, the finding of a successorship may be predicated on the employer's allegedly discriminatory refusal to hire the predecessor's employees in a deliberate attempt to avoid any bargaining obligation. The danger of irreparable injury is similar to that present in the withdrawal of recognition situation--i.e., that the employees are denied the benefits of union representation for the entire duration of the Board proceeding and the passage of time foreseeably will sever employee ties and loyalty to the union. See, generally, Bloedorn v. Francisco Foods, Inc. d/b/a Piggly Wiggly, 276 F.3d 270 (7th Cir. 2001) Hoffman v. Inn Credible Caterers, Ltd., 247 F.3d 360 (2d Cir. 2001); Frye v. Specialty Envelope, Inc., 10 F.3d 1221 (6th Cir. 1993); Asseo v. Centro Medico del Turabo, 900 F.2d 445 (1st Cir. 1990); Scott v. El Farra Enterprises. Inc., 863 F.2d 670 (9th Cir. 1988).

8. Conduct During Bargaining Negotiations

In these cases, one party to a collective-bargaining relationship has engaged in a refusal to bargain in good faith. The violation may be based upon a wide variety of situations--such as a refusal to meet and bargain, a refusal to supply relevant and necessary information requested by

the other party, an insistence to impasse during negotiations on a permissive or illegal subject of bargaining, or a course of conduct reflecting a bad-faith refusal to bargain with an open mind and a sincere desire to reach an acceptable agreement. Where such violations pose a real danger of creating industrial unrest and/or of undermining employee support for the union, Section l0(j) relief may be appropriate. See, generally, Rivera-Vega v. ConAgra, Inc., 70 F.3d 153 (1st Cir.); *aff'g* 876 F.Supp. 1350 (D. P.R. 1995); Kobell v. United Paperworkers Intern., 965 F.2d 1401 (6th Cir. 1992); Fleischut v. Burrows Paper Corp., 162 LRRM 2719, 2723 (S.D. Miss. 1999); Silverman v. Reinauer Transportation Co., 130 LRRM 2505 (S.D.N.Y. 1988), *aff'd mem.* No. 89-6010 (2d Cir. June 23, 1989); Boire v. SAS Ambulance Services. Inc., 108 LRRM 2388 (M.D. Fla. 1980), *aff'd per curium* 657 F.2d 1249 (5th Cir. 1981); Douds v. I.L.A., 241 F.2d 278 (2d Cir. 1957).

9. Mass Picketing and Violence

This category encompasses cases in which a labor organization or its agents have engaged in restraint or coercion of employees, typically those who choose to refrain from engaging in Section 7 activities such as a strike. These violations of Section 8(b)(1)(A) include: mass picketing which blocks ingress and egress to the plant or worksite; violence and threats thereof at or away from a picket line; and, damage to private property. In these cases, there is, of course, a concurrent state interest which may be protected through local police authorities and the state court system. However, there are cases in which state authorities are unwilling or unable to control the situation; in those cases, Section 10(j) relief is warranted because the threatened injury cannot be adequately remedied by a Board order issued many months later. See, generally, Frye v. District 1199, 996 F.2d 141 (6th Cir. 1993); Squillacote v. Local 248. Meat & Allied Food Workers, 534 F.2d 735 (7th Cir. 1976). As to the comity issues, compare Clark v. International Union UMWA (Clinchfield Coal, 714 F.Supp. 791 (W.D. Va. 1989) and Clark v. International Union UMWA (Covenant Coal), 722 F.Supp. 250 (W.D. Va. 1989).

10. Section 8(d) and 8(g) Notice Requirements for Strike or Picketing

These cases involve union strikes or picketing undertaken in contravention of the notice and waiting periods set forth in Section 8(d) (federal and state mediation) and 8(g) (notices to health care institutions). When unions engage in such violations, and where the economic activity is having or threatens to have a substantial adverse impact on the other party's operations, Section l0(j) relief is often sought. Absent quick relief, the Board's final order may not adequately restore the status quo, ensure that the parties' dispute will be open to the ameliorative effects of mediation under Section 8(d), or that adequate arrangements for the continuity of patient care may be made by the affected institution under Section 8(g). The relief sought includes the cessation of the strike and picketing unless and until the union properly complies with the requirements of 8(d) or 8(g). See, generally, McLeod v. Compressed Air, etc., Workers, 292 F.2d 358 (2d Cir. 1961). Accord: McLeod v. Communications Workers of America, 79 LRRM 2532 (S.D. N.Y. 1971).

11. Refusal to Permit Protected Activity on Private Property

These cases involve an employer's interference with the right of employees to engage in protected Section 7 activity in nonworking areas on the private property of an employer. Such

activity can include employee picketing or handbilling arising from a labor dispute; it may, in certain circumstances, encompass nonemployee efforts to disseminate organizational material to employees. Such cases involve an analysis of the employer's private property rights, the Section 7 rights being exercised or restrained, and any alternative means of communication; Where the protected rights prevail, an employer's denial of or interference with such rights violates Section 8(a)(1) of the Act. See, Hudgens v. NLRB, 424 U.S. 507 (1976); Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992). When the employer's illegal conduct is having a substantial adverse impact on the protected activity, Section 10(j) relief may be warranted, inasmuch as these disputes are often of a temporal nature. Absent quick relief, the Board's ultimate remedial order will come too late. See, Eisenberg v. Holland Rantos Co., Inc., 583 F.2d 100 (3d Cir. 1978). But see Silverman v. 40-41 Realty Associates, Inc., 668 F.2d 678 (2d Cir. 1982).

Section 10(j) relief also may be appropriate where the denial of access to an incumbent union constitutes a unilateral change in terms and conditions of employment. See Sheeran v. American Commercial Lines, Inc., 683 F.2d 970 (6th Cir. 1982).

12. Union Coercion to Achieve Unlawful Object

These cases typically involve union conduct violative of Section 8(b)(1)(B), 8(b)(2) or 8(b)(3) of the Act. Very often the misconduct arises in negotiations where the union insists to the point of impasse that an employer agree to a permissive or illegal subject of bargaining, or where the union's conduct amounts to restraint or coercion of the employer in its selection of representatives for the purposes of collective bargaining or grievance adjustment. Where the union's misconduct creates industrial unrest or is having substantial adverse impact on the employer's operations, or is affecting employees in a unique and possibly irreparable manner, Section 10(j) relief becomes appropriate. See, generally, Boire v. I.B.T., 479 F.2d 778 (5th Cir. 1973), rhg. denied 480 F.2d 924. Accord: Kobell v. United Paperworkers Int'l Union, 965 F.2d 1401 (6th Cir. 1992); D'Amico v. Industrial Union of Marine and Shipbuilding Workers, 116 LRRM 2508 (D. Md. 1984).

13. Interference with Access to Board Processes

These cases involve employer or union retaliation against employees for having resorted to the processes of the Board, typically for filing charges or giving testimony under the Act. Such retaliation may include threats, discharges, the imposition of internal union discipline, or even the institution of groundless lawsuits meant to retaliate or harass employees for their resort to the Board's processes. Such violations are often worthy of Section l0(j) relief, inasmuch as the chilling impact of such misconduct may preclude other employees from filing timely charges with the Board, or from giving testimony needed in ongoing administrative proceedings. See, generally, Sharp v. Webco Industries, 265 F.3d 1085 (10th Cir. 2001); Humphrev v. United Credit Bureau, 99 LRRM 3459 (D. Md. 1978). Accord: Wilson v. Whitehall Packing Co., 108 LRRM 2165 (W.D. Wisc. 1980). But see Szabo v. P.I.E., 878 F.2d 209 (7th Cir. 1989).

14. Segregating Assets

These cases involve situations where a respondent has allegedly committed unfair labor practices which are being litigated before the Board and the ultimate Board remedy may include

some measure of backpay for affected employees. During litigation, the respondent begins to close down operations and/or to liquidate its physical assets. These circumstances create a danger that, after liquidation, the respondent's assets will be dispersed and there will be no assets to satisfy the Board's backpay order. Section l0(j) relief is sought to restrict the respondents alienation of assets unless or until it establishes an escrow or bond in an amount of money equal to the Region's best estimate of anticipated net backpay plus interest. See, generally Blyer v. Unitron Color Graphics of NY, Inc., 1998 WL 1032625 (E.D.N.Y. 1998); Aguayo v. Chamtech Service Center, 157 LRRM 2299 (C.D. Cal. 1997); Jensen v. Chamtech Service Center, 155 LRRM 2058 (C.D. Cal. 1997); Maram v. Alle Arecibo Corp., 110 LRRM 2495 (D.P.R. 1982).

15. Miscellaneous

These cases involve imminent threats to statutory rights which do not fit into any of the first fourteen categories. Examples of these cases may include injunctions against the prosecution of certain lawsuits, employer violence, and interference with employee activities for mutual aid and protection. See, generally Lineback v. Printpack, Inc., 979 F. Supp. 831 (S.D. Ind. 1997) (enjoin prosecution of alleged baseless and retaliatory Section 303 LMRA suit); Sharp v. Webco Industries, 265 F.3d 1085 (10th Cir. 2001)(enjoin prosecution of preempted state court lawsuit).

The foregoing categories are not exclusive. Cases may arise in various contexts that are not encompassed by these categories but that still warrant extraordinary injunctive relief. The common denominator for all cases in which Section l0(j) relief is sought is that the Board's ultimate remedial order will be unable to restore completely the status quo and, thereby, neutralize the damage caused by the violations.

Therefore, when taking a charge or investigating a case which falls within one of the above categories, or when circumstances otherwise suggest a threat of remedial failure, Board agents should be particularly alert for the potential need for 10(j) relief.

3.0 NOTICE TO PARTIES & EXPEDITION OF 10(j) CASES

As soon as it appears that 10(j) relief may be considered, the Region immediately should notify all parties of this fact and invite the parties to submit evidence and argument relevant to the 10(j) consideration. See Casehandling Manual Section 10310.1.

Although Section 10(j) cases do not have statutory priority, the Agency has determined that, based upon policy considerations, any cases involving Section 10(j) relief should have priority over all other non-statutory priority cases in the Region (see Casehandling Manual 10310.6 and 102.94(a) Rules and Regulations). This expedition is necessary because inordinate delay in processing a Section 10(j) case diminishes the effectiveness of any relief obtained. Delay may entirely preclude relief where the situation has so changed that restoration of the status quo is impossible or would be no more effective than the Board's order in due course. Regions should therefore be reluctant to grant postponements to parties for production of witnesses and position statements.

4.0 INVESTIGATING AND ANALYZING "JUST AND PROPER"

As noted above, a 10(j) case differs from other unfair labor practice cases because the circumstances of the case make it likely that the Board's ultimate order will be ineffective to restore the status quo. Accordingly, when investigating an unfair labor practice charge that includes 10(j) consideration, the Board Agent will determine whether there is evidence establishing a violation of the Act, but should also conduct additional investigation and analysis to determine whether a Board order in due course will be inadequate to protect statutory rights. To make these determinations, the 10(j) investigator should focus on the impact of those unfair labor practices on statutory rights. The Region should also determine the type of interim relief that is needed to preserve the status quo so that the Board can issue an effective remedy.

The quantum of evidence required to establish the need for Section 10(j) relief will vary depending upon the type of cases involved, the applicable case law, and the judicial circuit in which injunctive relief is sought. Although some courts are willing to infer the irreparable injury to statutory rights from certain violations, others may require actual evidence of harm. For this reason, the existence or absence of direct evidence of impact in a particular case is always relevant to the evaluation of the need for 10(j) relief. Its absence does not necessarily mean that Section 10(j) proceedings are inappropriate. But, the ability of the Regions to adduce demonstrable evidence of irreparable harm or undermining effects of the unfair labor practices increases the Board's chances for success in litigating "just and proper" issues in Section 10(j) proceedings.

In any case being considered for 10(j) relief, the Board Agent should routinely question witnesses about the impact of the alleged violations on statutory rights, including possible "chill" on Section 7 rights, and include witness responses in their initial affidavits. In some instances, evidence of chill will be apparent from the nature of the violations, such as the discharge of a prominent activist or threats of plant closure made by high level officials at captive audience meetings. In any event, Board Agents should make every attempt to obtain both objective and subjective evidence which can be put before a district court. Objective evidence would include such things as a drop in the number of union authorization cards obtained after the onset of the unfair labor practices or a decrease in attendance at union organizing meetings. Subjective evidence is usually provided in statements given by employees, or union or employer representatives about the state of mind of employees as a result of the unfair labor practices; e.g. fear of job loss or anger at the Union. Although evidence from the affected employees is most persuasive, evidence can be obtained from another employee or union business representative to whom the affected employee expressed concern.[3] Union representatives can provide useful evidence in a variety of circumstances, such as whether a respondent's unlawful conduct has had an impact on an organizing campaign or the bargaining process.

[3] See the model argument to support the use of hearsay evidence in Section 10(j) proceedings, in Appendix G-4.

In developing the appropriate questions, Board Agents should determine whether the case falls within one of the 15 categories of Section 10(j) cases and consider the nature of the remedy the Region would seek in a 10(j) proceeding. These categories are discussed above in Section 2.1 and outlined in Appendix A. Board Agents should then refer to Appendix B of this Manual which provides a checklist of questions designed to adduce relevant evidence as to the need for interim relief. The checklist is grouped by the types of violations alleged and is cross-referenced to the 15 Section 10(j) categories.

If a charged party refuses to cooperate in an investigation and, as a result, the Region lacks sufficient evidence to evaluate the propriety of Section 10(j) relief, the Region should consider setting the case for an expedited administrative hearing within 28 days after complaint issues, in accordance with the applicable procedures.[4] After respondent produces its evidence pursuant to either procedure, the Region should reevaluate the need for Section 10(j) relief.

4.1 Region's Evaluation of Whether to Seek 10(j) Relief

After the Region completes its 10(j) investigation, it should evaluate whether 10(j) proceedings are appropriate. In determining whether to recommend the institution of 10(j) proceedings, the Region should consider the strength of the violations as well as the threat of remedial failure. The Region should also consider the case in light of the "just and proper" theories set forth in established 10(j) caselaw,[5] as well as the "just and proper" evidence adduced during the Region's investigation and provided by the parties. The Region's evaluation generally should be made at the same time that it determines whether to issue complaint on the allegations in the charge(s).

4.2 Region Concludes Injunction Proceedings Not Warranted

Except in circumstances where 10(j) submissions are mandatory, regions may conclude that Section 10(j) proceedings should not be instituted. In those instances, it should inform the parties of its decision that injunctive relief is not warranted.

5.0 SUBMISSION OF 10(j) CASE TO THE BOARD

5.1 Relationship between the Unfair Labor Practice Proceeding and 10(j) Proceeding

In considering whether to seek injunctive relief, the Region should keep in mind the relationship between the administrative proceeding and any injunction proceeding that is instituted under Section 10(j) of the Act. The statute provides that the Board may petition a district court for temporary relief "upon issuance of a complaint." Therefore, an administrative unfair labor practice complaint is a necessary predicate for seeking injunctive relief.

The Board may not seek relief in district court for a violation that is not alleged in the complaint. Similarly, the Board may not argue in district court a theory of violation that is not

[4] See Memorandum GC 94-17, Expedited Hearings.
[5] See Appendix E of this Manual for a list of court cases for each 10(j) category.

also being argued in the ancillary administrative proceeding. However, the converse is not true. Thus, while the violations alleged in the 10(j) petition must be alleged in the administrative complaint, it is not always necessary to seek interim relief on every violation alleged in the administrative complaint. Instead, in every 10(j) case, the Region should evaluate the unfair labor practice complaint to determine which violations must be remedied on an interim basis in order to restore the status quo. **[2 lines redacted, Exem. 5, attorney work product, 2 and 7(E)]**

Regions should remain vigilant about recommending 10(j) proceedings in cases even when there are related charges still unresolved in the Region. If a case is 10(j) worthy, the Region should not wait for additional related charges to be resolved before submitting the original case to Washington. If those related charges are ultimately found to be meritorious and also worthy of 10(j) relief, the Region should call the Injunction Litigation Branch.[6]

5.2 Preparing the Section 10(j) Memorandum to the General Counsel

After the Region determines that a case has merit and believes 10(j) proceedings are appropriate, the Region makes a recommendation in writing to the General Counsel, through the Injunction Litigation Branch (ILB) of the Division of Advice, as to whether it believes that Section 10(j) relief is warranted. The 10(j) memorandum should be submitted to the ILB within 14 days of the merit determination. If the General Counsel agrees that 10(j) proceedings should be sought, the Region's memorandum provides the foundation for the General Counsel's request for authorization from the Board. Therefore, the Region's memorandum should contain the necessary information, analysis, and recommendations for the General Counsel and the Board to decide whether to recommend and to authorize Section 10(j) relief in the case.

5.2.1 Content of the 10(j) Memorandum

[Bracketed sections are exempt from disclosure pursuant to Exemptions 5, attorney work product, 2, and 7(E), but are disclosed at the discretion of the General Counsel.]

[If the Region concludes 10(j) relief is warranted, its memorandum should detail the "merits" analysis and the analysis of the threat of remedial failure necessary to prove a 10(j) case in district court. This memorandum should set forth:

- the relevant facts and legal arguments and authorities establishing the violations, omitting analysis of minor violations
- responses to defenses raised by the respondent

[6] See Memorandum OM 01-33, Timely Processing of Section 10(j) Case When Multiple Related Charges are Filed.

- the Region's analysis including relevant facts and case law regarding why interim injunctive relief is necessary and a Board order in due course will be insufficient[7]

- responses to arguments against 10(j) raised by the respondent

- a proposed order listing specific interim remedies to be sought before the district court

- attach a copy of the unfair labor practice complaint,[8] the answer (if filed), any 10(j) position statements submitted by the parties, and a list of counsel representing the parties**]**

5.2.2 Resources for preparing the 10(j) Memorandum

[Bracketed sections are exempt from disclosure pursuant to Exemptions 5, attorney work product, 2, and 7(E), but are disclosed at the discretion of the General Counsel.]

[There are several resources available to help Board Agents prepare the Region's 10(j) memorandum. An outline of a model 10(j) memorandum is included in Appendix C of this manual. In addition, the Regions may obtain copies of prior 10(j) memoranda to the Board in the ILB's research database on the agency's Intranet. These memoranda contain arguments used in prior 10(j) cases and may have legal arguments—both on the merits and on the need for relief—that can be used in preparing the 10(j) memorandum. By searching through the ILB database with key words or by 10(j) category number (ie, "Go 10(j)#3"), one can review and copy from the hundreds of memoranda that have issued over the years.**]**

[Also, the ILB has prepared a number of model arguments that are frequently used (i.e., need for an interim bargaining order, need for interim reinstatement, delay should not preclude injunctive relief) which are found in Appendix G of this Manual. A list of important 10(j) cases, grouped by 10(j) categories, is located in Appendix E.**]**

[While the ILB, General Counsel, and Board are considering the case, the Region should continue to investigate the effects of the unfair labor practices, pursue settlement, and, in cases where the likelihood of obtaining authorization to seek Section 10(j) relief is high, begin the preparation of the appropriate papers for filing in court.**]**

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[7] **[**If the evidence adduced during the investigation demonstrates that the irreparable injury is imminent, the Region should consider, and explain in its memo, why a temporary restraining order (TRO) should be sought. For example, TRO's are often needed where there is ongoing violence or where a respondent has immediate plans to dispose of its assets. See Guidelines for Filing Motions for Temporary Restraining Orders Under Section 10(j) in Appendix J of this Manual.**]**

[8] **[**The Region should not hold the 10(j) memorandum if complaint has not issued, but instead immediately forward the complaint after submitting the case to ILB.**]**

5.3 Division of Advice Evaluation

[Bracketed sections are exempt from disclosure pursuant to Exemptions 5, attorney work product, 2, and 7(E), but are disclosed at the discretion of the General Counsel.]

[Once the Division of Advice receives the Region's recommendation to institute 10(j) proceedings, the case is assigned to an ILB attorney for an independent review and evaluation and presented to the ILB managers for a decision. When the Division of Advice agrees with the Region's recommendation that injunctive relief is appropriate, it prepares a cover memorandum on behalf of the General Counsel which is attached to the Region's memorandum requesting injunctive relief. Together, these two documents constitute the General Counsel's request to the Board for authorization to institute 10(j) proceedings. The cover memorandum includes items not included in the Region's memorandum and necessary for the Board to make a full and reasoned evaluation of the case. Also, as discussed below, the combination of these two documents serves as a road map for the Region in ultimately preparing the appropriate papers for filing in court.**]**

[After the General Counsel reviews and signs ILB's cover memorandum to the Board, the entire case, including the Region's memorandum and attachments, is submitted to the Board. The ILB will also fax or transmit by electronic mail to the Region a copy of the memorandum sent to the Board. At this point, at the latest, the Region should immediately begin preparing papers to file in district court.**]**

5.4 Inform ILB of Changed Circumstances

The Region should routinely keep the Injunction Litigation Branch updated on any new developments in cases submitted for 10(j) authorization at all stages of 10(j) processing, including after Board authorization. **[redacted 3 lines, exem. 5, attorney work product, 2, and 7(E)]**

5.5 Board Authorization and Timing of Filing Petition

[Bracketed sections are exempt from disclosure pursuant to Exemptions 5, attorney work product, 2, and 7(E), but are disclosed at the discretion of the General Counsel.]

If the Board authorizes Section 10(j) proceedings, the ILB will immediately notify the Region. The Region must file the Section 10(j) petition within 48 hours after notice by the ILB that the Board has authorized the use of Section 10(j). If a settlement is imminent, the Regional Office should consult with the Injunction Litigation Branch to seek telephone authorization to file the petition outside the 48-hour deadline.

During the 48 hours from the authorization of Section 10(j) proceedings until the filing of the Section 10(j) court papers, settlement efforts should be vigorously pursued. **[**Experience demonstrates that the authorization of Section 10(j) proceedings is a strong catalyst for settlement of the underlying case.**]**

6.0 PREPARING 10(j) PAPERS FOR DISTRICT COURT

As mentioned above, the Region must file the 10(j) petition in district court within 48 hours after notice by the ILB that the Board has authorized the use of Section 10(j). The typical documents to be filed in the U.S. District Court include:

- Petition for Injunctive Relief (attach charge, complaint and Regional Director's affidavit)
- Proposed Order to Show Cause
- Memorandum of Points and Authorities
- Proposed Findings of Fact and Conclusions of Law
- Proposed Temporary Injunction Order (should track the 10(j) memo to Board)

Examples of these basic pleadings, as well as others that may be applicable (i.e, a sample motion for a Temporary Restraining Order) are included in Appendix H of this Manual.[9]

The Region should always check the local district court rules to determine the procedures that should be followed in filing the papers. These rules can be obtained from Westlaw, and some courts maintain their own website containing the rules and other pertinent information. It may be helpful to contact attorneys in the area who are well practiced in civil litigation to help explain the vagaries of the local district court. It could also prove worthwhile to telephone the court and establish contact with someone in the clerk's office who can provide help on some of these procedural matters.

In preparing the papers for filing, the Region should ensure that the court is made aware at the outset that the Board's 10(j) petition should be given expedited treatment under 28 U.S.C. Section 1657(a) (gives priority to preliminary injunction cases in federal courts). Typically, this may be accomplished by indicating in the cover letter accompanying the filing of the court papers that treatment of the case is governed by Section 1657(a).

6.1 The Evidence

[Bracketed sections are exempt from disclosure pursuant to Exemptions 5, attorney work product, 2, and 7(E), but are disclosed at the discretion of the General Counsel.]

[The Region should decide how to make or place an evidentiary record before the district court judge. The Region's evidence should support both its petition allegations on the merits of

[9] If the Board has authorized a 10(j) protective order to sequester assets, refer to Appendix I for samples of the model pleadings.

the case, as well as the petition allegations on the propriety of granting injunctive relief. Some district courts permit or require the Board to litigate 10(j) cases purely on affidavits. In those circumstances, check with the district court or judge's law clerk as to when the affidavits should be filed in court. The Region should then prepare for filing with the court a volume of the affidavits and exhibits upon which it intends to rely.**]**

[In some cases, a record already compiled in the administrative proceeding before an administrative law judge (or relevant portions thereof) can be used in place of, or in conjunction with, affidavits. The administrative record will generally only support the merits of the violations, and not the need for injunctive relief. For this reason, 10(j) cases heard on the administrative record also will need supplementary evidence on the need for interim relief either in the form of affidavits or live testimony before the district court judge.**]**

[In either event, unless the district court has approved as a general rule the use of affidavits or administrative transcripts in 10(j) proceedings,[10] the Region should file a motion to hear the case on affidavits or the administrative record. This, preferably, should be filed simultaneously with the petition. Sample motions and a model memorandum to support such motions are contained in Appendix K of this Manual. In some instances, a district court will insist on hearing live testimony to prove the violations or just and proper allegations in the petition. In that case, the Region should be prepared to present witnesses at a 10(j) hearing in district court to prove the merits of the petition allegations.**]**

6.2 The Memorandum of Points and Authorities

In preparing the Memorandum of Points and Authorities, the Region should keep in mind that the district court judge or magistrate is unlikely to be as familiar with labor law principles as an administrative law judge. Thus, the Board's memorandum in support of the Petition for Injunctive Relief should lay out a theory of violation in greater detail than the Region is likely to do in its administrative litigation, and should avoid labor law jargon.

The Region's memorandum regarding Section 10(j) relief and the General Counsel's memorandum to the Board serve as a blueprint for the district court petition and brief and a repository of solutions for anticipated litigation problems in the particular case. The Region is not expected to perform additional research to prepare its court papers. Rather, the Region should rely upon these two documents, together with other resources, such as the Model 10(j) standards in Appendix D, the list of important 10(j) cases in Appendix E, sample arguments in Appendix G, and sample 10(j) pleadings in Appendix H, to draft papers in appropriate format for the district court. In addition, the attorney should review prior memoranda of points and authorities in support of a 10(j) petition to obtain the proper format for drafting the memorandum.

Basically, every memorandum of points and authorities should include, in the following order:

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[10] **[**For example, district courts in the Ninth Circuit require preliminary injunction cases to be tried on affidavits as a matter of course.**]**

- an introduction to the case which describes briefly the nature of the case and why the Board is before the court

- an overview of the statutory scheme of Section 10(j) of the Act

- the applicable 10(j) standard that should be applied in the case

- a chronological narrative containing the facts of the case, including all facts necessary to support the allegations in the petition and the need for relief, with annotations referring to any attached affidavits

- an analysis of how the facts support each of the violations alleged in the petition (applying either the "reasonable cause" or "likelihood of success" test), with citation to applicable Board and court authority

- a description of the specific relief the Board is seeking, together with an analysis of why that relief is needed in the case, relying upon, where available, evidence of the impact of the violations

- a conclusion

If sample memoranda of points and authority are unavailable in the regional office, the Region can request samples from the Injunction Litigation Branch. A listing of recommended samples available from ILB is located in Appendix F of this Manual. In addition, special instructions and model arguments for briefing Gissel 10(j) cases are located in Appendix G-2 of this Manual.

The respondent is afforded the opportunity to file answering papers and, where relevant, counter-affidavits and exhibits. The Region may need to file a reply brief and rebuttal affidavits and exhibits to answer unanticipated arguments raised by the respondent. Check the local district court rules to determine whether these are permitted as a matter of course or by motion.

7.0 ORAL ARGUMENT IN DISTRICT COURT

Once the Region files the initial 10(j) papers in district court, the case will be assigned to a judge who should schedule a hearing.[11] As shown in the following sections, numerous resources are available to assist Board attorneys in their preparation to argue before a federal district court judge. In addition to these resources, the Injunction Litigation Branch is available at all times to provide additional guidance and support as the 10(j) hearing approaches.

[11] If the judge does not set a date for a hearing after 30 days from the filing of the petition, refer to section 9.2 on District Court Delay in Issuing 10(j) Decision regarding how to proceed.

7.1 Preparation for the 10(j) Hearing

[Bracketed sections are exempt from disclosure pursuant to Exemptions 5, attorney work product, 2, and 7(E), but are disclosed at the discretion of the General Counsel.]

[Unless the court has specifically limited the issues to be addressed at hearing, the Board attorney should be prepared to address all aspects of the 10(j) case. In most instances, the Region will have filed with its initial papers a motion to either hear the case on affidavits or on the ALJ transcript. If the court has granted the motion, than it is doubtful that there will be any need to present live testimony on the merits of the unfair labor practice allegations. However, it may be advisable for Board counsel to prepare and bring to the hearing at least one key witness since it is within the court's discretion to ask for live testimony at any time.**]**

[On the other hand, it is also possible that the court will not have ruled on the motion, even as the hearing date approaches. In that event, the Board attorney should contact the judge's clerk and attempt to get a ruling on the motion prior to the hearing, or at least get a sense of which issues the court anticipates addressing during the hearing. If, at the time of the hearing, the court has still not ruled on the outstanding motion to try the case on either affidavits or ALJ record, than the Board attorney should be prepared to put on a full evidentiary hearing on both the merits of the unfair labor practice allegations as well as the need for injunctive relief.**]**

[Generally, however, the district court hearing is non-evidentiary, providing an opportunity to present oral arguments in support of the petition. The Board attorney should be prepared to argue all the affirmative elements of the case. Typically, these include the standard to be applied by the court for deciding whether to grant injunctive relief, the low burden of proof on the merits, the merits themselves (applying either the "reasonable cause" or "likelihood of success standards), and why injunctive relief is necessary in the case before the court. In addition, the Board attorney should address the defenses which respondent may have raised in its opposition memorandum.**]**

[In preparation for the district court hearing, the Board attorney should review "Questions By The Court and Possible Answers in Section 10(j) Proceedings" which is found in Appendix L of this Manual. This document lists questions which are frequently asked by judges in district court proceedings.**]** **[redacted 2 lines, exem. 5, attorney work product, 2, and 7(E)]** **[**The suggested answers will provide guidance on how to address these concerns.**]**

[There are certain steps the Board attorney should take prior to the hearing to help address these preeminent concerns of the district court. First, the Board attorney should notify the ALJ assigned to the case that 10(j) relief has been sought, and request expedited treatment of the unfair labor practice case. Having accomplished this task, Board counsel can fairly report to the judge that the Board has done everything possible to expedite the case. In this vein, the Board attorney should avoid and oppose any delay in the administrative hearing – trial postponements and extensions for filing briefs can indicate a lack of urgency. Second, the Board attorney should confirm prior to the hearing that any discriminatees involved in the case still desire reinstatement. It would be awkward to argue before the court about the need for

reinstatement, only to have Respondent counter that the discriminatee is no longer interested in reinstatement.**]**

7.2 Charging Party Intervention

Occasionally, a charging party may wish to intervene as a party in the Section 10(j) proceeding. Board counsel should oppose any effort by the charging party to intervene.[12] Instead, the Region should support amicus status for the charging party. If possible, this matter can be handled informally between the parties. However, if the charging party files a motion for intervention in district court, the Region should oppose that motion and support amicus status at that time. A sample argument to support a motion to oppose intervention is in Appendix M of this Manual.

7.3 Moot Court

A moot court session prior to a district court hearing may be advisable. A moot court provides the Board attorney with a greater level of familiarity and experience articulating the arguments. It also provides exposure to another point of view. Board attorneys can arrange a moot court with the supervisors or managers in their Regional office. In addition, the ILB is available to conduct a moot court session, either by telephone or via the agency's video conferencing equipment.

7.4 At the District Court Hearing or Oral Argument

[redacted 2 pages, exem. 5, attorney work product, 2 and 7(E)]

8.0 DISCOVERY IN 10(j) LITIGATION

[redacted 5 lines, exem. 5, attorney work product, 2 and 7(E)] These guidelines are designed to assist Board attorneys in responding to discovery requests by:

- setting forth the primary Agency objectives in handling discovery requests;
- summarizing how Regional Offices should deal with several general types of requested discovery material; and
- providing examples of strategies successfully used in the past to effectively respond to discovery requests while controlling the scope of discovered information.

Board attorneys should read these guidelines in conjunction with the Model Memorandum of Points and Authorities in Support of a Motion for a Protective Order to Limit Discovery Pursuant to Fed. R. Civ. P. 26(c)(1) (Model Memorandum), in Appendix N of this

[12] See Memorandum GC 99-4, Participation by Charging Parties in Section 10(j) Injunction and Section 10(j) Contempt Proceedings, located in Appendix M of this Manual.

Manual. The Model Memorandum supplements the legal issues outlined here with more comprehensive arguments and citation to case authority.[13] **[redacted 4 lines, exem. 5, attorney work product, 2 and 7(E)]**

The Region should immediately contact the Injunction Litigation Branch whenever it receives a discovery request in a Section 10(j) case.

8.1 Discovery Objectives

[redacted 3 paragraphs, exem. 5, attorney work product, 2 and 7(E)]

8.2 Types of Discovery Requests

[redacted 5 pages, exem. 5, attorney work product, 2 and 7(E)]

8.3 Successful Strategies for Carrying Out Board's Discovery Objectives

[redacted 5 paragraphs, exem. 5, attorney work product, 2 and 7(E)]

9.0 OTHER LITIGATION ISSUES

9.1 Impact of ALJD on 10(j) Litigation

[Bracketed sections are exempt from disclosure pursuant to Exemptions 5, attorney work product, 2, and 7(E), but are disclosed at the discretion of the General Counsel.]

[Frequently, an ALJ issues a decision in an unfair labor practice case when there is a related 10(j) petition pending before a district court. In that event, the Board attorney should review the ALJD and determine whether the ALJ's findings support or undercut the allegations in the 10(j) petition. The Region should also immediately notify the Injunction Litigation Branch of the issuance of the ALJD.**]**

[A favorable ALJD supports the Board's effort to convince a district court judge that there is either "reasonable cause" to believe respondent violated the Act as alleged in the 10(j) petition, or that there is a "likelihood of success" in proving the violations before the Board. Therefore, if the ALJ's findings support the 10(j) petition allegations, then the Region should submit a copy of the ALJ's decision to the district court judge who is presiding over the 10(j) petition. The Region should send a cover letter which explains how the ALJ's decision supports

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[13] Appropriate portions of the Model Memorandum should be filed in support of a motion to limit discovery. A model motion and order limiting discovery are also in Appendix N of this Manual. **Note that the Model Memorandum discusses numerous types of discovery problems that arise in 10(j) proceedings; therefore, a Region should be careful to use only those parts of the Memorandum, Model Motion and Model Order which concern its particular discovery request.**

the 10(j) petition. A proposed cover letter, with relevant arguments and case citation, is included in Appendix O of this Manual.**]**

[In the event of an adverse ruling by an ALJ, Board Rule 102.94(b) requires notification of the district court. Therefore, if the ALJ recommends dismissal of some or all of the complaint allegations which are contained in the 10(j) petition, the Region should immediately notify the ILB. The Region should evaluate the impact of the ALJ's decision on the critical allegations contained in the 10(j) petition and should consider the viability of proceeding with the 10(j) litigation in district court in the face of an adverse ALJ decision. This determination will be based, in part, on whether the Region will take exceptions to the ALJ's adverse rulings. The Region should then make a prompt recommendation to the Injunction Litigation Branch as to whether or not to withdraw the 10(j) petition or, at least, the losing allegations.**]**

9.2 District Court Delay in Issuing 10(j) Decision

The Board authorizes the use of injunction proceedings when immediate interim relief is needed to preserve the effectiveness of the Board's ultimate remedial order. For this reason, time is always of the essence in a 10(j) case. Just as the Agency makes every effort to expedite internal agency processes in every 10(j) case, the district court also should act quickly to resolve the 10(j) petition.

For this reason, the Region should be prepared to take action if it does not receive a prompt decision from a district court judge. **[redacted 5 lines, exem. 5, attorney work product, 2 and 7(E)]** A complete timeline, with comprehensive instructions and model papers for obtaining a prompt 10(j) decision from a district court, are located in Appendix P of this Manual. The Region should keep ILB apprised of all developments concerning expediting the Section 10(j) decision.

9.3 Withdrawal or Dismissal of the 10(j) Petition

[Bracketed sections are exempt from disclosure pursuant to Exemptions 5, attorney work product, 2, and 7(E), but are disclosed at the discretion of the General Counsel.]

[For various reasons, it may be necessary for the Region to consider withdrawing or seeking dismissal the Section 10(j) petition while it is pending in district court and before the court issues a decision. This may occur if the parties have settled the underlying labor dispute, or if there are other changed circumstances which render injunctive relief no longer appropriate. The Section 10(j) petition should not be withdrawn or dismissed, however, without the Region first conferring with the Injunction Litigation Branch.**]**

10.0 POST INJUNCTION PROCEDURES

A number of issues may arise after a district court issues a decision either granting or denying the Board's 10(j) petition. As always, the Region should immediately inform the Injunction Litigation Branch of the issuance of a district court's decision in any 10(j) matter, and

promptly send by facsimile transmission a copy of the 10(j) decision or order. However, the granting or denial of a 10(j) injunction is not the end of a 10(j) case. Whether the decision is a win or a loss, the Board attorney should be aware of a number of issues may arise.

10.1 Notification to ALJ or Board

Depending on the stage of the administrative proceeding, the Region must notify either the presiding ALJ or the Board whenever a district court issues an Section 10(j) injunction in a pending unfair labor practice case and request that the case be expedited. Section 102.94(a) of the Board's Rules and Regulations requires that the Board give expedited treatment to any complaint which is the basis for interim injunctive relief.

10.2 Modification or Clarification of 10(j) Order

When a district court issues an order granting interim injunctive relief under Section 10(j) of the Act, the Region immediately should determine whether the relief granted differs from that which was requested in the 10(j) petition. If the relief granted does not exactly track the language of the petition and the proposed 10(j) order, the Region should determine whether the relief obtained is clear, capable of compliance, and provides the relief necessary to restore the status quo. If the order is vague, or omits relief the district court obviously intended to grant, then the Region should consider whether to file a motion to clarify the order. If the Region is aware of a change in circumstances, or has otherwise obtained new evidence which, had it been heard by the district court would have affected the case, then the Region should consider whether to ask for a modification of the order. In either instance, the Region should confer with the Injunction Litigation Branch regarding any possible defects in the district court order and for authorization to file a motion clarifying or modifying the order.

10.3 Appeal Consideration if 10(j) Relief is Denied

[Bracketed sections are exempt from disclosure pursuant to Exemptions 5, attorney work product, 2, and 7(E), but are disclosed at the discretion of the General Counsel.]

The Injunction Litigation Branch evaluates each Section 10(j) loss, in part or in total, as a potential appeal. The Board, as a federal agency, has 60 days from entry of the district court order to file a notice of appeal (Fed. R. App. P. 4(a)(1)(B)). Consequently, Regions should immediately inform the ILB of the entry of a final order in district court, followed up by a fax of the decision and order. This will trigger the appeal consideration process by ILB personnel.

In addition to the district court decision itself, the ILB bases the propriety of an appeal on three sets of documents: the record before the district court, a transcript of district court proceedings, and the Region's recommendation as to the merits of an appeal. Generally, regions should send the district court record to the ILB as soon as possible, including the petition; supporting memoranda of points and authorities, as well as opposing briefs; and the record evidence submitted by both parties upon which the court relied (e.g., affidavits or the transcript of an ALJ hearing). The Region, however, should consult with the ILB to determine whether the case warrants transmission of the entire district court record.

Consideration of an appeal generally warrants review of the district court transcript. The Region is responsible for ordering the transcript and, if in doubt about the need for a transcript, should contact the ILB. A transcript may be unnecessary in certain circumstances, such as situations where the district court granted most of the requested relief and an appeal by Respondent is unlikely. The Region should advise the ILB of the transcript's delivery date and arrange for the court reporter to deliver it directly to the ILB, if possible.

[The Region's role in an appeal consideration culminates with the submission of a written recommendation. Although it is unnecessary to reiterate the merits of the petition, the Region should briefly relate the procedural history of the case before the district court, including the date the Region filed the petition; the date, nature and disposition of pertinent, substantive motions that bear on the ability to secure the requested relief (e.g., motions to dismiss); the hearing dates; and the evidentiary basis upon which the case was tried (e.g., affidavits or ALJ transcript). Since the 10(j) loss is reviewed in light of the evidentiary posture at trial, it is crucial to identify any material record evidence which differed from the facts upon which the Board authorized injunctive proceedings and analyze what, if any, impact the changed record would have on an appeal consideration. The Region should also identify any evidence which the court discredited and analyze the propriety of the credibility resolution according to circuit law.**]**

[The Region also should consider whether the decision is subject to reversal pursuant to the standard of review in the relevant circuit. Although standards differ, this analysis generally involves determining whether any of the court's adverse findings of fact were clearly erroneous; whether the court based its legal conclusions on an erroneous legal standard; and whether the failure to grant Section 10(j) relief constitutes an abuse of discretion. The Region should draw upon supporting, in-circuit precedent, as well as analyses of adverse caselaw. The Region should also review the court's adverse inferences, if any, to determine whether they were reasonably based in light of record evidence or, alternatively, constituted an abuse of discretion. The Region should further weigh the relative merits of likely respondent defenses to our arguments on appeal, as well as articulating possible rebuttals to those defenses.**]**

[The Region should next determine whether the denied relief continues to be needed, indicating any changed circumstances as well as the charging party's viewpoint.**]** **[redacted 2 lines, exem. 5, attorney work product, 2 and 7(E)]**

[Finally, the Region should analyze any policy considerations that support or negate taking an appeal. These would include the possible effect of adverse legal precedent resulting from a loss before the appellate court and any impact of an unappealed district court decision on future 10(j) litigation.**]**

10.4 Monitoring Compliance with the 10(j) Injunction

To ensure the effectiveness of a 10(j) decree, the Region should monitor the respondent's compliance with all aspects of the district court's order, especially any affirmative provisions, such as reinstatement, bargaining, or rescission orders. The Region should take the following steps in order to monitor compliance:

- Once the injunction is issued, the Region should maintain contact with the charging party, employees, or other interested parties to stay apprised of respondent's post-injunction conduct.

- The Region should keep in mind any deadlines contained in the injunction (e.g., for reinstatement offers to be made, for the affidavit of compliance to be filed) and check that respondent has taken appropriate action within the prescribed time periods.

- The Region should also inquire whether any triggering events or actions required by the charging party, such as a union's request for bargaining or for rescission of unilateral changes, have taken place.

10.5 Investigating Possible Contempt of the 10(j) Injunction

[Bracketed sections are exempt from disclosure pursuant to Exemptions 5, attorney work product, 2, and 7(E), but are disclosed at the discretion of the General Counsel.]

[If a respondent appears to be in noncompliance, the Region should conduct a contempt investigation. Post-injunction monitoring and contempt proceedings are essential tools in making sure that Section 10(j) decrees fulfill their purpose. The following are guidelines for these important post-injunction procedures.

- If the Region believes the respondent is in noncompliance with the court's order, the Region should identify the specific provisions of the order that are not being followed. The Region should analyze exactly what the order requires, of whom, and identify the acts or omissions it believes are noncompliant with those requirements.

- The Region should conduct an investigation, obtaining witness affidavits or documentary evidence, to establish how those specific provisions of the order are being disregarded. For example, in a reinstatement case, it may be necessary to obtain affidavits from each discriminatee to establish that no reinstatement offers have been made or that the offers are insufficient. In a refusal to bargain case, affidavits from union representatives, copies of bargaining demands or other correspondence between the parties may be required.

- In conducting this investigation, the Region should bear in mind the higher standard of proof required to show civil contempt, i.e., "clear and convincing" evidence of noncompliance.[14] But, the elements of contempt may be proven by

[14] **[**NLRB v. Blevins Popcorn Co., 659 F.2d 1173, 1184-86 (D.C. Cir. 1981); Squillacote v. Local 248, Meat & Allied Food Workers, 534 F.2d 735, 746-47 (7th Cir. 1976).**] [Corresponds to original fn. 42.]**

circumstantial evidence.[15] Moreover, contempt violations do not have to be willful or intentional, and good faith is not a defense.[16]

- During the investigation, the Region should contact respondent to ascertain that respondent received a copy of the district court's order. The Region should advise respondent that it believes there is noncompliance with the order and that it is conducting a contempt investigation. Respondent should be given an opportunity to respond and present evidence of compliance or raise defenses to contempt.

- The purpose of civil contempt sanctions are intended to coerce compliance with the order and compensate a party for damages resulting from noncompliance.[17]

- Contempt orders generally include payment to the Board of compensatory damages for the costs and expenditures incurred in investigating and prosecuting the contempt proceeding, including attorney fees of Board personnel. In order to calculate the Board's damages, Regional professional personnel should maintain a daily record of the time spent on the contempt case during this investigatory phase and continuing through prosecution of the contempt case. these records should be maintained in increments of tenths of one hour (or, every six minutes) and should include specific details of activities. Please contact ILB for further instructions and to obtain the appropriate forms for recording time.**]**

10.6 Submitting a Contempt Recommendation to ILB

[Bracketed sections are exempt from disclosure pursuant to Exemptions 5, attorney work product, 2, and 7(E), but are disclosed at the discretion of the General Counsel.]

[If the Region's post-decree investigation indicates that the respondent is not complying with the 10(j) injunction, and the Region determines there is "clear and convincing" evidence to indicate that the respondent is in contempt, the Region should submit the case to the Injunction Litigation Branch with a recommendation regarding whether to institute contempt proceedings. The Region's memorandum should include the following:

- a description of the 10(j) order, attaching a copy of the district court's opinion an order, including any modifications or clarifications;

- identify the specific provisions of the order with which the respondent is failing to comply;

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[15] **[**Walker v. City of Birmingham, 388 U.S. 307, 312 n. 4 (1967).**] [Corresponds to original fn. 43.]**

[16] **[**Asseo v. Bultman Enterprises, 951 F. Supp. 307, 312 (D. P.R. 1996).**] [Corresponds to original fn. 44.]**

[17] **[**Gompers v. Buchs Stove & Range Co., 221 U.S. 418, 441-444 (1911).**] [Corresponds to original fn. 45.]**

- describe the evidence of noncompliance obtained in the Region's investigation;

- summarize respondent's position on the contempt allegations;

- analyze the investigation results and respondent's defenses, and explain the basis for the Region's conclusion, applying the appropriate contempt standard (e.g., "clear and convincing" evidence for civil contempt);

- state the Region's recommendation as to contempt proceedings and a proposed contempt order.**]**

[A sample contempt memorandum issued by the ILB containing relevant contempt principles, arguments, and the suggested format for a contempt decree, is located in Appendix Q of this Manual.**]**

10.7 Impact of an Informal Settlement Agreement on a Section 10(j) Order.

[Bracketed sections are exempt from disclosure pursuant to Exemptions 5, attorney work product, 2, and 7(E), but are disclosed at the discretion of the General Counsel.]

[From time to time, cases in which the Board has obtained interim Section 10(j) relief are subsequently settled by an informal settlement agreement. However, the language contained in the standard informal settlement agreement may create a compliance problem when there is an outstanding 10(j) decree.**]**

[redacted 1 paragraph, exem. 5, attorney work product, 2 and 7(E)]

[In order to preserve the Board's authority to seek contempt sanctions under the Section 10(j) decree, the Region should modify the language of the standard informal settlement agreement to make it clear that the respondent's entering into the settlement will not result in the immediate withdrawal of the complaint, dismissal of the charge, or the vacating of the 10(j) injunction. Rather, the complaint will be withdrawn after compliance is complete. The Region should modify the standard informal settlement agreement with the model language set forth in Memorandum OM 01-62, Use of Special Informal Settlement Language in cases with Outstanding Section 10(j)-10(l) Injunctions, which is located in Appendix R of this Manual.**]**

10.8 Adjustment of the Section 10(j) case

There may be occasions when a respondent is willing to adjust the Section 10(j) case while the case is pending in district court but desires to litigate the underlying unfair labor practice case before the Board. In those circumstances, the Region has two Section 10(j) settlement options: a consent injunction or a settlement stipulation. First, a respondent can enter into a consent injunction by which it agrees to entry of a Section 10(j) order that tracts the proposed order to the district court. If a respondent violates the consent injunction, it will be subject to contempt proceedings. **[redacted 2 lines, exem. 5, attorney work product, 2 and 7(E)]**

Alternatively, a respondent can enter into a stipulation by which it agrees to terms equivalent to a consent injunction and to an indefinite postponement of the case in district court.[18] Under this type of settlement stipulation, if respondent breaches the injunctive terms, the court will conduct an expedited hearing to determine only whether there is reasonable cause to believe (or likelihood of success in showing) that the respondent has failed to comply with the settlement undertakings. Once a breach is shown, respondent agrees to entry of a consent injunction. **[redacted 4 lines, exem. 5, attorney work product, 2 and 7(E)]**

10.9 Issuance of Board Decision in Underlying Unfair Labor Practice Case

A 10(j) order is designed to provide interim relief during the pendency of the administrative proceeding and preserve the Board's ability to issue a meaningful order. Therefore, at some point while a 10(j) injunction is in effect, the Board will issue its final order in the underlying unfair labor practice case. When the final Board order issues, the 10(j) injunctive decree dissolves as a matter of law.[19]

When a 10(j) order is in effect, and the Board issues an order in the underlying case, the Region should immediately advise the ILB of the issuance of the Board's order. ILB can provide sample papers to instruct the Region on the best method for informing the district court of the issuance of the Board decision and its impact on the 10(j) decree. The Region should also consider and, where appropriate, discuss with ILB and the Appellate Court Branch whether there is a need for a Section 10(e) injunction to protect statutory rights pending enforcement of the Board order.

11.0 CONCLUSION

Section 10(j) of the Act remains a powerful tool for this Agency to effectively enforce the rights guaranteed by the Act. The ILB is committed to providing Agency personnel with the resources to help identify, investigate and litigate Section 10(j) cases. Please feel free to contact the ILB to discuss any questions or problems which may arise during the course of processing a 10(j) case.

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September 2002

[18] See Appendix S, "Stipulation and Order Continuing Case under 29 U.S.C. Section 160(j)."

[19] Barbour v. Central Cartage, Inc., 583 F.2d 335, 336-337 (7th Cir. 1978); Johansen v. Queen Mary Restaurant Corp., 522 F.2d 6 (9th Cir. 1975).

APPENDIX A

SECTION 10(j) CATEGORIES

Interference with organizational campaign (no majority)

- includes traditional "nip in the bud" unfair labor practices, such as threats, coercive interrogations, surveillance of protected activities, improper grant of benefits, and unlawful employee discipline, including discriminatory discharges
- if it includes shutdown or relocation of operations, subcontracting, or transfer of operations to alter ego or single or joint employer, see Category 3
- if it includes minority union recognition, see Category 6

2. Interference with organizational campaign (majority)

- includes Gissel cases where union has obtained a majority of authorization cards and employer engaged in serious and egregious unfair labor practices (see Memorandum GC 99-8 Guideline Memorandum Concerning *Gissel*)
- will include unfair labor practices similar to Category 1

3. Subcontracting or other change to avoid bargaining obligation

- these involve an employer's implementation of a major entrepreneurial-type decision which may include shutdown or relocation of operations, transfer of operations to alter ego or single or joint employer
- changes may be discriminatorily motivated in violation of Section 8(a)(3) and/or independently violative of Section 8(a)(5)

4. Withdrawal of recognition from incumbent

4. Undermining of bargaining representative

- includes implementation of important changes in working conditions, either discriminatorily or without bargaining with the union
- may include any of the additional types of violations listed in Category 1, above

- see also successor refusal to bargain (Category 7) or conduct during bargaining (Category 8)

6. Minority union recognition

- includes variety of illegal assistance to and/or domination of a labor organization

7. Successor refusal to recognize and bargain

- includes discriminatory refusal to hire predecessor's employees

8. Conduct during bargaining

- includes refusal to provide relevant information, delay or refusal to meet, insistence to premature impasse or impasse on permissive or illegal subjects of bargaining, unlawful course of conduct in bargaining, or surface bargaining

9. Mass picketing and violence

- includes mass picketing which blocks ingress and egress to the plant or worksite, violence and threats thereof, and damage to property

10. Notice requirements for strikes or picketing under Section 8(d) and 8(g)

- includes strikes or picketing undertaken in contravention of the notice and waiting periods set forth in Section 8(d) (federal and state mediation) and 8(g) (notices to health care institutions)

11. Refusal to permit protected activity on property

- may include employee picketing or handbilling arising from a labor dispute, or nonemployee efforts to disseminate organizational material to employees

- may also include a unilateral change in past practice or contractual term granting access to an incumbent union

12. Union coercion to achieve unlawful objective

- may involve union insistence to impasse on permissive or illegal subject of bargaining, or union conduct that amounts to restraint or coercion of the employer in its selection of representatives for the purposes of collective bargaining **or** grievance adjustment

13. Interference with access to Board processes

- may involve employer or union retaliation against employees for having resorted to the processes of the Board
- retaliation may include threats, discharges, the imposition of internal union discipline or the institution of groundless lawsuits

14. Segregating assets

- includes any alienation of assets which may require a protective order to preserve respondent's assets for backpay

15. Miscellaneous

- includes injunction against certain lawsuits, employer violence, interference with employee activities for mutual aid and protection

16. Interference with organizational campaign (no majority)

- includes traditional "nip in the bud" unfair labor practices, such as threats, coercive interrogations, surveillance of protected activities, improper grant of benefits, and unlawful employee discipline, including discriminatory discharges
- if it includes shutdown or relocation of operations, subcontracting, or transfer of operations to alter ego or single or joint employer, see Category 3
- if it includes minority union recognition, see Category 6

17. Interference with organizational campaign (majority)

- includes Gissel cases where union has obtained a majority of authorization cards and employer engaged in serious and egregious unfair labor practices (see Memorandum GC 99-8 Guideline Memorandum Concerning *Gissel)*

- will include unfair labor practices similar to Category 1

18. Subcontracting or other change to avoid bargaining obligation

- these involve an employer's implementation of a major entrepreneurial-type decision which may include shutdown or relocation of operations, transfer of operations to alter ego or single or joint employer

- changes may be discriminatorily motivated in violation of Section 8(a)(3) and/or independently violative of Section *8(a)(5)*

19. Withdrawal of recognition from incumbent

20. Undermining of bargaining representative

- includes implementation of important changes in working conditions, either discriminatorily or without bargaining with the union

- may include any of the additional types of violations listed in Category 1, above

- see also successor refusal to bargain (Category 7) or conduct during bargaining (Category 8)

21. Minority union recognition

- includes variety of illegal assistance to andior domination of a labor organization

22. Successor refusal to recognize and bargain

- includes discriminatory refusal to hire predecessor's employees

23. Conduct during bargaining

- includes refusal to provide relevant information, delay or refusal to meet, insistence to premature impasse or impasse on permissive or illegal subjects of bargaining, unlawful course of conduct in bargaining, or surface bargaining

24. Mass picketing and violence

- includes mass picketing which blocks ingress and egress to the plant or worksite, violence and threats thereof, and damage to property

25. Notice requirements for strikes or picketing under Section 8(d) and 8(g)

- includes strikes or picketing undertaken in contravention of the notice and waiting periods set forth in Section 8(d) (federal and state mediation) and 8(g) (notices to health care institutions) -

26. Refusal to permit protected activity on property

- may include employee picketing or handbilling arising from a labor dispute, or nonemployee efforts to disseminate organizational material to employees
- may also include a unilateral change in past practice or contractual term granting access to an incumbent union

27. Union coercion to achieve unlawful objective

- may involve union insistence to impasse on permissive or illegal subject of bargaining, or union conduct that amounts to restraint or coercion of the employer in its selection of representatives for the purposes of collective bargaining or grievance adjustment

28. Interference with access to Board processes

- may involve employer or union retaliation against employees for having resorted to the processes of the Board
- retaliation may include threats, discharges, the imposition of internal union discipline or the institution of groundless lawsuits

Appendix A

29. Segregating assets

- includes any alienation of assets which may require a protective order to preserve respondent's assets for backpay

30. Miscellaneous

- includes injunction against certain lawsuits, employer violence, interference with employee activities for mutual aid and protection

Appendix B
Checklist for Investigation of Requests
for Section lO(j) Relief

The following questions may help to elicit evidence relevant to the analysis of whether 10(j) relief is "just and proper" in a particular case. It should be emphasized that Section 10(j) determinations are made on a case-by-case basis, following careful examination, by the Office of the General Counsel and the Board, of all relevant facts and law. These determinations are not dependent upon the presence or absence of any particular fact. The questions are grouped according to the types of violations for which relief is sought.[1] For each type of violation we have cross-referenced the applicable categories of cases.

A. Unlawful Antiunion Activities and Discharge of Employees (Categories 1, 2, 3, 4, and 5)

1. Are ULPs isolated or do they form a pattern aimed at destruction of organizing campaign?

2. Size of bargaining unit (greater impact in small unit).

3. Number and percentage of unit employees subjected toULPs.

4. Was knowledge of unfair labor practices widespread among employees?

5. Were violations committed by senior employer officials?

6. Were 8(a)(3) violations committed in a manner to intimidate other employees?

7. Were discriminatees active in union?

   a) what did they do?

   b) were they perceived as leaders by other employees?

   c) are they willing to resume the campaign if reinstated?

8. Are ULPs blocking a representation case or a scheduled election?

   a) is union willing to revive campaign and/or proceed to an election if court orders injunctive relief?

9. Any scattering of employees "to the four winds"?

   a) Which discriminatees desire reinstatement?

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[1] This checklist is designed to assist Board agents in conducting investigations, and is not intended as an exhaustive list of relevant inquiries. Board agents should pursue all relevant leads based upon the facts of the case and current law and consult with their supervisor about the scope of the investigation.

b) If employees do not desire reinstatement, why not (fear, intimidation, better job elsewhere)?

c) Types of interim employment discriminatees have obtained: wage rates, locations in relation to employer's facility (scattering of employees reduces likelihood of return to employer).

10. Evidence of chill/loss of support on organizing activities.

a) Evidence of chill/loss of support for incumbent union (drifting away of members, deterioration of union's legitimacy with members). Employees refuse to talk to union organizers, take union literature or cards, wear union insignia or assume leadership positions.

b) Statements by employees that they are afraid for their jobs, afraid to support the union, or, in case of grant of benefits, no longer see a need for the union (hearsay statements from a union business agent may be admitted to show employee state of mind).

c) Lower attendance at union meetings.

d) Employees revoke or seek return of union authorization cards.

e) Reduction in rate at which cards are signed, after ULPs commenced.

f) Employees crossing organizational/recognitional picket lines.

g) Employees sign antiunion petition.

11. Evidence of chill/loss of support for incumbent union (drifting away of members, deterioration of union's legitimacy with members).

a) Drop in union membership, including the absence of new members where membership has been on the increase.

b) Cancellation of dues checkoff.

c) Decrease in number of grievances filed or fear of filing grievances (assuming employer is complying with grievance machinery).

d) Statements of dissatisfaction by employees, including desire to strike, engage in work stoppages, or violence.

e) If there is a strike, number and percentage employees who cross picket lines after ULPs.

f) Lower attendance at union meetings.

g) Reluctance to talk to union officials or become involved in union activities.

h) Employees sign antiunion petition.

i) Longevity of employment, and intimacy/cohesiveness of employees in unit.

B. Unlawful Employer Refusal to Recognize and Bargain (Including Gissel Bargaining Order, Unlawful Withdrawal of Recognition, Successor Refusal to Recognize, Unlawful Conduct during Negotiations--Insistence on Change in Unit or other Nonmandatory Subject, Refusal to Meet and Deal) (Categories 2, 3, 4, 5, 7, and 8)

1. Length of collective-bargaining relationship (likelihood of loyalty to union).

2. Size of bargaining unit (small size accentuates any 8(a)(1) and (3) violations).

3. Number and percentage of employees in bargaining unit affected by ULPs.

4. Actual loss of support for union (see A.10, above).

5. Any problems with union's majority status (coerced or tainted cards) or with appropriate unit? In "good faith doubt" cases, how strong is employer's defense?

6. Has the union threatened to strike or has it already commenced a strike? (Industrial unrest favors interim bargaining order.)

   a) What kind of strike is it (e.g., ULP strike, economic strike, or unprotected strike)?

   b) What effect, if any, is the strike having on the employer's operations? Is public interest being affected by strike, e.g., municipal/state construction, or other quasi-public services?

   c) Has union made unconditional offer to return to work? Has employer hired permanent replacements?

7. Have employees been locked out? Have they been replaced?

8. Have employer's bargaining violations caused, exacerbated or prolonged strike; or precluded negotiations on other subjects?

9. Is there a history of amiable bargaining between the parties? Is this bargaining for a first agreement? Is bargaining following a recent Board election? Was representation case protracted?

10. In Gissel bargaining order cases:

    a) How large was the union's card majority?

    b) Any demonstrable loss of majority?

1) Withdrawal or revocation of union authorization cards.

2) Union lost Board-conducted election.

3) Lower attendance at union meetings.

4) Employees resigned from union membership.

5) Employees sign antiunion petition.

6) Employees reluctant to take leadership positions in union.

c) Serious nature of violations, including "hallmark" violations (e.g., discharges, threats to close, 8(a)(1) violations committed by senior employer agents).

d) Any dissemination of violations among employees: number and who affected and knew of violations

e) Have unfair labor practices continued?

f) Any mitigating circumstances between time majority established and 10(j) hearing.

1) Substantial employee turnover not due to employer's ULPs (e.g., seasonal business).

2) Change in management or management policies toward union; removal of agents who committed ULPs.

3) Employer's voluntary remedy for some of violations, e.g., reinstate some of 8(a)(3)s

C. Unlawful Unilateral Changes (Categories 2, 3, 4, 5, 7, and 8)

1. Did changes affect important working conditions? Were substantial numbers of unit employees affected? Are employees upset? Is union being blamed for its inability to correct changes? (See A.10, above.)

a) Has employer discontinued health-care coverage for unit employees? Have any employees foregone medical care as a result?

b) Has employer eliminated nonmonetary benefits at core of union's representational status (e.g., refused to process grievances, denied union representatives access to plant)?

c) Has employer failed to pay benefit fund contributions? Are any union benefit funds insolvent, or in serious risk of insolvency, as a result?

d) Has union acceded to unlawful employer demands in grievance handling or negotiations?

2. Were unremedied unilateral changes a major stumbling block to the parties' negotiations?

3. Are unilateral changes isolated in nature or is there a pattern? History of prior ULPs?

4. Does union want prior working conditions restored?

5. Is union pursuing any Section 301 remedy?

6. In cases involving a successor's refusal to recognize union that represented predecessor's employees, how do terms and conditions of predecessor differ from successor?

D. Unlawful Refusal to Provide Relevant Information "Categories 2, 3, 4, 5, 7, and 8)

1. Are parties now bargaining?

2. How, if at all, does the absence of requested information affect the likelihood that parties will reach agreement?

3. Is information requested relevant to major issue in dispute?

E. Unlawful Shutdown of Operations (Including relocation or subcontracting) (Category 3)

1. Extent of employer's alienation of property.

a) Is plant/equipment presently offered for sale or lease?

b) What assets has employer already relocated/moved/ sold?

c) Did employer dispose of any critical assets while ULP proceeding pending? (If so, restoration order may already be burdensome.)

2. Was there a legitimate loss of work, i.e., would restoration fail to restore jobs because they were lost as a result of lawful economic changes?

3. Does restoration order threaten employer's viability, given size of company and extent of operations?

4. Number and percentage of employees affected by relocation/subcontracting closing. (See, also A, above.)

5. Number and extent of ULPs (the more flagrant, the more equitable the restoration relief). (See, also A, above.)

6. If shutdown in violation of bargaining obligation, how would restoration, or lack thereof, affect bargaining? Would a bargaining order without restoration be effective?

F. Unlawful Employer Recognition of Assisted Union (Category 6)

1. Extensiveness of employer interference (e.g., percentage of unit employees unlawfully influenced to support minority union)?

2. Is there an incumbent union or rival union with majority support? Could QCR be raised?

3. If so, has the support for the incumbent/majority union been diminished by ULPs (see A.10, above)?

4. Has rival union petitioned for election; is it willing to file Carlson waiver and request to proceed to election if 10(j) decree is granted?

5. If there are accompanying Section 8(a)(1) and (3) violations, are they continuing?

6. Is minority union contract in effect?

   a) Does it have a union security clause?

   b) Is it favorable or unfavorable to employees?

7. Is 8(a)(2) union unlawfully dominated, or merely assisted?

G. Unlawful Violence and other Picket-Line Misconduct (Category 9)

1. Nature of violations speaks for itself. However, how strong is evidence for union agency?

2. Union action to stop violence and misconduct.

   a) Has union disavowed violence and/or disciplined any members, withheld strike benefits, or prohibited offending members from picketing?

   b) Has union effectively aided misconduct (e.g., provided strike benefits to picketers engaged in misconduct; provided legal assistance or paid bail bond of members arrested for misconduct)?

3. State authorities' willingness and ability to control the misconduct.

   a) What effort has state or local police made to stop the misconduct? To what extent have these efforts been successful in halting the misconduct?

   b) Has charging party resorted to state court? Has state court issued any injunctions and/or contempt citations to stop misconduct? To what extent have these state court orders been successful in stopping the misconduct?

H. Unlawful Strikes and Picketing in Violation of 8(d) and 8(g) Notice Provisions (Category 10)

1. What is economic impact of strike or picketing on normal operations of employer or customers? In Section 8(g) cases, has strike interrupted continuity of patient care (e.g., disruptions to normal services to patients, cutback in elective surgery, disruptions of receipt of supplies, refusals of patients or other employees to cross picket lines)?

2. Has any party requested mediation by FMCS or the state mediation services? How much mediation took place? Did charging party frustrate mediation?

3. Has employer replaced strikers? (If so, operations may not be disrupted.)

4. Has union offered to supply critical employees despite strike?

I. Unlawful Denial of Access to Property[2] (Category 11)

1. Union's use of alternative means of communications with its intended audience.

   a) What methods of contacting audience has union used (e.g., mass media, requested employee names/addresses from employers?

   b) How successful have these efforts been?

   c) Has the employer attempted to block these efforts?

2. Has the employer attempted to make some accommodation (e.g., inside v. outside mall entrances)?

3. If access is sought to solicit employees, would it occur during working or nonworking time?

4. Is the closest public location for picketing/handbilling hazardous? If so, how?

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[2] Many of these questions may already be answered as part of the investigation of the merits of an access case under Lechmere.

5. If union is only handbilling, could union lawfully picket and communicate essence of message to public?

6. Has union picketing continued on disputed property without incident after access was initially denied?

7. If incumbent union is seeking access to established bargaining unit, are there any grievance matters on site, e.g., safety problems, needing union physical inspection?

8. Will the purpose of the union's picketing be over before the Board order issues (e.g., union's economic strike, construction project, political campaign, safety problem)?

9. If union is engaged in an organizing campaign:

   a) Had union obtained any authorization cards before it began picketing? After picketing began? If so, how many? How were they obtained?

   b) How many employees attended union meetings before picketing began? After picketing began?

   c) Did union ask employer for list of employee names and addresses? What was employer's response?

10. If union is protesting area standards, is there any evidence that primary employer's substandard benefits threaten to undermine union benefits elsewhere, e.g., union is about to negotiate master agreement and union employers demand concessions because of primary employer?

11. Has picketing caused any work cessation or other disruption to date? Are there any allegations that union engaged in threats or violence, blocked ingress?

12. Is union's intended audience located in inherently inaccessible place? (E.q., out-of-state employees, logging camp, ships without public facilities nearby.)

J. Union Coercion (Strike, Threats, Fines, etc.) to Achieve Unlawful Object (Categories 12 and 13)

1. What, if any, adverse impact is union's conduct having on the employer's operation (e.g., affecting relationship with customers, bidding on work)?

2. What, if any, adverse impact is union's conduct having on employees (e.g., is union attempting unlawfully to enforce contract, prevent implementation of contract, or impair employee rights to select union)?

3. Is employee victim of unlawful discipline precluded from participating in intraunion political affairs?

4. Is internal union discipline threatening labor contract stability with an employer?

5. Is union's conduct disrupting negotiations, or an employer's choice of bargaining representative?

K. Unlawful Filing and/or Maintenance of Civil Lawsuit to Interfere with Protected Activity, Internal Union Discipline (Categories 12 and 13)

1. Have any employees abandoned protected activity as a result of suit?

   Has respondent publicized lawsuit, fines to other employees?

2. What relief is respondent seeking in its lawsuit (damages, how much; jail term in criminal complaint cases)?

3. When is trial scheduled (more imminent, the greater need for interim relief)?

4. Has employee been required to pay union fines or is payment required imminently?

5. Can sued employee afford legal representation?

6. Has sued party moved state court to stay proceeding in light of Board's ULP complaint? If so, what result? If not, why not?

7. Is suit unlawful because it lacks reasonable basis in fact of law under Bill Johnson's or, alternatively because preempted or for "unlawful object" (Bill Johnson's footnote 5)?

8. Is an R case being blocked by respondent's misconduct?

L. Unlawful Interference with Access to Board Processes (Including Fines, Lawsuits) (Category 13)

1. Have any employees expressed fear of filing charges, or declined to file charges, cooperate in Board investigation, give testimony or otherwise participate in Board processes?

2. Have any employees changed prior testimony given in an affidavit or Board hearing as a result of employer or union action?

3. For lawsuits, union discipline, initiated in retaliation for participation in Board proceedings, see also Section K, above.

4. Where conduct complained of is discharge for going to Board, are employees other than those discriminated against aware of discrimination? For what reasons do these employees believe that discriminatees were discharged? (Most relevant in small plant.) See also Section A, above.

M. Alienation of Assets to Avoid Board Liability (Protective Orders) (Category 14)

1. What is estimated monetary liability from ULPs?

2. Has employer indicated intent to close operation and/or liquidate its assets?

3. Has employer begun to liquidate its assets (e.g., removed equipment or materials, closed plant or placed it on market? When?

4. Any evidence that assets were transferred with motive to evade backpay liability?

5. Is public auction scheduled to sell assets? When?

6. Are assets under judicial control, i.e., bankruptcy court, state proceeding to protect creditors, receivership, where? Can Board file a proof of claim?

7. Where the business is winding down, what is the likelihood that the liquidated assets will exceed the claims of secured creditors, current bona fide business expenses and liens of record?

8. Has employer expressed willingness to post bond to cover potential monetary liability or give written assurances to set aside sufficient funds to satisfy its financial liability?

9. Has employer refused to provide Board with reasonable method of oral/written communication or address? Are whereabouts of the employer known?

10. Has employer refused to comply with investigative subpoena regarding alienation of assets?

11. Has employer demonstrated propensity to misuse corporate form (creation of alter egos, commingling personal and corporate funds, inordinate salaries to officers or distribution of dividends to shareholders in closely held corporation)?

12. Is Region prepared to amend complaint or issue backpay specification to name another entity as a derivative respondent with backpay liability, e.g., single employer, joint employer, alter ego, Perma Vinyl successor? (Presence of deep pockets may moot need for protective order.)

APPENDIX C

SUGGESTED OUTLINE FOR REGIONAL MEMORANDUM RECOMMENDING SECTION 10(j) RELIEF

[Appendix C exempt from disclosure pursuant to Exemptions 5, attorney work product, 2, and 7(E), but disclosed at the discretion of the General Counsel.]

I. BACKGROUND

A. Procedural history, including date charge(s) filed, by whom, date complaint issued, and scheduled hearing date, if any

B. If related representation case, include procedural history of representation case, such as date representation petition filed, date election held or scheduled to be held, outcome of election, or present status of representation proceeding

C. Brief description of parties

1. location and nature of employer's operations

2. size of overall workforce as well as number of employees in relevant unit

3. collective-bargaining history, if any, including term of most recent collective-bargaining agreement

II. FACTS

A. Describe events in chronological order

B. Include titles of managers/supervisors

C. Include all facts relevant to support prima facie case for each violation alleged in complaint

D. Include all facts relevant to rebut respondent defenses

E. Include all facts relevant to prove "just & proper" (ie, evidence of impact)

III. MERITS ANALYSIS

A. Indicate appropriate standard for circuit in which case arises

B. Provide analysis for each unfair labor practice that is alleged in complaint and that you recommend litigating in the 10(j) proceeding. Minor independent violations of Section 8(a)(1) may be treated summarily.

1. use all facts necessary to support the allegation

2. where credibility disputes exist, provide explanation for resolution of dispute

3. indicate other anticipated evidentiary problems and how Region expects to resolve them

4. cite Board and, where possible, relevant circuit court law to support the theory of violation alleged in the complaint (not necessary for routine violations)

5. address adverse precedent in the circuit in which the case would be heard

6. provide analysis to show why Board would grant any special remedies requested in administrative case (i.e., Gissel bargaining order, restoration of operations) and circuit court law enforcing those remedies

C. Provide analysis to rebut respondent defenses

IV. JUST AND PROPER ANALYSIS

A. Indicate test for judging propriety of relief for circuit in which case arises

B. Explain why interim relief is necessary to preserve efficacy of final Board order using theories of just and proper, e.g., chill, threat of scattering, absence of leaders, undermining of union support, impediment to bargaining, etc.

1. Use evidence adduced during investigation

2. Use inferences permitted by 10(j) caselaw

C. Distinguish the case from adverse 10(j) precedent, if any

D. If applicable, respond to respondent's arguments that injunctive relief would be unduly burdensome

E. Where the recommended injunctive relief differs from that which is sought in the underlying administrative proceeding, explain the discrepancy

V. PROPOSED ORDER

A. Include separate sections for the cease and desist and affirmative provisions (including catch-all, narrow or broad cease-and-desist)

B. The proposed relief should track the relief sought in the underlying administrative proceeding (but see IV.E., above)

C. Include relief which is unique to 10(j) proceedings such as posting of the district court's order, affidavit of compliance, and where applicable, access to books and records (e.g., to monitor preferential hiring list)

VI. ATTACHMENTS

A. Include a sheet listing all counsel of record in the case

B. Send with the 10(j) recommendation any position statements submitted by the parties which address the issue of 10(j) relief

C. Send a copy of the administrative complaint and if available, answer If complaint not ready, send to ILB when issued.

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June 2001

APPENDIX D

SECTION 10(j) STANDARDS BY CIRCUIT

[Substance of Appendix D is exempt from disclosure pursuant to Exemptions 5, attorney work product, 2, and 7(E), but disclosed at the discretion of the General Counsel.]

First Circuit

Second Circuit

Third Circuit

Fourth Circuit

Fifth Circuit

Sixth Circuit

Seventh Circuit

Eighth Circuit

Ninth Circuit

Tenth Circuit

Eleventh Circuit

D.C. Circuit

Section 10(j) Standards - First Circuit

[This section exempt from disclosure pursuant to Exemptions 5, attorney work product, 2, and 7(E), but disclosed at the discretion of the General Counsel.]

THE STATUTORY SCHEME PURSUANT TO WHICH INJUNCTIVE RELIEF IS SOUGHT: THE APPLICABLE STANDARDS

Section 10(j) of the Act[1] authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint, and it could thereby render a final Board order ineffectual. See Fuchs v. Hood Industries, Inc., 590 F.2d 395, 396 (1st Cir. 1979), citing S. Rep. No. 105, 80th Cong., 1st Sess., at pp. 8, 27 (1947), reprinted at I Legislative History of the Labor Management Relations Act of 1947 414, 433 (Government Printing Office 1985). Thus, Section 10(j) was intended to prevent the potential frustration or nullification of the Board's remedial authority caused by the passage of time inherent in Board administrative litigation. See, e.g., Asseo v. Centro Medico del Turabo, 900 F.2d 445, 454-55 (1st Cir. 1990); Angle v. Sacks, 382 F.2d 655, 659-60 (10th Cir. 1967), cited in Sharp v. Webco Industries, 225 F.3d 1130, 1135 (10th Cir. 2000)

To resolve a 10(j) petition, a district court in the First Circuit considers only two issues: whether there is "reasonable cause to believe" that a respondent has violated the Act and whether temporary injunctive relief is "just and proper." Pye v. Excel Case

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[1] Section 10(j) (29 U.S.C. Section 160(j)) provides:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) 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 petition 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.

Ready, 238 F.3d 69, 72 (1st Cir. Jan 26, 2001); Asseo v. Centro Medico del Turabo, 900 F.2d at 450, 453; Asseo v. Pan American Grain Co., 805 F.2d 23, 25-26 (1st Cir. 1986).

A. The "Reasonable Cause" Standard

In determining whether there is reasonable cause to believe that the Act has been violated, the district court may not decide the merits of the case. See Asseo v. Centro Medico del Turabo, 900 F.2d at 450; Maram v. Universidad Interamericana de Puerto Rico, 722 F.2d 953, 958-959 (1st Cir. 1983). Rather, the court's role is limited to determining whether "the Regional Director's position was fairly supported" by the evidence. Maram v. Universidad Interamericana, 722 F.2d at 959; Asseo v. Centro Medico del Turabo, Inc., 900 F.2d at 450. The district court "is not the ultimate fact-finder, but merely determines what facts are likely to be proven to determine if the standard for an injunction has been met." Pye v. Excel Case Ready, 238 F.3d at 71, n. 2.

The district court should not resolve contested factual issues and should defer to the Regional Director's version of the facts if it is "within the range of rationality." Maram v. Universidad Interamericana, 722 F.2d at 958. Accord: Fuchs v. Hood Industries, 590 F.2d at 397 (district court's function is limited to whether contested factual issues could ultimately be resolved by the Board in favor of the General Counsel). The district court also should not attempt to resolve issues of credibility of witnesses. See Fuchs v. Jet Spray Corp., 560 F. Supp. 1147, 1150-51 n. 2 (D. Mass. 1983), affd. per curiam 725 F.2d 664 (1st Cir. 1983); Gottfried v. Frankel, 818 F.2d 485, 493, 494 (6th Cir. 1987) (district court is not permitted to resolve conflicts in evidence; respondent's attack on credibility of Board's witnesses merely establishes conflict in evidence); NLRB v. Electro-Voice, Inc., 83 F.3d 1559, 1570 (7th Cir. 1996), cert. denied 519 U.S. 1055(1997).

Similarly, on questions of law, the Regional Director need only establish that the legal theories relied on are "not without substance." Union de Tronquistas de Puerto Rico, Local 901 v. Arlook, 586 F.2d 872, 876 (1st Cir. 1978)(Section 10(l) proceeding).[2]

[2] Section 10(l) of the Act (29 U.S.C. Section 160(l)) is a companion provision to Section 10(j); it mandates the Board to seek temporary injunctions involving certain enumerated

Accord: Aguayo v. Tomco Carburetor Co., 853 F.2d 744, 748 (9th Cir. 1988) ("substantial and not frivolous" legal theory satisfies "reasonable cause" test); Fleischut v. Nixon Detroit Diesel, 859 F.2d 26, 29 (6th Cir. 1988)(same).

B. The "Just and Proper" Standard

Interim injunctive relief is appropriate to preserve and restore the status quo "when the circumstances of a case create a reasonable apprehension that the efficacy of the Board's final order may be nullified, or the administrative procedures will be rendered meaningless. . . " Asseo v. Centro Medico del Turabo, 900 F.2d at 455, quoting Angle v. Sacks, 382 F.2d at 660. District courts in the First Circuit rely on the traditional standards for granting preliminary injunctive relief to make that judgment. Pye v. Excel Case Ready, 238 F.3d at 73; Asseo v. Centro Medico del Turabo, 900 F.2d at 454. Under those standards, relief is appropriate if the Board demonstrates: (1) a likelihood of success on the merits; (2) the potential for irreparable injury in the absence of relief; (3) that such injury outweighs any harm preliminary relief would inflict on the defendant; and (4) that preliminary relief is in the public interest. Pye v. Excel Case Ready, 238 F.3d at 73, n.7; Asseo v. Centro Medico del Turabo, 900 F.2d at 454.

The First Circuit has also recognized that the public interest is served by granting interim injunctive relief that strengthens the collective bargaining process. Asseo v. Centro Medico del Turabo, Inc., 900 F.2d at 455. Section 10(j) interim relief "is designed to prevent employers from using unfair labor practices in the short run to permanently destroy employee interest in collective bargaining." Pye v. Excel Case Ready, 238 F.3d at 75.

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violations, such as secondary boycotts. The legal analysis under the two sections is basically the same. See, e.g., Boire v. International Brotherhood of Teamsters, 479 F.2d 778, 787 n. 7 (5th Cir. 1973); Kobell v. Suburban Lines, Inc., 731 F.2d 1076, 1084 (3d Cir. 1984).

Section 10(j) Standards - Second Circuit

[This section exempt from disclosure pursuant to Exemptions 5, attorney work product, 2, and 7(E), but disclosed at the discretion of the General Counsel.]

THE STATUTORY SCHEME PURSUANT TO WHICH INJUNCTIVE RELIEF IS SOUGHT: THE APPLICABLE STANDARDS

Section 10(j) of the Act,[1] authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint, and it could thereby render a final Board order ineffectual. See Kaynard v. Palby Lingerie, Inc., 625 F.2d 1047, 1055 (2d Cir. 1980); Seeler v. The Trading Port, Inc., 517 F.2d 33, 38 (2d Cir. 1975), citing S. Rep. No. 105, 80th Cong., 1st Sess., at pp. 8, 27 (1947), reprinted at I Legislative History of the Labor Management Relations Act of 1947 414, 433 (Government Printing Office 1985). Thus, Section 10(j) was intended to prevent the potential frustration or nullification of the Board's remedial authority caused by the passage of time inherent in Board administrative litigation. See, e.g., Seeler v. The Trading Port, Inc., 517 F.2d at 37-38.

To resolve a 10(j) petition, a district court in the Second Circuit considers only two issues: whether there is "reasonable cause to believe" that a respondent has violated

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[1] Section 10(j) (29 U.S.C. Section 160(j)) provides:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) 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 petition 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.

the Act and whether temporary injunctive relief is "just and proper." See, e.g., Silverman v. J.R.L. Food Corp. d/b/a Key Food, 196 F.3d 334, 335 (2d Cir. 1999)and the cases cited therein.

A. The "Reasonable Cause" Standard

In determining whether there is reasonable cause to believe that the Act has been violated, the district court may not decide the merits of the case. See Kaynard v. Mego Corp., 633 F.2d 1026, 1032-1033 (2d Cir. 1980). Rather, the court's role is limited to determining whether there is "reasonable cause to believe that a Board decision finding an unfair labor practice will be enforced by a Court of Appeals." Kaynard v. Mego Corp., 633 F.2d at 1033, quoting McLeod v. Business Machine and Office Appliance Mechanics Conference Board, 300 F.2d 237, 242 n. 17 (2d Cir. 1962). The district court should not resolve contested factual issues; the Regional Director's version of the facts "should be given the benefit of the doubt" (Seeler v. The Trading Port, Inc., 517 F.2d at 37) and, together with the inferences therefrom, "should be sustained if within the range of rationality" (Kaynard v. Mego Corp.), 633 F.2d at 1031). The district court also should not attempt to resolve issues of credibility of witnesses. Kaynard v. Palby Lingerie, Inc., 625 F.2d at 1051-1052, n. 5. See also NLRB v. Electro-Voice, Inc., 83 F.3d 1559, 1570, 1571 (7th Cir. 1996), cert. denied 519 U.S. 1055 (1997); Fuchs v. Jet Spray Corp., 560 F. Supp. 1147, 1150-51 n. 2 (D. Mass. 1983), affd. per curiam 725 F.2d 664 (1st Cir. 1983).

Similarly, on questions of law, the district court "should be hospitable to the views of the [Regional Director], however novel." Kaynard v. Mego Corp., 633 F.2d at 1031, quoting Danielson v. Joint Board of Coat, Suit and Allied Garment Workers' Union, I.L.G.W.U.), 494 F.2d 1230, 1245 (2d Cir. 1974). The Regional Director's legal position should be sustained "unless the [district] court is convinced that it is wrong." Kaynard v. Palby Lingerie, Inc., 625 F.2d at 1051. Accord: Silverman v. Major League

Baseball Player Relations Comm., Inc., 67 F.3d 1054, 1059 (2d Cir. 1995)("appropriate deference must be shown to the judgment of the NLRB, and a district court should decline to grant relief only if convinced that the NLRB's legal or factual theories are fatally flawed").

B. The "Just and Proper" Standard

The Second Circuit has recognized that Section 10(j) is among those "legislative provisions calling for equitable relief to prevent violations of a statute" and courts should grant interim relief thereunder "in accordance with traditional equity practice, as conditioned by the necessities of public interest which Congress has sought to protect.'" Morio v. North American Soccer League, 632 F.2d 217, 218 (2d Cir. 1980), quoting Seeler v. The Trading Port, Inc., 517 F.2d at 39-40. In applying these principles the Second Circuit has concluded that Section 10(j) relief is warranted where serious and pervasive unfair labor practices threaten to render the Board's processes "totally ineffective" by precluding a meaningful final remedy (Kaynard v. Mego Corp., 633 F.2d at 1034, discussing Seeler v. The Trading Port, Inc., 517 F.2d at 37-38); or where interim relief is the only effective means to preserve or restore the status quo as it existed before the onset of the violations (Seeler v. The Trading Port, Inc., 517 F.2d at 38); or where the passage of time might otherwise allow the respondent to accomplish its unlawful objective before being placed under any legal restraint (Kaynard v. Palby Lingerie, Inc., 625 F.2d at 1055). Accord: Silverman v. Major League Baseball Player Relations Comm., Inc., 880 F. Supp. 246, 255 (S.D.N.Y.), aff'd. 67 F.3d 1054 (2d Cir. 1995).

Section 10(j) Standards - Third Circuit

[This section exempt from disclosure pursuant to Exemptions 5, attorney work product, 2, and 7(E), but disclosed at the discretion of the General Counsel.]

THE STATUTORY SCHEME PURSUANT TO WHICH INJUNCTIVE RELIEF IS SOUGHT: THE APPLICABLE STANDARDS

Section 10(j) of the Act,[1] authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint, and it could thereby render a final Board order ineffectual. See Kobell v. Suburban Lines, Inc., 731 F.2d 1076, 1091 n. 25 (3d Cir. 1984), citing S. Rep. No. 105, 80th Cong., 1st Sess., at pp. 8, 27 (1947), reprinted at I Legislative History of the Labor Management Relations Act of 1947 414, 433 (Government Printing Office 1985). Accord: Pascarell v. Vibra Screw Inc., 904 F.2d 874, 878 (3d Cir. 1990).

To resolve a Section 10(j) petition, a district court in the Third Circuit considers only two issues: whether there is "reasonable cause to believe" that a respondent has violated the Act and whether temporary injunctive relief is "just and proper." See, e.g., Hirsch v. Dorsey Trailers, Inc., 147 F.3d 243, 247 (3d Cir. 1998); Pascarell v. Vibra Screw Inc., 904 F.2d at 877; Kobell v. Suburban Lines, Inc., 731 F.2d at 1078.

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[1] Section 10(j) (29 U.S.C. Section 160(j)) provides:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) 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 petition 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.

A. The "Reasonable Cause" Standard

In determining whether there is reasonable cause to believe that the Act has been violated, a district court may not decide the merits of the case and the Regional Director need not adduce evidence sufficient to prove a violation. See Kobell v. Suburban Lines, Inc., 731 F.2d at 1083-1084. See also Eisenberg v. Wellington Hall Nursing Home, Inc., 651 F.2d 902, 906 (3d Cir. 1981) (improper for district court to pass upon ultimate issue of alleged proscribed employer motivation for discharges). Instead, the reasonable cause standard imposes a "low threshold of proof" on the Regional Director. See Eisenberg v. Wellington Hall Nursing Home, 651 F.2d at 905; Kobell v. Suburban Lines, Inc., 731 F.2d at 1084. This standard is satisfied as long as (1) the Regional Director's legal theory is "substantial and not frivolous" and (2) viewing contested factual issues favorably to the Board, sufficient evidence supports that theory. Pascarell v. Vibra Screw Inc., 904 F.2d at 882, citing Kobell v. Suburban Lines, Inc., 731 F.2d at 1084. In making this examination, the district court should not attempt to resolve issues of credibility of witnesses. See Gottfried v. Frankel, 818 F.2d 485, 493, 494 (6th Cir. 1987). Accord: Fuchs v. Jet Spray Corp., 560 F. Supp. 1147, 1150-51 n. 2 (D. Mass. 1983), affd. per curiam 725 F.2d 664 (1st Cir. 1983).

B. The "Just and Proper" Standard

Injunctive relief is "just and proper" under Section 10(j) "when the nature of the alleged [violations] are likely to jeopardize the integrity of the bargaining process and thereby make it impossible or not feasible to restore or preserve the status quo pending litigation." Pascarell v. Vibra Screw Inc., 904 F.2d at 878. Thus, a district court must focus on the public interest in protecting the integrity of the bargaining process. Hirsch v. Dorsey Trailers, Inc., 147 F.3d at 247, citing Pascarell v. Vibra Screw, 904 F.2d at 879; Eisenberg v. Wellington Hall Nursing Home, Inc., 651 F.2d at 906-907. The "critical determination" for the court is "whether, absent an injunction, the Board's ability

to facilitate peaceful management-labor negotiation will be impaired." Pascarell v. Vibra Screw Inc., 904 F.2d at 879. An injunction is appropriate when a failure to grant interim relief likely would "prevent the Board, acting with reasonable expedition, from effectively exercising its ultimate remedial powers." Kobell v. Suburban Lines, Inc., 731 F.2d at 1091-1092. Accord: Sharp v. Webco Industries, Inc., 225 F.3d 1130, 1133 (10th Cir. 2000), citing Angle v. Sacks, 382 F.2d 655 (10th Cir. 1967).

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Section 10(j) Standards - Fourth Circuit

[This section exempt from disclosure pursuant to Exemptions 5, attorney work product, 2 and 7(E), but disclosed at the discretion of the General Counsel.]

THE STATUTORY SCHEME PURSUANT TO WHICH INJUNCTIVE RELIEF IS SOUGHT: THE APPLICABLE STANDARDS

Section 10(j) of the Act,[1] authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint, and it could thereby render a final Board order ineffectual. See S. Rep. No. 105, 80th Cong., 1st Sess., at pp. 8, 27 (1947), reprinted in I Legislative History of the Labor Management Relations Act of 1947 414, 433 (Government Printing Office 1985), cited in Sharp v. Webco Industries, Inc., 225 F.3d 1130, 1136 (10th Cir. 2000). Thus, Section 10(j) was intended to prevent the potential frustration or nullification of the Board's remedial authority caused by the passage of time inherent in Board administrative litigation. See NLRB v. Aerovox Corp., 389 F.2d 475, 477 (4th Cir. 1967) (10(e) case applying 10(j) standards), quoting Angle v. Sacks, 382 F.2d at 660. Accord: Sharp v. Webco Industries, Inc., 225 F.3d at 1133; Kobell v. United Paperworkers Intern., 965 F.2d 1401, 1406 (6th Cir. 1992).

[1] Section 10(j) (29 U.S.C. Section 160(j)) provides:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) 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 petition 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.

To resolve a Section 10(j) petition, a district court in the Fourth Circuit considers only two issues: whether there is "reasonable cause to believe" that a respondent has violated the Act and whether temporary injunctive relief is "just and proper." NLRB v. Aerovox Corp., 389 F.2d at 477.

A. The "Reasonable Cause" Standard

In determining whether there is reasonable cause to believe that the Act has been violated, the district court may not decide the merits of the case. See Humphrey v. International Longshoremen's Assn., AFL-CIO, 548 F.2d 494, 497-498 (4th Cir. 1977) (Section 10(l) proceeding).[2] See also D'Amico v. Cox Creek Refining Co., 719 F. Supp. 403, 407 (D. Md. 1989). Rather, the Regional Director need only demonstrate that there is "some reasonable possibility that the Board will ultimately enter an enforceable order" on the Director's complaint. Humphrey v. International Longshoremen's Assn., AFL-CIO, 548 F.2d at 498. As to matters of both law and fact, the district court should accord "considerable deference" to the Regional Director's "resolution of disputed issues" and it "should be especially reluctant to conclude that the [Director's] contentions are without merit." Ibid. Accord: Gottfried v. Frankel, 818 F.2d 485, 493, 494 (6th Cir. 1987) (district court is not permitted to resolve conflicts in the evidence; respondent's attack on credibility of Board's witnesses merely establishes conflict in the evidence); Arlook v. S. Lichtenberg & Co., Inc., 952 F.2d 367, 372-373 (11th Cir. 1992).

B. The "Just and Proper" Standard

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[2] Section 10(l) of the Act (29 U.S.C. Section 160(l)) is a companion provision to Section 10(j); it mandates the Board to seek temporary injunctions involving certain enumerated violations, such as secondary boycotts. The legal analysis under the two sections is basically the same. See, e.g., Boire v. International Brotherhood of Teamsters, 479 F.2d 778, 787 n. 7 (5th Cir. 1973); Kobell v. Suburban Lines, Inc., 731 F.2d 1076, 1084 (3d Cir. 1984).

Section 10(j) implements the public interest to protect the Board's remedial power from compromise by the passage of time inherent in obtaining an enforceable Board order. Thus, Section 10(j) relief is "just and proper" whenever "'the circumstances of a case create a reasonable apprehension that the efficacy of the Board's final order may be nullified or the administrative procedures will be rendered meaningless.'" NLRB v. Aerovox Corp., 389 F.2d at 477, quoting Angle v. Sacks, 382 F.2d at 660. See also Sachs v. Davis & Hemphill, Inc., 71 LRRM 2126, 2129, vacated as moot 72 LRRM 2879 (4th Cir. 1979); Sharp v. Webco Industries, Inc., 225 F.3d at 1135. Accordingly, the relief to be granted is that which will preserve, or restore as nearly as possible, the status quo existing before the alleged unfair labor practices occurred. See NLRB v. Aerovox Corp., 389 F.2d at 477; Sharp v. Webco Industries, Inc., 225 F.3d at 1135, quoting Angle v. Sacks, 382 F.2d at 660. Accord: Pascarell v. Vibra Screw Inc., 904 F.2d 874, 878 (3d Cir. 1990) (10(j) relief warranted where violations "are likely to jeopardize the integrity of the bargaining process and thereby make it impossible or not feasible to restore or preserve the status quo pending litigation").

Section 10(j) Standards - Fifth Circuit

[This section exempt from disclosure pursuant to Exemptions 5, attorney work product, 2 and 7(E), but disclosed at the discretion of the General Counsel.]

THE STATUTORY SCHEME PURSUANT TO WHICH INJUNCTIVE RELIEF IS SOUGHT: THE APPLICABLE STANDARDS

Section 10(j) of the Act,[1] authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint, and it could thereby render a final Board order ineffectual. See S. Rep. No. 105, 80th Cong., 1st Sess., at pp. 8, 27 (1947), reprinted in I Legislative History of the Labor Management Relations Act of 1947 414, 433 (Government Printing Office 1985). See also Boire v. Pilot Freight Carriers, Inc., 515 F.2d 1185, 1188 (5th Cir. 1975), reh. and reh. en banc denied 52l F.2d 795, cert. denied 426 U.S. 934 (1976).

To resolve a Section 10(j) petition, a district court in the Fifth Circuit considers only two issues: whether there is "reasonable cause to believe" that a respondent has violated the Act and whether temporary injunctive relief is "just and proper." See Boire v. Pilot Freight Carriers, Inc., 515 F.2d at 1188-1189 and the cases cited therein.

A. The "Reasonable Cause" Standard

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[1] Section 10(j) (29 U.S.C. Section 160(j)) provides:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) 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 petition 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.

In determining whether there is reasonable cause to believe that the Act has been violated, the district court may not decide the merits of the case. See Boire v. Pilot Freight Carriers, Inc., 515 F.2d at 1191. Rather, the district court's role in evaluating "reasonable cause" is limited to determining whether the Regional Director's "theories of law and fact are not insubstantial and frivolous." Id., 515 F.2d at 1189.

As to questions of law, the district court should be hospitable to the views of the Regional Director, even if the legal theories relied on are considered novel or untested. Boire v. International Brotherhood of Teamsters, 479 F.2d 778, 789-792 (5th Cir. 1973), reh. and reh. en banc denied 480 F.2d 924 (1973); Lewis v. New Orleans Clerks & Checkers, I.L.A. Local No. 1497, 724 F.2d 1109, 1114-1115 (5th Cir. 1984) (Section 10(l) proceeding).[2]

As to factual matters, the Regional Director need present only "enough evidence. . . to permit a rational factfinder, considering the evidence in the light most favorable to the Board, to rule in favor of the Board." Arlook v. S. Lichtenberg & Co., Inc., 952 F.2d 367, 371 (11th Cir. 1992). Accord: Kaynard v. Mego Corp., 633 F.2d 1026, 1031 (2d Cir. 1980). In determining whether the Regional Director has met this "minimal burden" (Boire v. Pilot Freight Carriers, Inc., 515 F.2d at 1189), a district court should not attempt to resolve conflicts in the evidence or the credibility of witnesses. Arlook v. S. Lichtenberg & Co., Inc., 952 F.2d at 372-373; Gottfried v. Frankel), 818 F.2d 485, 493, 494 (6th Cir. 1987) (district court is not permitted to resolve conflicts in the evidence; respondent's attack on credibility of Board's witnesses merely establishes conflict in the evidence); Fuchs v. Jet Spray Corp., 560 F.Supp. 1147, 1150-1151 n. 2 (D. Mass. 1983), affd. per curiam 725 F.2d 664 (1st Cir. 1983) (same).

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[2] Section 10(l) of the Act (29 U.S.C. Section 160(l)) is a companion provision to Section 10(j); it mandates the Board to seek temporary injunctions involving certain enumerated violations, such as secondary boycotts. The legal analysis under the two sections is basically the same. See, e.g., Boire v. International Brotherhood of Teamsters, 479 F.2d at 787 n. 7.

B. The "Just and Proper" Standard

Injunctive relief is "just and proper" under Section 10(j) whenever the facts demonstrate that, without such relief, "any final order of the Board will be meaningless or so devoid of force that the remedial purposes of the Act will be frustrated." Boire v. Pilot Freight Carriers, Inc., 515 F.2d at 1192. Accord: Arlook v. S. Lichtenberg & Co. Inc., 952 F.2d at 372, 374 ("just and proper" standard met where Section 10(j) interim relief would be "more effective" to protect employee statutory rights than a final Board order); Boire v. International Brotherhood of Teamsters, 479 F.2d at 788 (interim relief warranted where, absent such relief, "Board processes would be of little avail" to the affected employees). Thus, in the Fifth Circuit, the question is one of "equitable necessity" (Boire v. Pilot Freight Carriers, Inc., 515 F.2d at 1192), that is, whether interim relief is necessary to preserve the lawful status quo ante pending the Board's ultimate administrative adjudication. Id., 515 F.2d at 1193. Accord: Pascarell v. Vibra Screw Inc., 904 F.2d 874, 878 (3d Cir. 1990) (10(j) relief warranted where violations "are likely to jeopardize the integrity of the bargaining process and thereby make it impossible or not feasible to restore or preserve the status quo pending litigation."); Asseo v. Centro Medico del Turabo, Inc.), 900 F.2d 445, 454-455 (1st Cir. 1990) (same).

Section 10(j) Standards - Sixth Circuit

[This section exempt from disclosure pursuant to Exemptions 5, attorney work product, 2, and 7(E), but disclosed at the discretion of the General Counsel.]

THE STATUTORY SCHEME PURSUANT TO WHICH INJUNCTIVE RELIEF IS SOUGHT: THE APPLICABLE STANDARDS

Section 10(j) of the Act,[1] authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint, and it could thereby render a final Board order ineffectual. See Schaub v. West Michigan Plumbing & Heating, Inc., 250 F.3d 962, 970; Levine v. C & W Mining Co., Inc., 610 F.2d 432, 436-437 (6th Cir. 1979), quoting S. Rep. No. 105, 80th Cong., 1st Sess., 27 (1947), reprinted in I Legislative History of the Labor Management Relations Act of 1947 433 (Government Printing Office 1985). Accord: Fleischut v. Nixon Detroit Diesel, Inc., 859 F.2d 26, 28-29 (6th Cir. 1988). Thus, Section 10(j) was intended to prevent the potential frustration or nullification of the Board's remedial authority caused by the passage of time inherent in Board administrative litigation. See Kobell v. United Paperworkers Intern., 965 F.2d 1401, 1406 (6th Cir. 1992).

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[1] Section 10(j) (29 U.S.C. Section 160(j)) provides:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) 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 petition 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.

To resolve a Section 10(j) petition, a district court in the Sixth Circuit considers only two issues: whether there is "reasonable cause to believe" that a respondent has violated the Act and whether temporary injunctive relief is "just and proper." See, e.g., Schaub v. West Michigan Plumbing & Heating, Inc., 250 F.3d at 969; Kobell v. United Paperworkers Intern., 965 F.2d at 1406; Gottfried v. Frankel, 818 F.2d 485, 493 (6th Cir. 1987).

A. The "Reasonable Cause" Standard

In determining whether there is reasonable cause to believe that the Act has been violated, a district court may not decide the merits of the case. See Schaub v. West Michigan Plumbing & Heating, Inc., 250 F.3d at 969; Gottfried v. Frankel, 818 F.2d at 493. Instead, the Regional Director's burden in proving "reasonable cause" is "relatively insubstantial." See Schaub v. West Michigan Plumbing & Heating, Inc., 250 F.3d at 969; Kobell v. United Paperworkers Intern., 965 F.2d 1406; Levine v. C & W Mining Co., Inc., 610 F.2d at 435. Thus, the district court must accept the Regional Director's legal theory as long as it is "substantial and not frivolous." Fleischut v. Nixon Detroit Diesel, Inc., 859 F.2d at 29; Kobell v. United Paperworkers Intern., 965 F.2d 1407. Factually, the Regional Director need only "produce some evidence in support of the petition." Kobell v. United Paperworkers Intern., 965 F.2d at 1407. The district court should not resolve conflicts in the evidence or issues of credibility of witnesses, but should accept the Regional Director's version of events as long as facts exist which could support the Board's theory of liability. See Schaub v. West Michigan Plumbing & Heating, Inc., 250 F.3d at 969; Gottfried v. Frankel, 818 F.2d at 493 and 494.

B. The "Just and Proper" Standard

Injunctive relief is "just and proper" under Section 10(j) where it is "necessary to return the parties to the status quo pending the Board's processes in order to protect the Board's remedial powers under the NLRA." Kobell v. United Paperworkers International

Union, et al., 965 F.2d at 1410, quoting Gottfried v. Frankel, 818 F.2d at 495.[2] Accord: Schaub v. West Michigan Plumbing & Heating, Inc., 250 F.3d at 970. This standard is less "stringent" than traditional equitable principles and does not require consideration of elements such as irreparable harm. See Fleischut v. Nixon Detroit Diesel, Inc., 859 F.2d at 30 n. 3. Thus, "[i]nterim relief is warranted whenever the circumstances of a case create a reasonable apprehension that the efficacy of the Board's final order may be nullified or the administrative procedures will be rendered meaningless.'" Sheeran v. American Commercial Lines, Inc., 683 F.2d 970, 979 (6th Cir. 1982), quoting Angle v. Sacks, 382 F.2d 655, 660 (10th Cir. 1967). Accord: Fleischut v. Nixon Detroit Diesel, Inc., 859 F.2d at 30-31.

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[2] The "status quo" referred to in Gottfried v. Frankel is that which existed before the charged unfair labor practices took place. See Fleischut v. Nixon Detroit Diesel, Inc., 859 F.2d at 30 n. 3.

Section 10(j) Standards - Seventh Circuit

[This section exempt from disclosure pursuant to Exemptions 5, attorney work product, 2, and 7(E), but disclosed at the discretion of the General Counsel.]

THE STATUTORY SCHEME PURSUANT TO WHICH INJUNCTIVE RELIEF IS SOUGHT: THE APPLICABLE STANDARDS

Section 10(j) of the Act,[1] authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint, and it could thereby render a final Board order ineffectual. See S. Rep. No. 105, 80th Cong., 1st Sess., at pp. 8, 27 (1947), reprinted in I Legislative History of the Labor Management Relations Act of 1947 414, 433 (Government Printing Office 1985), cited in NLRB v. P*I*E Nationwide, Inc., 894 F.2d 887, 891 (7th Cir. 1990). Thus, Section 10(j) was intended to prevent the potential frustration or nullification of the Board's remedial authority caused by the passage of time inherent in Board administrative litigation. See Kinney v. Pioneer Press, 881 F.2d 485, 493-494 (7th Cir. 1989).

Section 10(j) directs district courts to grant relief that is "just and proper." The Seventh Circuit holds that to determine what relief is "just and proper," district courts

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[1] Section 10(j) (29 U.S.C. Section 160(j)) provides:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b)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 petition 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.

should apply the general equitable standards for considering requests for preliminary injunctions. NLRB v. Electro-Voice, Inc., 83 F.3d 1559, 1566 (7th Cir. 1996); Kinney v. Pioneer Press, 881 F.2d at 490. That is, the court must evaluate (1) the likelihood that the petitioner will succeed on the merits; (2) whether the petitioner has an adequate remedy at law; (3) whether the petitioner would be irreparably harmed if the injunction did not issue and whether the threatened injury to petitioner outweighs the threatened harm an injunction would inflict on defendant; and (4) whether the granting of a preliminary injunction serves the public interest. NLRB v. Electro-Voice, 83 F.3d at 1566-67. The greater the likelihood of success on the merits, the less the harm the petitioner need show in relation to the harm the defendant will suffer. Bloedorn v. Francisco Foods, Inc., d/b/a Piggly Wiggly, 276 F.3d 270, 286-287, 298; (7th Cir. 2001), citing NLRB v. Electro-Voice, 83 F.3d at 1567-68, citing Roland Machinery Co. v. Dresser Industries, Inc., 743 F.2d 380, 387 (7th Cir. 1984).

A. "Likelihood of Success"

The Regional Director makes a threshold showing of likelihood of success by showing that its chances are "better than negligible." NLRB v. Electro-Voice, 83 F.3d at 1568; Roland Machinery Co. v. Dresser Industries, Inc., 743 F.2d at 387. In assessing whether the Regional Director has met this burden, a district court must take into account that Section 10(j) confers no jurisdiction to pass on the ultimate merits of the unfair labor practice case (NLRB v. Electro-Voice, 83 F.3d at 1567) and that, ultimately, the Board's determination on the merits will be given considerable deference (Bloedorn v. Piggly Wiggly, 276 F.3d at 287.). Thus, in a 10(j) proceeding, the district court should sustain the Regional Director's factual allegations if they are "within the range of rationality" and, "[e]ven on an issue of law, the district court should be hospitable to the views of the [Director], however novel." Bloedorn v. Piggly Wiggly, 276 F.3d at 287. The district court should not resolve credibility conflicts in the evidence but rather focus on whether the Regional Director's evidence is sufficient to show a "better than negligible" chance of

success. NLRB v. Electro-Voice, 83 F.3d at 1570, 1571. See also Gottfried v. Frankel, 818 F.2d 485, 493, 494 (6th Cir. 1987).

B. Balancing the Equities

The irreparable harm to be avoided in a Section 10(j) case is the threatened frustration of the remedial purpose of the Act and of the public interest in deterring continued violations. Squillacote v. Local 248, Meat & Allied Food Workers, 534 F.2d 735, 744 (7th Cir. 1976), cited with approval in Kinney v. Pioneer Press, 881 F.2d at 491.[2] In evaluating whether irreparable injury to the policies of the Act is threatened, as well as in balancing such harms against any threatened harm to the respondent or the public interest, the hardships, the district court must "take into account the probability that declining to issue the injunction will permit the allegedly unfair labor practice to reach fruition and thereby render meaningless the Board's remedial authority." Miller v. California Pacific, 19 F.3d at 460, citing Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 545 (1987). Accord: Asseo v. Centro Medico del Turabo, Inc., 900 F.2d 445, 455 (1st Cir. 1990) (Section 10(j) relief is appropriate whenever the circumstances create a reasonable apprehension that, absent an injunction, the efficacy of the Board's final order may be nullified or frustrated during regular Board litigation).

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[2] NLRB v. Electro-Voice notes that when equitable relief is the ultimate relief sought, an additional element "no adequate remedy at law" is part of traditional equity analysis for which petitioner must show that an award of damages would be "seriously deficient." 83 F.3d at 1567, quoting Roland Machinery v. Dresser Industries, 749 F.2d at 386-87. As here, a Board proceeding resulting in permanent injunctive relief is the sole avenue of relief for conduct made unlawful under the National Labor Relations Act. Thus, in Section 10(j) cases, the "adequate remedy at law" inquiry is whether, in the absence of immediate relief, the harm flowing from the alleged violation cannot be prevented or fully rectified by the final judgment. Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d at 386. This inquiry effectively is the same as the question of "irreparable harm" to the petitioner. NLRB v. Electro-Voice, 83 F.3d at 1572-53.

Section 10(j) Standards - Eighth Circuit

[This section exempt from disclosure pursuant to Exemptions 5, attorney work product, 2, and 7(E), but disclosed at the discretion of the General Counsel.]

THE STATUTORY SCHEME PURSUANT TO WHICH INJUNCTIVE RELIEF IS SOUGHT: THE APPLICABLE STANDARDS

Section 10(j) of the Act,[1] authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint, and it could thereby render a final Board order ineffectual. See Minnesota Mining and Manufacturing Co. v. Meter, 385 F.2d 265, 269-270 (8th Cir. 1967) (citing S. Rep. No. 105, 80th Cong., 1st Sess. 27 (1947), reprinted in 1 NLRB, Legislative History of the Labor-Management Relations Act, 1947, at 414, 433 (1985)). Thus, Congress intended for Section 10(j) to prevent the potential frustration or nullification of the Board's remedial authority caused by the passage of time inherent in Board administrative litigation. Minnesota Mining, 385

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[1] Section 10(j) (29 U.S.C. Section 160(j)) provides:

> 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 petition 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.

F.2d at 271 (citing Angle v. Sacks, 382 F.2d 655, 660 (10th Cir. 1967)). Accord: Sharp v. Webco Industries, Inc., 225 F.3d 1130, 1133 (10th Cir. 2000).

Section 10(j) directs district courts to grant relief that is "just and proper." In the Eighth Circuit, district courts apply a traditional equitable analysis to consider whether interim relief is just and proper. Sharp v. Parents in Community Action, Inc., 172 F.3d 1034, 1039 (8th Cir. 1999). That is, the court must evaluate: "1) the threat of irreparable harm to the movant; 2) the balance between the harm to the movant and the harm to other parties if the injunction is granted; 3) the movant's probability of success on the merits; and 4) the public interest." Id., 172 F.3d at 1038, n.2 (citing Dataphase Systems, Inc. v. CL Systems, Inc., 640 F.2d 109 (8th Cir. 1981) (en banc)). In evaluating the warrant for interim relief, the court must take a flexible and pragmatic approach in balancing the factors, and no one factor is determinative. Dataphase Systems, 640 F.2d at 113. Where the irreparable harm to the movant is greater than the possible injury to other parties, the need to show likelihood of success is lower, and conversely, where the harm is greater to the other parties than to the movant, the burden of showing likelihood of success is great. Dataphase Systems, 640 F.2d at 112-113. See Henderson v. Bodine Aluminum, Inc., 70 F.3d 958, 961 (8th Cir. 1995) ("preliminary injunctions become easier to obtain as the plaintiff faces progressively graver harm").

A. Balancing the Equities

In deciding whether a Section 10(j) injunction is "just and proper," the court focuses initially on the question of irreparable injury. Parents in Community Action, 172 F.3d at 1039. The irreparable harm to be avoided in a Section 10(j) case is the "harm to the collective bargaining process or to other protected employee activities if a remedy

must await the Board's full adjudicatory process." Id. at 1038, 1040. An interim injunction is appropriate when it is "necessary either to preserve the status quo or prevent frustration of the basic remedial purposes of the Act." Parents in Community Action, 172 F.3d at 1039 (quoting Minnesota Mining, 385 F.2d at 270).

In evaluating whether irreparable injury to the policies of the Act is threatened, as well as in balancing such harms against any threatened harm to the respondent or the public interest, the district court must "take into account the probability that declining to issue the injunction will permit the allegedly unfair labor practice to reach fruition and thereby render meaningless the Board's remedial authority." Miller v. California Pacific Medical Center, 19 F.3d 449, 460 (9th Cir. 1994) (en banc). Accord: Asseo v. Centro Medico del Turabo, Inc., 900 F.2d 445, 455 (1st Cir. 1990). And, granting interim injunctive relief to strengthen the collective-bargaining process serves the public interest. See Asseo v. Centro Medico del Turabo, Inc., 900 F.2d at 455.

B. Likelihood of Success

Once the Regional Director has established irreparable injury, the district court examines likelihood of success on the merits, not in isolation, but "in the context of the relative injuries to the parties and the public." Parents in Community Action, 172 F.3d at 1039 (quoting Dataphase Systems, 640 F.2d at 113). In evaluating the likelihood of success, the district court considers only whether there are "suspected" statutory violations. Parents in Community Action, 172 F.3d at 1038. In assessing whether the Regional Director has met this requirement, the district court must take into account that it has no jurisdiction under Section 10(j) to adjudicate the merits of an unfair labor practice case. Parents in Community Action, 172 F.3d at 1039. See NLRB v. Electro-

Voice, 83 F.3d 1559, 1567 (7th Cir. 1996), cert. denied, 519 U.S. 1055 (1997). The court must also factor in the deference accorded to the Board's determination on the merits by courts of appeals. Miller v. California Pacific Medical Center, 19 F.3d at 460; NLRB v. Dorothy Shamrock Coal Co., 833 F.2d 1263, 1265 (7th Cir. 1987)). See NLRB v. Swift Adhesives, 110 F.3d 632, 634 (8th Cir. 1997)(Eighth Circuit reviews a final Board order "with great deference"). The district court should sustain the Regional Director's factual allegations if they are "within the range of rationality," and "[e]ven on an issue of law, the district court should be hospitable to the views of the [Director], however novel." Danielson v. Joint Board, 494 F.2d 1230, 1245 (2d Cir. 1974), cited with approval in Miller v. California Pacific, 19 F.3d at 460. The district court should not resolve credibility conflicts in the evidence, but rather focus on whether the Regional Director's evidence is sufficient to show a "better than negligible" chance of success. NLRB v. Electro-Voice, 83 F.3d at 1568.

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Section 10(j) Standards - Ninth Circuit

[This section exempt from disclosure pursuant to Exemptions 5, attorney work product, 2, and 7(E), but disclosed at the discretion of the General Counsel.]

THE STATUTORY SCHEME PURSUANT TO WHICH INJUNCTIVE RELIEF IS SOUGHT: THE APPLICABLE STANDARDS

Section 10(j) of the Act,[1] authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint. See Scott v. Stephen Dunn & Associates, 241 F.3d 652, 659 (9th Cir. 2001); Miller v. California Pacific Medical Center, 19 F.3d 449, 455 n.3 (9th Cir. 1994) (en banc), quoting S. Rep. No. 105, 80th Cong., 1st Sess., at pp. 8, 27 (1947), reprinted at 1 Legislative History of the Labor Management Relations Act of 1947 414, 433 (Government Printing Office 1985).

Section 10(j) directs district courts to grant relief that is "just and proper." In the Ninth Circuit, district courts rely on traditional equitable principles to determine whether interim relief is appropriate. Miller v. California Pacific, 19 F.3d at 459-460, cited with approval in Scott v. Stephen Dunn & Associates, 241 F.3d at 660. Thus, the courts consider (1) the likelihood that the petitioner will succeed on the merits; (2) the

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[1] Section 10(j) (29 U.S.C. Section 160(j)) provides:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) 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 petition 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.

possibility of irreparable injury to the petitioner if relief is not granted; (3) the extent to which the balance of hardships favors the respective parties; and (4) whether the public interest will be advanced by granting relief. Miller v. California Pacific, 19 F.3d at 456. These elements are evaluated on a "sliding scale" in which the required degree of irreparable harm increases as the probability of success decreases, and vice versa. Stephen Dunn & Associates, 241 F.3d at 661, and cases there cited; Miller v. California Pacific, 19 F.3d at 459-460.[2] The traditional equitable criteria should be considered in the context of the underlying purposes of Section 10(j), which is to protect the integrity of the collective bargaining process and to preserve the Board's remedial powers. Scott v. Stephen Dunn & Associates, 241 F.3d at 667, citing Miller, 19 F.3d at 461.

A. Likelihood of Success

The Regional Director makes a threshold showing of likelihood of success by producing "some evidence" in support of the unfair labor practice charge "together with an arguable legal theory." Stephen Dunn & Associates, 241 F.3d at 662, 664, quoting Miller v. California Pacific, 19 F.3d at 460. In the context of a 10(j) petition, the Regional Director need not prove the allegations by a preponderance of the evidence as required in an administrative proceeding. Rather, only "a better than negligible chance of success" need be shown. Stephen Dunn & Associates, 241 F.3d at 662. At a minimum, the Regional Director must demonstrate a "fair chance of success on the merits." Miller v. California Pacific, 19 F.3d at 460, citing Arcamuzi v. Continental Air Lines, Inc., 189 F.2d 935,937 (9th Cir. 1987); Stephen Dunn & Associates, 241 F.3d at 662, 666.

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[2] The following formulation reflects this sliding scale, and thus must be shown by the Regional Director in order to secure relief: "either (1) a combination of probable success on the merits and the possibility of irreparable harm, or (2) the existence of serious questions going to the merits, the balance of hardships tipping sharply in its favor, and at least a fair chance of success on the merits." Stephen Dunn & Associates, 241 F.3d at 661, quoting Miller v. California Pacific, 19 F.3d at 456.

In assessing whether the Regional Director has met this burden, a district court must take into account that it lacks jurisdiction over unfair labor practices; and that, ultimately, the Board's determination on the merits will be given considerable deference. Miller v. California Pacific, 19 F.3d at 460, and cases there cited. See also Photo-Sonics, Inc. v. NLRB, 678 F.2d 121, 123 (9th Cir. 1982). Thus, in a 10(j) proceeding, the district court should sustain the Regional Director's factual allegations if they are "within the range of rationality" and, "[e]ven on an issue of law, the district court should be hospitable to the views of the [Director], however novel." Danielson v. Jt. Board, 494 F.2d 1230, 1245 (2d Cir. 1974) cited with approval in Miller v. California Pacific, 19 F.3d at 460. Accord: Kaynard v. Mego Corp., 633 F.2d 1026, 1031 (2d Cir. 1980). The district court should not resolve credibility conflicts in the evidence. NLRB v. Electro-Voice, Inc., 83 F.3d 1559, 1571 (7th Cir. 1996). Accord: Stephen Dunn & Associates, 241 F.3d at 662 (conflict in the evidence does not prevent the issuance of 10(j) relief). Rather, the court should focus on whether the Board has produced "some evidence" to support the unfair labor practice allegations. Miller v. California Pacific, 19 F.3d at 460; Stephen Dunn & Associates, 241 F.3d at 662.

B. Balancing the Equities

In applying traditional equitable principles to a 10(j) petition, district courts must consider the matter through the "prism of the underlying purpose of Section 10(j), which is to protect the integrity of the collective bargaining process and to preserve the Board's remedial power while it processes the charge." Stephen Dunn & Associates, 241 F.3d at 661, quoting Miller v. California Pacific, 19 F.3d at 459-460. As the California Pacific court noted, the public interest is an important factor in the exercise of equitable discretion. 19 F.3d at 460. Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982). In 10(j) cases, "the public interest is to ensure that an unfair labor practice will not succeed because the Board takes too long to investigate and adjudicate the charge." Scott v. Stephen Dunn & Associates, 241 F.3d at 657, quoting Miller v. California Pacific, 19

F.3d at 460. Accordingly, in evaluating whether irreparable injury to the policies of the Act is threatened, as well as in balancing the hardships, the district court must "take into account the probability that declining to issue the injunction will permit the allegedly unfair labor practice to reach fruition and thereby render meaningless the Board's remedial authority." Miller v. California Pacific, 19 F.3d at 460, citing Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 545 (1987); Stephen Dunn & Associates, 241 F.3d at 667-668, 669.[3]

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[3] Under the "sliding scale," approach used in the Ninth Circuit, if the respondent concedes the substance of the unfair labor practice charge, or if the Board demonstrates that it is likely to prevail on the merits, irreparable harm will be presumed. On the other hand, if the charge is disputed, or if the Board has only a fair chance of succeeding on the merits, the court will expressly consider the possibility of irreparable injury. See Miller v. California Pacific, 19 F.3d at 460, citing United States v. Nutri-Cology, Inc., 982 F. 2d 394, 398 (9th Cir. 1992); Stephen Dunn & Associates, 241 F.3d at 666-667.

Section 10(j) Standards - Tenth Circuit

[This section exempt from disclosure pursuant to Exemptions 5, attorney work product, 2, and 7(E), but disclosed at the discretion of the General Counsel.]

THE STATUTORY SCHEME PURSUANT TO WHICH INJUNCTIVE RELIEF IS SOUGHT: THE APPLICABLE STANDARDS

Section 10(j) of the Act,[1] authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint, and it could thereby render a final Board order ineffectual. See S. Rep. No. 105, 80th Cong., 1st Sess., at pp. 8, 27 (1947), reprinted in I Legislative History of the Labor Management Relations Act of 1947 414, 433 (Government Printing Office 1985), cited in Sharp v. Webco Industries, Inc., 225 F.3d 1130, 1136 (10th Cir. 2000) and Angle v. Sacks, 382 F.2d 655, 659-660 (10th Cir. 1967). Thus, Section 10(j) was intended to prevent the potential frustration or nullification of the Board's remedial authority caused by the passage of time inherent in Board administrative litigation. Id. at 659. Accord: Kobell v. United Paperworkers Intern., 965 F.2d 1401, 1406 (6th Cir. 1992).

To resolve a Section 10(j) petition, a district court in the Tenth Circuit considers only two issues: whether there is "reasonable cause to believe" that a respondent has

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[1] Section 10(j) (29 U.S.C. Section 160(j)) provides:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) 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 petition 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.

violated the Act and whether temporary injunctive relief is "just and proper." See Sharp v. Webco Industries, 225 F.3d at 1133, 1137; Angle v. Sacks, 382 F.2d at 658, 660.

A. The "Reasonable Cause" Standard

In determining whether there is reasonable cause to believe that the Act has been violated, a district court in the Tenth Circuit may not decide the ultimate merits of the case. Angle v. Sacks, 382 F.2d at 661 (merits of unfair labor practice allegations to be resolved by the Board). Accord: Gottfried v. Frankel, 818 F.2d 485, 494 (6th Cir. 1987). Rather, the Regional Director "must only produce some evidence 'that [its] position is fairly supported by the evidence.'" Sharp v. Webco Industries, 225 F.3d at 1134, quoting Asseo v. Centro Medico del Turabo, Inc., 900 F.2d 445, 450 (1st Cir. 1990). Further, the Regional Director need only advance legal theories that are "valid, substantial and not frivolous" in order to "permit a rational factfinder, considering the evidence in the light most favorable to the Board, to rule in favor of the Board." Sharp v. Webco Industries, 225 F.3d at 1134, quoting Arlook v. S. Lichtenberg & Co., Inc., 952 F.2d 367, 371 (11th Cir. 1992). The district court should not resolve contested factual issues. See Scott v. El Farra Enterprises, Inc., d/b/a Bi-Fair Market, 863 F.2d 670, 673 n. 6 (9th Cir. 1988), citing Fuchs v. Hood Industries, Inc., 590 F.2d 395, 397 (1st Cir. 1979); Kaynard v. Mego Corp., 633 F.2d 1026, 1031 (2d Cir. 1980). Nor should it attempt to resolve issues of credibility of witnesses. See Gottfried v. Frankel, 818 F.2d at 493, 494 (district court is not permitted to resolve conflicts in evidence; respondent's attack on credibility of Board's witnesses merely establishes conflict in evidence). Accord: Fuchs v. Jet Spray

Corp., 560 F. Supp. 1147, 1150-51 n. 2 (D. Mass. 1983), affd. per curiam 725 F.2d 664 (1st Cir. 1983).

B. The "Just and Proper" Standard

Section 10(j) implements the public interest to protect the Board's remedial power from compromise by the passage of time inherent in obtaining an enforceable Board order. Thus, for Section 10(j) relief to be just and proper, "the circumstances of the case must demonstrate that there exists a probability that the purposes of the Act will be frustrated unless temporary relief is granted." Sharp v. Webco Industries, 225 F.3d at 1135, quoting Angle v. Sacks, 382 F.2d at 660. Accordingly, the relief to be granted is that which will preserve, or restore as nearly as possible, the status quo existing before the alleged unfair labor practices occurred. See Angle v. Sacks, 382 F.2d at 661. See also Pascarell v. Vibra Screw Inc., 904 F.2d at 878 (10(j) relief warranted where violations "are likely to jeopardize the integrity of the bargaining process and thereby make it impossible or not feasible to restore or preserve the status quo pending litigation").

Section 10(j) Standards - Eleventh Circuit

[This section exempt from disclosure pursuant to Exemptions 5, attorney work product, 2, and 7(E), but disclosed at the discretion of the General Counsel.]

THE STATUTORY SCHEME PURSUANT TO WHICH INJUNCTIVE RELIEF IS SOUGHT: THE APPLICABLE STANDARDS

Section 10(j) of the Act,[1] authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint, and it could thereby render a final Board order ineffectual. See S. Rep. No. 105, 80th Cong., 1st Sess., at pp. 8, 27 (1947), reprinted in I Legislative History of the Labor Management Relations Act of 1947 414, 433 (Government Printing Office 1985). See also Arlook v. S. Lichtenberg & Co., Inc., 952 F.2d 367, 371 (11th Cir. 1992), quoting Boire v. Pilot Freight Carriers, Inc., 515 F.2d 1185, 1188 (5th Cir. 1975), reh. and reh. en banc denied 52l F.2d 795, cert. denied 426 U.S. 934 (1976).

To resolve a Section 10(j) petition, a district court in the Eleventh Circuit considers only two issues: whether there is "reasonable cause to believe" that a respondent has violated the Act and whether injunctive relief is "just and proper." See Arlook v. S. Lichtenberg & Co., Inc., 952 F.2d at 371 and the cases cited therein.

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[1] Section 10(j) (29 U.S.C. Section 160(j)) provides:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) 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 petition 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.

A. The "Reasonable Cause" Standard

In determining whether there is reasonable cause to believe that the Act has been violated, the district court may not decide the merits of the case. See Arlook v. S. Lichtenberg & Co., Inc., 952 F.2d at 372-373, citing Boire v. Pilot Freight Carriers, Inc., 515 F.2d at 1191. Rather, the district court's role is limited to evaluating whether (1) the Regional Director's theory of violation is "substantial, nonfrivolous [and] coherent" and (2) the evidence, considered in the light most favorable to the Board, would permit a rational factfinder to rule in the Board's favor. Arlook v. S. Lichtenberg & Co., Inc., 952 F.2d at 371-372. Accord: Boire v. Int'l Bhd. of Teamsters, 479 F.2d 778, 789-92 (5th Cir. 1973), reh. and reh. en banc denied 480 F.2d 924 (1973) (legal theories need only be "substantial and not frivolous"). In determining whether the Regional Director has met this "minimal burden" (Boire v. Pilot Freight Carriers, Inc., 515 F.2d at 1189), a district court should not attempt to resolve conflicts in the evidence or the credibility of witnesses. Arlook v. Lichtenberg & Co., Inc., 952 F.2d at 372-373; Gottfried v. Frankel, 818 F.2d 485, 493, 494 (6th Cir. 1987) (respondent's attack on credibility of Board's witnesses merely establishes conflict in the evidence); Fuchs v. Jet Spray Corp., 560 F. Supp. 1147, 1150-1151 n. 2 (D. Mass. 1983), affd. per curiam 725 F.2d 664 (1st Cir. 1983) (same).

B. The "Just and Proper" Standard

Injunctive relief is "just and proper" under Section 10(j) "whenever the facts demonstrate that, without such relief, any final order of the Board will be meaningless or so devoid of force that the remedial purposes of the [NLRA] will be frustrated.'" Arlook v. S. Lichtenberg & Co., Inc., 952 F.2d at 372, quoting Boire v. Pilot Freight Carriers,

Inc., 515 F.2d at 1192. In the Eleventh Circuit, injunctive relief is shown to be "equitably necessary" where, for example, union organizationl efforts are being extinguished by employer unfair labor practices, unions and employees have already suffered substantial damage from probable violations and future violations are likely to be repeated absent an injunction. Arlook v. S. Lichtenberg & Co., Inc., 952 F.2d at 372. Therefore, it is "just and proper" for a district court to grant interim relief where a Section 10(j) injunction would be "more effective" to protect employee statutory rights than a final Board order. Id., 952 F.2d at 374. Accord: Pascarell v. Vibra Screw Inc., 904 F.2d 874, 878 (3d Cir. 1990) (10(j) relief warranted where violations "are likely to jeopardize the integrity of the bargaining process and thereby make it impossible or not feasible to restore or preserve the status quo pending litigation."); Asseo v. Centro Medico del Turabo, Inc., 900 F.2d 445, 454-455 (1st Cir. 1990) (same).

Section 10(j) Standards - D.C. Circuit

[This section exempt from disclosure pursuant to Exemptions 5, attorney work product, 2, and 7(E), but disclosed at the discretion of the General Counsel.]

THE STATUTORY SCHEME PURSUANT TO WHICH INJUNCTIVE RELIEF IS SOUGHT: THE APPLICABLE STANDARDS

Section 10(j) of the Act,[1] authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint. See S. Rep. No. 105, 80th Cong., 1st Sess., at pp. 8, 27 (1947), reprinted at I Legislative History of the Labor Management Relations Act of 1947 414, 433 (Government Printing Office 1985). Thus, Section 10(j) was intended to prevent the potential frustration or nullification of the Board's remedial authority caused by the passage of time inherent in Board administrative litigation. See, e.g., Sharp v. Webco Industries, Inc., 225 F.3d 1130, 1133 (10th Cir. 2000); citing Angle v. Sacks, 382 F.2d 655, 659 (10th Cir. 1967); Kobell v. United Paperworkers International Union, 965 F.2d 1401, 1406 (6th Cir. 1992).

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[1] Section 10(j) (29 U.S.C. Section 160(j)) provides:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in anunfair 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 petition 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.

To resolve a 10(j) petition, the district court in the District of Columbia considers only two issues: whether there is "reasonable cause to believe" that the Act has been violated and whether the "remedial purposes of the law will be served by pendente lite [injunctive] relief." See Int'l. Union, U.A.W. v. NLRB (Ex-Cell-O Corp.), 449 F.2d 1046, 1051 (D.C. Cir. 1971) Section 10(e) (29 U.S.C. Section 160(e)) temporary injunction case, citing NLRB v. Aerovox Corporation of Myrtle Beach, South Carolina, 389 F.2d 475, 477 (4th Cir. 1967)(equating 10(e) standards with 10(j) criteria). Most circuits have adopted this two part standard, the second half of which is also characterized as whether temporary injunctive relief is "just and proper." See, e.g., Arlook v. S. Lichtenberg & Co., Inc., 952 F.2d 367, 371 (11th Cir. 1992) and the cases cited therein.

A. The "Reasonable Cause" Standard

The Regional Director has a minimal burden to establish reasonable cause to believe that the Act has been violated; he or she need meet only a "low threshold of proof." Eisenberg v. Wellington Hall Nursing Home, Inc., 651 F.2d 902, 905 (3rd Cir. 1981). See, also Kobell v. Suburban Lines, Inc., 731 F.2d 1076, 1084 (3d Cir. 1984). The district court may not decide the merits of the case. See, e.g., Arlook v. S. Lichtenberg Co., Inc., 952 F.2d at 372-73. Nor should it resolve contested factual issues or credibility disputes. See, e.g. Gottfried v. Frankel, 818 F.2d 485, 493 and 494 (6th Cir. 1987); Fuchs v. Jet Spray Corp., 560 F. Supp. 1147, 1150-1151 n. 2 (D. Mass. 1983), affd. per curiam 725 F.2d 664 (1st Cir. 1983). Rather, the court should consider the evidence "in the light most favorable to the Board" (Arlook v. S. Lichtenberg & Co., Inc., 952 F.2d at 371-72) and should limit its inquiry to whether factual issues could ultimately be resolved by the Board in favor of the Regional Director (Fuchs v. Hood Industries, 590 F.2d at 397).

Similarly, on propositions of law, the Regional Director need only establish that the legal theory is "substantial and not frivolous." Arlook v. S. Lichtenberg & Co., Inc., 952 F.2d at 371-72

("substantial, nonfrivolous, coherent legal theory"); Pascarell v. Vibra Screw Inc., 904 F.2d 874, 882 (3d Cir. 1990)("substantial, non-frivolous legal theory, implicit or explicit").

B. The "Just and Proper" Standard

As the District of Columbia Circuit has recognized, interim injunctive relief is appropriate to protect the remedial purposes of the Act and, in particular, to preserve the Board's remedial powers from compromise by the passage of time inherent in obtaining a Board order. Int'l. Union, U.A.W. v. NLRB(Ex-Cell-O Corp.), 449 F.2d at 1051, citing NLRB v. Aerovox Corp., 389 F.2d at 477; Angle v. Sacks, 382 F.2d at 659. Thus, Section 10(j) relief is appropriate when "the circumstances of a case create a reasonable apprehension that the efficacy of the Board's final order may be nullified, or the administrative procedures will be rendered meaningless" unless such relief is granted. Id. at 660, cited in Sharp v. Webco Industries, Inc., 225 F.3d at 1134; Pascarell v. Vibra Screw Inc., 904 F.2d at 878 (injunctive relief is warranted when the alleged violations "are likely to jeopardize the integrity of the bargaining process and thereby make it impossible or not feasible to restore or preserve the status quo pending litigation"). In determining what interim relief is "just and proper," the district court should consider what is necessary to preserve or restore as nearly as possible the status quo before the alleged violations occurred. See Sharp v. Webco Industries, Inc., 225 F.3d at 1134, citing Angle v. Sacks, 382 F.2d at 661; Kobell v. United Paperworkers Intern., 965 F.2d 1401, 1410 (6th Cir. 1992); Int'l. Union, U.A.W. v. NLRB (Ex-Cell-O Corp.), 449 F.2d at 1051, n. 25.

APPENDIX E

List of Court Cases for Each 10(j) Category and Relevant Law Review Articles

[W= win; L= loss]
[*= more important case]
(parentheticals indicate additional issues addressed in the case)

[Parentheticals indicating additional issues addressed in the cases and * indicating more important cases are exempt from disclosure pursuant to Exemption 5, attorney work product, but disclosed at the discretion of the General Counsel.]

1. **Interference with Organizational Campaign (no majority)**

Angle v. Sacks, 382 F.2d 655 (10th Cir.) (W) (classic "nip in the bud" case)[*]

Aguayo v. Tomco Carburetor, 853 F.2d 744 (9th Cir.) (W) (discharge of union organizing committee members; protect potential collective-bargaining process; rights of replacements subordinate to discriminatees)

Sharp v. Parents in Community Action, Inc., 172 F.3d 1034 (8th Cir.) (L) (no public interest served by reinstatement of single 8(a)(3))

Silverman v. JRL Food Corp., 196 F.2d 334 (2d Cir.) (W) (must give deference to ALJD)

Sharp v. Webco Industries, Inc., 225 F.3d 1130 (10th Cir.) (W) (discriminatory selection for layoffs; union attempting to revive stalled campaign)[*]

Pye v. Excel Case Ready, 238 F.3d 69 (1st Cir.) (W) (loss of union support coincides with unlawful discharges)

Schaub v. West Michigan Plumbing & Heating, Inc., 250 F.3d 962 (6th Cir.) (W) (reinstatement of single 8(a)(3) in early stages of campaign)

NLRB v. Ona Corp., 605 F.Supp. 874 (N.D. Ala.) (W) (single 8(a)(3); good evidence of "chilling" impact)

Silverman v. Whittal & Shon, 125 LRRM

2150 (S.D.N.Y.) (W) (good language on chill)

Sharp v. La Siesta Foods, Inc., 859 F.Supp. 1370 (D. Kan.) (L) (union lost election and campaign had stopped)[*]

D'Amico v. U.S. Service Industries, Inc., 867 F.Supp. 1075 (D. D.C.) (W) (inform unit employees about terms of decree; multi-site in scope)

Fleischut v. Avondale Industries, Inc., 148 LRRM 2685 (E.D. La.) (L) (insufficient showing of irreparable harm to union's campaign)

Blyer v. P & W Electric, Inc., d/b/a Pollari Electric, 141 F.Supp. 326 (E.D.N.Y. 2001) (W) (reinstatement of 3 employees in unit of 15)

2. Interference with Organizational Campaign (Majority)

Seeler v. The Trading Port, 517 F.2d 33 (2d Cir.) (W) (correct view of status quo)[*]

Boire v. Pilot Freight Carriers, 515 F.2d 1185 (5th Cir.) (L) (incorrect view of status quo)[*]

Levine v. C & W Mining Co., 610 F.2d 432 (6th Cir.) (W) (also read the district court opinion)

Kaynard v. Palby Lingerie, 625 F.2d 1047 (2d Cir.) (W) (disputed unit not bar to relief; good language on risk of error)

Kaynard v. MMIC, 734 F.2d 950 (2d Cir.) (W) (unresolved election not bar to relief)

Asseo v. Pan American Grain Co., 805 F.2d 23 (1st Cir.) (W) (quotes Tiidee)

NLRB v. Electro-Voice, Inc., 83 F.3d 1559 (7th Cir.) (W) (follows Seeler view of status quo; good lanaguage on need to reinstate)[*]

Scott v. Stephen Dunn & Associates, 241 F.3d 652 (9th Cir.) (W) (8(a)(1) Gissel)

Gottfried v. Mayco Plastics, 472 F.Supp. 1161 (E.D. Mich.) (affd. C.A.6) (W) (union lost election; mass reinstatement; also good language on delay)

Lightner v. Dauman Pallet, Inc., 823 F.Supp. 249 (D. N.J.)(affd. C.A.3) (W) (has good evidentiary ruling on chilling impact)

Garner v. Macclenny Products, Inc., 859 F. Supp. 1478 (M.D. Fla.) (W) (only 8(a)(1) violations; unresolved election)

Hoeber v. KNZ Construction, Inc., 879 F.Supp. 451 (E.D. Pa.) (W) (good language on need for interim bargaining order)

Ahearn v. Beckley Mechanical, Inc., 161 LRRM 2311 2315 (S.D. W.Va.) (W) (8a1 violations)

Moore-Duncan v. Aldworth Co., 124 F.Supp.2d 268 (D. NJ) (interim bargaining order runs against joint employer)

Sharp v. Ashland Construction Co., 169 LRRM 3075 (W.D. Wis. 2002) (W)

3. Subcontracting or Other Change to Avoid Bargaining Obligation

Levine v. C & W Mining Co., 610 F.2d 432 (6th Cir.) (L) (lost on prohibition against sale of trucks [*]

Maram v. Universidad Interamericana, etc., 722 F.2d 953 (1st Cir.) (W) (8(a)(3) subcontracting of janitorial department; rights of discriminatees superior to replacements)

Calatrello v. Automatic Sprinkler Corp. of America, 55 F.3d 208 (6th Cir.) (L) (8(a)(3) subcontracting; won reasonable cause, lost on j & p)

Hirsch v. Dorsey Trailers, 147 F.3d 243 (3d Cir.) (W) (granted "mothball" order; good language on delay)

Zipp v. Bohn Heat Transfer, 110 LRRM 3013 (C.D. Ill.) (W) (work relocation; with 8(a)(5) information)

Kobell v. Thorsen Tool Co., 112 LRRM 2397 (M.D. Pa.) (W) (work relocation)

Eisenberg v. Suburban Transit, 112 LRRM 2708 (D. N.J.) (affd. C.A. 3) (W) ("single employer," work relocation)

Silverman v. Imperia Foods, 646 F.Supp. 393 (S.D.N.Y.) (W) (8(a)(3) accelerated plant relocation and mass discharge)

D'Amico v. A.G. Boone, 647 F.Supp. 1546 (W.D. Va.) (L), supplemented in 660 F.Supp. 534 (W.D. Va.) (W) (8(a)(3) work relocation; lost first on interim restoration, but then won Rule 60(b)(6) motion for "mothball" order)

Kobell v. J.D. Hinkle & Sons, 131 LRRM 2321 (N.D. W. Va.) (L) (restoration was too burdensome)

Frye v. Seminole Intermodal Transport, Inc. 141 LRRM 2265 (S.D. Ohio) (W) (work relocation; good language on destruction of unit)

Miller v. LCF, Inc. (aka Sprint), 147 LRRM 2911 (N.D. Ca.) (L)

Frye v. Kentucky May Coal, 148 LRRM 2945 (E.D. Ky.) (L) (unit employees working for subcontractor at original location)

Bernstein v. Carter & Sons Freightways, Inc., 983 F.Supp. 994 (D. Kan.) (W) (discriminatory subcontracting; also grants Gissel remedy)

Aguayo v. Quadrtech Corporation, 129 F.Supp.2d 1273 (C.D. Ca.) (W) (discriminatory work relocation; also obtained TRO)

Dunbar v. Carrier Corp., 66 F.Supp.2d 346 (N.D.N.Y.) (W) (unilateral work relocation)[*]

4. Withdrawal of Recognition from Incumbent

Brown v. Pacific Telephone, 218 F.2d 542 (9th Cir.) (W) (8(a)(5) and 8(a)(2); Pope's concurring opinion)[*]

Sachs v. Davis & Hemphill, 71 LRRM 2126 (4th Cir.) (W) (classic "good-faith doubt" case; also read the district court opinion)

Pye v. Sullivan Brothers Printers, Inc., 38 F.3d 58 (1st Cir.) (L) (novel union merger)

DeProspero v. House of the Good Samaritan, 474 F.Supp. 552 (N.D.N.Y.) (W) (affiliation of union)

Balicer v. Helrose Bindery, 82 LRRM 2891 (D. N.J.) (W) (alter ego)

Pascarell v. Gitano Group, 730 F.Supp. 616 (D. N.J. 1990) (W) (relocated part of operation)

Ledford v. Mining Specialists, Inc., 865 F.Supp. 314 (S.D. W. Va.) (L) (alter ego)

Hoffman v. Hartford Hospital, 149 LRRM 2248 (D. Conn.) (W) (hospital merger)

Hirsch v. Konig, 149 LRRM 3070 (E.D. Pa.) (W) (good language on delay after ALJ hrg.)

Ahearn v. House of Good Samaritan, 884 F.Supp. 654 (N.D.N.Y.) (W)

D'Amico v. Townsend Culinary, Inc., 22 F.Supp.2d 480 (D. Md.) (W) (bad faith bargaining tainted later showing of employee disaffection from union)[*]

Dunbar v. Park Associates, Inc., 23 F.Supp.2d 212 (N.D.N.Y.) (affd. C.A.2) (W) (tainted good faith doubt)

McDermott v. Scott, 162 LRRM 2224 (C.D. Ca.) (W)

Overstreet v. Tucson Ready Mix, Inc., 11 F.Supp.2d 1139 (D. Ariz.) (W) (tainted good faith doubt)

Moore-Duncan v. Horizon House Developmental

Services, 155 F.Supp.2d 390 (E.D. Pa. 2001) (W)

5. Undermining of Bargaining Representative

Morio v. Soccer League, 632 F.2d 217 (2d Cir.) (W) (individual employment contracts; also read district court opinion)

Eisenberg v. Wellington Hall Nursing Home, 651 F.2d 902 (3d Cir.) (W) (discharge employees on union bargaining committee)

Squillacote v. Advertisers Mfg., 677 F.2d 544 (7th Cir.) (W) (c & d order against unilateral changes during test 8(a)(5))

Sheeran v. American Commercial Lines, 683 F.2d 970 (6th Cir.) (W) (unilateral rescission of union hiring hall and union access to vessels; reject Collyer-Dubo defense)

Gottfried v. Frankel, 818 F.2d 485 (6th Cir.) (W) (harass key union officials; summons and complaint not necessary for 10j petition)

Szabo v. U.S. Marine, 819 F.2d 714 (7th Cir.) (W) (civil contempt; direct dealing; general bargaining order covers all 8a5 conduct)

Fleischut v. Nixon Detroit Diesel, 859 F.2d 26 (6th Cir.) (W) (imminency of ALJ hearing)

Pascarell v. Vibra Screw, 904 F.2d 874 (3d Cir.) (W) (discharge of employees on bargaining committee; good language on "chill" and delay)[*]

Arlook v. S. Lichtenberg, 952 F.2d 367 (11th Cir. 1992) (W) (harass union stewards and probationary employees; unilateral changes; newly certified union is vulnerable; good language on passage of time)

Schaub v. Detroit Newspaper Agency, 154 F.3d 276 (6th Cir.) (L) (insufficent adverse impact on union's employee support and parties' negotiations)

Overstreet v. Thomas Davis Medical Centers, 9 F.Supp.2d 1162 (D. Ariz.) (W) (post-election unilateral changes)

Silverman v. Major League Baseball Player Relations Committee, Inc., 880 F.Supp. 246 (S.D.N.Y.) (affd. CA2) (W) (unilateral changes in sport's free agency)

LeBus v. Manning, Maxwell & Moore, 218 F.Supp. 702 (W.D. La.) (W) (test of certification; stresses industrial unrest)

Kinney v. Chicago Tribune, 132 LRRM 2795 (N.D. Ill.) (L) (pay unnecessary wages)

Ahearn v. Dunkirk Ice Cream, 133 LRRM 2088 (W.D.N.Y.) (W) (abrogate grievance/arbitration provisions)

Reynolds v. Curley Printing, 247 F.Supp. 317 (M.D. Tenn.) (W) (post-certification 8(a)(3) subcontracting and surface bargaining)

Pascarell v. Orit Corp., 705 F.Supp. 200 (D. N.J.) (affd. C.A.3) (W) (refusal to properly recall ULP strikers)

Bordone v. Talsol Corp., 799 F.Supp. 796 (S.D. Ohio) (W) (discriminatory changes in t & c)

Kobell v. Beverly Health & Rehabilitation Services, 154 LRRM 2947 (W.D. Pa.) (affd. C.A.3) (W) (interim reinstatement of ULP strikers granted)

Dunbar v. Colony Liquor Distributors, 158 LRRM 3124 (N.D.N.Y.) (W) (lawful plant relocation, but unlawful "effects" bargaining)

Aguayo v. South Coast Refuse Corp., 161 LRRM 2867 (C.D. Ca.) (W) (refusal to recall ULP strikers and to comply with terms of agreed-upon labor agreement)

Lineback v. Printpack, Inc., 979 F.Supp. 831 (S.D. Ind.) (W) (interim reinstatement of union president during contract negotiations)

Calatrello v. NSA, a Division of Southwire Co., 164 LRRM 2500 (W.D. Ky.) (W) (bad faith bargaining and refusal to recall ULP strikers; good language for need to protect newly certified union)

6. Minority Union Recognition

Eisenberg v. Hartz Mountain, 519 F.2d 138 (3d Cir.) (L) (seemingly fair contract; time limits on 10(j) decrees)[*]

Kaynard v. Mego, 633 F.2d 1036 (2d Cir.) (W) (accretion; a tussle among the parties)

Hirsch v. Trim Lean Meat, 479 F.Supp. 1351 (D. Del.) (W) (includes Gissel)

Fuchs v. Jet Spray, 560 F.Supp. 1147 (D. Mass.) (affd. C.A.1) (W) (good entrenching analysis)

Zipp v. Dubuque Packing, 112 LRRM 3139 (N.D. Ill.) (W) (premature recognition)

Green v. Senco, 282 F.Supp. 690 (D. Mass.) (W) (Regional Director does not have to litigate entire ULP complaint)

7. Successor Refusal to Recognize and Bargain

Solien v. Merchants Home Delivery, 557 F.2d 622 (8th Cir.) (L) (good language on delay)

Kobell v. Suburban Lines, 731 F.2d 1076 (3d Cir.) (L) (Kallman; small and intimate unit exception; rejects Crain and Mack defense re replacements)[*]

Scott v. El Farra Enterprises, 863 F.2d 670 (9th Cir.) (W) (Kallman; court must defer to Board's choice of remedy)

Asseo v. Centro Medico del Turabo, 900 F.2d 445 (1st Cir.) (W) (failure to hire union steward)[*]

Frye v. Specialty Envelope, Inc., 10 F.3d 1221 (6th Cir.) (W)

Hoffman v. Inn Credible Caterers, Ltd., 247 F.3d 360 (2d Cir. 2001), (W)[*]

Bloedorn v. Francisco Foods, Inc. d/b/a Piggly Wiggly, 276 F.3d 270 (7th Cir. 2001) (W) (Kallman successor) [*]

Squillacote v. U.S. Marine, 116 LRRM 2663 (E.D. Wis.) (W)

Mack v. Air Express, 471 F.Supp. 1119 (N.D. Ga.) (L) (rights of replacements)

Asseo v. El Mundo Corp., 706 F.Supp. 116 (D. P.R.) (W) (Kallman)

Watson v. Moeller Rubber Products, 792 F.Supp. 1459 (N.D. Miss.) (W)

Asseo v. Bultman Enterprises, Inc., 913 F.Supp. 89 (D. P.R.) (W) (Kallman)

Donner v. NRNH, 163 LRRM 2033 (W.D.N.Y. 1999) (W) (Kallman)

Wells v. Brown & Root, Inc., 65 F.Supp.2d 1264 (L) (Kallman)

Dunbar v. Onyx Precision Services, 129 F.Supp.2d 230 (W.D.N.Y.) (W) (8a2 union involved)

8. Conduct During Bargaining Negotiations

Douds v. ILA, 241 F.2d 278 (2d Cir.) (W) (union insisted upon change in historic unit)

McLeod v. General Electric, 366 F.2d 847 (2d Cir.) (L) (employer refusal to meet with union's bargaining committee)

MMM v. Meter, 385 F.2d 265 (8th Cir.) (L) (union bargaining committee; 10(j) order changed status quo)[*]

Rivera-Vega v. ConAgra, Inc., 70 F.3d 153 (1st Cir.), affg. 876 F.Supp. 1350 (D. P.R.), stay denied 879 F.Supp. 165 (W) (denial of financial information; bad faith bargaining; unilateral changes; employer lockout)[*]

Kobell v. United Paperworker Int'l Union, AFl-CIO, 965 F.2d 140l (6th Cir.) (W) (8(b)(3) pooling of contract ratification votes)

Boire v. SAS Ambulance, 108 LRRM 2388 (M.D. Fla.) (affd. C.A.5) (W) (refusal to bargain with 8(a)(3)s on union committee)

Little v. Portage Realty, 73 LRRM 2971 (N.D. Ind.) (W) (bad faith bargaining)

Johansen v. Operating Engineers, 99 LRRM 2852 (C.D. Cal.) (W) (permissive bargaining subject)

Squillacote v. Generac, 304 F.Supp. 435 (E.D. Wis.) (W) (denial of relevant information)

Penello v. U.M.W., 88 F.Supp. 935 (D. D.C.) (W) (remove union's permissive stumbling block)

Hirsch v. Tube Methods, 125 LRRM 2198 (E.D. Pa.) (W) (classic bad faith bargaining)

Silverman v. Reinauer Transportation Cos., 130 LRRM 2505 (S.D.N.Y.) (affd. C.A.2) (W) (employer insisted upon change in historic unit and order required recall of ULP strikers)

Frye v. Pony Express Courier, 148 LRRM 2042

(S.D. Ohio) (L) (refusal to meet at reasonable times)

Kobell v. United Refining Co., 159 LRRM 2762 (W.D. Pa.) (W) (unilateral changes after union's certification, with animus motive)

Fleischut v. Burrows Paper Corp., 162 LRRM 2719 (S.D. Miss.) (W) (bad faith bargaining)

Friend v. District Council of Painters No. 8, 157 LRRM 2753 (N.D. Ca.) (W) (multi-employer unit)

9. Mass Picketing and Violence

Squillacote v. Food Workers, 534 F.2d 735 (7th Cir.) (W) (agency; TRO; civil contempt)[*]

Frye v. District 1199, 996 F.2d 141 (6th Cir.) (W) (good language on irreparable harm; scope of just and proper relief)

Grupp v. Steelworkers, 532 F.Supp. 102 (W.D. Pa.) (W) (joint venture)

Compton v. Puerto Rico Newspaper Guild, 343 F.Supp. 884 (D. P.R.) (W)

Squillacote v. Auto Workers, 384 F.Supp. 1171 (E.D. Wis.) (L) (unremedied 8a5 complaint)

Squillacote v. Food Workers, 390 F.Supp. 1180 (E.D. Wis.) (W) (state suit not bar)

Vincent v. UE, 73 LRRM 2139 (S.D.N.Y.) (W) (blocking ingress)

Clark v. UMWA, 722 F.Supp. 250 (W.D. Va.) (L) (state court decree was effective)

Clark v. UMWA, 714 F.Supp. 791 (W.D. Va.) (W) (state court decree was not effective)

Bloedorn v. Teamsters Local 695, 132 LRRM 3102 (W.D. Wis.) (W) (affidavit of compliance)

10. Notice Requirements for Strike or Picketing (8(d) & 8(g))

McLeod v. Sewer Workers, 292 F.2d 338 (2d Cir.) (W)

McLeod v. CWA, 79 LRRM 2532 (S.D.N.Y.) (W)

Cury v. Trabajadores, 86 F.Supp. 707 (D. P.R.) (W)

Schneid v. UMW, 40 LRRM 2529 (N.D. Ill.) (W)

Blyer v. Local 1814, ILA , 724 F.Supp. 1092 (S.D.N.Y. 1989) (L) ("technical" violation)

11. Refusal to Permit Protected Activity on Property

Eisenberg v. Holland Rantos, 583 F.2d 100 (3d Cir.) (W) (industrial park)

Silverman v. 40-41 Realty Associates, 668 F.2d 678 (2d Cir.) (L) (office building)

12. Union Coercion to Achieve Unlawful Object

Boire v. IBT, 479 F.2d 778 (5th Cir.) (W) (expansion of unit)[*]

D'Amico v. Shipbuilding Workers, 116 LRRM 2508 (D. Md.) (W) (internal union discipline)

Compton v. Carpenters, 220 F.Supp. 280 (D. P.R.) (W)

Evans v. I.T.U., 76 F.Supp. 881 (S.D.Ind.) (W)

Brown v. NMU, 104 F.Supp. 685 (N.D. Cal.) (W) (hiring hall)

Madden v. UMW, 79 F.Supp. 616 (D. D.C.) (W)

Elliott v. Sheet Metal Workers, 42 LRRM 2100 (D. N.M.) (W) (multiemployer bargaining)

Jaffee v. Newspaper and Mail Deliverers, 97 F.Supp. 443 (S.D.N.Y.) (W)

13. Interference with Access to Board Processes

Sharp v. Webco Industries, Inc., 265 F.3d 1085 (10th Cir. 2001) (W) (lawsuit)

Humphrey v. United Credit Bureau, 99 LRRM 3459 (D. Md.) (W) (lawsuit)

Wilson v. Whitehall Packing, 108 LRRM 2165 (W.D. Wis.) (W) (lawsuit)

Hirsch v. Pilgrim Life Insurance Co., 112 LRRM 3147 (E.D. Pa.) (W) (lawsuit)

Szabo v. P*I*E Nationwide, 878 F.2d 207 (7th Cir.) (L) (no chill)[*****]

Zipp v. Caterpillar, Inc., 858 F.Supp. 794 (C.D. Ill.) (L)

14. Segregating Assets

NLRB v. Burnette Castings, 24 LRRM 2354 (6th Cir.) (W) (Section 10(e); bond alternative)

NLRB v. Interstate Equipment, 74 LRRM 2003 (7th Cir.) (W) (Section 10(e))

NLRB v. A.N. Electric Corp., 140 LRRM 2860 (2d Cir.) (W) (Section 10(e))

NLRB v. Horizon Hotel Corp., 159 LRRM 2449 (1st Cir.) (W) (Section 10(e))

Jensen v. Chamtech Service Center, 155 LRRM 2058 (C.D. Ca.) (W) (10j petition based upon backpay specification)[*****]

Aguayo v. Chamtech Service Center, 157 LRRM 2299 (C.D. Ca.) (W) (ex parte TRO protective order granted under 10j and All Writs Act)

Maram v. Alle Arecibo, 110 LRRM 2494 (D. P.R.) (W)

Norton v. New Hope Industries, 119 LRRM 3086 (M.D. La.) (W) (individual's personal assets; duty to provide information)

Kobell v. Menard Fiberglass, 678 F.Supp. 1155 (W.D. Pa.) (W) (includes reinstatement and preferential hiring list)

Schaub v. Brewery Products, 715 F.Supp. 829 (E.D. Mich.)(W) (need only estimate amount of backpay)

Fuchs v. Workroom For Designers, 116 LRRM 2324 (D. Mass.) (W) (appointment of special master with receivership powers)

Model Argument for "Protective Order" or Sequestration of Assets Injunctions Under Section 10(j) [*]

15. Miscellaneous

Eisenberg v. Lenape Products, 781 F.2d 999 (3d Cir.) (L) (Washington Aluminum discharges) (read Becker's dissent); see also discussion in Vibra Screw, 904 F.2d 874 (3d Cir.)

Luster Coate Metallizing, Inc., Case 3-CA-19735, G.C. 10(j) Memorandum dated March 22, 1996 (Washington Aluminum discharges)

Lineback v. Printpack, Inc., 979 F. Supp. 831 (S.D. Ind.)(enjoin prosecution of alleged baseless and retaliatory Section 303 LMRA suit)[*]

Sharp v. Webco Industries, Inc., 265 F.3d 1085 (10th Cir. 2001) (W) (enjoin prosecution of preempted lawsuit)

Hirsch v. Corban Corp., 155 LRRM 2589 (E.D.Pa.) (W) (EAJA)

Kinney v. Federal Security Inc., 272 F.3d 924 (7th Cir. 2001) (Board's resolution of unfair labor practice case moots a 10(j) appeal)

Law Review Articles

1. Paul Weiler, "Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA," 96 Harv. L. Rev. 1769, 1787-1803 (1983)

2. Paul Weiler, "Striking a New Balance: Freedom of Contract and the Prospects for Union Representation," 98 Harv. L. Rev. 351, 354-57 (1984)

3. Catherine Hodgman Helm, "The Practicality of Increasing the Use of NLRA Section 10(j) Injunctions," 7 Ind. Rel. L. J. 599, 603-607 (1985)

4. Randal L. Gainer, "The Case For Quick Relief: Use of Section 10(j) of the Labor Management Relations Act in Discriminatory Discharge Cases," 56 Ind. L. J. 515, 517 n. 13 (1981)

5. Warren H. Chaney, "The Reinstatement Remedy Revisited," 32 Lab. L. J. 357, 363 (1981)

6. Note, "The Propriety of Section 10(j) Bargaining Orders in Gissel Situations," 82 Mich. L. Rev. 112 (1983)

APPENDIX F

DISTRICT COURT MEMORANDA OF POINTS & AUTHORITIES AND APPELLATE COURT BRIEFS BY SECTION 10(j) CATEGORY[1]

[Copies of 10(j) district court memoranda of points and authorities and appellate court briefs may be obtained by contacting the Injunction Litigation Branch. Most of the appellate court briefs are also available in electronic form from the ILB database on the NLRB Intranet.]

[Parentheticals following cases cites exempt from disclosure under Exemption 5, but disclosed at the discretion of the General Counsel]

1. Interference with Organizational Campaign (no majority)

Schaub v. West Michigan Plumbing, 99-2369 (6th) (isolation and discharge of Union supporter very early in organizing campaign)

Silverman v. JRL Food, 99-6189 (2d) (discharge of union supporter; deference to ALJD)

Pye v. Excel Case Ready, 00-1632 (1st) (discharge of union supporters)

Sharp v. Webco Industries, 99-5111 (10th) (pretextual layoff of majority of Union organizing committee; defense of two-part standard)

Scott v. PHC-Elko, 99-16755 (9th) (8(a)(3) and (1) discharge)

McDermott v. St. Vincent Medical Center, 00-56572 (9th) (subcontract bargaining unit in response to Union campaign)

Sharp v. Parents In Community Action, 98-1285 (8th) (8(a)(3) discharge of prominent Union organizer, 8(a)(1) campaign; defense of two-part standard)

2. Interference with Organizational Campaign (majority)

Yerger Trucking, Inc., 4-CA-19810 (3d)(alter Ego, Gissel bargaining order)

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[1] Cases referred to by Board charge number refer to district court memoranda of points and authorities; cases referred to by appellate court docket number refer to appellate briefs.

Dauman Recycling, Inc., 22-CA-18105 (3d)

Moore-Duncan v. Traction Wholesale, 98-1111 (3d) (8(a)(1) and (3) Gissel bargaining order sought after election loss; discharge of leading Union organizer)

Scott v. Stephen Dunn & Associates, 00-15416 (9th) (Gissel; improved wages and working conditions, unit packing)

Bordone v. Electro-Voice, 95-2611 (7th)

Gottfried v. Special Waste Systems, 91-1147 (6th)

Garner v. Macclenny Products, 94-3185 (11th)

3. Subcontracting or Other Change to Avoid Bargaining obligation

Santana Express, Inc., 25-CA-21776 (7th) (8(a)(3) subcontracting and Gissel bargaining order)

LCF, Inc., d/b/a Sprint Corp., 20-CA-26203 (9th Cir. 1994)(8(a)(3) work relocation and single employer)

Hartford Division, Emhart Glass, 34-CA-6704 (2d Cir. 1994)(8(a)(5) subcontracting; no union waiver; request for TRO)

Aguayo v. Quadrtech Corp., 21-CA-34084 (9th Cir. 2000) (8(a)(3) & (5) relocation)

Hirsch v. Dorsey Trailers, 97-7542 (3d) (8(a)(5) work relocation and plant closure; "mothball" order sought)

Sharp v. Oklahoma Fixtures, 92-5244 (10th) (8(a)(3) subcontracting)

Calatrello v. Automatic Sprinkler, 94-4213 (6th) (8(a)(3) subcontracting)

4. Withdrawal of Recognition from Incumbent

Kuhnle Brothers, Inc., 3-CA-19625 (2d Cir. 1996)(bad faith bargaining, reassignment of unit work to outside of unit, withdrawal of recognition)

Bridgestone/Firestone, Inc., 32-CA-16135 (9th Cir. 1998)(tainted withdrawal of recognition)

Research Management Corp., 4-CA-18559 (3d Cir. 1990) (Snow and Sons refusal to be bound by card check; need for interim bargaining order to negotiate over effects of closing of facility)

Bloedorn v. Wire Products, 95-3656 (7th) (assisted decertification campaign, discrimination, withdrawal of recognition based upon tainted, minority petition)

Tremain v. Beverly Farm Foundation, 96-33531 (7th) (withdrawal of recognition after end of certification year)

Hoffman v. Hartford Hospital, 95-6065 (2d) (merger of hospitals)

Malone v. Beaird Industries, 92-4538 (5th) (tainted good faith doubt)

5. Undermining of Bargaining Representative

S. Lichtenberg & Co., 10-CA-24782 (11th Cir. 1990) (8(a)(3) and (5) violations to undermine newly certified union)

Ahearn v. PCI, 00-5059 (6th) (failure to bargain in good faith and unilateral changes during Union's certification year)

Schaub v. Detroit Newspaper Agency, 97-1920 (6th) (refusal to recall unfair labor practice strikers during contract negotiations)

Fleischut v. Burrows Paper, 99-60745 (5th) (bad faith bargaining and unitlateral changes during initial contract negotations; defense of two-part 10(j) standard)

Pascarell v. Consec Security, 97-5275 (3d) (wage restoration necessary for effective contract negotiations; defense of two-part 10(j) standard)

Kobell v. Beverly Health and Rehabilitation Services, 97-3200 & 97-3357 (3d) (coordinated 8(a)(1) campaign; defense of two-part standard; broad, multi-facility cease and desist order sought)

Pascarell v. Vibra Screw, 89-5973 (3d) (discharge of members of union negotiating committee)

Arlook v. Lichtenberg & Co., 91-8162 (11th) (refusal to meet and bargain, unilateral changes and 8(a)(3) conduct directed at union stewards and probationary employees)

6. Minority Union Recognition

(none available at time of printing; call Injunction litigation Branch for subsequent filings)

7. Successor Refusal to Recognize and Bargain

BTNH, Inc., 3-CA-19793 (2d Cir. 1996)(Burns; unit and 2(11) issues; unilateral changes; petition and memo of points)

Hoffman v. Inn Credible Caterers, 00-6235 (2d) (Burns successor; harm to public interest)

Cohen v. Samuel Bent, 00-2411 (1st) (Burns successor, St. Elizabeth theory; rejecting Allentown Mack defense)

Scott v. Catholic Healthcare West South Bay, 00-16338 (9th) (Burns successor; non-conforming health care unit)

Bloedorn v. Francisco Foods d/b/a Piggly Wiggly, 00-1860 (7th) (Kallman/Love's BBQ refusal to hire predecesor employees; interim rescission of unilateral changes)

Frye v. Specialty Envelope, 93-3339 (6th)

8. Conduct during Bargaining Negotiations

ConAgra, Inc., 24-CA-6856 (1st Cir. 1994)(refusal to bargain in good faith, with employer lockout of unit; petition, memo of points, Board opposition to employer motion for stay, in district court and circuit court)

Pascarell v. Control Services, 90-5451 (3d) (refusal to meet at reasonable times)

Rivera-Vega v. ConAgra, 95-1266 (1st) (lockout in support of bad faith bargaining)

Silverman v. Reinauer Transportation, 89-6010 (2d) (insistence upon permissive change in scope of unit)

Kobell v. United Paperworkers, 91-6141 (6th) (8(b)(3) "pooled" contract ratification vote)

9. Mass Picketing and Violence

Frye v. District 1199, 92-6102 (6th) (scope of court's power to grant j&p relief)

Clark v. United Mine Workers, 90-2068, 91-2016 (4th) (union agency; civil contempt)

10. Notice Requirements for Strikes or Picketing Section 8(d) and 8(g)

(none available at time of printing; call Injunction litigation Branch for subsequent filings)

11. Refusal to Permit Protected Activity on Property

Hirsch v. The Electrology Co., 89-1537 (3d) (organizing union's access to private property factory driveway)

12. Union Coercion to Achieve Unlawful Object

Sheet Metal Workers' Local Union No. 22,
Case 22-CB-5953 (3d Cir. 1989)(unlawful union fine)
(petition, memoranda of points and dist court op.)

13. Interference with Access to Board Processes

Sharp v. Webco Industries, 00-5005 (10th Cir. 2000) (preempted state suit against employee charge filing activity)

14. Segregating Assets

Opposition to Motion for Stay of Protective Order Pending Appeal, Fleischut v. Memphis Dinettes, 87-5408 (6th)

15. Miscellaneous

Soctt v. PHC-ELKO, 99-16755 (9th Cir. 2000)
(reinstatement of employee engaged in 8(a)(1) protected concerted activity)

Dauman Recycling, Inc., 22-CA-18105 (3d Cir. 1992)
(opposition to employer stay motion against Gissel bargaining order)

Tennessee Electric Company, 10-CA-24854 (6th Cir. 1991) (memo of points and draft petition dealing with 8(a)(1) lawsuit)

Kingsbury Mini Motors of America, Inc., 3-CA-15824 (2d Cir. 1992)(8(a)(1) denial of access to property which leads to employee's criminal prosecution for trespass; TRO requested)

16. Contempt

Pascarell v. Consec Security, 98-5013 (3d Cir. 1998) (failure to restore court-ordered wage rate)

Clark v. United Mine Workers, 90-2068, 91-2016 (4th) (union agency; civil contempt)

17. Special Motions Pending Appeal or to Amend Judgment

Pye v. Excel Case Ready, 00-1632 (1st Cir.)
(opposition to motion for stay; nip-in-the-bud, 8a3 discharges)

Dunbar v. Landis Plastics, 98-6042 (2d Cir.)[2]
(oppstay; nip-in-the-bud, 8a3 discharges)

Lightner v. Dauman Pallet, 9205529 (3d Cir.)(oppstay; Gissel)

D'Amico v. Townsend Culinary, 98-2523 (4th Cir.)
(oppstay; withdrawal of recognition, unilateral changes)

Bloedorn v. Wire Products, 95-3656 (7th Cir.)
(oppstay; withdrawal of recognition, tainted petition)

Scott v. California Cedar, 00-15095 (9th Cir.)
(oppstay; undermining representative, wage restoration)

Bernstein v. Carter & Sons Freightways,
97-3324 (10th Cir.) (oppstay; Gissel, restoration order)

Arlook v. Lockheed Georgia Employees' Federal Credit Union, 96-8016 (11th Cir.)(oppstay; Burns successor)

[2] The Second Circuit limits briefs in support of or opposition to motions to no more than 10 pages.

APPENDIX G

MODEL "JUST AND PROPER" ARGUMENTS

1. Non-*Gissel* Interim Bargaining Orders Against Employers Under Section 10(j) of the Act

2. *Gissel* Bargaining Orders Against Employers

   Instructions for Briefing *Gissel* 10(j) Cases

   Sample *Gissel* Argument

   Memorandum GC 99-8, Guideline Memorandum Concerning *Gissel*

3. Model Arguments in Support of Interim Reinstatement

4. Model Responses to Claim of Board Delay in Seeking 10(j) Relief

5. Argument to Support Use of Hearsay Evidence in Section 10(j) Proceedings

APPENDIX G-1

NON-GISSEL INTERIM BARGAINING ORDERS AGAINST EMPLOYERS UNDER SECTION l0(j) OF THE ACT

[The following argument should be included in the "just and proper" section of the memorandum of points and authorities submitted to the district court to support a request for an interim bargaining order against an employer in non-Gissel cases. Regional offices should select only the arguments that are relevant to the facts in their 10(j) case. Where lengthy string-cites appear, choose the precedent which will be persuasive in the jurisdiction in which the case will be heard. Sections enclosed in brackets "[]" should be included where appropriate.]

[12 pages redacted, exem. 5, attorney work product, 2, and 7(E)]

APPENDIX G-2

Gissel Bargaining Orders Against Employers

Instructions for Briefing *Gissel* 10(j) Cases

Sample *Gissel* Argument

Memorandum GC 99-8, Guideline Memorandum Concerning *Gissel*

Instructions for Briefing Gissel 10(j) Cases and Sample Argument

[14 pages redacted, exem. 5, attorney work product, 2, and 7(E)]

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 99-8 November 10, 1999

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

FROM: Fred Feinstein, General Counsel

SUBJECT: Guideline Memorandum Concerning Gissel

I. Introduction

In NLRB v. Gissel Packing Co.,[1] the Supreme Court upheld the Board's authority to issue a remedial bargaining order based on union authorization cards from a majority of employees rather than an election. Such relief is appropriate when the employer commits unfair labor practices so serious that it is all but impossible to hold a fair election even with traditional Board remedies. Over the years, some of the circuit courts of appeal considering whether to enforce Board Gissel orders have differed with the Board's approach. In several recent decisions, the Board has explicated its views regarding the factors, including those factors emphasized by the circuit courts, relevant to determining whether a Gissel bargaining order is warranted. In Part II below, we identify and discuss these factors, which the Regions should rely on in determining whether to issue Gissel complaints. In Part III, we discuss recent problems with enforcement of Section 8(a)(1) Gissel cases. In order to develop a response on these issues, Regions are directed to submit to Advice all cases in which they wish to issue complaint seeking a Gissel order based solely on 8(a)(1) violations.

The courts have generally also accepted the propriety of interim Gissel bargaining orders under Section 10(j) of the Act. Where an employer's violations have precluded employees' choice regarding representation through the election process, use of Section 10(j) is particularly appropriate to preserve the effectiveness of the Board's final remedy. Accordingly, I have determined that Regions should consider 10(j) relief in all Gissel complaint cases and should submit each case to the Injunction Litigation

[1] 395 U.S. 575 (1969).

Branch with a recommendation as to whether interim relief should be sought. In Part IV below, we discuss issues, particular to certain circuit courts, which the Regions should take into account in investigating and evaluating the propriety of interim Gissel relief.

II. The Factors Relevant to *Gissel*

A. The Gissel decision

In Gissel, the Supreme Court considered whether the Board had the authority to order an employer to bargain with a non-incumbent union on the basis of a union card majority. The Court recognized that, in some cases, "an employer has committed independent unfair labor practices which have made the holding of a fair election unlikely or which have in fact undermined a union's majority and caused an election to be set aside."[2] Declaring that "a bargaining order is designed as much to remedy past election damage as it is to deter future misconduct,"[3] the Court rejected employer arguments that such a bargaining order would prejudice employees' Section 7 rights. The Court reasoned that "[a]ny effect will be minimal . . . for there 'is every reason for the union to negotiate a contract that will satisfy the majority, for the union will surely realize that it must win the support of the employees, in the face of a hostile employer, in order to survive the threat of a decertification election after a year has passed.'"[4]

The Court identified two situations (now known as category I and category II Gissel cases[5]) in which employer misconduct may warrant the imposition of a card-based bargaining order remedy. Category I cases are those "exceptional" cases involving "outrageous and pervasive unfair labor practices" where the unfair labor practices are of "such a nature that their

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[2] 395 U.S. at 610.

[3] Id. at 612 (footnote omitted).

[4] Id. at 612, n. 33 (citation omitted).

[5] See M.J. Metals Products, Inc., 328 NLRB No. 170, slip op. at 1 (August 10, 1999).

coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had."[6] Category II cases are "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes."[7] In the latter cases, the Court held, the Board

> can properly take into consideration the extensiveness of an employer's unfair [labor] practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue. . ."[8]

B. The Board's Application of Gissel

1. Category I Cases

The category I Gissel case is rare. As stated above, it is confined to cases where an employer's unfair labor practices are "outrageous" and "pervasive" and have made the holding of a fair election impossible even with traditional Board remedies. The Board has found Category I misconduct where an employer, in response to a union request for recognition, discharged all, or a substantial portion, of the entire bargaining unit and made it clear to employees that the reason for the discharges was the employees' support for the union;[9] or where the employer shut down the unit and

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[6] Gissel, 395 U.S. at 613-614.

[7] Id. at 614.

[8] Id. at 614-615.

[9] Cassis Management Corp., 323 NLRB 456, 459 (1997), supplemented by 324 NLRB 324 (1997), enfd. mem. 152 F.3d 917 (2d Cir. 1998), cert. denied 160 LRRM 2192 (1998)(discharge of entire unit); U.S.A. Polymer Corp., 328 NLRB No. 177 (August 24, 1999) numerous independent violations of Section 8(a)(1), unlawful layoff of 45% of the unit employees, including 9 of the 10 members of the employees' organizing committee and retaliatory conduct against employees who

discharged the employees in retaliation for their union activities.[10]

Although the practical impact of a designation as Category I or II may seem minimal,[11] there may be some benefit to litigating a Gissel case as a category I case when the level of employer misconduct appears to be extraordinarily egregious. In this regard, the D.C. Circuit has held that the Board's decision to issue a Gissel bargaining order in Category I cases is entitled to greater deference.[12]

2. Category II cases

In Category II cases, which comprise the vast majority of Gissel cases, the Board determines that the employer misconduct, though not as extraordinary or pervasive as in a Category I case, is sufficiently serious that it will have a tendency to undermine the union's majority strength and make a fair election unlikely. As the Supreme Court instructed, the Board may "take into consideration the extensiveness of an employer's unfair [labor] practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future."[13] A review of recent Board Gissel cases demonstrates that the Board examines a number of criteria relevant to these issues in determining whether to impose a Gissel bargaining order remedy:

- the presence of "hallmark" violations

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testified on behalf of the General Counsel at the unfair labor practice hearing).

[10] Allied General Services, 329 NLRB No. 58 (September 30, 1999).

[11] At one time the Board interpreted the Gissel decision as authorizing the Board to issue bargaining orders in response to category I level violations even in the absence of a prior union card majority. See United Dairy Farmers Cooperative Assn, 257 NLRB 772 (1981) and Conair Corp., 261 NLRB 1189 (1982). The Board, however, abandoned this approach in Gourmet Foods, 270 NLRB 578 (1984).

[12] See Power, Inc. v. NLRB, 40 F.3d 409, 422 (D.C. Cir. 1994).

[13] Gissel, 395 U.S. at 614.

- the number of employees affected by the violation -- either directly or by dissemination of knowledge of their occurrence among the workforce
- the size of the bargaining unit
- the identity of the perpetrator of the unfair labor practice
- the timing of the unfair labor practices
- direct evidence of impact of the violations on the union's majority
- the likelihood the violations will recur
- the change in circumstances after the violations

These factors are discussed in more detail below. When investigating a charge containing a potential Gissel allegation, the Regions should adduce evidence concerning, and evaluate the warrant for Gissel in light of, these factors.[14] Likewise in any litigation of a Gissel case, the record should include evidence and argument demonstrating that a Gissel remedy is appropriate under these factors.[15]

a. Presence of "hallmark" violations

Certain employer violations are consistently regarded by the Board and the courts as highly coercive of employee Section 7 rights. These violations, sometimes referred to as "hallmark" violations, will support the issuance of a Gissel bargaining order unless some significant mitigating circumstance exists.[16] Hallmark violations include plant closure[17]

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[14] Of course, the Region must also determine whether the union obtained a valid card majority.

[15] Summary judgment motions containing a Gissel allegation should conform to the requirements set forth in Allied General Services, 329 NLRB No. 58, slip op. at 3 (September 30, 1999).

[16] See, e.g., NLRB v. Jamaica Towing, Inc., 632 F.2d 208, 212-13 (2d Cir. 1980); Garvey Marine, Inc., 328 NLRB No. 147, slip op. at 4 (July 27, 1999).

and threats thereof,[18] unlawful discharge of union adherents,[19] threats of job loss[20] or the granting of significant benefits to employees.[21] The gravity of these types of violations makes them likely to have "a lasting inhibitive effect on a substantial percentage

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[17] NLRB v. Jamaica Towing, 632 F.2d at 212, citing, inter alia, Frito-Lay, Inc., 232 NLRB 753, 755 (1977), enf'd as modified, 585 F.2d 62 (3d Cir. 1978).

[18] A threat of plant closure "is the one serious threat of economic disadvantage which is wholly beyond the influence of the union or the control of the employees." NLRB v. Jamaica Towing, 632 F.2d at 213. Accord: Indiana Cal-Pro, Inc. v. NLRB, 863 F.2d 1292, 1301-1302 (6th Cir. 1988) and the cases cited therein. Indeed, in Gissel, the Supreme Court noted that threats of plant closure are demonstrably "more effective to destroy election conditions for a longer period of time than others." 395 U.S. at 611, n. 31. Thus, repeated plant closure threats--alone--were held to warrant a remedial bargaining order in one of the cases comprising the Gissel decision. See NLRB v. The Sinclair Glass Co., 397 F.2d 157 (1st Cir. 1968), affd. in Gissel, 395 U.S. at 615.

[19] The discharge of union activists is conduct which "'goes to the very heart of the Act' and is not likely to be forgotten. . . . Such action can only serve to reinforce employees' fear that they will lose employment if they persist in union activity.'" M.J. Metal Products, Inc., 328 NLRB No. 170, slip op. at 2, citing NLRB v. Entwistle Mfg. Co., 120 F.2d 532, 536 (4th Cir. 1941). See also NLRB v. Davis, 642 F.2d 350, 354 (9th Cir. 1981)(employees are unlikely "to miss the point that backpay and offers of reinstatement made some 9 to 11 months after the discharge does not necessarily compensate for the financial hardship and emotional and mental anguish apt to be experienced during an interim period of unemployment.").

[20] Garney Morris, Inc., 313 NLRB 101, 103 (1993), enf'd mem. 47 F.3d 1161 (3d Cir. 1995).

[21] The Board has noted that unlawfully granted benefits "are particularly lasting in their effect on employees and difficult to remedy by traditional means . . . not only because of their significance to the employees, but also because the Board's traditional remedies do not require the Respondent to withdraw the benefits from the employees." America's Best Quality Coatings Corp., 313 NLRB 470, 472 (1993), enfd. 44 F.3d 516 (7th Cir.), cert. denied 515 U.S. 1158 (1995).

of the work force,"[22] thus precluding a fair election even with traditional Board remedies. However, as further discussed in Part III, below, at least two circuit courts have questioned the issuance of Gissel bargaining orders based solely on the granting of benefits.

As detailed below, however, even when "hallmark" violations occur, other factors, such as the proportion of the unit directly affected or informed about the violation, or the size of the unit must also be considered. Moreover, steps that ameliorate the impact of the violations may diminish the need for Gissel relief.[23]

b. The number of employees affected by the violations -- either directly or by dissemination of knowledge of their occurrence among the workforce

Central to determining whether violations warrant Gissel relief are the number of employees directly affected by the violations. . . .[and] the extent of dissemination among employees."[24] Where a substantial percentage of employees in the bargaining unit is directly affected by an employer's serious unfair labor practices, the possibility of holding a fair election decreases.[25] Thus, discriminatory mass layoffs or discharges of most, if not all, employees in a unit are

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[22] NLRB v. Jamaica Towing, Inc., 632 F.2d at 213.

[23] Masterform Tool Co., Cylinder Components, Inc., 327 NLRB No. 185, slip op. at 3 (March 30, 1999)(Gissel remedy denied where certain 8(a)(1) violations were dismissed and employer recalled 6 of 7 unlawfully laid off employees after three months).

[24] Garvey Marine, Inc., 328 NLRB No. 147, slip op. at 3.

[25] See, e.g., M.J. Metal Products, Inc., 328 NLRB No. 170, slip op. at 1 (noting that 8(a)(3) discharges constituted more than 25% of the unit); Bonham Heating & Air Conditioning, Inc., 328 NLRB No. 61, slip op. at 2 (May 19, 1999)(noting that 4 of 7 unit employees, or 40%, were unlawfully laid off); General Fabrications Corp., 328 NLRB No. 166, slip op. at 2 (August 11, 1999)(noting that 7 of 31 unit employees suffered unlawful discrimination).

inherently pervasive.[26] So too are unlawful across-the-board wage increases or other grants of benefits and unlawful threats or promises of benefits made at captive audience meetings.[27] Where only a small portion of a unit is affected, however, even hallmark discharges may be insufficient to warrant Gissel relief.[28]

Another way of examining pervasiveness is to consider how widely disseminated is knowledge of the violations among the work force.[29] Even discrimination directed toward one employee, if widely disseminated, may support the need for a Gissel bargaining order.[30] The manner of carrying out unlawful discrimination may also indicate a greater likelihood that the violation will have an inhibitory effect on other unit employees. Thus, where an employer overtly demonstrates its retaliatory motive for unlawful discrimination, the Board can conclude that the inhibitory impact of such violations is accentuated.[31] Similarly, where an

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[26] See, e.g., Allied General Services, Inc., 329 NLRB No. 58, slip op. at 3; U.S.A. Polymer Corp., 328 NLRB No. 177, slip op. at 1; Cassis Management Corp., 323 NLRB at 459 (1997).

[27] See, e.g., Skyline Distributors, 319 NLRB 270, 278-279 (1995), enf. denied in rel. part 99 F.3d 403, 410-412 (D.C. Cir. 1996) (grant of benefit); Complete Carrier Services, Inc., 325 NLRB No. 96, ALJD slip op. at 3 and 5 (1998)(promise and grant of benefit, threat of plant closure); Gerig's Dump Trucking, Inc., 320 NLRB 1017 (1996), enfd. 137 F.3d 936 (7th Cir. 1998)(grant of benefits). But as to the propriety of relying solely on Section 8(a)(1) violations for Gissel relief, see discussion Part 0, infra.

[28] Philips Industries, Inc., 295 NLRB 717, 718-719 (1989)(large size of unit diluted impact of unlawful discharges); Pyramid Management Group, Inc., 318 NLRB 607, 609 (1995) (discrimination affected only small portion of unit).

[29] See Holly Farms Corp., 311 NLRB 273, 282 (1993), enfd. 48 F.3d 1360 (4th Cir. 1995), affd. on other grounds 517 U.S. 392 (1996).

[30] See, e.g., Traction Wholesale Center Co., 328 NLRB No. 148, slip op. at 21 (July 28, 1999); Coil-ACC, Inc., 262 NLRB 76, 83 (1982), enfd. 712 F.2d 1074 (6th Cir. 1983).

[31] See, e.g., U.S.A. Polymer Corp., 328 NLRB No. 177, slip op. at 2.

employer carries out discrimination in a public manner, i.e., where it clearly appears that the discrimination is intended to "send a message" to other employees, the Board may conclude that the violation was widely disseminated to other employees.[32]

In contrast, the Board will not issue a Gissel bargaining order if the evidence shows that a substantial portion of the bargaining unit was unaware of the employer's unfair labor practices. This situation may arise in the case of threats of discharge or plant closure directed to just a small number of employees,[33] or where the employees were not aware that the discriminatee was a leading union activist.[34]

c. Size of the bargaining unit

The Board will also consider the size of the unit to determine whether an employer's serious misconduct had a pervasive effect on the workforce which precludes the effective use of traditional remedies. The Board assumes that employer unfair labor practices will have a more coercive effect on a smaller unit of employees: widespread knowledge of the violation is more likely and only a few employees can make the difference between a union's majority and minority support.[35] In

[32] See Garvey Marine, Inc., 328 NLRB No. 147, slip op. at 2 and 5 ("public and dramatic discharge" of discriminatee); J.L.M. Inc. d/b/a Sheraton Hotel Waterbury, 312 NLRB 304, 305 (1993), enf. as mod. 31 F.3d 79 (2d Cir. 1994)(employer posts notice at facility that discriminatee would never work for the employer again).

[33] See Blue Grass Industries, 287 NLRB 274, 276 (1987) (bargaining order denied where no evidence that threats of plant closure were widely disseminated among employees in the unit).

[34] See Munro Enterprises, Inc., 210 NLRB 403 (1974).

[35] See Garvey Marine, Inc., 328 NLRB No. 147, slip op. at 5 (gravity of impact of violations heightened in relatively small unit of 25 employees); Traction Wholesale 328 NLRB No. 148, slip op. at 21 (same, 20 person unit); NLRB v. Berger Transfer & Storage Co., 678 F.2d 679, 694 (7th Cir. 1982)(impact of unfair labor practices increased in "small unit" of 42 employees); NLRB v. Bighorn Beverage, 614 F.2d 1238, 1243 (9th Cir. 1980)("probable impact of unfair labor practices is increased when a small bargaining unit . . is involved and increases the need for a bargaining order").

contrast, the Board may deny a Gissel in a large unit, even in the face of "hallmark" unfair labor practices.[36]

d. Identity of the perpetrator of the unfair labor practice

The Board will also consider the management level of the perpetrators of the unfair labor practices in evaluating the need for a Gissel bargaining order. The Board has stated that "[t]he severity of the misconduct is compounded by the involvement of high-ranking officials."[37] The Board has observed that "[w]hen the antiunion message is so clearly communicated by the words and deeds of the highest levels of management, it is highly coercive and unlikely to be forgotten."[38]

This is not to say that the Board will deny a Gissel bargaining order when the unfair labor practices are committed only by first-line supervisors. In this regard, the Board has noted that "the words and actions of immediate supervisors may in some circumstances leave the strongest impression."[39]

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[36] See Philips Industries, 295 NLRB 717, 718-719 (1989) ("the effect of violations is more diluted and more easily dissipated in a larger unit" of 90 employees); Beverly California Corp., 326 NLRB No. 30, slip op. at 4 (1998) (Gissel not warranted where unit was "sizeable" (92-103 employees) and violations generally did not affect a significant number of employees).

[37] M.J. Metal Products, Inc., 328 NLRB No. 170, slip op. at 2, citing Consec Security, 325 NLRB No. 71, slip op. at 2 (1998). Accord: NLRB v. Q-1 Motor Express, Inc., 25 F.3d 473, 481 (7th Cir. 1994).

[38] M.J. Metal Products, Inc., 328 NLRB No. 170, slip op. at 2. See also id. at n. 9 and cases cited therein; Bakers of Paris, 288 NLRB 991, 992 (1988), enfd. 929 F.2d 1427 (9th Cir. 1991)("The effect of unfair labor practices is increased when the unlawful conduct is committed by top management officials, who are readily perceived as representing company policy and in positions to carry out their threats . . . .").

[39] Garvey Marine, Inc., 328 NLRB No. 147, slip op. at 4. See also C & T Manufacturing Co., 233 NLRB 1430 (1977) ("Threats from a so-called first-line supervisor, accompanied by use of the names of company officials . . . are as coercive upon the employees as if made by the company officials themselves . . . .").

e. The timing of the unfair labor practices

The Board often highlights the timing of the unfair labor practices to justify the imposition of a Gissel bargaining order. An employer's swift reaction to union activity is an indication of the coercive effect of unlawful conduct and the effect of unfair labor practices is increased when the unlawful conduct begins "on the Employer's acquiring knowledge of the advent of the Union. . . ."[40] Similarly, an employer's continued misconduct after the holding of a representation election will further diminish the effectiveness of traditional remedies.[41]

f. Direct evidence of impact of the violations on the union's majority

A Gissel remedy may also be supported if the record reveals actual damage to the union's card majority such as a discrepancy between the number of card signers and the number of votes cast for the union in an election.[42] Other evidence of actual loss includes employee revocation of union cards or a marked fall-off of employee participation in union activities such as attendance at union meetings, distribution of literature, wearing union paraphernalia.

On the other hand, the Board has also held that traditional remedies may be insufficient to correct an

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[40] Bakers of Paris, 288 NLRB at 992. See also M.J. Metal Products, 328 NLRB No. 170, slip op. at 2; State Materials, Inc., 328 NLRB No. 184, slip op. at 1 (August 31, 1999)(unfair labor practices began immediately after union organizing campaign commenced); Joy Recovery Technology Corp., 320 NLRB 356, 368 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998)(employer's "prompt" response); America's Best Quality Coatings Corp., 313 NLRB 470, 472 (1993), enf'd. 44 F.3d 516 (7th Cir.), cert. denied 515 U.S. 1158 (1995) (impact magnified by the fact that it occurred on the day after the union demanded recognition).

[41] General Fabrications Corp., 328 NLRB No. 166, slip op. at 2, citing Garney Morris, Inc., 313 NLRB 101, 103 (1993), enfd. mem. 47 F.3d 1161 (3d Cir. 1995).

[42] See J.L.M., Inc., 312 NLRB 304, 305 (1993), enf. denied on other grounds, 31 F.3d 79 (2d Cir. 1994)("clear dissipation of union support" revealed by the stark drop from card majority of 128 to only 62 votes in election).

employer's violations even where a union subsequently obtains a card majority[43] or even where the union might ultimately be certified in an unresolved Board election.[44] Regions should be aware, however, that this view is not universally accepted by the courts of appeals (see discussion at 0 below).

g. The likelihood the violations will recur

The Gissel determination turns not only on the extensiveness of the past violations but also the likelihood of their recurrence in the future.[45] The Board has held that post-election violations evidence a strong likelihood that unlawful conduct will recur in the event another organizing effort occurs in connection with a Board-ordered re-run election.[46] Moreover, the violations may themselves demonstrate the tenacity of an employer's commitment to thwart the union and permit the inference that violations are likely to recur.[47]

h. Change in circumstances after the violations

Gissel respondents typically move the Board to consider evidence of a change in circumstances since the administrative hearing which, they argue, would support the denial of a bargaining order. The change in circumstances which they believe should obviate the need for a Gissel bargaining order includes the passage of time since the violations occurred and the turnover

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[43] See discussion and cases cited in Weldun International, 321 NLRB 733, 735-736 (1996), enf. denied in rel. part 165 F.3d 28, 1998 WL 681252 (6th Cir. 1998)(unpublished decision).

[44] See, General Fabrications Corp., 328 NLRB No. 166, slip op. at 3, n. 17 (and cases cited therein).

[45] Id., slip op. at 1.

[46] Id., slip op. at 2; Bonham Heating & Air Conditioning, Inc., 328 NLRB No. 61, slip op. at 3.

[47] Bonham Heating & Air Conditioning, Inc., id., slip op. at 3 ("the depth of the Respondent's disregard for employee rights is evidenced by the extreme measures it took to defeat the employees' organizational efforts").

of employees or management.[48] The Board generally denies respondents' motions to reopen the record to consider such evidence.[49] However, while denying the motion, the Board generally discusses the evidence as proffered and provides a full discussion as to whether such changes would mitigate the need for a Gissel bargaining order.[50]

Resort to 10(j) proceedings in Gissel cases, as discussed in Part 0 below, may minimize the delay that permits changed circumstances to become an issue in Gissel cases. However, in those cases where the issue is raised, the Regions must be prepared to argue, in rejecting a respondent's offer of proof, why the evidence offered would not mitigate the need for a Gissel bargaining order.

III. Gissel and Section 8(a)(1) violations

Gissel cases that involve only allegations of Section 8(a)(1) present a unique problem and should, henceforth, be submitted to Advice on whether to issue a Gissel complaint. These cases generally involve either threats of plant closure, or promises or grants of benefits, or a combination of both. Historically, the Board, with court approval, has considered these violations of the "hallmark" variety which, even in the absence of Section 8(a)(3) misconduct, may be sufficient to warrant the need for a Gissel bargaining order.[51] However, the viability of these 8(a)(1)

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[48] The courts are almost unanimous in requiring that the Board consider the relevance of changed circumstances. See Flamingo Hilton-Laughlin v. NLRB, 148 F.3d 1166, 1170-1172 and cases cited at n. 4 (D.C. Cir. 1998). The Ninth Circuit is the only circuit which does not require the Board to consider post-hearing changed circumstances. See NLRB v. Bakers of Paris, 929 F.2d 1427, 1448 (9th Cir. 1991).

[49] See Garvey Marine, Inc., 328 NLRB No. 147, slip op. at 5 and 7)(employee turnover and passage of time, citing Salvation Army Residence, 293 NLRB 944, 945 (1989), enfd. mem. 923 F.2d 846 (2d Cir. 1990)).

[50] See, e.g., Garvey Marine, Inc., 328 NLRB No. 147, slip op. at 5-7 and fn. 14; State Materials, 328 NLRB No. 184, slip op. at 1-2.

[51] See NLRB v. So-Lo Foods, Inc., 985 F.2d 123, 125-126 (4th Cir. 1992)(Gissel bargaining order appropriate where employer accompanied grant of benefits with, inter alia,

Gissels has become less certain in recent years, as several of the courts of appeals have not accepted the Board's view of these violations as "hallmark" and declined to enforce the Board's decisions.

For instance, the Sixth and D.C. Circuits have questioned the notion that an unlawful grant of benefits is a "hallmark" violation which may justify the imposition of a Gissel bargaining order. In DTR Industries, Inc.,[52] the Sixth Circuit indicated that it does not consider an unlawful wage increase to be a hallmark violation. And, in Skyline Distributors, the D.C. Circuit stated that there was "almost no judicial authority supporting a Gissel bargaining order based solely on the grant of economic benefits."[53]

In addition, in several cases in which the Board relied on unlawful threats of plant closure to support a Gissel order, the Board failed to obtain enforcement of the Gissel order because the courts disagreed that the employers' statements were unlawful threats, finding them instead to be protected speech under Section 8(c) of the Act.[54]

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threats of plant closure); Indiana Cal-Pro, Inc. v. NLRB, 863 F.2d 1292 (6th Cir. 1988)(threats of plant closure with minor 8(a)(1)'s); NLRB v. Ely's Foods, 656 F.2d 290 (8th Cir. 1981)(threats of closure and promise of wage increase); and NLRB v. Dadco Fashions, 632 F.2d 493 (5th Cir. 1980) (threats of plant closure and other 8(a)(1)'s). See also Tower Records, 182 NLRB 382, 387 (1970), enfd. mem. 79 LRRM 2736 (9th Cir. 1972)(Gissel order based on wage increase: "It is difficult to conceive of conduct more likely to convince employees that with an important part of what they were seeking in hand union representation might no longer be needed.").

[52] 39 F.3d 106, 115 (6th Cir. 1994).

[53] Skyline Distributors v. NLRB, 99 F.3d 403, 410 (D.C. Cir. 1996). Apart from the court's refusal to uphold the Gissel bargaining order, Judge Edwards, writing for the majority, expressed profound disagreement with the Supreme Court's determination that the grant of a wage increase may constitute an unfair labor practice. See, id. at 408-409, discussing NLRB v. Exchange Parts, Co., 375 U.S. 405 (1964).

[54] See Be-Lo Stores v. NLRB, 126 F.3d 268, 285-286 (4th Cir. 1997); Kinney Drugs, Inc., 74 F.3d 1419, 1427-1428 and 1429 (2d Cir. 1996); DTR Industries, Inc. v. NLRB, 39 F.3d at

In at least one recent case, the Board issued a Gissel bargaining order based only on Section 8(a)(1) threats of plant closure and unlawful grants of benefits.[55] The Board has yet to fully address the implications of these decisions, however. In order to develop a coordinated response to the positions taken by the courts, these cases should be submitted for advice on the merits of whether to issue a Gissel complaint.

IV. Interim *Gissel* Orders under Section 10(j)

A. The Effectiveness of Gissel 10(j)s

From FY 1990 through FY 1998, the Board issued decisions in 119 ULP cases involving a request for a Gissel bargaining order. In a comparable nine year period, however, the Board sought a Section 10(j) interim Gissel bargaining order in only 68 cases. Thus, Regions have issued and litigated dozens of Gissel unfair labor practice complaints without the benefit of parallel 10(j) proceedings.

Those benefits can be substantial. In 69% of the 68 10(j) cases (47 out of 68 cases), the injunction case was resolved favorably, either through settlement (28 cases) or a favorable decision by a district court (19 cases).[56] Further, in only two of the favorably resolved 10(j) cases did the underlying ULP case go before a circuit court for Section 10(e)-10(f) enforcement of the Board's order.[57] Thus, in many cases,

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114; and Crown Cork & Seal Co. v. NLRB, 36 F.3d 1130, 1133-1136 (D.C. Cir. 1994).

[55] See Complete Carrier Services, Inc., 325 NLRB No. 96 (1998)(Gissel bargaining order based on promise and grant of wage increase and threats of plant closure; no 8(a)(3) discharges or layoffs). See, also Wallace Int'l, 328 NLRB No. 3 (April 12, 1999)(threats of plant closure and promises of wage increases are "likely to have a pervasive and lasting deleterious effect on the employees' exercise of their Section 7 rights," and Board would "normally consider issuing a Gissel bargaining order in these circumstances," but denies Gissel based on "unjustified delay" in deciding the case.

[56] The 19 wins were 48% of the Gissel 10(j) cases litigated to a court decision in this period.

[57] The Board was successful before the courts in both those cases.

with 10(j) relief, the entire underlying labor dispute can be resolved short of the full litigation through circuit court enforcement of a final Board order.

In contrast, absent 10(j) relief, enforcement of a Gissel bargaining obligation is often delayed for several years as the case is litigated before the Board and circuit courts. During that time, "the union's position in the plant may have already deteriorated to such a degree that effective representation is no longer possible."[58] Legal commentators have noted that an ultimate Gissel bargaining order issued by the Board often does not produce a viable and enduring bargaining relationship.[59] Lengthy enforcement litigation also leaves the Board's Gissel order vulnerable to an employer's passage of time and changed circumstances defenses.[60] Thus, it appears that the most effective and successful vehicle for gaining Gissel relief includes petitioning a district court for an interim bargaining order under Section 10(j) soon after an administrative complaint issues.[61]

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[58] Seeler v. Trading Port, Inc., 517 F.2d 33, 37-38 (2d Cir. 1975).

[59] See Weiler, Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA, 96 Harv. L. Rev. 1769, 1795 (1993); see also Bethel, The Failure of Gissel Bargaining Orders, 14 Hofstra Lab. L.J. 423 (1997).

[60] Under the Board's Rules and Regulations, Section 102.94(a), whenever a district court grants an injunction under Section 10(j), the Board obligates itself to expedite the underlying unfair labor practice proceeding. Such expedition may further limit the development of changed circumstances in the administrative case.

[61] Such relief preserves the Board's ability to effectively remedy the violations either in the form of a remedial bargaining order or an election. See Seeler v. Trading Port, Inc., 517 F.2d at 38. In one instance involving a decertification petition rather than an initial representation petition, the Board's final order was a re-run election rather than a Gissel-type bargaining order where the status quo had previously been restored through the grant of an interim bargaining order under Section 10(j). See Eby-Brown Co. L.P., 328 NLRB No. 75, slip op. at 3-4 (May 26, 1999).

Accordingly, whenever a Region is investigating the propriety of issuing a Gissel complaint, it should also investigate and consider the propriety of seeking a 10(j) Gissel order. Any case in which a Region issues a Gissel complaint should be submitted to the Injunction Litigation Branch, Division of Advice, with a recommendation regarding Section 10(j) Gissel relief.[62]

In evaluating the propriety of 10(j) Gissel relief, the Regions should consider not only the criteria discussed above relevant to the issuance of a Gissel complaint but should also be mindful of the treatment accorded Gissel bargaining order remedies by the circuit court in which the 10(j) case would be litigated. Issues specific to the circuit courts are discussed below.

B. Circuit Court Considerations

1. Criticism of the Board's failure to articulate the need for a Gissel bargaining order

The Second, Fourth, Sixth and D.C. Circuits have expressed dissatisfaction with the level of the Board's discussion and analysis of the need for a Gissel order in lieu of traditional non-bargaining order remedies.[63] Thus, in evaluating and litigating a Gissel 10(j) case, the Regions should consider the evidence relevant to the Gissel factors discussed in Part II, above, and explain how the evidence supports the need for a Gissel bargaining order.

In particular, these courts criticize the Board for failing to consider or explicate why traditional remedies would not suffice to ensure a fair election.[64]

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[62] The Region's submission may recommend against 10(j) proceedings. Of course, if a case poses a close issue on the merits of the Gissel bargaining order remedy, the Region may also submit the case to the Division of Advice on the merit issue.

[63] See, e.g., Harpercollins San Francisco v. NLRB, 79 F.3d 1324, 1333 (2d Cir. 1996); Be-Lo Stores v. NLRB, 126 F.3d 268, 282 (4th Cir. 1997); NLRB v. Taylor Machine Products, Inc., 136 F.3d 507, 520 (6th Cir. 1998); Flamingo Hilton-Laughlin v. NLRB, 148 F.3d 1166, 1173 (D.C. Cir. 1998).

[64] See cases cited in preceding footnote.

The Regions should therefore specifically explain why traditional Board remedies will not suffice to remedy an employer's serious and pervasive unfair labor practices. In this regard, the Regions may focus on the particular nature of the violations, or the circumstances in which they were committed, to demonstrate why traditional remedies will not suffice to allow the Board to conduct a free and fair election untainted by the effects of the employer's unfair labor practices.

2. Requiring proof of a "causal connection"

The Sixth and Fourth Circuits have suggested the necessity in Gissel cases for proof of a "causal connection" between the unfair labor practices and the inability to hold a fair election.[65] Thus, in M.P.C. Plating, Inc. v. NLRB, the Sixth Circuit held that, to justify a Gissel bargaining order, the Board "must make factual findings and must support its conclusion that there is a causal connection between the unfair labor practices and the probability that no fair election could be held."[66]

Although this requirement is arguably inconsistent with the test as enunciated in Gissel, which spoke of violations that "have the tendency to undermine majority strength and impede the election processes,"[67] it is nevertheless binding on district courts which sit in these circuits. In our view, the type of evidence required to meet this standard is akin to "impact" evidence adduced in typical 10(j) proceedings. Thus, in order to demonstrate that an interim Gissel bargaining order under Section 10(j) is "just and proper" and necessary to prevent "irreparable harm," Regions can adduce evidence to prove the adverse effects of the unfair labor practices on employee

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[65] See M.P.C. Plating, Inc. v. NLRB, 912 F.2d 883, 888 (6th Cir. 1990); NLRB v. Taylor Machine Products, Inc., 136 F.3d at 519; and Be-Lo Stores v. NLRB, 126 F.3d at 282. But, in the Fourth Circuit compare NLRB v. CWI of Maryland, Inc., 127 F.3d 319, 334 (4th Cir. 1997), where the court upheld the bargaining order and made no reference to the requirement of a causal connection.

[66] 912 F.2d at 888.

[67] 395 U.S. at 614 (emphasis added).

support for the union, including, where available, the actual loss of majority support.[68] Therefore, where such evidence is available, the Regions should continue to demonstrate the actual adverse impact of the violations upon the union's majority support in both the ULP proceeding and the 10(j) litigation.

3. Whether a union's success in obtaining or holding employee support after an employer's unfair labor practices negates the need for a Gissel bargaining order

Some courts have upheld the Board's view that traditional remedies may be insufficient to correct an employer's violations even where a union subsequently obtains a card majority[69] or even wins a representation election.[70] These courts have relied upon the egregiousness of the unfair labor practices, the employer's continued misconduct, the effect of cumulative misconduct and the avoidance of further delay from ordering a rerun election instead of an immediate bargaining order.[71] In contrast, the Fourth, Sixth and Eighth circuits have held that a union's continued success was proof that a fair election could be held.[72] The Regions should continue to adhere to the

[68] See, e.g., Seeler v. The Trading Port, Inc., 517 F.2d at 37-38. See also Part 0, supra.

[69] See Davis Supermarkets, Inc. v. NLRB, 2 F.3d 1162, 1175 (D.C. Cir. 1993), discussing United Oil Mfg. Co., Inc. v. NLRB, 672 F.2d at 1212 and NLRB v. Permanent Label Corp., 657 F.2d 512, 519 (3d Cir. 1981)(en banc), cert. denied 455 U.S. 940 (1982).

[70] See Power, Inc. v. NLRB, 40 F.3d 409, 423 (D.C. Cir. 1994).

[71] See, e.g., Power, Inc. v. NLRB, id.

[72] See NLRB v. Weldun Int'l, Inc., 165 F.3d 28, 1998 WL 681252 (6th Cir. 1998)(unpublished order)(denying enforcement of Gissel bargaining order based, in part, on union's obtaining additional signed authorization cards after an unlawful layoff); NLRB v. Appletree Chevrolet, Inc., 608 F.2d 988, 1000-1001 (4th Cir. 1979)(where union received "substantial majority" of unchallenged votes cast in election, no reasonable basis for finding that employer's misconduct made a fair election unlikely); and Arbie Minerals Feed Co. v. NLRB, 438 F.2d 940, 945 (8th Cir. 1971)(declining to enforce Gissel bargaining order where

Board's view when issuing Gissel complaints which may ultimately be litigated in these courts.[73] However, when evaluating their Gissel cases for the propriety of seeking 10(j) relief in any district court which sits in the Fourth, Sixth or Eighth circuit, the Regions should consider this issue and address it in their 10(j) memorandum.

IV. Conclusion

Any questions regarding the implementation of this memorandum should be directed to the Division of Advice; questions regarding issuance of a complaint should be addressed to the Regional Advice Branch; questions regarding Section 10(j) Gissels should be addressed to the Injunction Litigation Branch.

/s/
F. F.

cc: NLRBU
Release to the Public

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June 2001

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union obtained 11 of its 14 authorization cards after most of the employer's unfair labor practices).

[73] See discussion, infra., at Part II.B.2.f.

APPENDIX G-3

Model Arguments in Support of Interim Reinstatement

[The following arguments can be made in 10(j) cases where the Region is seeking interim reinstatement of alleged discriminatees. The Regions should use arguments made to the Board and any others that are appropriate, [2 lines redacted, exem. 5, attorney work product, 2 and 7(E)]. Where string cites appear, Regions should choose only those that will be persuasive in their jurisdictions. Passages in bold type within brackets [_] are either internal operating instructions or inserts to be used if applicable to a particular case.]

[19 pages redacted, exem. 5, attorney work product, 2 and 7(E)]

APPENDIX G-4

Model Responses to Claim of Board Delay in Seeking 10(j) Relief

[2 pages redacted, exem. 5, attorney work product, 2, and 7(E)]

APPENDIX G-5

Argument to Support Use of Hearsay Evidence in Section 10(j) Proceedings

[3 pages redacted, exem. 5, attorney work product, 2, and 7(E)]

APPENDIX H

SAMPLE 10(j) PLEADINGS

1. Order to Show Cause (temporary injunction only; when it is clear that the case will be heard on the affidavits)
Miller v. Recycling Industries

2. Order to Show Cause (temporary injunction only; without scheduling of affidavits)
Blyer v. P&W Electric, Inc.

3. Order to Show Cause (TRO and temporary injunction)
DePalma v. Steelworkers, Local 15320

4. Petition for Injunction for all circuits except 1st, 7th, 8th, & 9th
Dunbar v. MSK Corp.

5. Petition for Injunction for 1st, 7th, 8th & 9th circuits
Chavarry v. Great Lakes Distributing & Storage

6. Petition for Injunction for all circuits except 1st, 7th, 8th, & 9th (with Gissel remedy)
Moore-Duncan v. Aldworth Co.

7. Petition for Injunction for 1st, 7th, 8th, & 9th circuits (with Gissel remedy)
Miller v. Recycling Industries

8. Motion for Temporary Restraining Order (Fed.R.Civ.P. 65(b)), union picketline misconduct (separate)
Frye v. District 1199

9. Proposed Findings of Fact and Conclusions of Law, for all circuits except 1st, 7th, 8th, & 9th
Moore-Duncan v. Horizon House

10. Proposed Findings of Fact and Conclusions of Law for 1st, 7th, 8th, & 9th circuits
Chavarry v. Great Lakes Distributing & Storage

11. Proposed Order Granting Temporary Injunction, for all circuits except 1st, 7th, 8th, & 9th, union violence
Kollar v. Steelworkers, Local 2155

12. Proposed Order Granting Temporary Injunction for 1st, 7th, 8th & 9th circuits
Chavarry v. Great Lakes Distributing & Storage

13. Proposed Order Granting Temporary Injunction for all circuits except 1st, 7th, 8th, & 9th (with Gissel remedy)
Bernstein v. Carter & Sons Freightways, Inc.

14. Proposed Temporary Injunction Order for 1st, 7th, 8th, & 9th circuits (with Gissel remedy)
Miller v. Recycling Industries

15. Model Proposed Temporary Restraining Order for all circuits, union violence
Kollar v. Steelworkers, Local 2155

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT H. MILLER, Regional Director of Region 20 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, Petitioner, vs. RECYCLING INDUSTRIES, INC. Respondent.	Civil No. ORDER TO SHOW CAUSE

The Petition and Administrative Complaint of Robert H. Miller, Regional Director of Region 20 of the National Labor Relations Board, herein called the Board, having been filed in this Court pursuant to Section 10(j) of the National Labor Relations Act, as amended [29 U.S.C. § 160(j)], herein called the Act, praying for an order directing Recycling Industries, Inc., herein called Respondent, to show cause why a temporary injunction should not be granted as prayed for in said petition pending the final disposition of the administrative matters involved pending before said Board in Board Case 20-CA-29897-1 and, good cause appearing therefore,

IT IS ORDERED that Respondent appear before this Court at the United States Court house in Sacramento, California, on the _____ day of _____, _____, at _____ ___.m., or as soon thereafter as counsel can be heard, and then and there show cause, if any there be, why, pending the final disposition of the administrative proceedings now pending before the Board in Board Case 20-CA-29897-1, Respondent, its officers, representatives, supervisors, agents, servants, employees, attorneys, and all persons acting on its

behalf or in participation with it, should not be temporarily enjoined and restrained under Section 10(j) of the Act, as prayed in said Petition; and

IT IS FURTHER ORDERED that Respondent file an Answer to the allegations of said Petition, together with any affidavits, declarations, and exhibits in support of said Answer that are limited to the issue of the equitable necessity of injunctive relief, with the Clerk of this Court, and serve copies thereof upon Petitioner at his office located at 901 Market Street, Suite 400, San Francisco, California, to be received on or before _____ p.m., the _____ day of _____, _____, and that Petitioner may file and serve rebuttal affidavits, declarations, and exhibits at least _____ day(s) before the hearing. Pursuant to Rule 220-7 of the Local Rules of this Court and pursuant to the Order of this Court, all evidence shall be presented by the transcript and exhibits in the proceeding before the administrative law judge of the Board in Board Case 20-CA-29897-1, and in affidavits, declarations, and exhibits limited to the issue of the equitable necessity of injunctive relief, and no oral testimony will be heard unless otherwise ordered by the Court; and

IT IS FURTHER ORDERED that service of copies of this Order, together with copies of the Petition, be made forthwith upon Respondent or upon its counsel of record in Board Case 20-CA-29897-1, in any manner provided in the Federal Rules of Civil Procedure, for the United States District Courts, by electronic facsimile transmission or by certified mail, and that proof of such service be filed with the Court.

ORDERED this _____ day of _____, 2001, at Sacramento, California.

_____
United States District Judge

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November 2001

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

ALVIN BLYER, Regional Director of Region 29 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD	*	
Petitioner	*	
	*	__--CV--____
v.	*	
P&W ELECTRIC, INC., d/b/a POLLARI ELECTRIC	*	
Respondent	*	

ORDER TO SHOW CAUSE

The petition of Alvin Blyer, Regional Director of Region 29 of the National Labor Relations Board, having been filed pursuant to Section 10(j) of the National Labor Relations Act, as amended, praying for an order directing Respondent to show cause why a temporary injunction should not issue enjoining and restraining Respondent from engaging in certain acts and conduct in violation of the Act, as prayed for in said petition, the petition being verified, and to be supported by testimony and evidence, and good cause appearing therefor,

IT IS ORDERED that Respondent appear before this Court at the United States Courthouse, Court Room No. ____, 225 Cadman Plaza East, Brooklyn, New York, on the _____ day of January, 2001, at _____, or as soon thereafter as counsel can be heard, and then and there show cause, if any there be, why, pending the final disposition of the matters involved pending before the National Labor Relations Board, in consolidated Case Nos. 29-CA-23527, 29-CA-23529 and 29-CA-23712, Respondent, its officers, representatives, agents, servants,

employees, attorneys, and all members and persons acting in concert or participation with it, should not be enjoined and restrained as prayed in said petition; and

IT IS FURTHER ORDERED that should Respondent file an answer to the allegations of said petition, said answer shall be filed with the Clerk of this Court, and Respondent shall serve a copy thereof upon Petitioner at his office located at One MetroTech Center North, Tenth Floor, Brooklyn, New York 11201, on or before the ____ day of January, 2001, by _____, and deliver courtesy papers to chambers. Should Petitioner file a reply, such reply shall be served and filed by the ____ day of _____, 2001, by _____, and deliver courtesy papers to chambers; and

IT IS FURTHER ORDERED that service of a copy of this Order to Show Cause together with a copy of the petition, transcript and exhibits upon which it is issued, be forthwith made by a United States Marshal or an agent of the Board, 21 years or older, upon Respondent, and upon Local 25, International Brotherhood of Electrical Workers, a Charging Party before the Board, in any manner provided in the Rules of Civil Procedure for the United States District Court, by electronic facsimile transmission or by certified mail on or before the _____ day of _____, 2001, by _____, and that proof of such service be filed with the Court.

ORDERED this _____ day of January, 2001, at Brooklyn, New York.

BY THE COURT,

_____
UNITED STATES DISTRICT JUDGE

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November 2001

T. Michael Patton, Supervisory Attorney
A. E. Ruibal, Attorney
Michael W. Josserand, Attorney
Counsel for the NLRB
300 South, 600 - 17th St.
Denver, CO 80202
(303) 844-3551

Lee Pico
Assistant U. S. Attorney, District of Wyoming
Box 668
Cheyenne, WY 82003
(307) 772-2124

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

ARTHUR R. DEPALMA, REGIONAL DIRECTOR, OF REGION 27 OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v. Civil No. _____

UNITED STEELWORKERS OF AMERICA, LOCAL NO. 15320 and UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC

Respondents

ORDER TO SHOW CAUSE

The Petition and Administrative Complaint of Arthur R. DePalma, Regional Director for Region 27 of the National Labor Relations Board (herein NLRB or Board), having been filed in this Court pursuant to Section 10(j) of the National Labor Relations

Act, as amended, 61 Stat. 149, 29 U.S.C. Sec. 160(j) (herein the Act), praying for a Temporary Restraining Order pursuant to Rule 65(b) of the Federal Rules of Civil Procedure (Fed. R. Civ. P.) against Respondents United Steelworkers of America, Local No. 15320, (hereinafter Respondent Local), United Steelworkers of America, AFL-CIO-CLC, (hereinafter Respondent International) hereinafter collectively called Respondents, and for an order directing said Respondents to show cause why a temporary restraining order and a temporary injunction should not be granted as prayed for in said Petition pending the final disposition of the administrative matters involved pending before said Board in NLRB Cases 27-CB-3271 and 27-CB-3272 and, good cause appearing therefore,

IT IS ORDERED that Respondents shall appear before this court at the United States Courthouse in Cheyenne, Wyoming, on the _____day of _____, 199 3, at _____ .m., or as soon as thereafter counsel can be heard, and then and there show cause, if any there be, why, pending disposition by the Court of the merits of the instant Petition for a temporary injunction Respondents, their officers, agents, servants, employees, attorneys, and all persons acting in concert or participation with them, should not be temporarily restrained pursuant to Section 10(j) of the Act and Fed. R. Civ. P. 65(b) as prayed for in said Petition; and

IT IS FURTHER ORDERED that Respondents, shall file an Answer to the allegations of said Petition with the Clerk of this Court, and serve a copy thereof upon Petitioner at his office located at 300 South Tower, 600 17th Street, Denver, Colorado 80202, on or before _____ day of _____, 1993; and

IT IS FURTHER ORDERED that Respondents, shall appear before this Court at the United States Courthouse in Cheyenne, Wyoming, on the _____ day of _____, 1993, at _____ .m. or as soon as thereafter counsel can be heard, and

then and there show cause, if any there be, why, pending the final disposition of the administrative proceedings now pending before the Board in NLRB Cases 26-CB-3271 and 27-CB-3272, Respondents, their officers, agents, servants, employees, attorney, and all persons acting in concert or participation with them, should not be temporarily enjoined and under Section 10(j) of the Act as prayed for in said Petition; and

IT IS FURTHER ORDERED that service of a copy of this Order, together with a copy of the Petition and Administrative Complaint, attached affidavits and exhibits and supporting legal memoranda, be forthwith made by a United States Marshal or an agent of the Board, 21 years of age or older, upon Respondents, United Steelworkers of America, Local No. 15320, and United Steelworkers of America AFL-CIO-CLC, or upon their counsel of record in NLRB Cases 27-CB-3271 and 27-CB-3272, in any manner provided in the Federal Rules of Civil Procedure for the United States District Courts, by electronic facsimile transmission or by certified mail, and that proof of such service be filed with the Court.

ORDERED this ____ day of November, 1993, at Cheyenne, Wyoming.

BY THE COURT:

_____

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

SANDRA DUNBAR, Regional Director of the Third Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD

Petitioner

vs. **CIVIL NO. 00-**

MSK CORP.-MAIN EVENT FOOD SERVICE

Respondent

PETITION FOR INJUNCTION UNDER SECTION 10(j)
OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED

To the Honorable, the Judges of the United States District Court for the Western District of New York:

Comes now Sandra Dunbar, Regional Director of the Third Region of the National Labor Relations Board, herein called the Board, and petitions this Court, for and on behalf of the Board, pursuant to Section 10(j) of the National Labor Relations Act, as amended [61 Stat. 149; 73 Stat. 544; 29 U.S.C. Sec. 160(j)], herein called the Act, for appropriate injunctive relief pending the final disposition of the matters involved herein pending before the Board, based upon the Complaint and Notice of Hearing of the Office of the General Counsel of the Board, alleging that MSK Corp.-Main Event Food Service, herein called Respondent, has engaged in, and is engaging in, acts and conduct in violation of Section 8(a)(1) and (5) of the Act. In support thereof, Petitioner respectfully shows as follows:

1. Petitioner is the Regional Director of the Third Region of the Board, an agency of the United States, and files this petition for and on behalf of the Board.

2. Jurisdiction of this Court is invoked pursuant to Section 10(j) of the Act.

3. On February 7, 2001, Local 4, Hotel Employees and Restaurant Employees Union, herein called the Union, pursuant to the provisions of the Act, filed with the Board an unfair labor practice charge in Case 3-CA-22915, alleging that Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act. (A copy of the charge in Case 3-CA-22915 is attached hereto as Exhibit A.)

4. The aforesaid charge was referred to the Petitioner as Regional Director of the Third Region of the Board.

5. On April 9, 2001, based upon the charge filed in the case described above in paragraph 3, the Acting General Counsel of the Board, by the Regional Director of the Third Region of the Board, on behalf of the Board, pursuant to Section 10(b) of the Act, issued a Complaint and Notice of Hearing against Respondent. (A copy of the Complaint is attached hereto as Exhibit B.)

6. There is reasonable cause to believe that the allegations set forth in the Complaint are true and that Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, affecting commerce within the meaning of Section 2(6) and (7) of the Act. More particularly, there is reasonable cause to believe that Respondent is failing and refusing to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of an appropriate unit of Respondent's employees, described below in paragraph 6(m), and herein called the Unit, in violation of Section 8(a)(1) and (5) of the Act, by refusing to recognize and bargain with the Union as the exclusive collective-bargaining

representative of the Unit. There is reasonable cause to believe that Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act, by interrogating its employees about their Union activities and sympathies. In support thereof, the Petitioner, upon information and belief, shows as follows:

(a) At all material times, Respondent, a corporation, with its principal office and place of business at the New York State Fairgrounds in Solvay, New York, and a branch office located at the Buffalo Raceway in Hamburg, New York, herein called Respondent's Hamburg facility, has been engaged in the operation of a restaurant and food service operation.

(b) Annually, Respondent, in conducting its business operations described above in paragraph II(a), derives gross revenues in excess of $500,000.

(c) Annually, Respondent, in conducting its business operations described above in paragraph II(a), purchases and receives at its Hamburg facility products, goods and materials valued in excess of $5,000 from points directly outside of the State of New York.

(d) At all material times, Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

(e) At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

(f) At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent, within the meaning of Section 2(11) of the Act, and agents of Respondent within the meaning of Section 2(13) of the Act:

Steven Jankiewicz -- Vice-president

Michael Chemotti -- Secretary-treasurer

(g) On or about February 2 and 3, 2001, Respondent, by Michael Chemotti, herein called Chemotti, at Respondent's Hamburg facility, interrogated employees about their Union activities and sympathies.

(h) At all material times prior to on or about January 1, 2001, the following employees of New York Sportservice, Inc., herein called the Sportservice Unit, constituted a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> [A]ll persons employed in the categories or classifications set forth in the Wage Schedule attached … [to the January 1, 1998 through December 31, 2000 collective-bargaining agreement between the Union and New York Sportservice, Inc.] at Hamburg Raceway regularly working forty (40) hours or more per month; excluding office and clerical employees, guards, professional employees, trainees for management or supervisory positions, managerial employees, purchasing agents, managers, assistant managers, and all supervisors as defined in the National Labor Relations Act, 1947, as amended, and all other employees not specifically included as employees.

(i) At all material times prior to on or about January 1, 2001, the Union was the designated exclusive collective-bargaining representative for the Sportservice Unit for the purposes of collective bargaining with respect to wages, hours of employment and other terms and conditions of employment, and the Union was recognized as the representative by New York Sportservice, Inc. This recognition was embodied in successive collective-bargaining agreements, the most recent of which was effective from January 1, 1998 through December 31, 2000.

(j) At all material times prior to on or about January 1, 2001, based on Section 9(a) of the Act, the Union was the exclusive collective-bargaining representative of the Sportservice Unit.

(k) On or about January 26, 2001, Respondent commenced to provide the restaurant and food services that were formerly provided by New York Sportservice, Inc. at the Buffalo Raceway in Hamburg, New York, and since January 26, 2001, has continued to operate such business in basically unchanged form, and has employed as a majority of its employees, individuals who were previously employed by New York Sportservice, Inc.

(l) Based on the operations described above in paragraph 6(k), Respondent has continued the employing entity and is a successor to New York Sportservice, Inc.

(m) The following employees employed by Respondent, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> [A]ll persons employed in the categories or classifications set forth in the Wage Schedule attached … [to the January 1, 1998 through December 31, 2000 collective-bargaining agreement between the Union and New York Sportservice, Inc.] at Hamburg Raceway regularly working forty (40) hours or more per month; excluding office and clerical employees, guards, professional employees, trainees for management or supervisory positions, managerial employees, purchasing agents, managers, assistant managers, and all supervisors as defined in the National Labor Relations Act, 1947, as amended, and all other employees not specifically included as employees.

(n) At all times since on or about January 26, 2001, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of Respondent's employees in the Unit.

(o) On or about January 26, 2001, the Union requested that Respondent recognize it as the exclusive collective-bargaining representative of the Unit and bargain collectively with the Union as the exclusive collective-bargaining representative of the Unit.

(p) Since on or about January 26, 2001, Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit at Respondent's Hamburg facility.

(q) By the conduct described above in paragraph 6(g), Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

(r) By the conduct described above in paragraph 6(p), Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees, in violation of Section 8(a)(1) and (5) of the Act.

(s) The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. Upon information and belief, it may be fairly anticipated that, unless enjoined, Respondent will continue to engage in the said acts and conduct, or similar or related acts and conduct, and will continue to fail and refuse to bargain collectively and in good faith with the Union, in violation of Section 8(a)(1) and (5) of the Act.

8. Upon information and belief, unless the continuation of the aforementioned unfair labor practices is immediately restrained, a serious flouting of the Act and of public policies involved in the Act will continue, with the result that enforcement of important provisions of the Act and of the public policy will be impaired before Respondent can be placed under legal restraint through the regular procedures of a Board order and enforcement decree. Unless injunctive relief is immediately obtained, it may fairly be anticipated that Respondent will continue its unlawful conduct during the proceedings before the Board and during subsequent proceedings before a Court of Appeals for an enforcement decree, with the result that employees

will continue to be deprived of their fundamental right to be represented for purposes of collective bargaining as provided for in the Act.

9. Upon information and belief, to avoid the serious consequences set forth above, it is essential, appropriate and just and proper, for the purposes of effectuating the policies of the Act and avoiding substantial, irreparable, and immediate injury to such policies, to the public interest, and to employees of Respondent, and in accordance with the purposes of Section 10(j) of the Act, that, pending the final disposition of the matters involved herein pending before the Board, Respondent be enjoined and restrained from the commission of the acts and conduct alleged above, similar acts and conduct or repetition thereof.

10. No previous application has been made for the relief requested herein.

WHEREFORE, Petitioner prays:

1. That the Court issue an order directing Respondent promptly to file an answer to the allegations of this petition and to appear before this Court, at a time and place fixed by the Court, and show cause, if any there be, why an injunction should not issue enjoining and restraining Respondent, its officers, agents, representatives, servants, employees, attorneys, and all persons acting in concert or participation with them, pending the final disposition of the matters involved herein, pending before the Board, from:

(a) interrogating its employees concerning their Union activities and sympathies;

(b) refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the following described collective bargaining unit, herein called the Unit:

> [A]ll persons employed in the categories or classifications set forth in the Wage Schedule attached … [to the January 1, 1998 through December 31, 2000 collective bargaining agreement between the Union and New York Sportservice, Inc.] at Hamburg Raceway regularly working forty (40) hours or more per month; excluding office and clerical employees, guards, professional employees, trainees for management or supervisory positions, managerial employees, purchasing agents, managers, assistant managers, and all supervisors as defined in the National Labor Relations Act, 1947, as amended, and all other employees not specifically included as employees.

(c) in any like or related manner failing and refusing to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of its employees in the Unit.

(d) in any like or related manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. That the Court issue an affirmative order directing Respondent to:

(a) recognize and, upon request, bargain in good faith with the Union as the exclusive collective bargaining representative of the employees employed in the Unit at the Buffalo Raceway facility;

(b) post copies of the District Court's opinion and order at Buffalo Raceway facility, where Respondent's notices to employees are customarily posted; said posting shall be maintained during the Board's administrative proceedings, free from all obstructions and defacements; and agents of the Board shall be granted reasonable access to the Buffalo Raceway facility to monitor compliance with the posting requirement;

(c) within 20 days of the issuance of the Order, file with the District Court, with a copy submitted to the Regional Director of the Board for Region Three, a sworn affidavit from a responsible official of the Respondent, setting forth with specificity the manner in which the Respondent has complied with the terms of the decree, including how the documents have been posted as required by the order.

3. That the Court grant such further and other relief as may be deemed just and proper.

Dated at Buffalo, New York this 10th day of May 2001.

SANDRA DUNBAR, Regional Director
National Labor Relations Board - Region Three
Thaddeus J. Dulski Federal Building
111 West Huron Street - Room 901
Buffalo, NY 14202-2387

Office of the General Counsel
Barry Kearney, Associate General Counsel
Ellen A. Farrell, Deputy General Counsel
Rhonda P. Aliouat, Regional Attorney

Beth Mattimore, Counsel for Petitioner
National Labor Relations Board - Region Three
Thaddeus J. Dulski Federal Building
111 West Huron Street - Room 901
Buffalo, NY 14202-2387
Telephone: 716/551-4943

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November 2001

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Roberto G. Chavarry, Regional Director
of the Twenty-fifth Region of the
National Labor Relations Board,
for and on behalf of the
NATIONAL LABOR RELATIONS BOARD

Petitioner

v. CIVIL NO.

GREAT LAKES DISTRIBUTING & STORAGE, INC. and
GREAT LAKES PACKAGING, INC.

Respondent

PETITION FOR INJUNCTION UNDER SECTION 10(j)
OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED

To the Honorable, the Judges of the United States District Court for the Northern District of Indiana:

Comes now Roberto G. Chavarry, Regional Director of the Twenty-fifth Region of the National Labor Relations Board (herein called the Board), and petitions this Court for and on behalf of the Board, pursuant to Section 10(j) of the National Labor Relations Act, as amended (61 Stat. 149; 73 Stat. 544; 29 U.S.C. Sec. 160(j); herein called the Act), for appropriate injunctive relief pending the final disposition of the matters involved herein pending before the Board on a complaint of the Acting General Counsel of the Board, charging that Great Lakes Distributing & Storage, Inc., herein called GLDS, and Great Lakes Packaging, Inc., herein called

GLP and herein jointly called respondent, has engaged in, and is engaging in, acts and conduct in violation of Section 8(a)(1) and (5) of the Act, 29 U.S.C. Sec. 158(a)(1) and (5). In support thereof, petitioner respectfully shows as follows:

1. Petitioner is Regional Director of the Twenty-fifth Region of the Board, an agency of the United States, and files this petition for and on behalf of the Board.

2. Jurisdiction of this proceeding is conferred upon this Court by Section 10(j) of the Act.

3. At all times material herein, respondent has maintained an office and place of business in Valparaiso, Indiana, where it is now and has at all times material herein been engaged in this judicial district in co-packaging, distribution and storage of food products.

4. On November 27, 2000, District No. 90, International Association of Machinists and Aerospace Workers, AFL-CIO, a/w International Association of Machinists and Aerospace Workers, AFL-CIO(herein called the Union), pursuant to the provisions of the Act, filed a charge with the Board against Great Lakes Distributing & Storage, Inc. (herein called GLDS) in Case 25-CA-27340-1, and on January 18, 2001 filed an amended charge in Case 25-CA-27340-1 Amended against GLDS and Great Lakes Packaging, Inc. (herein called GLP and together with GLDS herein called respondent), alleging that respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act. A copy of the original charge is attached hereto as Exhibit A and a copy of the amended charge is attached hereto as Exhibit B.

5. On February 27, 2001, following a field investigation during which all parties had an opportunity to submit evidence upon the said charge as amended in Case 25-CA-27340-1 Amended, the Acting General Counsel of the Board, on behalf of the Board, by the petitioner

herein, issued a complaint, pursuant to Section 10(b) of the Act [29 U.S.C. Sec. 160(b)], alleging that respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act. A copy of this complaint is attached hereto as Exhibit C.

6. (a) At all material times GLDS and GLP have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy; have shared common premises and facilities; have provided services for and made sales to each other; have interchanged personnel with each other; and have held themselves out to the public as single-integrated business enterprises.

(b) Based on its operations described above in paragraph 6(a), GLDS and GLP constitute a single-integrated business enterprise and a single employer within the meaning of the Act.

(c) About November 11, 2000, respondent purchased the microwave popcorn packaging portion of the Valparaiso, Indiana facility of the Orville Redenbacher Popcorn Division of ConAgra Grocery Products Company, herein called Orville Redenbacher, and since then has continued to operate the microwave popcorn packaging portion of the business of the Valparaiso, Indiana facility of Orville Redenbacher in basically unchanged form, and has employed as a majority of its employees individuals who were previously employees of Orville Redenbacher.

(d) Based upon the operations described above in paragraph 6(c), respondent has continued the employing entity of and is a successor to Orville Redenbacher.

(e) The following employees of respondent, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act [29 U.S.C. Sec.159(b)]:

> All production and maintenance employees, including all shipping and receiving employees of the Employer at its Valparaiso, Indiana facility, but excluding all office clerical employees, all professional employees, all guards, and all supervisors as defined in the Act.

(f) On April 7, 1978, the Union was certified as the exclusive collective-bargaining representative of the Unit employed by Orville Redenbacher.

(g) Since about November 11, 2000, based on the facts described above in paragraphs 6(c) and 6(d), the Union has been the designated exclusive collective-bargaining representative of the Unit.

(h) From about April 7, 1978, to about June 1, 2000, based on Section 9(a) of the Act, the Union had been the exclusive collective-bargaining representative of the Unit employed by Orville Redenbacher.

(i) At all times since about November 11, 2000, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of respondent's employees in the Unit.

7. Petitioner asserts that there is a likelihood that the Regional Director will, in the underlying administrative proceeding in Case 25-CA-27340-1 Amended, establish that:

(a) At all material times GLDS, a corporation, with an office and place of business in Valparaiso, Indiana, herein called respondent's facility, has been engaged in the distribution and storage of food and other products.

(b) At all material times GLP, a corporation, with an office and place of business in Valparaiso, Indiana, the respondent's facility, has been engaged in the co-packaging of food products.

(c) During the past 12 months respondent, in conducting its business operations described above in paragraphs 7(a) and 7(b), sold and shipped from its Valparaiso, Indiana facility goods valued in excess of $50,000 directly to points outside the State of Indiana.

(d) During the past 12 months respondent, in conducting its business operations described above in paragraphs 7(a) and 7(b), purchased and received at its Valparaiso, Indiana facility goods valued in excess of $50,000 directly from points outside the State of Indiana.

(e) At all material times respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act [29 U.S.C. Sec. 152(2), (6) and (7)].

(f) At all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act [29 U.S.C. Sec. 152(5)].

(g) At all material times the following individuals held the positions set forth opposite their respective names and have been supervisors of respondent within the meaning of Section 2(11) of the Act [29 U.S.C. Sec. 152(11)]and agents of respondent within the meaning of Section 2(13) of the Act [29 U.S.C. Sec. 152(13)]:

Joe Glusak	-	Owner and President
Bradly Hendrickson		Owner
David Jancosek		Owner
William English		Owner

Thomas Adams		Owner
Kim Defries	-	Line Supervisor
John Schlink	-	Maintenance Manager

(h) By letters dated November 20, 2000 and January 19, 2001, the Union requested that respondent recognize it as the exclusive collective-bargaining representative of the Unit and bargain collectively with the Union as the exclusive collective-bargaining representative of the Unit.

(i) Since about November 20, 2000, respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit.

(j) By the conduct described above in paragraph 7(i), respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

(k) The unfair labor practices of respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

(l) The unfair labor practices of respondent described above in paragraphs 7(i) and 7(j) have taken place within this judicial district.

8. Respondent's unfair labor practices, as described above in paragraph 7, have and are continuing to irreparably harm employees of the respondent in the exercise of the rights guaranteed them by Section 7 of the Act. More particularly, respondent's unfair labor practices have caused and will continue to cause the following harm:

(a) As a result of respondent's failure and refusal to bargain with the Union, the Union's employee support will be irreparably undermined over time as conditions change in the facility without any Union input.

(b) As a result of respondent's failure and refusal to bargain with the Union, the employees will be deprived of the benefits of collective bargaining.

9. An order requiring interim bargaining is necessary to prevent the irreparable erosion of the Union's majority support while the Union is unable to represent employees and affect their working conditions. Additionally, such an order is necessary to prevent irreparable harm to the employees through their loss of the benefits of collective bargaining during Board litigation.

10. Unless injunctive relief is immediately obtained, it can fairly be anticipated that employees will permanently and irreversibly lose the benefits of the Board's processes and the exercise of statutory rights for the entire period required for Board adjudication, a harm which cannot be remedied in due course by the Board.

11. There is no adequate remedy at law for the irreparable harm being caused by respondent's unfair labor practices, as described above in paragraphs 8 and 9.

12. Granting the temporary injunctive relief requested by Petitioner will cause no undue hardship to respondent.

13. In balancing the equities in this matter, the harm to the employees involved herein, to the public interest, and to the purposes and policies of the Act if injunctive relief, as requested, is not granted, outweighs any harm that the grant of such injunctive relief will work on respondent.

14. Upon information and belief, it may be fairly anticipated that unless respondent's conduct of the unfair labor practices described in paragraphs 7(i) and 7(j) above is immediately enjoined and restrained, respondent will continue to engage in those acts and conduct, or similar acts and conduct constituting unfair labor practices.

15. Upon information and belief, to avoid the serious consequences set forth above, it is essential, just, proper, and appropriate for the purposes of effectuating the policies of the Act and avoiding substantial, irreparable and immediate injury to such policies, to the public interest, and the employees involved herein, and in accordance with the purposes of Section 10(j) of the Act, that, pending final disposition of the matters presently pending before the Board, respondent be enjoined and restrained as herein prayed.

WHEREFORE, PETITIONER PRAYS:

1. That the Court issue an Order, directing respondent to appear before this Court, at a time and place fixed by the Court, and show cause, if any there be, why, pending final adjudication by the Board of the matters pending before it in National Labor Relations Board Case 25-CA-27340-1 Amended, a temporary injunction should not issue:

(a) directing and ordering respondent to cease and desist from: (1) failing and refusing to recognize and to bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of its employees in the appropriate collective bargaining unit; and (2) in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed them by Section 7 of the Act;

(b) directing and ordering respondent, pending final Board adjudication, to: (1) recognize and on request bargain in good faith with the Union as the exclusive collective-bargaining representative of its employees in the appropriate collective bargaining unit

respecting rates of pay, hours of work, or other terms and conditions of employment; (2) post copies of the district court's opinion and order at its Valparaiso, Indiana facility at all locations where notices to employees customarily are posted, maintain said postings during the pendency of the Board's administrative proceedings free from all obstructions and defacements, and grant agents of the Board reasonable access to respondent's Valparaiso, Indiana facility to monitor compliance with the posting requirement; and (3) within twenty (20) days of the issuance of the district court's order, file with the court, with a copy submitted to the Regional Director of the Board for Region 25, a sworn affidavit from a responsible official of respondent setting forth with specificity the manner in which respondent is complying with the terms of the decree.

2. That upon return of said Order to Show Cause, the Court issue an Order enjoining and restraining respondent in the manner set forth above.

3. That the Court grant such further and other relief as may be just and appropriate.

4. That the Court grant expedited consideration to this petition, consistent with 28 U.S.C. Sec. 1657(a) and the remedial purposes of Section 10(j) of the Act.

DATED at Indianapolis, Indiana, this 23rd day of April, 2001.

_____

Roberto G. Chavarry, Regional Director
National Labor Relations Board
Region Twenty-five
Room 238, Minton-Capehart Building
575 North Pennsylvania Street
Indianapolis, Indiana 46204-1577

Barry J. Kearney
Associate General Counsel

Rik Lineback
Regional Attorney

Joanne C. Mages
Attorney

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November 2001

Lea F. Alvo-Sadiky
Margarita Navarro Rivera
Deena E. Kobell, Attorneys
National Labor Relations Board
615 Chestnut Street, 7th Floor
Philadelphia, Pennsylvania 19106
(215) 597-9619; (215) 597-7647; (215) 597-7650
LFA-S/1866
MNR/0674
DEK/6336

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

* *

DOROTHY L. MOORE-DUNCAN, Regional Director of the Fourth Region of the NATIONAL LABOR RELATIONS BOARD, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v. Civil No.

ALDWORTH COMPANY, INC. and DUNKIN' DONUTS MID-ATLANTIC DISTRIBUTION CENTER, INC., JOINT EMPLOYERS

Respondents.

* *

PETITION FOR INJUNCTION UNDER SECTION 10(j)
OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED

To the Honorable, the Judges of the United States District Court for the District of New Jersey:

Comes now, Dorothy L. Moore-Duncan, Regional Director of the Fourth Region of the National Labor Relations Board (herein called the Board), and petitions this Court for and on behalf of the Board, pursuant to Section 10(j) of the National Labor Relations Act, as amended (61 Stat. 149; 73 Stat. 544; 29 U.S.C. Sec. 160(j), (herein called the Act), for appropriate injunctive relief pending the final disposition of the matters involved herein pending before the

Board on charges alleging that Aldworth Company, Inc. and Dunkin' Donuts Mid-Atlantic Distribution Center, Inc. (herein called Aldworth and Dunkin, respectively, and herein also collectively called Respondents), have engaged in, and are engaging in, acts and conduct in violation of Section 8(a)(1), (3) and (5) of the Act. In support thereof, the Petitioner respectfully shows as follows:

1. The Petitioner is the Regional Director of the Fourth Region of the Board, an agency of the United States, and files this Petition for and on behalf of the Board.

2. Jurisdiction of this Court is invoked pursuant to Section 10(j) of the Act.

3. (a) On July 7, 1998, United Food and Commercial Workers Union Local 1360 a/w United Food And Commercial Workers International Union, AFL-CIO, herein called the Union), pursuant to provisions of the Act, filed a charge with the Board in Case 4-CA-27274 alleging that Aldworth and Dunkin, employers within the meaning of Section 2(2) of the Act, have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. A copy of the charge in Case 4-CA-27274 is attached hereto as Exhibit 1 and made a part hereof.

(b) On October 22, 1998, the Union, pursuant to provisions of the Act, filed the first amended charge with the Board in Case 4-CA-27274, alleging that Aldworth and Dunkin have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1), (3) and (5) of the Act. A copy of the first amended charge in Case 4-CA-27274 is attached hereto as Exhibit 2 and made a part hereof.

(c) On November 24, 1998, the Union, pursuant to provisions of the Act, filed the second amended charge with the Board in Case 4-CA-27274, alleging that Aldworth and Dunkin have engaged in, and are engaging in, unfair labor practices within the meaning of

Section 8(a)(1), (3) and (5) of the Act. A copy of the second amended charge in Case 4-CA-27274 is attached hereto as Exhibit 3 and made a part hereof.

(d) On April 15, 1999, the Union, pursuant to provisions of the Act, filed the third amended charge with the Board in Case 4-CA-27274, alleging that Aldworth and Dunkin have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1), (3) and (5) of the Act. A copy of the third amended charge in Case 4-CA-27274 is attached hereto as Exhibit 4 and made a part hereof.

(e) On July 10, 1998, William A. McCorry, an individual, pursuant to provisions of the Act, filed a charge with the Board in Case 4-CA-27289 alleging that Aldworth has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. A copy of the charge in Case 4-CA-27289 is attached hereto as Exhibit 5 and made a part hereof.

(f) On December 18, 1998, William A. McCorry, pursuant to provisions of the Act, filed the first amended charge with the Board in Case 4-CA-27289 alleging that Aldworth has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. A copy of the first amended charge in Case 4-CA-27289 is attached hereto as Exhibit 6 and made a part hereof.

(g) On October 27, 1998, the Union, pursuant to provisions of the Act, filed the charge with the Board in Case 4-CA-27603 alleging that Aldworth and Dunkin have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. A copy of the charge in Case 4-CA-27603 is attached hereto as Exhibit 7 and made a part hereof.

(h) On November 24, 1998, the Union, pursuant to provisions of the Act, filed the first amended charge with the Board in Case 4-CA-27603 alleging that Aldworth and Dunkin have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. A copy of the first amended charge in Case 4-CA-27603 is attached hereto as Exhibit 8 and made a part hereof.

(i) On November 5, 1998, the Union, pursuant to provisions of the Act, filed a charge with the Board in Case 4-CA-27629 alleging that Aldworth, an employer within the meaning of Section 2(2) of the Act, has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. A copy of the charge in Case 4-CA-27629 is attached hereto as Exhibit 9 and made a part hereof.

(j) On November 24, 1998, the Union, pursuant to provisions of the Act, filed the first amended charge with the Board in Case 4-CA-27629, alleging that Aldworth and Dunkin have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. A copy of the first amended charge in Case 4-CA-27629 is attached hereto as Exhibit 10 and made a part hereof.

(k) On April 14, 1999, the Union, pursuant to provisions of the Act, filed the second amended charge with the Board in Case 4-CA-27629, alleging that Aldworth and Dunkin have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1), (3) and (5) of the Act. A copy of the second amended charge in Case 4-CA-27629 is attached hereto as Exhibit 11 and made a part hereof.

(l) On December 2, 1998, the Union, pursuant to provisions of the Act, filed a charge with the Board in Case 4-CA-27707 alleging that Aldworth and Dunkin have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the

Act. A copy of the charge in Case 4-CA-27707 is attached hereto as Exhibit 12 and made a part hereof.

(m) On April 15, 1999, the Union, pursuant to provisions of the Act, filed the first amended charge with the Board in Case 4-CA-27707, alleging that Aldworth and Dunkin have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. A copy of the first amended charge in Case 4-CA-27707 is attached hereto as Exhibit 13 and made a part hereof.

(n) On December 9, 1998, the Union, pursuant to provisions of the Act, filed a charge with the Board in Case 4-CA-27725 alleging, inter alia, that Aldworth and Dunkin, employers within the meaning of Section 2(2) of the Act, have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. A copy of the charge in Case 4-CA-27725 is attached hereto as Exhibit 14 and made a part hereof.

(o) On April 14, 1999, the Union, pursuant to provisions of the Act, filed the first amended charge with the Board in Case 4-CA-27725, alleging that Aldworth and Dunkin have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1), (3) and (5) of the Act. A copy of the first amended charge in Case 4-CA-27725 is attached hereto as Exhibit 15 and made a part hereof.

(p) On February 8, 1999, the Union, pursuant to provisions of the Act, filed a charge with the Board in Case 4-CA-27866 alleging, inter alia, that Aldworth has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. A copy of the charge in Case 4-CA-27866 is attached hereto as Exhibit 16 and made a part hereof.

(q) On February 12, 1999, the Union, pursuant to provisions of the Act, filed the first amended charge with the Board in Case 4-CA-27866, alleging that Aldworth and Dunkin have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. A copy of the first amended charge in Case 4-CA-27866 is attached hereto as Exhibit 17 and made a part hereof.

(r) On April 14, 1999, the Union, pursuant to provisions of the Act, filed the second amended charge with the Board in Case 4-CA-27866, alleging that Aldworth and Dunkin have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1), (3) and (5) of the Act. A copy of the second amended charge in Case 4-CA-27866 is attached hereto as Exhibit 18 and made a part hereof.

4. On April 15, 1999, and April 22 1999, based upon the charges and amended charges in Cases 4-CA-27274, 4-CA-27289, 4-CA-27603, 4-CA-27629, 4-CA-27707, 4-CA-27725 and 4-CA-27866, the General Counsel of the Board, on behalf of the Board, by the Petitioner, issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, and Amendment to Consolidated Complaint, respectively, in Cases 4-CA-27274, 4-CA-27289, 4-CA-27603, 4-CA-27629, 4-CA-27707, 4-CA-27725 and 4-CA-27866, pursuant to Section 10(b) of the Act, alleging that Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1), (3) and (5) of the Act. Copies of the Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, and Amendment to Consolidated Complaint in Cases 4-CA-27274, 4-CA-27289, 4-CA-27603, 4-CA-27629, 4-CA-27707, 4-CA-27725 and 4-CA-27866 are attached hereto as Exhibits 19 and 20, respectively and made a part hereof.

5. (a) On or about August 11, 1998, the Union filed a representation petition with the Board in Case 4-RC-19492, and an election was conducted on September 19, 1998. A copy of the representation petition in Case 4-RC-19492 is attached hereto as Exhibit 21 and made a part hereof.

(b) On May 7, 1999, the Petitioner issued a Notice of Hearing on Objections to Election in Case 4-RC-19492, concluding that the Union's Objections to the representation election and other unalleged conduct raised issues in common with the unfair labor practices in Cases 4-CA-27274, 4-CA-27289, 4-CA-27603, 4-CA-27629, 4-CA-27707, 4-CA-27725 and 4-CA-27866, and that, in due course, the Objections would be consolidated for hearing with the unfair labor practie charges. On May 18, 1999, the Petitioner issued issued an Order Consolidating Cases and Scheduling Consolidated Hearing in Cases 4-CA-27274, 4-CA-27289, 4-CA-27603, 4-CA-27629, 4-CA-27707, 4-CA-27725, 4-CA-27866 and 4-RC-19492. Copies of the Notice of Hearing on Objections to Election in Case 4-RC-19492, and of the Order Consolidating Cases and Scheduling Consolidated Hearing in Cases 4-CA-27274, 4-CA-27289, 4-CA-27603, 4-CA-27629, 4-CA-27707, 4-CA-27725, 4-CA-27866 and 4-RC-19492 are attached hereto as Exhibits 22 and 23 and made a part hereof.

6. There is reasonable cause to believe that the allegations set forth in the Consolidated Complaint and Notice of Hearing and in the Amendment to Consolidated Complaint in Cases 4-CA-27274, 4-CA-27289, 4-CA-27603, 4-CA-27629, 4-CA-27707, 4-CA-27725 and 4-CA-27866 are true, and that Respondents have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1), (3) and (5) of the Act, affecting commerce within the meaning of Section 2(6) and (7) of the Act. More particularly, in support

thereof, and of the request for injunctive relief herein, the Petitioner, upon information and belief, shows as follows:

(a) At all material times, Aldworth, a Massachusetts corporation with a principal place of business in Lynnfield, Massachusetts, has been engaged in the business of leasing personnel to enterprises in the transportation industry.

(b) During the past year, Aldworth, in conducting its business operations described above in subparagraph (a), purchased and received goods valued in excess of $50,000 directly from points outside the Commonwealth of Massachusetts.

(c) At all material times, Aldworth has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

(d) At all material times, Dunkin Donuts' has been a Delaware corporation with a facility at 501 Arlington Boulevard, Swedesboro, New Jersey, herein called the Center, where it has been engaged in the distribution of products to donut shops.

(e) During the past year, Dunkin' Donuts, in conducting its business operations described above in subparagraph (d), sold and shipped products valued in excess of $50,000 directly to points outside the States of New Jersey and Delaware.

(f) At all material times, Dunkin' Donuts has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

(g) At all material times, Aldworth and Dunkin' Donuts have been parties to an agreement pursuant to which Aldworth has provided employees to work at, and to deliver products stored within, the Center; Dunkin' Donuts has exercised control over Aldworth's labor relations policy with respect to the employees who were hired and are paid by Aldworth; and

Aldworth and Dunkin' Donuts have codetermined the terms and conditions of employment of those employees.

(h) At all material times, based on their operations at the Center described above in subparagraph (g), Aldworth and Dunkin' Donuts have been joint employers of the employees referred to above in subparagraph (g).

(i) At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

(j) At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondents within the meaning of Section 2(11) of the Act and agents of Respondents within the meaning of Section 2(13) of the Act:

Ernest Dunn	-	Aldworth President
Kevin Roy	-	Aldworth Executive Vice President
Wayne Kundrat	-	Aldworth Assistant to Executive Vice President
Tim Kennedy	-	Aldworth Regional Operations Manager
Frank Fisher	-	Aldworth Operations Manager
Steve Wade	-	Aldworth Dispatcher/Warehouse Supervisor
Mark Kearney	-	Aldworth Warehouse Supervisor
Dave Mann	-	Aldworth Warehouse Supervisor
Keith Cybulski	-	Aldworth Warehouse Supervisor
Scott Henderschott	-	Aldworth Warehouse Supervisor
Juan Rivera	-	Aldworth Floor Supervisor
Kevin Donohue	-	Aldworth Floor Supervisor
Mike Houston	-	Aldworth Driver Supervisor
Craig Setter	-	Dunkin' Donuts President
Mike Shive	-	Dunkin' Donuts Distribution Center Manager
Tom Knoble	-	Dunkin' Donuts Transportation Supervisor
Warren Engard	-	Dunkin' Donuts Warehouse Supervisor

(k) Respondents, by Kevin Roy, engaged in the following conduct:

(1) In early April 1998, a more precise date being presently unknown to the Petitioner, in a meeting with its warehouse employees at the Center: (i) threatened

employees with job loss if they sought union representation; and (ii) solicited employees' complaints and grievances thereby promising them improved terms and conditions of employment in order to discourage them from seeking union representation.

(2) On or about April 11, 1998, in a meeting with employees at the Center: (i) solicited employees' complaints and grievances thereby promising them improved terms and conditions of employment in order to discourage them from seeking union representation; (ii) promised employees he would hire a new Regional Operations Manager in order to discourage them from seeking union representation; and (iii) threatened employees with a loss of benefits by telling them that they would "start out with nothing" if they selected a union to bargain for them.

(3) On or about May 8, 1998, by letter to employees: (i) solicited employees' complaints and grievances thereby promising them improved terms and conditions of employment in order to discourage them from seeking union representation; (ii) announced the creation of an "Issue Report Form" to solicit employees' complaints and grievances in order to discourage them from seeking union representation; and (iii) announced that certain of the grievances raised at the meeting referred to above in subparagraph (b), were being "adjusted" or "corrected" in order to discourage them from seeking union representation.

(4) On or about June 16, 1998, by letter to employees: (i) created the impression among its employees that their Union activities were under surveillance by telling them that he knew that Union representatives were visiting employees at their homes; (ii) solicited employees to report such "harassment" to him in order to discourage them from seeking Union representation; and (iii) solicited employees' complaints and grievances thereby

promising them improved terms and conditions of employment in order to discourage them from seeking Union representation.

(5) On or about June 27, 1998, at a meeting with employees at the Holiday Inn in Bridgeport, New Jersey: (i) threatened employees with loss of their existing benefits by telling them that they would start with a blank piece of paper if they selected the Union as their collective bargaining representative; (ii) created the impression among its employees that their Union activities were under surveillance by telling them he knew that "Union people" were visiting employees at their homes; (iii) interrogated employees concerning their Union activities; (iv) threatened employees that another employee who supported the Union would be discharged, and disparaged the employee; (v) threatened employees with job loss if they selected the Union as their collective bargaining representative; and (vi) promised employees wage increases, new work attire and an improved benefits package in order to discourage them from seeking Union representation.

(6) On or about June 29, 1998, by telephone: (i) told an employee that another employee's termination resulted from that employee's Union activities; (ii) threatened the employee with discharge because the employee supported the Union; and (iii) solicited the employee to campaign against the Union and to tell other employees that the employee's suspension was unrelated to the employee's Union activities.

(7) In August 1998, a more precise date being presently unknown to the Petitioner, in his office at the Center, interrogated an employee concerning the employee's Union activities and the Union activities of other employees.

(8) On or about August 29, 1998, September 1, 1998, September 2, 1998, September 3, 1998, September 8, 1998, September 9, 1998, September 10, 1998,

September 15, 1998, and September 17, 1998, in meetings with employees at the Holiday Inn in Bridgeport, New Jersey, solicited employees' complaints and grievances thereby promising them improved terms and conditions of employment in order to discourage them from selecting the Union as their collective bargaining representative.

(9) On or about September 1, 1998, September 3, 1998, and September 10, 1998, in meetings with employees at the Holiday Inn in Bridgeport, New Jersey, announced that Aldworth had responded favorably to complaints and grievances that employees had voiced earlier in order to discourage employees from selecting the Union as their collective bargaining representative.

(10) In certain of the meetings with employees at the Holiday Inn in Bridgeport, New Jersey, indicated to employees that it would be futile for them to select the Union as their collective bargaining representative by telling them: (i) on or about August 29, 1998, "Nobody from outside this room can force that change upon me without me saying so....Nobody has the force here" and that "...somebody else that doesn't belong in this room" can't do "a god damn thing unless I say so"; (ii) on or about September 1, 1998, that "There isn't one person outside this door, outside of our organization that is going to help me make it better"; and (iii) at one of the meetings, the specific date of which is presently unknown to the Petitioner, by telling employees that he "would not deal with the Union" and that he would "show up at negotiations but did not have to agree to anything."

(11) In certain of the meetings with employees at the Holiday Inn in Bridgeport, New Jersey, on or about August 29, 1998, September 8, 1998, September 15, 1998 and September 16, 1998, threatened employees with a loss of benefits by telling them, that they

would start with a blank piece of paper if they selected the Union as their collective bargaining representative.

(l2) In certain of the meetings with employees at the Holiday Inn in Bridgeport, New Jersey, on or about August 29, 1998, September 2, 1998, September 3, 1998, September 8, 1998, September 9, 1998, September 10, 1998, September 15, 1998, September 16, 1998 and September 17, 1998, threatened employees with loss of their jobs if they selected the Union as their collective bargaining representative.

(13) On or about August 29, 1998, after a meeting with employees at the Holiday Inn in Bridgeport, New Jersey, threatened an employee with discharge because the employee engaged in Union activity.

(14) On or about August 29, 1998, at a meeting with employees at the Holiday Inn in Bridgeport, New Jersey: (i) informed employees that Respondents had suspended an employee because the employee spoke in favor of the Union and concertedly complained to Respondent regarding their wages, hours and conditions of employment at a meeting at the Holiday Inn in Bridgeport, New Jersey held in June 1998; and (ii) informed employees that Respondents had discharged an employee because the employee spoke in favor of the Union at the earlier meeting at the Holiday Inn in Bridgeport, New Jersey.

(15) On or about September 10, 1998, at a meeting with employees at the Holiday Inn in Bridgeport, New Jersey: (i) threatened to discharge employees because the employees spoke in favor of the Union at the meeting; (ii) disparaged an employee because the employee supported the Union; and (iii) ejected an employee from the meeting because the employee supported the Union.

(16) In certain of the meetings with employees at the Holiday Inn in Bridgeport, New Jersey, on or about August 29, 1998, September 10, 1998 and September 17, 1998: (i) promised to create new supervisory positions and promotion opportunities for the employees in order to discourage them from selecting the Union as their collective bargaining representative; and (ii) promised to remove an unpopular supervisor in order to discourage employees from selecting the Union as their collective bargaining representative.

(17) On or about September 1, 1998, in a meeting with employees at the Holiday Inn in Bridgeport, New Jersey, created the impression among its employees that their Union activities were under surveillance by informing employees that he knew the identity of an employee who signed a Union authorization card and he knew the reason for the employee's decision to sign the authorization card.

(18) On or about September 10, 1998, September 15, 1998, September 16, 1998 and September 17, 1998, in meetings with employees at the Holiday Inn in Bridgeport, New Jersey, promised to improve employees medical insurance benefits in order to discourage them from selecting the Union as their collective bargaining representative.

(19) In certain of the meetings with employees at the Holiday Inn in Bridgeport, New Jersey, on or about September 15, 1998, September 16, 1998 and September 17, 1998, threatened employees with loss of their 401K plan if they selected the Union as their collective bargaining representative.

(20) On or about September 15, 1998, in a meeting with employees at the Holiday Inn in Bridgeport, New Jersey, informed employees that he had ejected an employee from an earlier meeting at the Holiday Inn in Bridgeport, New Jersey because the employee voiced support for the Union.

(21) On or about September 16, 1998, at a meeting with employees at the Holiday Inn in Bridgeport, New Jersey, threatened employees with discipline and other unspecified reprisals in order to discourage them from selecting the Union as their collective bargaining representative.

(l) Respondents, by Frank Fisher, engaged in the following conduct at the Center:

(1) In June 1998, a more precise date being presently unknown to the Petitioner, solicited an employee's complaints and grievances, thereby promising the employee improved terms and conditions of employment in order to discourage the employee from seeking union representation.

(2) In late August or early September 1998, a more precise date being presently unknown to the Petitioner, with Dave Mann, told an employee to take off a Union T-shirt, and directed the employee to turn the T-shirt inside out, while permitting other employees to wear T-shirts with other logos and messages without interference.

(3) In or about early September 1998, a more precise date being presently unknown to the Petitioner, accused its employees of disloyalty by telling an employee that he wanted to thank employees for making his life a "living hell" by seeking Union representation.

(4) On or about September 17, 1998, threatened employees with less favorable consideration of requests for time off if they selected the Union as their collective bargaining representative.

(5) In October 1998, a more precise date being presently unknown to the Petitioner, threatened to withhold work boot allowance money from an employee because the employee supported the Union.

(6) On or about October 15, 1998, told an employee that the employee's suspension was related to the employee's Union sympathies and activities.

(7) In or about the end of April or early May 1999, a more precise date being presently unknown to the Petitioner, interrogated an employee concerning the unfair labor practice proceedings pending before the Board.

(m) Respondents, by Keith Cybulski, engaged in the following conduct at the Center:

(1) With Kevin Donohue, in late July or early August 1998, a more precise date being presently unknown to the Petitioner, interrogated an employee concerning the employee's Union sympathies.

(2) With Scott Henderschott, during the period between September 1, 1998 and September 17, 1998, threatened employees with job loss if they selected the Union as their collective bargaining representative.

(n) Respondents, by Dave Mann, engaged in the following conduct at the Center:

(1) In mid-August 1998, a more precise date being presently unknown to the Petitioner, threatened employees with job loss if they selected the Union as their collective bargaining representative.

(2) On or about September 17, 1998, threatened employees with more onerous working conditions if they selected the Union as their collective bargaining representative.

(o) In or about the end of October or early November 1998, a more precise date being presently unknown to the Petitioner, Respondents, by Scott Henderschott, at the Center, told an employee to take off a Union T-shirt, while permitting other employees to wear T-shirts with other logos and messages without interference.

(p) During the week beginning September 13, 1998, Respondents, by Kevin Donohue, at the Center, threatened employees with unspecified reprisals if they selected the Union as their collective bargaining representative.

(q) During the week beginning September 6, 1998, Respondents, by Mike Shive and Wayne Kundrat, at the Center, engaged in surveillance of employees engaging in Union activities at the entrances to the Center's property.

(r) On or about September 10, 1998, Respondents, by Warren Engard, at the Center, threatened an employee with closure of the Center if the employees selected the Union as their collective bargaining representative.

(s) In the first part of September 1998, a more precise date being presently unknown to the Petitioner, Respondents, by Mike Shive, at the Center, told an employee to remove a Union pin from the employee's uniform.

(t) In or about mid-June 1999, a more precise date being presently unknown to the Petitioner, Respondents, by Mike Houston, at the Center, interrogated an employee concerning the employee's involvement in unfair labor practice proceedings before the Board.

(u) On or about June 27, 1998, in a meeting with employees at the Holiday Inn in Bridgeport, New Jersey, Respondents' employee William A. McCorry, in order to induce group action, concertedly complained to Respondents regarding the wages, hours and working conditions of Respondents' employees by complaining about the safety and cleanliness of the stores at which Respondents' employees made deliveries.

(v) On or about July 18, 1998, Respondents issued a handbook to employees announcing, *inter alia*, stricter and more onerous policies concerning tardiness, absenteeism and log falsifications.

(w) Respondents engaged in the conduct described above in subparagraph (u): (i) because its employees were seeking Union representation; and (ii) because its employees engaged in the concerted activities described above in subparagraph (u), and to discourage them from engaging in these activities.

(x) On or about June 23, 1998, Respondents conducted a Route Survey on the route assigned to its employee William A. McCorry.

(y) On or about June 29, 1998, Respondents suspended employee William A. McCorry for five (5) days.

(z) Respondents engaged in the conduct described above in subparagraphs (x) and (y), because: (i) William A. McCorry engaged in the conduct described above in subparagraph (u); and (ii) because William A. McCorry supported and assisted the Union and in order to discourage employees from engaging in these or other concerted activities.

(aa) On or about June 29, 1998, Respondents discharged employee Leo Leo.

(bb) Respondents engaged in the conduct described above in subparagraph (aa), because Leo Leo supported and assisted the Union.

(cc) On or about October 14, 1998, Respondents issued five (5) day suspensions to its employees Doug King, Rob Moss, Dave Shipman and Jesse Sellers.

(dd) Respondents engaged in the conduct described above in subparagraph (cc), because Doug King, Rob Moss, Dave Shipman and Jesse Sellers supported and assisted the Union.

(ee) On or about October 21, 1998, Respondents changed the work shifts and job assignments of its employees Doug King, Ken Mitchell, Rob Moss, Dave Shipman and Jesse Sellers.

(ff) Respondents engaged in the conduct described above in subparagraph (ee), because Doug King, Ken Mitchell, Rob Moss, Dave Shipman, and Jesse Sellers supported and assisted the Union.

(gg) In early November 1998, a more precise date being presently unknown to the Petitioner**,** Respondents suspended its employee Jesse Sellers for one day.

(hh) Respondents engaged in the conduct described above in subparagraph (gg), because its employee Jesse Sellers supported and assisted the Union.

(ii) On or about November 19, 1998, Respondents discharged its employee Rob Moss.

(jj) Respondents engaged in the conduct described above in subparagraph (ii), because its employee Rob Moss supported and assisted the Union.

(kk) In early October 1998, a more precise date being presently unknown to the Petitioner, Respondents implemented, and began enforcing, a new "Selection Accuracy Policy."

(ll) Since in or about early October 1998, Respondents, pursuant to the Selection Accuracy Policy referred to above in subparagraph (kk), have discharged its

employees Carl Nelson, Ken Mitchell, Jesse Sellers and Doug King and other similarly situated employees whose names are presently unknown to the Petitioner.

(mm) Respondents engaged in the conduct described above in subparagraphs (kk) and (ll) above because its employees supported and assisted the Union.

(nn) The following employees of Respondents, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time drivers, warehouse employees, yard jockeys, maintenance employees and warehouse trainees employed by Respondents at the Center, excluding all other employees, guards and supervisors as defined in the Act.

(oo) On or about July 27, 1998, a majority of the Unit designated and selected the Union as their representative for the purposes of collective bargaining with Respondents.

(pp) At all times since on or about July 27, 1998, based on Section 9(a) of the Act, the Union has been the exclusive collective bargaining representative of the Unit.

(qq) By the conduct described above in subparagraphs (k) through (t) and (v) through (z), Respondents have been interfering with, restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

(rr) By the conduct described above in subparagraphs (v) through (mm), Respondents have been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

(ss) The conduct described above in subparagraphs (k) through (t), (v) through (mm), (qq) and (rr), is so serious and substantial in character that the possibility of erasing the

effects of these unfair labor practices and of conducting a fair rerun election by the use of traditional remedies is slight, and the employees' sentiments regarding representation, having been expressed through authorization cards, would, on balance, be protected better by issuance of a bargaining order than by traditional remedies alone.

(tt) On or about July 28, 1998, the Union, by letter, requested Respondents to recognize it as the exclusive collective bargaining representative of the Unit and bargain collectively with it as the exclusive collective bargaining representative of the Unit..

(uu) Since on or about July 28, 1998, Respondents have failed and refused to recognize and bargain with the Union as the exclusive collective bargaining representative of the Unit.

(vv) The subjects described above in subparagraphs (kk) and (ll) concern wages, hours and other terms and conditions of employment of the Unit and are mandatory subjects for the purposes of collective bargaining.

(ww) Respondents engaged in the conduct described above in subparagraphs (kk) and (ll), without prior notice to the Union and without having afforded the Union an opportunity to bargain with Respondents concerning this conduct.

(xx) By the conduct described above in subparagraphs (kk), (ll), (uu) and (ww), Respondents have been failing and refusing to bargain collectively with the exclusive collective bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

(yy) The unfair labor practices of Respondents described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. Upon information and belief, it may be fairly anticipated that, unless restrained, Respondents will continue their aforesaid unlawful acts and conduct in violation of Section 8(a)(1), (3) and (5) of the Act.

8. Upon information and belief, unless the continuation or repetition of the above described unfair labor practices is restrained, a serious failure of enforcement of important provisions of the Act, and of the public policy embodied in the Act, will result before an ultimate order of the Board can issue.

9. Upon information and belief, to avoid the serious consequences set forth above, it is essential, appropriate, just and proper, for the purposes of effectuating the policies of the Act and of avoiding substantial, irreparable and immediate injury to such policies, to employees, and to the public interest, and in accordance with Section 10(j) of the Act, that, pending the final disposition of the matters involved herein pending before the Board, Respondents be enjoined and restrained from the commission of the acts and conduct alleged above, similar or related acts or conduct or repetitions thereof.

WHEREFORE, the Petitioner prays:

1. That the Court enter an order directing Respondents, Aldworth Company , Inc. and Dunkin' Donuts Mid-Atlantic Distribution Center, Inc., to appear before this Court, at a time and place fixed by the Court, and show cause, if any there be, why an injunction should not issue enjoining and restraining Respondents, their officers, representatives, agents, servants, employees, attorneys, successors and assigns, and all persons acting in concert or participation with them, pending final disposition of the matters involved herein pending before the Board, from:

(a) threatening employees with job loss if they seek Union representation;

(b) soliciting employee complaints and grievances and promising to improve terms and conditions of employment in order to discourage employees from seeking Union representation;

(c) threatening employees with loss of benefits if they support the Union;

(d) announcing the creation of benefits in order to discourage employees from seeking Union representation;

(e) creating the impression among its employees that their Union activities are under surveillance;

(f) soliciting employees to report on the Union activities of others in order to discourage Union activity;

(g) interrogating employees about their Union activities, the Union activities of other employees, or the employees' involvement in unfair labor practice proceedings before the National Labor Relations Board;

(h) threatening to discharge, suspend or otherwise discipline employees because they support the Union;

(i) promising employees wage increases, new work attire and improved benefits packages in order to discourage them from seeking Union representation;

(j) telling employees that other employees' discharges and suspensions resulted from the employees' Union and other protected activities;

(k) soliciting employees to campaign against the Union and to falsely tell other employees that discipline they have received was unrelated to Union activity;

(l) announcing that employees' complaints have been responded to favorably in order to discourage employees from seeking Union representation;

(m) telling employees that selecting the Union as their bargaining representative will be futile;

(n) disparaging employees because they support and assist the Union and engage in other protected activities;

(o) ejecting employees from employer-held meetings with employees because the employees support the Union;

(p) promising to create new supervisory positions and promotional opportunities for employees in order to discourage them from selecting the Union as their bargaining representative;

(q) promising to remove unpopular supervisors in order to discourage employees from selecting the Union as their collective bargaining representative;

(r) promising to improve employees' medical insurance benefits in order to discourage them from seeking Union representation;

(s) threatening employees with loss of their 401K benefits if they select the Union as their collective bargaining representative;

(t) threatening employees with discipline and other unspecified reprisals in order to discourage them from selecting the Union as their collective bargaining representative;

(u) directing employees to remove Union T-shirts, buttons or other items with the Union logo while permitting other employees to wear T-shirts, buttons, or other items with other logos without interference;

(v) accusing employees of disloyalty because they seek Union representation;

(w) threatening employees with less favorable consideration of requests for time off if they select the Union as their collective bargaining representative;

(x) threatening to withhold boot allowance money from employees because they support the Union;

(y) threatening employees with more onerous working conditions if they select the Union as their collective bargaining representative;

(z) engaging in the surveillance of Union activities;

(aa) threatening employees with closure of the Distribution Center if they select the Union as their collective bargaining representative;

(bb) instituting new policies that establish more onerous conditions of employment because employees seek Union representation;

(cc) discharging, suspending or otherwise disciplining employees because they support the Union or engage in other protected activities;

(dd) failing or refusing to recognize and upon request bargain with the Union as the exclusive collective bargaining representative of employees in the following bargaining unit (Unit):

> All full-time and regular part-time drivers, warehouse employees, yard jockeys, maintenance employees and warehouse trainees employed by Respondents at the Center, excluding all other employees, guards and supervisors as defined in the Act.

(ee) unilaterally instituting new terms and condition of employment including the new Selection Accuracy Policy

(ff) in any other manner interfering with, restraining or coercing its employees in the exercise of their Section 7 rights.

2. That the Court enter an Order directing Respondents, their officers, representatives, agents, servants, employees, attorneys, successors and assigns, and all persons

acting in concert or participation with them, pending final disposition of the matters involved herein pending before the Board, to:

(a) on an interim basis, offer Leo Leo, Carl Nelson, Robert Moss, Kenneth Mitchell, Jesse Sellers, Douglas King, and all other employees who were discharged pursuant to the new Selection Accuracy Policy reinstatement to their former positions, or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights and privileges previously enjoyed, and displacing, if necessary, any employee who has been hired or reassigned to replace them;

(b) on an interim basis, offer employees Robert Moss, Kenneth Mitchell, Jesse Sellers and Douglas King reinstatement to the positions and shifts they held prior to October 13, 1998;

(c) on an interim basis, recognize, and upon request, bargain in good faith with the Union as the exclusive bargaining representative of the Unit;

(d) on an interim basis, rescind and cease giving effect to the "new Selection Accuracy Policy," first implemented in early October 1998;

(e) on an interim basis, restore the terms and conditions of employment as they existed for Unit employees on July 27, 1998;

(f) post copies of the District Court's Opinion and Order in Respondents' Swedesboro, New Jersey facility, in all locations where other notices to employees are customarily posted; maintain these postings during the Board's administrative process free from all obstructions and defacements; and grant to agents of the Board reasonable access to these facilities in order to monitor compliance with the posting requirement; and

(g) within twenty (20) days of the issuance of the District Court's Order, file with the District Court, and serve a copy to Petitioner, a sworn affidavit from a responsible official of Respondents, setting forth with specificity the manner in which Respondents have complied with the Court's Order including where exactly Respondents have posted the documents required by the Order.

3. That upon return of the order to show cause, the Court issue an order enjoining and restraining Respondent in the manner set forth above.

4. That the Court grant such further and other relief as may be just and proper.

Signed at Philadelphia, Pennsylvania this 28th day of July, 1999.

_____

DOROTHY L. MOORE-DUNCAN
Regional Director, Region Four
National Labor Relations Board

FREDERICK L. FEINSTEIN
General Counsel

BARRY J. KEARNEY
Associate General Counsel

DANIEL E. HALEVY,
Regional Attorney, Region Four

SCOTT C. THOMPSON,
Deputy Regional Attorney, Region Four

_____

LEA F. ALVO-SADIKY,

_____

MARGARITA NAVARRO-RIVERA,

_____

DEENA E. KOBELL
Attorneys for Petitioner
National Labor Relations Board,
Region Four
One Independence Mall, 7th Floor

615 Chestnut Street
Philadelphia, Pennsylvania 19106
Telephone: (215) 597-9619
(215) 597-7647
(215) 597-7650

COMMONWEALTH OF PENNSYLVANIA)
)
COUNTY OF PHILADELPHIA)

I, DOROTHY L. MOORE-DUNCAN, being first duly sworn, depose and say that I am Regional Director of the Fourth Region of the National Labor Relations Board, that I have read the foregoing Petition and Exhibits and know the contents thereof, that the statements therein made as upon personal knowledge are true and those made as upon information and belief, I believe to be true.

_____
DOROTHY L. MOORE-DUNCAN

Subscribed and sworn to before me
this 28th day of July, 1999

_____
NOTARY PUBLIC

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November 2001

JOSEPH P. NORELLI
WILLIAM A. BAUDLER
KATHLEEN C. SCHNEIDER
National Labor Relations Board, Region 20
901 Market Street, Suite 400
San Francisco, California 94103-1735
Telephone Numbers: (415) 356-5154/356-5194

Attorneys for Petitioner

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT H. MILLER, Regional Director of Region 20 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, Petitioner, vs. RECYCLING INDUSTRIES, INC., Respondent.	Civil No. PETITION FOR INJUNCTION UNDER SECTION 10(j) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED [29 U.S.C. SECTION 160(j)]

To the Honorable, the Judges of the United States District Court,
Eastern District of California

Comes now Robert H. Miller, Regional Director of Region 20 of the National Labor Relations Board, herein called the Board, and petitions this Court, for and on behalf of the Board, pursuant to Section 10(j) of the National Labor Relations Act, as amended [61 Stat. 149; 73 Stat. 544; 29 U.S.C. § 160 (j)], herein called the Act, for appropriate injunctive relief pending the final disposition of the matters involved herein pending before the Board on a Complaint of the Acting General Counsel of the Board charging that Recycling Industries, Inc., herein called Respondent, is engaging in unfair labor practices in violation of Sections 8(a)(1)

and (3) of the Act [29 U.S.C. § 158(1) and (3)]. In support thereof, Petitioner respectfully shows as follows:

1. Petitioner is the Regional Director of Region 20 of the Board, an agency of the United States Government, and files this petition for and on behalf of the Board, which has authorized the filing of this petition.

2. Jurisdiction of the Court is invoked pursuant to Section 10(j) of the Act, which provides, inter alia, that the Board shall have power, upon issuance of a complaint charging that any person has engaged in unfair labor practices, to petition any United States district court within any district wherein the unfair labor practices in question are alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary injunctive relief or restraining order pending final disposition of the matter by the Board.

3. On November 15, 2000, the International Longshore and Warehouse Union, Local 17, herein called the Union, filed with the Board an original charge in Board Case 20-CA-29897-1 alleging that Respondent is engaged in unfair labor practices in violation of Section 8(1), (3), (4) and (5) of the Act. On December 14, 2000, a first-amended charge was filed by the Union in Board Case 20-CA-29897-1 alleging that Respondent engaged in unfair labor practices in violation of Section 8(a)(1), (3) and (4) of the Act. On January 11, 2001, a second-amended charge was filed by the Union in Board Case 20-CA-29897-1 alleging that Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3). On January 31, 2001, a third-amended charge was filed by the Union in Board Case 20-CA-29897-1 alleging that Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3).

4. The aforesaid charges were referred to Petitioner as Regional Director of Region 20 of the Board.

5. Upon investigation, Petitioner determined that there is reasonable cause to believe, as alleged in the aforesaid charges, that Respondent is engaging in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.

6. On February 28, 2001, the Regional Director of Region 20 of the Board, upon such charges and pursuant to Section 10(b) of the Act [29 U.S.C. § 160(b)], issued a Complaint against Respondent alleging that Respondent is engaging in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.

7. Pursuant to Rule 10(c) of the Federal Rules of Civil Procedure, true copies of the aforesaid Complaint and charges in Board Case 20-CA-29897-1 are attached hereto and marked as Exhibits 1-5, respectively, and are incorporated herein as though fully set forth.

8. There is a likelihood that the allegations set forth in the Complaint are true and that Respondent engaged in, and is engaging in, unfair labor practices in violation of Section 8(a)(1) and (3) of the Act. More specifically, and as more particularly described in the Complaint attached hereto as Exhibit 1, Petitioner alleges that there is a likelihood that Petitioner will establish the following:

(1) (a) At all material times, Respondent, a corporation with an office and place of business in Sacramento, California, has been engaged in the business of processing recyclable materials.

(b) During the twelve-month period ending May 31, 2000, Respondent, in conducting its business operations described above in 1(a), sold and shipped goods valued in excess of $50,000 directly to customers located outside the State of California.

(2) At all material times, Respondent has been an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act [29 U.S.C. §§ 152(2), (6), and (7)].

(3) At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act [29 U.S.C. § 152(5)].

(4) (a) At all material times, the following individuals have held the positions set forth opposite their respective names and have been supervisors of Respondent

within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Scott Kuhnen	-	General Manager
David Kuhnen	-	Treasurer
Jose Sanchez	-	Labor Consultant

(b) At all material times, prior to an unknown date in October 2000, Antonio Cortes occupied the position of leadman for Respondent and was an agent of Respondent within the meaning of Section 2(13) of the Act.

(c) At all material times, after an unknown date in October 2000, Antonio Cortes has occupied the position of Supervisor for Respondent and has been a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

(5) (a) The following employees of Respondent, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a) of the Act:

> All full-time and regular part-time machine operators, forklift operators, baler operators, buyers, clerical/cashier-weigh masters, drivers, welders, mechanics, and sorter/laborers employed by the Employer at its 3300 Power Inn Road, Sacramento, California location; excluding all other employees, guards and supervisors as defined in the Act.

(b) During the period from about May 17 to June 3, 2000, a majority of the Unit designated and selected the Union as their representative for the purposes of collective bargaining with Respondent.

(c) At all times since June 3, 2000, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

(6) Respondent, by Jose Sanchez, at Respondent's facility:

(a) On various unknown dates in about June 2000, told employees that Respondent would never accept the Union as their collective-bargaining representative thereby informing employees it would be futile for them to select the Union as their representative.

(b) On an unknown date in about June 2000, threatened employees that Respondent would go bankrupt and lay off all its employees if they selected the Union as their collective-bargaining representative.

(7) (a) On an unknown date in about June 2000, Respondent, by Antonio Cortes, at Respondent's facility, announced that effective July 2000, employees would receive a wage increase as an inducement for them to abandon their support for the Union.

(b) On unknown dates in July 2000, Respondent granted a wage increase to its Unit employees in order to induce them to abandon their support for the Union.

(c) On an unknown date in November or December 2000, Respondent, by Antonio Cortes, at Respondent's facility, solicited employees to sign a petition stating that they no longer want the Union as their collective-bargaining representative.

(8) (a) About July 4 and 5, 2000, Respondent held a raffle with substantial cash prizes for its Unit employees.

(b) As a condition of participating in the raffle described above in subparagraph 8(a), Respondent required its employees to complete and give to Respondent for review, a questionnaire containing questions calculated to determine their union sympathies. (9) (a) About May 31, 2000, Respondent suspended its employee Jorge Ontiveros for one day without pay.

(b) About October 12, 2000, Respondent suspended its employee Jose Hernandez for two days without pay.

(c) About October 27, 2000, Respondent suspended its employee Juan Orozco for one day without pay.

(d) About October 27, 2000, Respondent discharged its employee Jorge Ontiveros.

(e) About January 19, 2001, Respondent suspended its employee Juan Orozco for five days without pay.

(f) Respondent engaged in the conduct described above in subparagraph 9(a) through (e) because the employees named therein joined and/or assisted the Union and engaged in union and/or concerted activities and to discourage employees from engaging in these activities.

(10) The conduct described above in paragraphs 6 through 9 is so serious and substantial in character that the possibility of erasing the effects of these unfair labor practices and of conducting a fair election by the use of traditional remedies is slight, and the employees' sentiments regarding representation, having been expressed through authorization cards would, on balance, be protected better by issuance of a bargaining order than by traditional remedies alone.

(11) By the conduct described above in paragraphs 6 through 8, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

(12) By the conduct described above in paragraph 9, Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization, in violation of Section 8(a)(1) and (3) of the Act.

(13) The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and 2(7) of the Act.

9. It may fairly be anticipated that, unless enjoined, Respondent will continue to repeat the acts and conduct set forth in paragraph 8 or similar or like acts in violation of Section 8(a)(1) and (3) of the Act.

10. It is likely that substantial and irreparable harm will result to Respondent's employees and their statutorily protected right to organize unless the aforesaid unfair labor practices are immediately enjoined and appropriate relief granted. By its unlawful conduct, including its termination of union adherent Jorge Ontiveros, its threats not to accept the Union as the collective-bargaining representative of its employees, its threat to go bankrupt and lay off all its employees, and granting a unit-wide wage increase, Respondent has, for now, succeeded in nipping that campaign "in the bud." That blow to the organizing campaign is not likely to be remedied through the regular administrative procedures of a Board Order and an Enforcement Decree of the Court of Appeals, which could take years to conclude. By then, the momentum of the organizing campaign likely will have dissipated, with the result that Respondent will have achieved its ultimate objective of thwarting the organizing campaign, with little likelihood of that damage being undone by remedies imposed at the conclusion of the administrative and appellate process. Moreover, studies show that, as time goes by, the probability increases that employees who have been discharged will obtain work elsewhere and will be more reluctant to return to work for the employer that unlawfully terminated them, thereby further dissipating an organizing union's base of support and correspondingly further enabling an employer, such as Respondent, to reap irreversible benefits from its unlawful conduct, all in disregard of the policies of the Act and the public interest.

11. Upon information and belief, it is submitted that, in balancing the equities in this matter, the harm that will be suffered by the Union, the employees, and the public interest, and the purposes and policies of the Act if injunctive relief is not granted greatly outweighs any harm that Respondent may suffer if such injunctive relief is granted.

12. Upon information and belief, to avoid the serious consequences referred to above, it is essential, just and proper, and appropriate for the purposes of effectuating the

remedial purposes of the Act and avoiding substantial and irreparable injury to such policies, the public interest, the employees, and the Union, and in accordance with the purposes of Section 10(j) of the Act that, pending final disposition by the Board, Respondent be enjoined and restrained as herein prayed.

WHEREFORE, Petitioner respectfully requests the following:

(1) That the Court issue an order directing Respondent to file an answer to each of the allegations set forth and referenced in the said Petition and to appear before the Court, at a time and place fixed by the Court, and show cause, if any there be, why, pending final disposition of the matters herein involved now pending before the Board, Respondent, its officers, representatives, supervisors, agents, servants, employees, attorneys and all persons acting on its behalf or in participation with it, should not be enjoined and restrained from the acts and conduct described above, similar or like acts, or other conduct in violation of Section 8(a)(1) and (3) of the Act, or repetitions thereof, and that the instant Petition be disposed of on the basis of affidavit and documentary evidence, without oral testimony, absent further order of the Court.

(2) That the Court issue an order directing Respondent, its officers, representatives, supervisors, agents, servants, employees, attorneys and all persons acting on its behalf or in participation with it, to cease and desist from the following acts and conduct, pending the final disposition of the matters involved now pending before the National Labor Relations Board:

(a) telling employees that it would be futile for them to select the Union as their representative;

(b) threatening to file bankruptcy and lay off its employees if they select the Union as their collective-bargaining representative;

(c) announcing and subsequently granting wage increases to employees as an inducement for them to abandon their support for the Union;

(d) soliciting employees to sign a petition stating that they no longer want the Union as their collective-bargaining representative;

(e) requiring employees to complete a questionnaire containing questions calculated to determine their union sympathies as a condition of participating in a raffle with substantial cash prizes;

(f) disciplining, suspending or discharging employees because of their Union and/or other protected concerted activity.

(h) in any other manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act;

(3) That the Court further order Respondent, its officers, representatives, supervisors, agents, servants, employees, attorneys and all persons acting on its behalf or in participation with it, to take the following steps pending the final disposition of the matters herein involved now pending before the National Labor Relations Board:

(a) offer interim employment to Jorge Ontiveros to his former job position and working conditions, or if that position no longer exists, to a substantially equivalent position without prejudice to his seniority or rights and privileges, displacing, if necessary, any newly hired or reassigned worker;

(b) recognize and bargain with International Longshore and Warehouse Union, Local 17, AFL-CIO, as the collective-bargaining representative of its employees in the following unit:

> All full-time and regular part-time machine operators, forklift operators, baler operators, buyers, clerical/cashier-weigh masters, drivers, welders, mechanics, and sorter/laborers employed by Respondent at its 3300 Power Inn Road, Sacramento, California location; excluding all other employees, guards and supervisors as defined in the Act.

(c) rescind and remove from employees' personnel files any reference to unlawful disciplinary actions/warnings and refrain from relying upon such discipline in the future;

(d) post copies of the District Court's Temporary Injunction and Findings of Fact and Conclusions of Law, in English and Spanish, at Respondent's 3300 Power Inn Road, Sacramento, California facility, in all locations where notices to its employees are normally posted; maintain these postings during the Board's administrative proceeding free from all obstructions and defacement; grant all employees free and unrestricted access to said postings; and grant to agents of the Board reasonable access to its Sacramento, California facility to monitor compliance with the posting requirement; and

(e) within twenty (20) days of the issuance of the Court's order, file with the Court, with a copy submitted to the Regional Director of the Board for Region 20, a sworn affidavit from a responsible official of Respondent, setting forth with specificity the manner in which Respondent is complying with the terms of the decree, including the locations of the posted documents.

(4) That upon return of said Order to Show Cause, the Court issue an order enjoining and restraining Respondent as prayed and in the manner set forth in Petitioner's proposed temporary injunction lodged herewith.

(5) That the Court grant such other and further temporary relief that may be deemed just and proper.

DATED AT San Francisco, California, this 14th day of May, 2001.

Robert H. Miller, Regional Director
National Labor Relations Board
Region 20
901 Market Street, Suite 400
San Francisco, California 94103-1735

JOSEPH P. NORELLI
Regional Attorney, Region 20
WILLIAM A. BAUDLER

Supervisory Attorney, Region 20
KAHTLEEN C. SCHNEIDER
Attorney, Region 20

KATHLEEN C. SCHNEIDER
Attorney for Petitioner
NATIONAL LABOR RELATIONS BOARD

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN FRANCISCO)

Robert H. Miller, being duly sworn, disposes and says that he is the Regional Director of Region 20 of the National Labor Relations Board, that he has read the foregoing petition, and the attached affidavits and exhibits in Board Case 20-CA-29897-1 and filed herewith, and knows the contents thereof; that the statements therein made as upon personal knowledge are true and that those made on information and belief he believes to be true.

Robert H. Miller

Subscribed and sworn to before me,
a Notary Public in and for the
County within the State aforesaid,
this 14th day of May, 2001.

NOTARY PUBLIC

My Commission Expires: _____

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November 2001

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
AT ASHLAND

D. RANDALL FRYE, Regional Director of
the Ninth Region of the National Labor
Relations Board, for and on behalf of the
NATIONAL LABOR RELATIONS BOARD

Petitioner

v. Civil No.

DISTRICT 1199, THE HEALTH CARE AND SOCIAL
SERVICE UNION, SERVICE EMPLOYEES INTERNATIONAL
UNION, AFL-CIO-CLC

Respondent

MOTION FOR TEMPORARY RESTRAINING ORDER UNDER SECTION 10(j)
OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED

To the Honorable Judges of the United States District Court for the Eastern District of Kentucky at Ashland:

The petition of D. Randall Frye, Regional Director of the Ninth Region of the National Labor Relations Board, herein called the Board, having been filed pursuant to Section 10(j) of the National Labor Relations Act, as amended, praying for appropriate injunctive relief against District 1199, The Health Care and Social Service Union, Service Employees International Union, AFL-CIO-CLC, herein called respondent, pending final disposition of the matters involved herein pending before the Board, now comes petitioner and respectfully avers as follows:

Upon information and belief as more fully appears from the affidavits attached hereto, and made a part hereof, substantial and irreparable injury will unavoidably result to the policies of the Act and to M.E.B. Incorporated d/b/a J.J. Jordan Geriatric Center, herein called J.J. Jordan Geriatric Center, the charging party before the Board, its

employees, and the patients for whom it provides care**,** from a continuation of respondent's unlawful conduct.

WHEREFORE, petitioner moves;

1. That the Court issue a temporary restraining order forthwith enjoining and restraining respondent, its officers, agent's, representatives, servants, employees, attorneys, and all members and persons acting in concert or participation with them, for a period of ten (10) days duration as provided for in Rule 65(b) of the Federal Rules of Civil Procedure, from: restraining or coercing the employees of J.J. Jordan Geriatric Center, or of any other person doing business with J.J. Jordan Geriatric Center, by:

(a) Engaging in mass picketing thereby blocking ingress to and egress from, or in any other manner, preventing, attempting to prevent or hindering employees, customers, suppliers or other persons from entering or leaving the Louisa, Kentucky facility of J.J. Jordan Geriatric Center.

(b) Inflicting, or attempting to inflict injury or damage to the persons or property, including motor vehicles, of any employees or any persons doing business with J.J. Jordan Geriatric Center.

(c) Threatening nonstriking employees or others with injury to their person, their families, or damage to property.

(d) Possessing weapons on the picket line or taking pictures of nonstriking employees or other persons crossing its picket line.

(e) In any other manner, or by any other means. restraining or coercing the employees of J.J. Jordan Geriatric Center or of any person doing business with J.J. Jordan Geriatric Center, in the exercise of their rights guaranteed under Section 7 of the Act.

2. That the Court issue an order directing respondent to appear before this Court, at a time and place to be fixed by the Court, and show cause, if any there be, why an injunction should not issue enjoining and restraining respondent, its officers, agents, representatives, servants, employees, attorneys, and all members and persons acting in concert or participation with them, pending the final disposition of the matters involved, pending before the Board, in the manner set forth above and in the petition.

3. That upon the return of the order to show cause, this Court issue an order enjoining and restraining respondent in the manner set forth above and in the petition.

4. That this Court grant such other and further relief as may be deemed just and proper.

Dated at Cincinnati, 0hio this 15th day of July 1992.

D. Randall Frye, Regional Director
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

JERRY M. HUNTER
General Counsel
ROBERT E. ALLEN
Associate General Counsel
EARL L. LEDFORD
Acting Regional Attorney

Carol. L. Shore, Trial Attorney
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Plain Street
Cincinnati, Ohio 45202-3271

Telephone: (513) 684-3686

Attachments

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

* *		
DOROTHY L. MOORE-DUNCAN, Regional Director of the Fourth Region of the NATIONAL LABOR RELATIONS BOARD, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,	*	
Petitioner,	*	
v.	*	Civil No.
HORIZON HOUSE DEVELOPMENTAL SERVICES, INCORPORATED	*	
Respondent.	*	
* *		

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This cause came to be heard upon the verified petition and amended petition of Dorothy L. Moore-Duncan, Regional Director of the Fourth Region of the National Labor Relations Board (herein called the Board), for a temporary injunction pursuant to Section 10(j) of the National Labor Relations Act, as amended (61 Stat. 149; 73 Stat. 544; 29 U.S.C. Sec. 160 (j); (herein called the Act), pending the final disposition of the matters involved herein pending before the Board, and upon the issuance of an order to show cause why injunctive relief should not be granted as prayed for in said petition and amended petition. The Court has fully considered the petition, evidence and arguments of counsel and upon the entire record, the Court makes the following:

FINDINGS OF FACT

1. Petitioner is Regional Director for the Fourth Region of the Board, an agency of the United States, and files this Petition for and on behalf of the Board.

2. Jurisdiction of this Court is invoked pursuant to Section 10(j) of the Act.

3. On October 2, 2000, District 1199C, National Union of Hospital and Health Care Employees, AFSCME, AFL-CIO, (herein called the Union), pursuant to provisions of the Act, filed a charge with the Board in Case 4-CA-29830 alleging that Respondent, an employer within the meaning of Section 2(2) of the Act, has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

4. On February 23, 2001, based upon the charge in Cases 4-CA-29830, the Acting General Counsel of the Board, on behalf of the Board, by the Petitioner, issued a Complaint and Notice of Hearing in Case 4-CA-29830, pursuant to Section 10(b) of the Act, alleging that Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

5. There is, and Petitioner has reasonable cause to believe, that the allegations set forth in the Complaint and Notice of Hearing in Case 4-CA-29830 are true, and that Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, affecting commerce within the meaning of Section 2(6) and (7) of the Act. More particularly:

(a) At all material times, Respondent, a Pennsylvania corporation with an office at 120 South 30th Street, Philadelphia, Pennsylvania, has been engaged in providing health care and related services to the mentally disabled.

(b) During the past year, Respondent, in conducting its business operations described above in subparagraph (a), received gross revenues in excess of $250,000 and

purchased and received at its Philadelphia, Pennsylvania office goods valued in excess of $5,000 directly from points outside the Commonwealth of Pennsylvania.

(c) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and has been a health care institution within the meaning of Section 2(14) of the Act.

(d) At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

(e) At all material times, Robert Lindsey and Rita Kucsan held the positions of Respondent's Human Resources Manager and Director of Human Resources, respectively, and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act.

(f) At all material times, since at least July 27, 2000, Respondent has designated its attorney Guy Vilim as its negotiator for bargaining with the Union and, in that capacity, he has been an agent of Respondent within the meaning of Section 2(13) of the Act.

(g) The following employees of Respondent constitute a unit, herein called the Unit, appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time, regular part-time and substitute Resident Advisors II and III employed in the Bucks County, Pennsylvania Division of Respondent, excluding all other employees, including home coordinators, team coordinators, program specialists guards and supervisors as defined in the Act.

(h) On July 3, 1997, the Union was certified as the exclusive collective bargaining representative of the Unit.

(i) At all material times, since July 3, 1997, based on Section 9(a) of the Act, the Union has been the exclusive collective bargaining representative of the Unit.

(j) In July 1999, a more precise date being presently unknown to the General Counsel, date being presently unknown to the Petitioner, Respondent and the Union entered into their first collective bargaining agreement, herein called the Agreement, effective by its terms from December 21, 1998 through September 30, 2000.

(k) On or about July 1, 2000, the Union, by letter, requested Respondent to begin negotiations for a new collective bargaining agreement.

(l) From on or about August 14, 2000 until on or about September 30, 2000, the Union, by several telephone calls from its negotiator Vivian Gioia to Guy Vilim, attempted to schedule negotiations for a new collective bargaining agreement.

(m) Since, on or about July 1, 2000, Respondent has failed and refused to bargain with the Union for a new collective bargaining agreement.

(n) Respondent did not respond to the telephone calls described above in subparagraph (b).

(o) On or about August 14, 2000, the Union, by letter to Rita Kucsan requested the following information: (1) recent payroll run; (2) medical benefit information that included the amount paid by the employees, the amount paid by the employer, and the actual premium cost; and (3) the number of regular and overtime hours worked by each employee during the past 12 months per pay period.

(p) On or about August 30, 2000, the Union, by facsimile transmission to Robert Lindsey, requested the "Leave/Bank" policy referred to in Article 19 of the Agreement.

(q) The information described above in subparagraphs (o) and (p), is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the Unit.

(r) Since, on or about August 14, 2000, Respondent has failed and refused to furnish to the Union the information described above in subparagraph (o).

(s) Since, on or about August 30, 2000, Respondent has failed and refused to furnish to the Union the information described above in subparagraph (p).

(t) On or about August 30, 2000, the Union filed grievances protesting the following terms and conditions of employment of the Unit: (1) supervisors performing bargaining unit work; (2) employees not being paid overtime; and (3) failure to post work schedules.

(u) The subjects set forth above in subparagraph (a), relate to wages, hours and other terms and conditions of employment of the Unit and are mandatory subjects for the purposes of collective bargaining.

(v) Since, on or about August 30, 2000, Respondent has failed and refused to process the grievances described above in subparagraph (t).

(w) Petitioner has reasonable cause to believe that, by the conduct described above in subparagraphs (m), (n), (r), (s) and (v), Respondent has been failing and refusing to bargain with the exclusive collective bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act and that the unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. It may be fairly anticipated that, unless enjoined and restrained, Respondent will continue its aforesaid unlawful acts and conduct in violation of Section 8(a)(1) and (5) of the Act.

7. Unless the continuation or repetition of the above described unfair labor practices

is restrained, a serious failure of enforcement of important provisions of the Act, and of the public policy embodied in the Act, will result before an ultimate order of the Board can issue.

8. To avoid the serious consequences set forth above, it is essential, appropriate, just and proper, for the purposes of effectuating the policies of the Act and of avoiding substantial, irreparable and immediate injury to such policies, to employees, and to the public interest, and in accordance with Section 10(j) of the Act, that, pending the final disposition of the matters involved herein pending before the Board, Respondent be enjoined and restrained from the commission of the acts and conduct described, similar or related acts or conduct or repetitions thereof.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and of the subject matter of the proceeding, and under Section 10(j) of the Act, is empowered to grant injunctive relief.

2. There is, and Petitioner has reasonable cause to believe that:

(a) Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

(b) The Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

(c) Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Sections 8(a)(1) and (5) of the Act, affecting commerce within the meaning of Section 2(6) and (7) of the Act, and a continuation of these unfair labor practices will impair the policies of the Act as set forth in Section 1(b) thereof.

3. To preserve the issues for the orderly determination as provided in the Act, it is appropriate, just, and proper that, pending the final disposition of the matters herein involved pending before the Board, Respondent, its officers, representatives, agents, servants, employees, attorneys, and all members and persons acting in concert or participation with them, be enjoined and restrained from the commission, continuation, or repetition, of the acts and conduct set forth in Finding of Facts paragraph 5, subparagraphs (m), (n), (r), (s), (v) and (w) above, acts or conduct in furtherance or support thereof, or like or related acts or conduct, the commission of which in the future is likely or may fairly be anticipated from Respondent's acts and conduct in the past.

Done at Philadelphia, Pennsylvania this _____ day of _____, 2001.

_____
Harvey Bartle, III,
U.S. District Court Judge

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November 2001

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Roberto G. Chavarry, Regional Director
of the Twenty-fifth Region of the
National Labor Relations Board,
for and on behalf of the
NATIONAL LABOR RELATIONS BOARD

Petitioner

v. CIVIL NO.

GREAT LAKES DISTRIBUTING & STORAGE, INC. and
GREAT LAKES PACKAGING, INC.

Respondent

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on to be heard upon the verified petition of Roberto G. Chavarry, Regional Director of the Twenty-fifth Region of the National Labor Relations Board, herein called the Board, for preliminary injunction pursuant to Section 10(j) of the National Labor Relations Act, as amended [61 Stat. 149; 73 Stat. 544; 29 U.S.C. Sec. 160(j)], herein called the Act, pending the final disposition of the matters involved pending before the Board, and upon the issuance of an order to show cause why injunctive relief should not be granted as prayed for in said petition. The Court has fully considered the petition, evidence and arguments of counsel and upon the entire record, the Court makes the following:

I. FINDINGS OF FACT:

1. Petitioner is the Regional Director of the Twenty-fifth Region of the Board, an agency of the United States, and filed this petition for and on behalf of the Board.

2. On or about November 27, 2000, District No. 90, International Association of Machinists and Aerospace Workers, AFL-CIO, a/w International Association of Machinists and Aerospace Workers, AFL-CIO, herein called the Union, filed a charge with the Board, and on January 18, 2001 filed an amended charge with the Board alleging, inter alia, that Great Lakes Distributing & Storage, Inc., herein called GLDS, and Great Lakes Packaging, Inc., herein called GLP and herein jointly called respondent, has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

3. The aforesaid charges were referred the Regional Director of the Twenty-fifth Region of the Board.

4. On February 27, 2001, upon the charges filed against respondent by the Union, the Acting General Counsel of the Board, on behalf of the Board, by the Regional Director, pursuant to Section 10(b) of the Act, issued a complaint and notice of hearing against respondent alleging that respondent engaged in violations of Section 8(a)(1) and (5) of the Act.

5. There is a substantial likelihood that the Petitioner will, in the underlying administrative proceeding in Case 25-CA-27340-1 Amended, establish that:

(a) At all material times GLDS and GLP have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy; have shared common premises and facilities; have provided services for and made sales to each other; have interchanged personnel

with each other; and have held themselves out to the public as single-integrated business enterprises.

(b) Based on its operations described above in Findings of Fact 5(a), GLDS and GLP constitute a single-integrated business enterprise and a single employer within the meaning of the Act.

(c) About November 11, 2000, respondent purchased the microwave popcorn packaging portion of the Valparaiso, Indiana facility of the Orville Redenbacher Popcorn Division of ConAgra Grocery Products Company, herein called Orville Redenbacher, and since then has continued to operate the microwave popcorn packaging portion of the business of the Valparaiso, Indiana facility of Orville Redenbacher in basically unchanged form, and has employed as a majority of its employees individuals who were previously employees of Orville Redenbacher.

(d) Based upon the operations described above in Findings of Fact 5(c), respondent has continued the employing entity of and is a successor to Orville Redenbacher.

(e) At all material times respondent, with an office and place of business in Valparaiso, Indiana, herein called respondent's facility, has been engaged within this judicial district in the co-packaging, distribution and storage of food products. During the past twelve months, respondent, in conducting its business operations described above, purchased and received at its Valparaiso, Indiana facility goods valued in excess of $50,000 directly from points outside the State of Indiana. During the past twelve months, respondent, in conducting its business operations described above, sold and shipped from its Valparaiso, Indiana, facility goods valued in excess of $50,000 directly to points outside the State of Indiana. At all material

times respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

(f) The Union, an unincorporated association, is an organization in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, and conditions of employment, and is a labor organization within the meaning of Section 2(5) of the Act.

(g) The following employees of respondent, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act [29 U.S.C. Sec.159(b)]:

> All production and maintenance employees, including all shipping and receiving employees of the Employer at its Valparaiso, Indiana facility, but excluding all office clerical employees, all professional employees, all guards, and all supervisors as defined in the Act.

(h) On April 7, 1978, the Union was certified as the exclusive collective-bargaining representative of the unit described above in Findings of Fact 5(g), herein also called the Unit.

(i) At all times since November 11, 2000, and continuing to date, based on the Findings of Fact 5(c) and 5(d), the Union has been the designated exclusive collective-bargaining representative for the purpose of collective bargaining of the employees in the Unit.

(j) From about April 7, 1978 to about June 1, 2000 the Union had been the representative for the purpose of collective bargaining of the employees in the Unit described

above in Findings of Fact 5(g) and, by virtue of Section 9(a) of the Act, has been and is now, the exclusive representative of all the employees in said Unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

(k) At all times since November 11, 2000, and continuing to date, the Union has been the representative for the purpose of collective bargaining of the employees in the Unit described above in Findings of Fact 5(g), and, by virtue of Section 9(a) of the Act, has been and is now, the exclusive representative of all the employees in said Unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

(l) At all material times the following individuals held the positions set forth opposite their respective names and have been supervisors of respondent within the meaning of Section 2(11) of the Act [29 U.S.C. Sec. 152(11)] and agents of respondent within the meaning of Section 2(13) of the Act[29 U.S.C. Sec. 152(13)]:

Joe Glusak	-	Owner and President
Bradly Hendrickson		Owner
David Jancosek		Owner
William English		Owner
Thomas Adams		Owner
Kim Defries	-	Line Supervisor
John Schlink	-	Maintenance Manager

(m) By letters dated November 20, 2000 and January 19, 2001, the Union requested that respondent recognize it as the exclusive collective-bargaining representative of the Unit and bargain collectively with the Union as the exclusive collective-bargaining representative of the Unit.

(n) Since about November 20, 2000, respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit.

6. By the acts and conduct set forth above there is a substantial likelihood that the Regional Director will establish in the underlying administrative proceeding before the Board that respondent has interfered with, restrained and coerced its employees, and is interfering with, restraining and coercing its employees, in the exercise of their rights guaranteed to them by Section 7 of the Act; that respondent has failed and refused, and continues to fail and refuse to bargain collectively with the Union as the collective bargaining representative of its employees; and that by all of said conduct respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act and affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. Unless the interim relief requested is granted and respondent is enjoined and restrained from engaging in the unfair labor practices referred to above, a serious flouting of the Act will continue with the result that enforcement of important provisions of the Act and of public policy will be thwarted because of the reduction of the possibility of fully restoring the status quo ante is provided. It may be fairly anticipated that, unless enjoined, respondent will continue to repeat the acts and conduct described above in Findings of Fact 5(n), or similar or like acts and conduct, in violation of Section 8(a)(1) and (5) of the Act, with the result that

employees will be deprived of the rights guaranteed to them by the Act because of the improbability of being able to restore them to the status quo ante. Such harm clearly outweighs any harm respondent will suffer if the requested injunctive relief is granted.

It is, therefore, essential, appropriate, just and proper, for the purposes of effectuating the policies of the Act, and in accordance with the provisions of Section 10(j) thereof, that pending final disposition of the matters involved herein pending before the Board, respondent be enjoined and restrained from the commission of the acts and conduct set forth in the order granting preliminary injunction in this case.

CONCLUSIONS OF LAW:

1. This Court has jurisdiction of the parties and of the subject matter of this proceeding and, under Section 10(j) of the Act, is empowered to grant injunctive relief.

2. There is a substantial likelihood that Petitioner will, in the underlying administrative proceeding in Case 25-CA-27340-1 Amended establish that:

(a) The Union is a labor organization within the meaning of Sections 2(5), 8(b) and 10(j) of the Act.

(b) Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

(c) Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, affecting commerce within the meaning of Section 2(6) and (7) of the Act, and a continuation of these practices will impair the policies of the Act, as set forth in Section 1(b) thereof.

3. To preserve the issues for the orderly determination as provided in the Act, it is appropriate, just and proper, that pending the final disposition of the matters herein involved

pending before the Board, respondent, its officers, representatives, agents, servants, employees, and all members and persons acting in concert or participation with them, be enjoined as set forth hereinafter in the order granting preliminary injunction in this case.

Entered: , 2001

U. S. District Court Judge

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November 2001

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN KOLLAR, ACTING REGIONAL DIRECTOR FOR. REGION 8 OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

CIVIL NO. 4:99 CV 0392
JUDGE PETER C. ECONOMUS

UNITED STEELWORKERS OF AMERICA, LOCAL No.2155

and

UNITED STEELWORKERS OF AMERICA, LOCAL No. 2155-7

Respondents

ORDER GRANTING PRELIMINARY INJUNCTION

This cause came to be heard upon the verified petition of John Kollar, Acting Regional Director of the Eighth Region of the National Labor Relations Board, herein called the Board, for a preliminary injunction pursuant to Section 10(j) of the National Labor Relations Act, as amended, [61 Stat. 149; 73 Stat. 544; 29 U.S.C. Sec. 160(j)], herein called the Act, pending the final disposition of the matters involved pending before the Board, and upon issuance of an order to show cause why injunctive relief should not be granted as prayed for in said petition. The Court, upon consideration of the pleadings, evidence, briefs, arguments of counsel, and the entire record in the case, has made and

filed its findings of fact and conclusions of law finding and concluding that there is reasonable cause to believe that Respondents have engaged in, and are engaging in, acts and conduct in violation of Section 8(b)(1)(A) of the Act, affecting commerce within the meaning of Section 2(6) and (7) of the Act, and that such acts and conduct will likely be repeated or continued unless enjoined.

Now, therefore, upon the entire record, it is,

ORDERED, ADJUDGED AND DECREED, pending the final disposition of the matters involved pending before the Board:

1. That Respondents, United Steelworkers of America Locals No. 2155 and 2155-7, their officers, agents, representatives, servants, employees, and all members and persons acting in concert or participation with them be, and they hereby are, enjoined and restrained from restraining and coercing the employees, or supervisors, or management personnel in the presence of employees of RMI Titanium Company, herein called RMI, or any other person doing business with RMI, by:

(a) Engaging in mass picketing thereby blocking ingress to and egress from, or in any other manner preventing, attempting to prevent or hindering employees, customers, or suppliers from entering or leaving the RMI Titanium facility located in Niles, Ohio.

(b) Inflicting or attempting to inflict injury or damage to the person or property, including motor vehicles, of any employees or any persons doing business with RMI Titanium.

(c) Threatening non-striking employees or others with injury to their person, their families or damage to their property.

(d) Possessing any rocks, bricks projectiles, sticks, clubs, jack-rocks, nails, explosive devices or any other dangerous weapons at the Respondents' picket lines maintained at RMI's Niles, Ohio facility, or within one mile of such facility.

(e) Surveilling employees and/or persons doing business with RMI at RMI's Niles, Ohio facility by the use of video cameras, film or digital cameras and/or the written recording of automobile license plate numbers.

(f) Engaging in any mass picketing, blocking of ingress and egress into or out of RMI's Niles, Ohio facility and/or by engaging in oral threats and/or physical assaults against property or persons along Warren Avenue for a distance of one mile in both directions from RMI's Niles, Ohio facility, which creates a "gauntlet" to persons either entering or leaving the Niles facility

(g) In any other manner, or by any other means, restraining or coercing the employees or supervisors or management personnel in the presence of employees of RMI Titanium or any other person doing business with RMI Titanium, in the exercise of their rights guaranteed under Section 7 of the Act.

2. (a) That Respondents provide each of their officers, representatives, agents, members and picketers with a copy of this Order and a clear written directive to refrain from engaging in any picket line misconduct enjoined by this Court, or any other similar conduct.

(b) That Respondents post in their business offices and local meeting halls the Court's Opinion and Order In this case.

(c) That Respondents provide to this Court, with copies submitted to the Regional Director of the Eighth Region of the Board within ten (10) days of the issuance

of this Order, sworn affidavits describing with specificity what steps they have taken to comply with the terms of this injunction, including proof of service of the above document.

(d) That Respondents designate a picket line captain at all times they maintain a picket line at RMI's Niles, Ohio facility, who will be present at the picket line and who will control the conduct of all pickets, and the schedule of identified picket captains shall at all times be given beforehand to the National Labor Relations Board

(e) That Respondents shall, before each employee shift change at RMI's Niles, Ohio facility, police and remove any and all debris in the entranceways and roadways at the entrances to Gates 1 and 3 at the Niles facility.

3. That the United States Marshals take all actions deemed necessary to enforce the provisions and prohibitions set forth in this Order.

4. That this case shall remain on the docket of this Court and on compliance by Repondents with their obligations undertaken hereto, and upon disposition of the matters pending before the Board, the Petitioner shall cause this proceeding to be dismissed.

Dated at Youngstown, Ohio this 10th day of March 1999.

_____

Peter C. Economus
United States District Judge

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November 2001

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Roberto G. Chavarry, Regional Director
of the Twenty-fifth Region of the
National Labor Relations Board,
for and on behalf of the
NATIONAL LABOR RELATIONS BOARD

Petitioner

v. CIVIL NO.

GREAT LAKES DISTRIBUTING & STORAGE, INC. and
GREAT LAKES PACKAGING, INC.

Respondent

ORDER GRANTING PRELIMINARY INJUNCTION

This cause came to be heard upon the verified petition of Roberto G. Chavarry, Regional Director of the Twenty-fifth Region of the National Labor Relations Board, herein called the Board, for preliminary injunction pursuant to Section 10(j) of the National Labor Relations Act, as amended [61 Stat. 149; 73 Stat. 544; 29 U.S.C. Sec. 160(j)], herein called the Act, pending the final disposition of the matters involved pending before the Board, and upon the issuance of an order to show cause why injunctive relief should not be granted as prayed for in said petition. The Court, upon consideration of the pleadings, evidence, briefs, arguments of counsel, and the entire record in this case, has made and filed its findings of fact and conclusions of law finding and concluding that there is a likelihood that the Regional Director will, in the underlying Board proceeding, establish that respondent has engaged in, and is engaging in, acts and conduct in violation of Section 8(a)(1) and (5) of the Act, affecting commerce within the meaning of

Section 2(6) and (7) of the Act, and that such acts and conduct will likely be repeated or continued unless enjoined.

Now, therefore, upon the entire record, it is

ORDERED, ADJUDGED AND DECREED that, pending final disposition of the matters involved pending before the National Labor Relations Board, herein called the Board, an injunction issue enjoining and restraining and ordering and directing respondent Great Lakes Distributing & Storage, Inc, and Great Lakes Packaging, Inc., its officers, agents, servants, employees, attorneys, and all persons acting in concert or participation with it or them, as follows:

A. Enjoining and restraining respondent Great Lakes Distributing & Storage, Inc, and Great Lakes Packaging, Inc., from:

(i) failing and refusing to recognize and to bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of its employees in the appropriate collective bargaining unit;

(ii) in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed them by Section 7 of the Act;

B. Ordering and directing respondent Great Lakes Distributing & Storage, Inc, and Great Lakes Packaging, Inc., pending final Board adjudication, to:

(i) recognize and on request bargain in good faith with the Union as the exclusive collective-bargaining representative of its employees in the appropriate collective bargaining unit respecting rates of pay, hours of work, or other terms and conditions of employment; (ii) post copies of the district court's opinion and order at its Valparaiso, Indiana facility at all locations where notices to employees customarily are posted, maintain said postings

during the pendency of the Board's administrative proceedings free from all obstructions and defacements, and grant agents of the Board reasonable access to respondent's Valparaiso, Indiana facility to monitor compliance with the posting requirement; and (iii) within twenty (20) days of the issuance of the district court's order, file with the court, with a copy submitted to the Regional Director of the Board for Region 25, a sworn affidavit from a responsible official of respondent setting forth with specificity the manner in which respondent is complying with the terms of the decree.

IT IS FURTHER ORDERED that this case shall remain on the docket of this Court and on compliance by respondent with its obligations undertaken hereto, and upon disposition of the matters pending before the Board, the petitioner shall cause this proceeding to be dismissed.

Dated at Hammond, Indiana, this _____ day of _____, 2001.

_____
United States District Judge

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November 2001

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

LEONARD P. BERNSTEIN, Acting Regional Director for Region Seventeen of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD	*	
Petitioner	*	
v.	*	Civil No.
CARTER & SONS FREIGHTWAYS, INC.	*	
Respondent	*	

ORDER GRANTING TEMPORARY INJUNCTION

This cause came on to be heard upon the verified petition of Leonard P. Bernstein, Acting Regional Director of the Seventeenth Region of the National Labor Relations Board, for and on behalf of said Board, for a temporary injunction pursuant to Section 10(j) of the National Labor Relations Act, as amended, pending the final disposition of the matters involved pending before said Board, and upon the issuance of an order to show cause why injunctive relief should not be granted as prayed in said petition. The Court, upon consideration of the pleadings, evidence, memoranda, argument of counsel, and the entire record in the case, has made and filed its Findings of Fact and Conclusions of Law, finding and concluding that there is reasonable cause to believe that Respondent has engaged in, and is engaging in, acts and conduct in violation of Section 8(a)(1) and (3) of said Act, affecting commerce within the meaning of Section 2(6) and (7) of said Act, and that such acts and conduct will likely be repeated or continued unless enjoined.

Now, therefore, upon the entire record, it is

ORDERED, ADJUDGED AND DECREED that, pending the final disposition of the matters involved pending before the National Labor Relations Board, Respondent Carter & Sons Freightways, Inc., its officers, representatives, agents, servants, employees, attorneys, successors and assigns, and all persons acting in concert or participation with it or with them, be and they hereby are enjoined and restrained from:

(a) Terminating its employees because of their support for and activities on behalf of the International Brotherhood of Teamsters, Local Union No. 795, AFL-CIO (the Union);

(b) Subcontracting its work to other companies in order to avoid unionization or bargaining with the Union;

(c) Threatening to close its facility and to discharge employees if employees continue to support the union, or its employees select the Union as their collective-bargaining representative;

(d) Ordering employees to retrieve union authorization cards they have signed on behalf of the Union;

(e) Threatening employees with unspecified reprisals because employees continued their support for and activities on behalf of the Union;

(f) Interrogating employees about their union activities and support and the union activities and support of other employees;

(g) In any other manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, pending the final disposition of the matters pending before the National Labor Relations Board, Respondent Carter & Sons Freightways, Inc. its officers, representatives, agents, servants, employees, attorneys,

successors and assigns, and all persons acting in concert or participation with it or them, shall take the following affirmative action:

(a) Restore and reinstitute the operations at the Wichita, Kansas facility to their status as of June 19, 1997;

(b) Offer interim reinstatement at the Wichita, Kansas facility, to employees Bill Casselman, Steve Hoelscher, Ed Newman, and Glen Tucker at their previous wage rates and working conditions;

(c) Recognize and, upon request, bargain in good faith with the International Brotherhood of Teamsters, Local Union No. 795, AFL-CIO, as the exclusive collective-bargaining representative of the Unit described below at Respondent's Wichita, Kansas facility, concerning their wages, hours, and other terms and conditions of employment. This bargaining obligation is effective retroactive to June 19, 1997. The unit is:

> All full-time and regular part-time city pickup and delivery drivers and road drivers employed by Respondent at its facility located in Wichita, Kansas, but excluding office clerical employees, dispatchers, professional employees, guards, and supervisors as defined in the Act.

(d) Post copies of the District Court's Opinion and Order, at Respondent's Wichita, Kansas facility where notices to employees are customarily posted, said postings to be maintained during the pendency of the Board's administrative proceedings free from all obstructions and defacements; and grant to agents of the National Labor Relations Board reasonable access to Respondent's Wichita, Kansas facility to monitor compliance with this posting requirement;

(e) File within twenty days of the issuance of the District Court's Opinion and Order, with a copy submitted to the Regional Director of Region 17 of the National Labor Relations Board, a

sworn affidavit from a responsible official of Carter & Sons Freightways, Inc., setting forth with specificity the manner in which Respondent has complied with the terms of this Order.

Done at Wichita, Kansas this _____day of _____, 1997.

_____
UNITED STATES DISTRICT JUDGE

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November 2001

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT H. MILLER, Regional Director of Region 20 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, Petitioner, vs. RECYCLING INDUSTRIES, INC. Respondent.	Civil No. TEMPORARY INJUNCTION

This case came to be heard upon the verified Petition of Robert H. Miller, Regional Director of Region 20 of the National Labor Relations Board, herein called the Board, for and on behalf of the Board, for a temporary injunction pursuant to Section 10(j) of the National Labor Relations Act, as amended [29 U.S.C. § 160(j)], herein called the Act, pending the final disposition of the matters herein involved now pending before said Board, and upon the issuance of an Order to Show Cause why injunctive relief should not be granted as prayed in said Petition. All parties were afforded full opportunity to be heard, and the Court, upon consideration of the pleadings, the affidavits, declarations, and exhibits, the briefs and arguments of counsel, and the entire record in the case, has made its Findings of Fact and Conclusions of Law, finding and concluding that, in the underlying administrative proceeding in Board Case 20-ca-29897-1, there is a likelihood that Petitioner will establish that Recycling Industries, Inc.,

herein called Respondent, has engaged in, and is engaging in, acts and conduct in violation of Section 8(a)(1) and (3) of the Act [29 U.S.C. § 158(a)(1) and (3)] affecting commerce within the meaning of Section 2, subsections (6) and (7) of the Act [29 U.S.C. § 152(6) and (7)], and that in balancing the equities in this matter, the said violations of the Act will likely be repeated or continued and will irreparably harm the employees and the Union and the public interest, and will thwart the purposes and policies of the Act, unless enjoined.

Now, therefore, upon the entire record, it is hereby

ORDERED, ADJUDGED AND DECREED that, pending the final disposition of the matters now pending before the National Labor Relations Board, Respondent, its officers, representatives, supervisors, agents, servants, employees, attorneys and all persons acting on its behalf or in participation with it, be, and they hereby are, enjoined and restrained from:

(a) telling employees it would be futile for them to select International Longshore and Warehouse Union, Local 17, AFL-CIO, herein referred to as the Union, as their representative;

(b) threatening to file bankruptcy and lay off its employees if they select the Union as their collective bargaining representative;

(c) announcing and subsequently granting wage increases to employees as an inducement for them to abandon their support for the Union;

(d) soliciting employees to sign a petition stating that they no longer want the Union as their collective-bargaining representative;

(e) requiring employees to complete a questionnaire containing questions calculated to determine their union sympathies as a condition of participating in a raffle with substantial cash prizes;

(f) disciplining, suspending or discharging employees because of their Union and/or protected concerted activity.

(g) in any other manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

It is further

ORDERED, ADJUDGED AND DECREED that, pending the final disposition of the matters herein now pending before the National Labor Relations Board, Respondent, its officers, representatives, supervisors, agents, servants, employees, attorneys and all persons acting on its behalf or in participation with it, shall within five (5) days hereof, take the following steps:

(a) offer interim employment to Jorge Ontiveros to his former job position and working conditions, or if that job position no longer exists, to a substantially equivalent position without prejudice to his seniority or rights and privileges, displacing, if necessary, any newly-hired or reassigned worker;

(b) recognize and bargain with the Union as the collective bargaining representative of its employees in the bargaining unit concerning their wages, hours and other terms and conditions of employment, including providing the Union with advance notice and an opportunity to bargain over any intended changes to their wages, hours and other terms and conditions of employment;

The appropriate bargaining unit is:

All full-time and regular part-time machine operators, forklift operators, baler operators, buyers, clerical/cashier-weigh masters, drivers, welders, mechanics, and sorter/laborers employed by Respondent at its 3300 Power Inn road, Sacramento, California location; excluding all other employees, guards and supervisors as defined in the Act.

(c) rescind and remove from employees' personnel files any reference to unlawful disciplinary actions/warnings and refrain from relying upon such discipline in the future;

(d) post copies of the Court's Temporary Injunction and Findings of Fact and Conclusions of Law, in both Spanish and English, at Respondent's 3300 Power Inn Road, Sacramento, California facility in all locations where notices to its employees are normally posted; maintain these postings during the Board's administrative proceeding free from all obstructions and defacement; grant all employees free and unrestricted access to said postings; and grant to agents of the Board reasonable access to the facility to monitor compliance with the posting requirement; and

(e) within twenty (20) days of the issuance of the Court's order, file with the Court, with a copy submitted to the Regional Director of the Board for Region 20, a sworn affidavit from a responsible official of Respondent, setting forth with specificity the manner in which Respondent is complying with the terms of the decree.

DATED AT San Francisco, California, this _____ day of _____, 2001.

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN KOLLAR, Acting Regional Director for Region 8 of the National Labor Relations Board, for and on Behalf of the National Labor Relations Board,	)	**CASE NO. 4:99 CV 0392**
Petitioner	)	**JUDGE PETER C. ECONOMUS**
vs.	)	
UNITED STEEL WORKERS OF AMERICA, LOCAL NO. 2155 and UNITED STEELWORKERS OF AMERICA, LOCAL NO. 2155-7,	)	
Respondents	)	

TEMPORARY RESTRAINING ORDER

The petition of John Kollar, Acting Regional Director for Region 8 of the National Labor Relations Board, herein the Board, for and on behalf of the Board, having been filed and properly served on United Steelworkers of America Local No. 2155 and Local No. 2155-7, herein jointly referred to as the Respondents, pursuant to Section 10(j) of the National Labor Relations Act, as amended, 29 U.S.C. Section 160(j), herein the Act, following the issuance of the unfair labor practice complaint in Case 8-CA-_____, praying for a temporary injunction order against the Respondents, pending final disposition of the matters involved herein pending before the Board, and Petitioner having filed a motion for a temporary restraining order, pursuant to Fed. R. Civ. P. 65(b), the petition and motion being verified and supported by affidavits and exhibits; and

IT APPEARING to the Court from the verified petition, motion, other pleadings, affidavits, exhibits, argument of counsel, the hearing held before the Court on _____, and the entire record in this matter, that:

1. There is reasonable cause to believe [in traditional equity circuits, use the "likelihood of success on the merits" standard] that Respondents are statutory labor organizations within the meaning of Section 2(5) of the Act;

2. There is reasonable cause to believe that the Respondents through their agents have engaged, inter alia, in picket line violence, threats and property damage, mass picketing and blocking of ingress and egress at the facility of RMI Titanium located in Niles, Ohio;

3. There is reasonable cause to believe that the above-described conduct of the Respondents violates Section 8(b)(1)(A) of the Act and that said unfair labor practices affect commerce or an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act;

4. There is substantial evidence that local police authorities and state courts are unable to control and abate the misconduct of the Respondents;

5. There is imminent danger that, absent immediate injunctive relief, substantial and irreparable injury to the statutory rights of employees under the Act will be inflicted by the Respondents and that the final administrative order of the Board will be frustrated or nullified if interim relief is not granted; and

6. It is appropriate and just and proper, within the meaning of Section 10(j) and Fed. R. Civ. P. 65(b) that, pending completion of the hearing before the Court on the merits of the petition, and for a period of ten (10) days from the entry of this Order, that

the Respondents be temporarily enjoined and restrained from the commission of further acts and misconduct in violation of the Act as described in the petition.

WHEREFORE, IT IS HEREBY ORDERED that United Steelworkers of America Local No. 2155 and Local No. 2155-7, herein jointly referred to as the Respondents, their officers, agents, servants, employees, attorneys, and all members and persons acting in concert or participation with them, for a period of ten (10) days' duration from the date of this Order, as provided for in Rule 65(b) of the Federal Rules of Civil Procedure and pursuant to Section 10(j) of the Act, are **ENJOINED AND RESTRAINED** from:

1. Engaging in any mass picketing or blocking ingress to or egress from the RMI Titanium facility located in Niles, Ohio;

2. Inflicting or attempting to inflict injury or damage to persons or property, including motor vehicles, of any employees of RMI Titanium or of any persons doing business with RMI Titanium;

3. Threatening non-striking employees or other individuals with injury to their person or their families, or with damage to their property;

4. Possessing any rocks, bricks, projectiles, sticks, clubs, jackrocks, nails, explosive devices or any other dangerous weapons at the Respondents' picket lines maintained at the Niles, Ohio facility of RMI Titanium, or within one mile of such facility;

5. Surveilling employees and/or persons doing business with RMI Titanium at its Niles, Ohio facility by the use of video cameras, film, or digital cameras and/or the written recording of automobile/truck license plate numbers;

6. Engaging in any mass picketing, blocking of ingress or egress into or out of the Niles, Ohio facility of RMI Titanium by engaging in any oral threats and/or physical assaults against property or persons along Warren Avenue for a distance of one mile in both directions from the Niles, Ohio facility, which creates a "gauntlet" to persons either entering or leaving the Niles facility;

7. In any other manner, or by any other means, restraining or coercing the employees of RMI Titanium or any other person doing business with RMI Titanium in the exercise of their rights guaranteed under Section 7 of the Act.

IT IS FURTHER ORDERED that, to assure compliance with the Court's temporary restraining order and because of the local authorities' inability to deal with the situation, the United States Marshals Service **IS DIRECTED** to take those actions deemed necessary to enforce the provisions and prohibitions set forth in this Order. A copy of this Order shall be served upon the United States Marshal for the Northern District of Ohio.

IT IS FURTHER ORDERED that service of a copy of this Order be made forthwith by a United States Marshal upon the Respondents, United Steelworkers of America Local No. 2155 and Local No. 2155-7, in any manner provided in the Federal Rules of Civil Procedure for the United States District Courts and that proof of such service be filed with the Court.

SO ORDERED this ___ day of _____, at _____am/pm at Cleveland, Ohio.

_____
PETER C. ECONOMUS
UNITED STATES DISTRICT JUDGE

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APPENDIX I

SAMPLE PLEADINGS AND ARGUMENTS FOR 10(j) PROTECTIVE ORDER OR SEQUESTRATION OF ASSETS

1. Sample Order to Show Cause in Blyer v. Unitron Color Graphics

2. Sample Affidavit of Regional Director for Order to Show Cause in Blyer v. Unitron Color Graphics

3. Sample 10(j) Petition in Cohen v. Estoril Cleaning Co.

4. Sample Motion for TRO in Cohen v. Estoril Cleaning Co.

5. Model Proposed Findings of Fact and Conclusions of Law in Pascarell v. Alpine Fashions, Inc.

6. Sample Proposed 10(j) Order and TRO in Blyer v. Unitron Color Graphics

7. Outline of short memo of points to support TRO request

8. Model Argument for Protective Order or Sequestration of Assets

9. Sample Memorandum of Points and Authorities in in Cohen v. Estoril Cleaning Co.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

****

ALVIN BLYER, Regional Director
of Region 29 of the National Labor
Relations Board, for and on behalf of
the NATIONAL LABOR RELATIONS BOARD

Petitioner

v. Civil No.

UNITRON COLOR GRAPHICS OF
NEW YORK, INCORPORATED

Respondent

****

ORDER TO SHOW CAUSE

The Motion for Temporary Restraining Order and the Petition of Alvin Blyer, Regional Director for Region Twenty-Nine of the National Labor Relations Board (herein called the NLRB or Board), having been filed in this Court pursuant to Section 10(j) of the National Labor Relations Act, as amended, 61 Stat. 149, 29 U.S.C. Sec. 160 (j) (herein called the Act), praying for a Temporary Restraining Order pursuant to Rule 65(b) of the Federal Rules of Civil Procedure (Fed. R. Civ. P) against Respondent Unitron Color Graphics of New York, Incorporated also known as LIC Group, Inc. (hereinafter Respondent) and praying for issuance of an order directing said Respondent to show cause why a temporary injunction should not be granted as prayed for in said Petition for Temporary Injunction pending the final disposition of the administrative

matters involved pending before said Board in NLRB Case Nos. 29-CA-18119, 29-CA-18381, 29-CA-18421 and 29-CA-20680 and, good cause appearing therefore,

IT IS ORDERED that Respondent shall appear before this Court at the United States Courthouse, Court Room , 225 Cadman Plaza East, Brooklyn, New York, on the 10th day of March 1998, at 2:00 p.m., or as soon as thereafter counsel can be heard, and then and there show cause, if any there be, why, pending disposition by the Court of the merits of the instant Petition for a temporary injunction, a temporary restraining order should not issue, enjoining and restraining Respondent, its representatives, agents, servants, employees, attorneys, and all persons acting in concert or participation with it, pursuant to Section 10(j) of the Act and Fed. R. Civ. P. 65(b) as prayed for in the aforesaid Petition; and

IT IS FURTHER ORDERED that Respondent shall file an Answer to the allegations of said Petition with the Clerk of this Court, and serve a copy thereof upon Petitioner at his office located at National Labor Relations Board, Twenty-Ninth Region, One MetroTech Center North, 10th Floor, Brooklyn, New York 11201, on or before the _____ day of _____ 1998, at _____; and

IT IS FURTHER ORDERED that upon issuance of any temporary restraining order in this matter, Respondent shall appear before this Court at the United States Courthouse in Brooklyn, New York, on the _____ day of _____1998, at ____.m., or as soon as thereafter counsel can be heard, and then and there show cause, if any there be, why, pending the final disposition of the administrative proceedings now pending before the Board in NLRB Case Nos. 29-CA-18119, 29-CA-18381, 29-CA-18421 and 29-CA-20680, a temporary injunction should not issue enjoining and restraining Respondent, its

representatives, officers, agents, servants, employees, attorneys and all persons acting in concert or participation with it, under Section 10(j) of the Act as prayed for in said Petition; and

IT IS FURTHER ORDERED that service of a copy of this Order, together with a copy of the Petition and Administrative Complaint, attached affidavits and exhibits and supporting legal memoranda, be forthwith made by an United States Marshal or an agent of the Board, 21 years age or older, upon Respondent, and Applied Graphics Technologies, L.P. or its counsel, Marc Kramer, Esq., in any manner provided in the Federal Rules and of Civil Procedure for the United States District Courts, by electronic facsimile transmission or by certified mail, and that proof of such service be filed with the Court.

I find that based on the affidavit of service of Robert Califf, that effective notice of this matter has been provided to Respondent and that the Court has jurisdiction herein under 10(j) of the Act.

ORDERED this day of , 1998, at Brooklyn, New York.

BY THE COURT;

_____

UNITED STATES DISTRICT JUDGE

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June 2001

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

****

ALVIN BLYER, Regional Director
of the Twenty-Ninth Region
of the National Labor Relations Board,
for and on behalf of the
NATIONAL LABOR RELATIONS BOARD,

Petitioner

v. Civil No.

UNITRON COLOR GRAPHICS OF
NEW YORK INCORPORATED

Respondent

****

STATE OF NEW YORK)
) s.s.:
COUNTY OF KINGS)

I, Alvin Blyer, being duly sworn, depose and say:

1. I am the Regional Director for Region 29 of the National Labor Relations Board. I have read the foregoing Motion for Temporary Restraining Order and Petition for Temporary Injunction and know the contents thereof and the statements therein made as upon personal knowledge are true and those made as upon information and belief I believe to be true.

2. Pursuant to Rule 3(c)(4) of the General Rules of the United States District Court For the Eastern District of New York and 28 U.S.C., Sec. 1657, this proceeding was brought on by application for Order to Show Cause, rather than by Notice of Motion, for the following reasons:

(a) I have reasonable cause to believe that the activities of Respondent, Unitron Color Graphics of New York, Incorporated, described in the Petition and

exhibits, occurring in connection with the business operations of other employers engaged in commerce or in industries affecting commerce, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to and do lead to labor disputes burdening and obstructing commerce and the free flow of commerce, and it may fairly be anticipated that, unless appropriate injunctive relief, including a temporary restraining order is immediately obtained, that Respondent will dissipate or disperse its present income and assets, as well as the assets and income it will derive in the future, with the result that the affected employees will be denied their statutory rights to the detriment of the policies of the Act, the public interest, the interest of the individuals, and the interests of the parties involved.

(b) Section 10(j) of the National Labor Relations Act reflects the Congressional determination that because of the sometimes necessarily protracted and time-consuming legal procedures, Congress gave the Board power in the public interest to seek injunctive relief to prevent persons who are violating the Act from accomplishing their unlawful purpose. In Section 10(j), therefore, Congress gave the Board power to petition any District Court of the United States for appropriate temporary relief. The legislative history of the Act shows that Congress intended such power to be exercised by the Court. S. Rep. No. 105, 80th Cong., 1st Sess. 8, 27 (1947).

3. Accordingly, I respectfully submit that the Congressional mandate referred to above indicates that the most expeditious procedures available should be utilized in proceedings of this nature, and that, therefore, good and sufficient reason exists within the meaning of General Rule 3(c)(4) to bring this matter on by Order to Show Cause, rather than by Notice of Motion. This action for Injunction Under Section 10(j) of the Act, seeks to restrain conduct which is currently obstructing or leading to the obstruction of interstate commerce. Therefore, good cause exists within the meaning of 28 U.S.C. Sec. 1657 to expedite consideration of this case by allowing it to be heard upon an Order to Show Cause rather than upon a Notice of Motion.

(c) No previous application has been made for the order or relief sought herein.

4. On March 9, 1998, Respondent was notified that the Board would be making application for a temporary injunction order on this date. No attorney has appeared in this matter for Respondent.

_____

Alvin Blyer
Regional Director, Region 29
National Labor Relations Board
One MetroTech Center North, 10th Floor
Brooklyn, New York 11201

Subscribed and sworn to before me this
th day of March, 1998

_____

Anthony A. Ambrosio
Notary Public, State of New York
No. 30-5066035
Qualified in Nassau County
Commission Expires on , 19

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

****

RONALD S. COHEN, Acting Regional Director
of the First Region
of the National Labor Relations Board,
for and on behalf of the
NATIONAL LABOR RELATIONS BOARD,

Petitioner

v. Civil No.

ESTORIL CLEANING CO., INC.,

Respondent

and

POLAROID CORPORATION,

Party-in-Interest

****

PETITION FOR TEMPORARY INJUNCTION PURSUANT TO SECTION 10(J) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED [29 U.S.C. SECTION 160 (J)] **[**AND THE ALL WRITS ACT [28 U.S.C. SECTION 1651(A)]**]**[1]

To the Honorable, the Judges of the United States District Court, District of Massachusetts:

Comes now Ronald S. Cohen, Acting Regional Director of the First Region of the National Labor Relations Board (herein called the Board), and petitions this Court for and on behalf of the Board, pursuant to Section 10(j) of the National Labor Relations Act, as amended (61 Stat. 149; 29 U.S.C. Sec. 160 (j); herein called the Act), for appropriate injunctive relief, pending the final disposition of the matters involved herein pending before the Board on an administrative consolidated complaint of the General Counsel of the Board charging that Estoril Cleaning Co., Inc. (herein called Respondent or Estoril) has engaged in, and is engaging in, acts

[1] **[The All Writs Act applies only when the Region is authorized to enjoin a third party that is not a party to the underlying unfair labor practice case.]**

and conduct in violation of Section 8(a)(1) and (5) of the Act (29 U.S.C. Sec. 158 (a)(1) and (5). In support thereof, Petitioner respectfully shows as follows:

1.

Petitioner is the Acting Regional Director of the First Region of the Board, an agency of the United States Government, and files this petition for and on behalf of the Board, which has authorized the filing of this petition.

2.

Statutory jurisdiction by this Court over this cause of action and over the Respondent is invoked pursuant to Section 10(j) of the Act.

3.

(A) On or about the dates set forth below in subparagraphs (1)-(4), Service Employees International Union, Local 254, AFL-CIO, CLC (herein called the Union or Charging Party), pursuant to the provisions of the Act, filed with the Board charges and amended charges, as follows:

(1) The charge in Case 1-CA-37811 was filed by the Union on January 6, 2000, alleging that Respondent had engaged in violations of Section 8(a)(1) and (5) of the Act.

(2) A charge and a first amended charge in Case 1-CA-37828 were filed by the Union on January 14, 2000 and February 17, 2000, respectively, alleging that Respondent had engaged in further violations of Section 8(a)(1) and (5) of the Act.

(3) The charge in Case 1-CA-37875 was filed by the Union on February 8, 2000, alleging that Respondent had engaged in further violations of Section 8(a)(1) and (5) of the Act.

(4) The charge in Case 1-CA-37931 was filed by the Union on February 24, 2000, alleging that Respondent had engaged in further violations of Section 8(a)(1) and (5).

(B) Based upon the charges filed in Cases 1-CA-37811, 1-CA-37828 and 1-CA-37875, and after investigation of the aforesaid charges in which Respondent was given the opportunity to present evidence and legal argument, the General Counsel of the Board, on behalf of the Board, pursuant to Section 3(d) of the Act, 29 U.S.C. Sec. 153(d), by the Regional Director for the Board's First Region, pursuant to Section 10(b) of the Act, 29 U.S.C. Sec. 160(b), issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (herein called the Consolidated Complaint) against Estoril on February 28, 2000. The Consolidated Complaint alleges that Respondent violated Sections 8(a)(1) and (5) of the Act by engaging in certain conduct including, *inter alia*, refusing to execute an agreed upon collective-bargaining agreement; failing and refusing to provide relevant information which was requested by the Union; and failing and refusing to bargain over the effects on unit employees of Respondent's decision to close its operations. (Copies of the foregoing charges and the Consolidated Complaint are attached hereto and are made a part hereof as Exhibits Nos. (1) (a)-(d) and (2), respectively.)

(C) Based upon the charge filed in Case 1-CA-37931, and after investigation of aforesaid charge in which Respondent was given the opportunity to present evidence and legal argument, the General Counsel of the Board, on behalf of the Board, pursuant to Section 3(d) of the Act, 29 U.S.C. Sec. 153(d), by the Regional Director for the Board's First Region, pursuant to Section 10(b) of the Act, 29 U.S.C. Sec. 160(b), issued a Complaint and Notice of Hearing (herein called the Complaint) and a Second Order Consolidating Cases against Estoril on March 7, 2000. The Complaint alleges that Respondent violated Sections 8(a)(1) and (5) of the Act by failing to pay employees for hours worked in January 2000. (Copies of the foregoing Charge, the Complaint and the Second Order Consolidating Cases are attached hereto and are made a part hereof as Exhibits Nos. (3), (4), and (5) respectively.)

4.

(A) A hearing on the allegations in the Consolidated Complaint and the Complaint described in paragraphs 3(B) and 3(C) above is scheduled to be held before an Administrative Law Judge of the Board on April 3, 2000.

(B) Counsel for the General Counsel seeks in this pending administrative proceeding an order against the Respondent from the Board, pursuant to Section 10(c) of the Act, 29 U.S.C. Sec. 160(c), which will include a monetary remedy of backpay as set forth in Transmarine Navigation Corp., 170 NLRB 389 (1968), as well as wages due for work performed by the bargaining unit employees described in paragraph 5(F) below in January 2000.

5.

Upon the basis of the following, Petitioner has reasonable cause to believe that the allegations of the aforesaid Consolidated Complaint and Complaint, and more specifically, those allegations upon which the monetary remedy may be based, are true and that Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act for which a monetary remedy will be ordered by the Board, but that the Board's order for such remedy will be frustrated without the temporary injunctive relief sought herein. In support thereof, and of the request for a temporary injunctive relief, Petitioner, upon information and belief, shows as follows:

(A) During the 12-month period ending January 31, 2000, Respondent, a corporation with an office and place of business in Waltham, Massachusetts, herein called Respondent's Waltham facility, was engaged in the business of providing cleaning services for Party-in-Interest Polaroid Corporation (herein called Polaroid) in Waltham, Massachusetts.

(B) During the 12-month period ending January 31, 2000, Respondent, in conducting its business operations described above in paragraph A, performed services valued in excess of $50,000 for Polaroid, an enterprise directly engaged in interstate commerce.

(C) During the 12-month period ending January 31, 2000, Respondent was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

(D) At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

(E) During the 12-month period ending January 31, 2000, the following individuals held the positions set forth opposite their respective names and were supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Emilia Delgado	Owner
Marco A. Delgado	Senior Vice President
Mayra Martínez	Personnel Manager

(F) The following employees of Respondent, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time cleaning employees, maintenance employees, utility employees and foremen employed by Respondent at its 1277 Main Street, Waltham, Massachusetts facility, but excluding office clerical employees, managerial employees, casual employees, confidential employees, guards, and supervisors as defined in the Act.

(G)(1) On November 24, 1998, the Union was certified as the exclusive collective-bargaining representative of the Unit.

(2) At all times since November 24, 1998, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

(H)(1) About September 29, 1999, the Union and Respondent reached complete agreement on terms and conditions of employment of the Unit to be incorporated in a collective-bargaining agreement.

(2) Since about November 15, 1999, the Union has requested that the Respondent execute a written contract containing the agreement described above in subparagraph H(1).

(3) Since about November 15, 1999, Respondent, by Emilia Delgado and Marco Delgado, has failed and refused to execute the agreement described above in subparagraph H(1).

(I)(1) Since about January 7, 2000, the Union, by letter, has requested that Respondent furnish the Union with the following information about Unit employees:

(a) names;

(b) dates of hire;

(c) schedules of work; and

(d) addresses.

(2) The information requested by the Union, as described above in subparagraph I(1) is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the Unit.

(3) Since about January 7, 2000, Respondent, by Marco Delgado, has failed and refused to furnish the Union with the information requested by it as described above in subparagraph I(1).

(J)(1) On about January 31, 2000, Respondent ceased operations.

(2) The subject set forth in subparagraph J(1) relates to wages, hours, and other terms and conditions of employment of the Unit, and the effects of that conduct are mandatory subjects for the purposes of collective bargaining.

(3) Respondent engaged in the conduct described above in subparagraph J(1), without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to the effects of this conduct.

(K)(1) Since about mid-January, 2000, Respondent has failed to pay employees their wages.

(2) The subject set forth in subparagraph K(1) relates to wages, hours, and other terms and conditions of employment of the Unit, and the effects of that conduct are mandatory subjects for the purposes of collective bargaining.

(3) Respondent engaged in the conduct described above in subparagraph K(1), without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to the effects of this conduct.

(L) By its overall conduct, including the conduct described above in paragraphs H, I, J and K, Respondent has failed and refused to bargain collectively with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(5) and (1) of the Act.

(M) The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

6.

As part of the remedy for the unfair labor practices described above, pursuant to the Board's decision in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), at a minimum, the bargaining unit employees will be entitled to two weeks of backpay, or approximately $15,700.

Additionally, the bargaining unit employees will be entitled to wages earned in January 2000, or approximately $10,300. The verified affidavit of Compliance Officer Elizabeth Gemperline, explaining said calculation, is attached hereto as Exhibit 6.

7.

(A) **[if applicable:** Polaroid Corporation, (herein called Polaroid) was the Respondent's sole customer. Polaroid currently owes Respondent $54,331.52 for services rendered. Polaroid is scheduled to pay this money to Respondent on March 10, 2000.**]**

(B) On about January 31, 2000, Respondent closed its operations.

(C) The remaining assets of Respondent are uncertain. The Respondent owns no real property, has closed its only office, and has no other customers.

(D) The Respondent recently has: moved its office without informing the Union; disconnected its business telephone without providing the Union with a new telephone number; failed to return numerous telephone calls both from the Union and from the Region; refused to accept certified letters from the Region; issued checks to employees that have bounced; allegedly failed to pay employees for their last eleven working days, and paid the Respondent's indebtedness for an earlier unfair labor practice charge from a different corporation's bank account.

(E) Since the hearing before an administrative law judge is not scheduled to begin until April 3, 2000, it is highly likely that Respondent will have disbursed of or dissipated all assets before a Board decision and order could be enforced by an appropriate circuit court of appeals.

8.

(A) Based on the circumstances described above in paragraph 7, there is imminent danger that substantial and irreparable injury will result to the Unit employees and to the Board's

administrative proceedings if Respondent disperses or dissipates its income in an attempt to avoid its backpay liability under the Act.

(B) Since Respondent has ceased operations, if it disperses the money that it receives from Polaroid, it appears that the Board will have no adequate remedy at law to enforce its remedial order once it becomes final and the amounts of backpay to employees, as specified above, become due and owing. Such actions by Respondent, which may fairly be anticipated, would act to irreparably harm the employee beneficiaries of the prospective Board order, and would thereby nullify or frustrate the remedial order of the Board. A final and binding Board and/or Court order rendered months or years from now will be ineffective to remedy Respondent's unfair labor practices, particularly since Respondent has ceased operations and its only known asset is that money owed to it by Polaroid.

9.

(A) Section 10(j) of the Act, which authorizes the Board to file petitions for temporary injunctive relief, also authorizes this Court to grant such temporary relief, upon the Board's application, as the Court deems just and proper. It appears clear from the circumstances set forth above that unless Respondent and its agents are restrained from dissipating or dispersing its present assets, and any income or assets it may receive in the future, unless and until they discharge any backpay liability caused by their unfair labor practices, pending the Court's disposition of the merits of the Petition, any prospective Board order and court judgment thereon may well be frustrated and rendered impossible of compliance.

(B) Upon information and belief it may be fairly anticipated that unless enjoined and restrained in the manner requested herein, Respondent will dissipate any assets which it presently has and will receive in the future, and, thereby, deprive the individual employees, as

beneficiaries of the Board's ultimate remedial order, of the money to which they will be entitled and which constitutes backpay.

(C) Upon information and belief, unless Respondent and its agents **[**and Polaroid**]** are immediately enjoined as requested herein, a serious flouting of the Act will continue with the result that enforcement of important provisions of the Act and of public policy embodied therein will be thwarted before Respondent can be placed under legal restraint through regular administrative procedures leading to a Board Order and a Decree of a Court of Appeals pursuant to Section 10(e) or (f) of the Act, 29 U.S.C. Sec. 160(e) or (f). Unless injunctive relief is immediately obtained, it may be fairly anticipated that Respondent will dissipate or disperse its present income and assets as well as any future income and assets it receives, with the result that the affected employees will be denied their statutory rights to the detriment of the policies of the Act, the public interest, the interest of the individuals, and the interests of the parties involved.

(D) Respondent **[**and Party-in-Interest Polaroid**]** were informed by Petitioner at 2:00 p.m. and 1:45 p.m., respectively, on March 7, 2000, that this Petition for Temporary Injunction and the Motion For Temporary Restraining Order in this matter would be filed on March 8, 2000, and that Petitioner was seeking the Court to order Respondent to deposit $32,202.80, an amount sufficient to cover the minimum backpay liability, plus estimated interest, into the registry of the Court pending the final disposition of the matters involved herein before the Board. As of the filing of the Petition herein, Respondent has not contacted Petitioner.

(E) Upon information and belief, to avoid the serious results referred to in paragraphs 8 and 9 (A) through (C), it is essential, just and proper, and appropriate for the purposes of effectuating the remedial purposes of the Act and avoiding substantial and irreparable injury to such policies, and in accordance with the purposes of Section 10(j) of the Act, that pending final disposition of the administrative matters involved pending before the Board, Respondent be

enjoined and restrained from the dissipation or dispersal of assets, as described above, and that the Court grant such other and further injunctive relief as it may deem appropriate.

10.

The relief prayed for herein has not been previously requested.

WHEREFORE, Petitioner respectfully requests the following:

(1) That the Court issue an order directing Respondent to promptly file an answer to the allegations of this Petition and to appear before this Court, at a time and place designated by this Court, and show cause, if any there be, why a temporary injunction should not issue, enjoining and restraining Respondent, its agents, servants, employees, attorneys, and all persons acting in concert or participation with Respondent, pending final disposition of the administrative matters before the Board and any judicial review thereof from:

(a) in any manner or by any means distributing, transferring or otherwise disposing of assets or funds of Respondent including any income or assets which may be received in the future, except that Respondent may sell or transfer said assets for full, fair, present consideration, provided that the receipts from any such sale or transfer shall, immediately upon receipt, be deposited in the registry of the United States District Court for the District of Massachusetts until the total amount deposited in that Court's registry in connection with this case shall equal $32,202.80, to protect the backpay claims created by the unfair labor practices which may be found by the Board and the Court of Appeals;

(b) unless and until the sum of $32,202.80 is set aside and retained, in any manner or by any means entering into any arrangement or agreement providing for, or which would result in, a lien on any of Respondent's current assets or income, or pledging as security or encumbering any of its current assets or income;

(c) unless and until the sum of $32,202.80 is set aside and retained, distributing any of the Respondent's assets, or income, or divestment thereof, to shareholders, officers or directors of Respondent, or to any other person, enterprise or entity controlled by, or related to or affiliated with Respondent without further order of this Court;

(d) concealing, altering or destroying any of Respondent's financial documents.

(2) That the Court further order Respondent and any person, natural or corporate, having notice of this order and holding funds or proceeds for Respondent's credit, **[**including Polaroid,**]** to deposit said funds in the registry of the United States District Court, until the total amount deposited in the registry of the Court in connection with this case shall equal $32,202.80, pending the Court's ruling on the merits of Petitioner's request for an injunction and further directs that they stop payment on any checks issued to Respondent as of February 15, 2000.

(3) That the Court further order Respondent, its agents, servants, employees, attorneys, and all persons acting in concert or participation with Respondent, pending final disposition of the administrative matters before the Board and any judicial review thereof, to:

(a) immediately based on the income and assets it presently has and from any income and assets it receives in the future, deposit in the registry of the Court, the total amount of $32,202.80, or whatever amount less than that it presently has or receives in the future, pending final disposition of the administrative matters before the Board and any judicial review thereof;

(b) serve a copy of the temporary injunction upon any person, natural or corporate, to whom Respondent proposes to sell, lease, transfer or otherwise disperse any of its assets, and upon any person, natural or corporate, holding for Respondent's credit, funds, income or proceeds of any sale of Respondent's assets;

(c) keep, and make available to Petitioner, upon request, for inspection and copying, written records of each and every transaction involving receipts or expenditures in excess of $250.00 by Respondent;

(d) keep and make available to the Petitioner, upon request, for inspection and copying, all financial records and all records kept in the normal course of business by any corporation or entity under Respondent's control;

(e) within 21 days of the issuance of a temporary injunction, file with the Court a sworn and notarized affidavit setting forth the actions Respondent has taken to comply with the Court's Order, and serve a copy of said affidavit upon the Petitioner.

(4) That upon return of said order to show cause, the Court issue an order temporarily enjoining and restraining Respondent in the manner set forth above pending final disposition of the administrative proceedings now pending before the Board in NLRB Cases 1-CA-37811, 1-CA-37828, 1-CA-37875 and 1-CA-37931.

(5) That the Court grant such other and further temporary relief that may be deemed just and proper.

(6) That the Court grant expedited consideration to this Petition, in accordance with 28 U.S.C. 1657(a) and the remedial purposes of Section 10(j) of the Act.

Dated this 8th day of March, 2000 at Boston, Massachusetts.

_____

Acting Regional Director, Region 1
National Labor Relations Board
10 Causeway Street, 6th Floor
Boston, Massachusetts 02222

LEONARD PAGE, General Counsel

BARRY J. KEARNEY, Associate General Counsel

ELLEN A. FARRELL, Assistant General Counsel

ROSEMARY PYE, Regional Director

PAUL J. RICKARD, Assistant to the Regional Director

SARA R. LEWENBERG, Counsel for Petitioner

CERTIFICATION OF SERVICE

I hereby certify that a true copy of the above document was served upon Respondent Estoril Cleaning Co., Inc. and Party-in-Interest Polaroid Corporation and the attorney of record for Polaroid Corporation, by hand, on March 8, 2000.

_____
Sara R. Lewenberg, BBO #634257

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June 2001

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

****

RONALD S. COHEN, Acting Regional Director
of the First Region
of the National Labor Relations Board,
for and on behalf of the
NATIONAL LABOR RELATIONS BOARD,

Petitioner

v. Civil No.

ESTORIL CLEANING CO., INC.,

Respondent

and

POLAROID CORPORATION,

Party-in-Interest

****

MOTION FOR TEMPORARY RESTRAINING ORDER PURSUANT TO SECTION 10(J) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED [29 U.S.C. SECTION 160 (J)] **[**, AND THE ALL WRITS ACT [28 U.S.C. SECTION 1651(A)]**]**[1]

To the Honorable, the Judges of the United States District Court, District of Massachusetts:

Comes now Ronald S. Cohen, Acting Regional Director of the First Region of the National Labor Relations Board (herein called the Board), and petitions this Court for and on behalf of the Board, pursuant to Section 10(j) of the National Labor Relations Act, as amended (61 Stat. 149; 29 U.S.C. Sec. 160 (j); herein called the Act) **[**, and the All Writs Act, 28 U.S.C. Section 1651(a),**]** for a temporary restraining order, pursuant to Fed. R. Civ. P. 65(b) pending the final disposition of the matters involved herein pending before the Board on an administrative consolidated complaint of the General Counsel of the Board charging that Estoril Cleaning Co., Inc., (herein called Respondent or Estoril) has engaged in, and is engaging in, acts and conduct in

[1] **[The All Writs Act applies only when the Region is authorized to enjoin a third party that is not a party to the underlying unfair labor practice case.]**

violation of Section 8(a)(1) and (5) of the Act (29 U.S.C. Sec. 158 (a)(1) and (5). In support thereof, Petitioner respectfully shows as follows:

1.

Petitioner is the Acting Regional Director of the First Region of the Board, an agency of the United States Government, and files this petition for and on behalf of the Board, which has authorized the filing of this petition.

2.

Statutory jurisdiction by this Court over this cause of action and over the Respondent is invoked pursuant to Section 10(j) of the Act.

3.

(A) On or about the dates set forth below in subparagraphs (1)-(4), Service Employees International Union, Local 254, AFL-CIO, CLC (herein called the Union or Charging Party), pursuant to the provisions of the Act, filed with the Board charges and amended charges, as follows:

(1) The charge in Case 1-CA-37811 was filed by the Union on January 6, 2000, alleging that Respondent had engaged in violations of Section 8(a)(1) and (5) of the Act.

(2) A charge and a first amended charge in Case 1-CA-37828 were filed by the Union on January 14, 2000 and February 17, 2000, respectively, alleging that Respondent had engaged in further violations of Section 8(a)(1) and (5) of the Act.

(3) The charge in Case 1-CA-37875 was filed by the Union on February 8, 2000, alleging that Respondent had engaged in further violations of Section 8(a)(1) and (5) of the Act.

(4) The charge in Case 1-CA-37931 was filed by the Union on February 24, 2000, alleging that Respondent had engaged in further violations of Section 8(a)(1) and (5).

(B) Based upon the charges filed in Cases 1-CA-37811, 1-CA-37828 and 1-CA-37875, and after investigation of the aforesaid charges in which Respondent was given the opportunity to present evidence and legal argument, the General Counsel of the Board, on behalf of the Board, pursuant to Section 3(d) of the Act, 29 U.S.C. Sec. 153(d), by the Regional Director for the Board's First Region, pursuant to Section 10(b) of the Act, 29 U.S.C. Sec. 160(b), issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (herein called the Consolidated Complaint) against Estoril on February 28, 2000. The Consolidated Complaint alleges that Respondent violated Sections 8(a)(1) and (5) of the Act by engaging in certain conduct including, *inter alia*, refusing to execute an agreed upon collective-bargaining agreement; failing and refusing to provide relevant information which was requested by the Union; and failing and refusing to bargain over the effects on unit employees of Respondent's decision to close its operations. (Copies of the foregoing charges and the Consolidated Complaint are attached hereto and are made a part hereof as Exhibits Nos. (1) (a)-(d) and (2), respectively.)

(C) Based upon the charge filed in Case 1-CA-37931, and after investigation of aforesaid charge in which Respondent was given the opportunity to present evidence and legal argument, the General Counsel of the Board, on behalf of the Board, pursuant to Section 3(d) of the Act, 29 U.S.C. Sec. 153(d), by the Regional Director for the Board's First Region, pursuant to Section 10(b) of the Act, 29 U.S.C. Sec. 160(b), issued a Complaint and Notice of Hearing (herein called the Complaint) and a Second Order Consolidating Cases against Estoril on March 7, 2000. The Complaint alleges that Respondent violated Sections 8(a)(1) and (5) of the Act by failing to pay employees for hours worked in January 2000. (Copies of the foregoing Charge, the Complaint, and the Second Order Consolidating Cases are attached hereto and are made a part hereof as Exhibits Nos. (3), (4), and (5) respectively.)

4.

(A) A hearing on the allegations in the Consolidated Complaint and the Complaint described in paragraphs 3(B) and 3(C) above is scheduled to be held before an administrative law judge of the Board on April 3, 2000.

(B) Counsel for the General Counsel seeks in this pending administrative proceeding an order against the Respondent from the Board, pursuant to Section 10(c) of the Act, 29 U.S.C. Sec. 160(c), which will include a monetary remedy of backpay as set forth in Transmarine Navigation Corp., 170 NLRB 389 (1968), as well as wages due for work performed by the bargaining unit employees described in paragraph 5(F) below in January 2000.

5.

Upon the basis of the following, Petitioner has reasonable cause to believe that the allegations of the aforesaid Consolidated Complaint and Complaint, and more specifically, those allegations upon which the monetary remedy may be based, are true and that Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act for which a monetary remedy will be ordered by the Board, but that the Board's order for such remedy will be frustrated without the temporary restraining order sought herein. In support thereof, and of the request for a temporary restraining order, Petitioner, upon information and belief, shows as follows:

(A) During the 12-month period ending January 31, 2000, Respondent, a corporation with an office and place of business in Waltham, Massachusetts, herein called Respondent's Waltham facility, was engaged in the business of providing cleaning services **[**for Party-in-Interest Polaroid Corporation (herein called Polaroid)**]** in Waltham, Massachusetts.

(B) During the 12-month period ending January 31, 2000, Respondent, in conducting its business operations described above in paragraph A, performed services valued in excess of $50,000 for Polaroid, an enterprise directly engaged in interstate commerce.

(C) During the 12-month period ending January 31, 2000, Respondent was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

(D) At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

(E) During the 12-month period ending January 31, 2000, the following individuals held the positions set forth opposite their respective names and were supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Emilia Delgado	Owner
Marco A. Delgado	Senior Vice President
Mayra Martínez	Personnel Manager

(F) The following employees of Respondent, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time cleaning employees, maintenance employees, utility employees and foremen employed by Respondent at its 1277 Main Street, Waltham, Massachusetts facility, but excluding office clerical employees, managerial employees, casual employees, confidential employees, guards, and supervisors as defined in the Act.

(G)(1) On November 24, 1998, the Union was certified as the exclusive collective-bargaining representative of the Unit.

(2) At all times since November 24, 1998, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

(H)(1) About September 29, 1999, the Union and Respondent reached complete agreement on terms and conditions of employment of the Unit to be incorporated in a collective-bargaining agreement.

(2) Since about November 15, 1999, the Union has requested that the Respondent execute a written contract containing the agreement described above in subparagraph H(1).

(3) Since about November 15, 1999, Respondent, by Emilia Delgado and Marco Delgado, has failed and refused to execute the agreement described above in subparagraph H(1).

(I)(1) Since about January 7, 2000, the Union, by letter, has requested that Respondent furnish the Union with the following information about Unit employees:

(a) names;

(b) dates of hire;

(c) schedules of work; and

(d) addresses.

(2) The information requested by the Union, as described above in subparagraph I(1) is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the Unit.

(3) Since about January 7, 2000, Respondent, by Marco Delgado, has failed and refused to furnish the Union with the information requested by it as described above in subparagraph I(1).

(J)(1) On about January 31, 2000, Respondent ceased operations.

(2) The subject set forth in subparagraph J(1) relates to wages, hours, and other terms and conditions of employment of the Unit, and the effects of that conduct are mandatory subjects for the purposes of collective bargaining.

(3) Respondent engaged in the conduct described above in subparagraph J(1), without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to the effects of this conduct.

(K)(1) Since about mid-January, 2000, Respondent has failed to pay employees their wages.

(2) The subject set forth in subparagraph K(1) relates to wages, hours, and other terms and conditions of employment of the Unit, and the effects of that conduct are mandatory subjects for the purposes of collective bargaining.

(3) Respondent engaged in the conduct described above in subparagraph K(1), without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to the effects of this conduct.

(L) By its overall conduct, including the conduct described above in paragraphs H, I, J and K, Respondent has failed and refused to bargain collectively with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(5) and (1) of the Act.

(M) The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

6.

As part of the remedy for the unfair labor practices described above, pursuant to the Board's decision in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), at a minimum, the bargaining unit employees will be entitled to two weeks of backpay, or approximately $15,700.

Additionally, the bargaining unit employees will be entitled to wages earned in January 2000, or approximately $10,300. The verified affidavit of Compliance Officer Elizabeth Gemperline, explaining said calculation, is attached hereto as Exhibit 6.

7.

(A) **[if applicable:** Party-in-Interest Polaroid Corporation, (herein called Polaroid) was the Respondent's sole customer. Polaroid currently owes Respondent $54,331.52 for services rendered. Polaroid is scheduled to pay this money to Respondent on March 10, 2000.**]**

(B) On about January 31, 2000, Respondent closed its operations.

(C) The remaining assets of Respondent are uncertain. The Respondent owns no real property, has closed its only office, and has no other customers.

(D) The Respondent recently has: moved its office without informing the Union; disconnected its business telephone without providing the Union with a new telephone number; failed to return numerous telephone calls both from the Union and from the Region; refused to accept certified letters from the Region; issued checks to employees that have bounced; allegedly failed to pay employees for their last eleven working days, and paid the Respondent's indebtedness for an earlier unfair labor practice charge from a different corporation's bank account.

(E) Since the hearing before an administrative law judge is not scheduled to begin until April 3, 2000, it is highly likely that Respondent will have disbursed of or dissipated all assets before a Board decision and order could be enforced by an appropriate circuit court of appeals.

8.

(A) Based on the circumstances described above in paragraph 7, there is imminent danger that substantial and irreparable injury will result to the unit employees and to the Board's

administrative proceedings if Respondent disperses or dissipates its income in an attempt to avoid its backpay liability under the Act.

(B) Since Respondent has ceased operations, if it disperses the money that it receives **[**from Polaroid**]**, it appears that the Board will have no adequate remedy at law to enforce its remedial order once it becomes final and the amounts of backpay to employees, as specified above, become due and owing. Such actions by Respondent, which may fairly be anticipated, would act to irreparably harm the employee beneficiaries of the prospective Board order, and would thereby nullify or frustrate the remedial order of the Board. A final and binding Board and/or Court order rendered months or years from now will be ineffective to remedy Respondent's unfair labor practices, particularly since Respondent has ceased operations and its only assets being **[**that money owed to it by Polaroid.**]**

9.

(A) Section 10(j) of the Act, which authorizes the Board to file petitions for temporary injunctive relief, also authorizes this Court to grant such temporary relief, upon the Board's application, as the Court deems just and proper. It appears clear from the circumstances set forth above that unless Respondent and its agents are restrained from dissipating or dispersing its present assets, and any income or assets it may receive in the future, unless and until they discharge any backpay liability caused by their unfair labor practices, pending the Court's disposition of the merits of the Petition, any prospective Board order and court judgment thereon may well be frustrated and rendered impossible of compliance.

(B) Upon information and belief it may be fairly anticipated that unless enjoined and restrained in the manner requested herein, Respondent will dissipate any assets which it presently has and will receive in the future and thereby deprive the individual employees, as beneficiaries

of the Board's ultimate remedial order, of the money to which they will be entitled and which constitutes backpay.

(C) Upon information and belief, unless Respondent and its agents **[**and Polaroid**]** are immediately enjoined as requested herein, a serious flouting of the Act will continue, with the result that enforcement of important provisions of the Act and of public policy embodied therein will be thwarted before Respondent can be placed under legal restraint through regular administrative procedures leading to a Board Order and a Decree of a Court of Appeals pursuant to Section 10(e) or (f) of the Act, 29 U.S.C. Sec. 160(e) or (f). Unless injunctive relief is immediately obtained, it may be fairly anticipated that Respondent will dissipate or disperse its present income and assets as well as any future income and assets it receives, with the result that the affected employees will be denied their statutory rights, to the detriment of the policies of the Act, the public interest, the interest of the individuals, and the interests of the parties involved.

(D) Respondent **[**and Polaroid**]** was **[**were**]** informed by Petitioner at 2:00 p.m. and 1:45 p.m., respectively, on March 7, 2000, that this Motion For Temporary Restraining Order and the Petition for Temporary Injunction in this matter would be filed on March 8, 2000, and that Petitioner was seeking the Court to order Respondent to deposit $32,202.80, an amount sufficient to cover the minimum backpay liability, plus estimated interest, into the registry of the Court pending the final disposition of the matters involved herein before the Board. As of the filing of the Motion herein, Respondent has not contacted Petitioner. **[**Polaroid has been notified that Petitioner is seeking a Temporary Restraining Order requiring Polaroid to hold all monies due and owing to Respondent pending this Court's hearing on the merits of Petitioner's request for a temporary injunction.**]**

(E) Upon information and belief, to avoid the serious results referred to in paragraphs 8 and 9 (A) through (C), it is essential, just and proper, and appropriate for the purposes of

effectuating the remedial purposes of the Act and avoiding substantial and irreparable injury to such policies, and in accordance with the purposes of Section 10(j) of the Act, that pending final disposition of the administrative matters involved pending before the Board, Respondent be enjoined and restrained from the dissipation or dispersal of assets, as described above, and that the Court grant such other and further injunctive relief as it may deem appropriate.

10.

The relief prayed for herein has not been previously requested.

WHEREFORE, Petitioner respectfully requests the following:

(1) That the Court immediately execute Petitioner's proposed Order to Show Cause and thereby cause notice of this Petition to be served upon Respondent **[**and Polaroid**]** consistent with the provisions of Section 10(j);

REQUEST FOR ORAL ARGUMENT

(2) That the Court hold a hearing on Petitioner's request for a temporary restraining order on March 8, 2000, or as soon thereafter as counsel may be heard, and thereupon, pending its consideration of the merits of this Petition, issue a temporary restraining order forthwith enjoining and restraining Respondent, its officers, agents, representatives, servants, employees, attorneys, and all members and persons acting in concert or participation with them, for a period of ten (10) days duration as provided for in Rule 65(b) of the Federal Rules of Civil Procedure, from:

(A) in any manner or by any means, selling, transferring, dissipating, distributing, dispersing or otherwise disposing of any of Respondent’s assets or funds, in the disposition of its business, including, but not limited to, equipment used to carry out Respondent’s business, finished products, accounts receivable, and monies deposited in Respondent’s bank accounts, any income or assets which may be received in the future, or incurring any liens on its assets,

except as they may be required to do so pursuant to any lien of record recorded prior to the filing of the charges herein, and further provided that Respondent may sell or transfer assets for a full, fair, and present consideration actually paid Respondent, provided that the proceeds for any such sale or transfer shall immediately upon receipt be deposited intact and not disbursed except to the extent that it is necessary to do so to pay bona fide current business expenses such as rent, utilities, maintenance, insurance, legal fees and expenses, or to satisfy bona fide liens of records and judgments of record which were recorded prior to the filing of the charges herein, in the registry of the United States District Court for the District of Massachusetts until the total amount deposited in the Court's registry in connection with this case shall equal $32,202.80; provided further that Respondent shall keep, and make available to the Board upon request for inspection and copying, written records of each and every transaction involving expenditures or receipts by Respondent in excess of $250.

(B) distributing its assets or the proceeds from the sale or divestment thereof, to officers, principals, shareholders or directors of Respondent, or to any other person, entity or enterprise controlled by or related to or affiliated with, Respondent or its shareholders, officers or directors, including the repayment of loans to Respondent, or for the payment of unreasonable salaries to Respondent's officers, shareholders, or directors or their relatives, without further order of the Court.

(C) concealing, altering or destroying any of its financial documents.

(3) That the Court further order Respondent to deposit said funds in the registry of the United States District Court, until the total amount deposited in the registry of the Court in connection with this case shall equal $32,202.80, pending the Court's ruling on the merits of Petitioner's request for an injunction.

(4) That the Court further order Respondent, its agents, servants, employees, attorneys, and all persons acting in concert or participation with Respondent, pending final disposition of the administrative matters before the Board and any judicial review thereof, to:

(A) Immediately, based on the income and assets it presently has and from any income and assets it receives in the future, deposit in the registry of the Court, the amount of $32,202.80, or whatever amount less than that it presently has or receives in the future, pending final disposition of the administrative matters before the Board and any judicial review thereof.

(B) Serve a copy of the temporary injunction upon any person, natural or corporate, to whom Respondent proposes to sell, lease, transfer or otherwise disperse any of its assets, and upon any person, natural or corporate, holding for Respondent's credit, funds, income or proceeds of any sale of Respondent's assets.

(5) **[if applicable:** That the Court enjoin Polaroid from disbursing any sums or money owed Respondent, and further that the Court order Polaroid to stop payment on any unpaid checks issued to Respondent on or after February 15, 2000, pending the Court's ruling on the merits of Petitioner's request for a temporary injunction.**]**

(6) That the Court issue an order directing Respondent to promptly file an answer to the allegations of the Petition for Temporary Injunction and to appear before this Court, at a time and place designated by this Court, and show cause, if any there be, why a temporary injunction should not issue, extending and incorporating the terms of the temporary restraining order and further enjoining and restraining Respondent, its agents, servants, employees, attorneys, and all persons acting in concert or participation with Respondent, pending final disposition of the administrative matters before the Board and any judicial review thereof as prayed for in said Petition.

(7) That upon return of said order to show cause, the Court issue an order temporarily enjoining and restraining Respondent in the manner set forth above and in the Petition for Temporary Injunction pending final disposition of the administrative proceedings now pending before the Board in NLRB Cases 1-CA-37811, 1-CA-37828, 1-CA-37875 and 1-CA-37931.

(8) That the Court grant such other and further temporary relief that may be deemed just and proper.

(9) That the Court grant expedited consideration to this Petition, in accordance with 28 U.S.C. 1657(a) and the remedial purposes of Section 10(j) of the Act.

Dated this 8th day of March, 2000 at Boston, Massachusetts.

_____
Acting Regional Director, Region One
National Labor Relations Board
10 Causeway Street, 6th Floor
Boston, Massachusetts 02222

LEONARD PAGE, General Counsel
BARRY J. KEARNEY, Associate General Counsel
ELLEN A. FARRELL, Assistant General Counsel
ROSEMARY PYE, Regional Director
PAUL J. RICKARD, Assistant to the Regional Director
SARA R. LEWENBERG, Counsel for Petitioner

CERTIFICATION OF SERVICE

I hereby certify that a true copy of the above document was served upon Respondent Estoril Cleaning Co., Inc, **[**and Party-in-Interest Polaroid Corporation and the attorney of record for Polaroid Corporation,**]** by hand, on March 8, 2000.

_____
Sara R. Lewenberg, BBO #634257

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June 2001

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

WILLIAM A. PASCARELL, Regional Director of Region 22 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,	*	
Petitioner,	*	
v.	*	Civil No.
ALPINE FASHIONS, INC.,	*	
Respondents.	*	

FINDINGS OF FACT AND CONCLUSIONS OF LAW
FOR ISSUANCE OF TEMPORARY INJUNCTION
PURSUANT TO 29 U.S.C. Section 160(j)

This case was heard upon the verified petition, as amended, of William A. Pascarell, Regional Director of Region 22 of the National Labor Relations Board ("the Board"), for a temporary [restraining order and] injunction against Alpine Fashions, Inc. ("the Respondent") pursuant to Section 10(j) of the National Labor Relations Act as amended ("the Act"), 61 Stat. 149, 29 U.S.C. Section 160(j), pending the final disposition of the matters which are now before the Board in NLRB Case 22-CA-14948, and upon the issuance of an order to show cause why injunctive relief should not be granted as prayed for in the petition. [No answer was filed by the Respondent.] In a hearing on the issues raised by the petition, the Court has received and fully considered the testimony of witnesses and evidence presented by the parties. Based upon the petition, testimony of witnesses, exhibits of the parties, the briefs and argument of counsel and the entire record, the Court makes the following:

FINDINGS OF FACT

1.

Petitioner is the Regional Director for Region 22 of the Board, an agency of the United States, and properly filed the petition for and on behalf of the Board.

2.

On or about March 26, 1987 Local 162, International Ladies Garment Workers Union, AFL-CIO, ("the Union"), pursuant to the provisions of the Act, filed with the Board a charge in Case 22-CA-14948 alleging that Respondent had engaged in violations of Section 8(a) (1) and (5) of the Act.

3.

That charge was referred to the Petitioner for investigation.

4.

Based upon the charge, and after an impartial investigation, the General Counsel of the Board, on behalf of the Board, by the Regional Director for the Board's Region 22, pursuant to Section 10(b) of the Act, on or about May 22 and May 28, 1987 issued a complaint and amended complaint as described below, alleging that Respondent had engaged in, and is engaging in, unfair labor practices in violation of Section 8(a) (1) and (5) of the Act by failing to transmit to the Union dues withheld from the wages of its employees, failing to make pension and welfare contributions required by its collective-bargaining agreement with the Union, failing to furnish the Union with information about its imminent cessation of operations, and failing and refusing to bargain with the Union with respect to the effect upon its employees of its cessation of its operations.

5.

On June 4, 1987, after securing authorization from the Board, Petitioner filed a petition with this Court pursuant to Section 10(j) of the Act, 29 U.S.C. Section 160(j), seeking a temporary restraining order and injunction against Respondent. The Court caused the petition, its attachments and exhibits to be duly served on the Respondent.

6.

There is, and Petitioner has, reasonable cause to believe that:

(A) At all material times Respondent is, and has been, a corporation with a facility located in North Bergen, New Jersey ("the facility"), where it is engaged in the manufacture of clothing.

(B) During the past 12 months, which period is representative of all material times, Respondent, in the course and conduct of its business operations as described in Findings of Fact, paragraph 9(A) above, purchased and received goods and materials valued in excess of $50,000 which were shipped to Respondent's facility directly from points outside the State of New Jersey,

(C) Respondent is, and has been at all material times, an employer within the meaning of Section 2(2) of the Act, engaged in commerce or an industry affecting commerce within the meaning of Section 2(2) and (7) of the Act.

(D) At all material times, John Pandolfi has been and is a supervisor of Respondent within the meaning of Section 2(11) of the Act, and/or an agent of Respondent within the meaning of Section 2(13) of the Act.

(E) 1) The Union is a labor organization within the meaning of Section 2(5) of the Act.

2) About October, 1986, a majority of Respondent's production and maintenance employees designated and selected the Union as their exclusive representative for the purposes of collective bargaining.

(F) Since on or about October 20, 1986, and at all material times, the Union, by virtue of Section 9(a) of the Act, has been the designated exclusive collective-bargaining representative of Respondent's production and maintenance employees and, since that date, the Union has been recognized as such representative by Respondent.

(G) Since October 20, 1986, Respondent has been an employer-member of the Association of Rain Apparel Contractors, Inc. ("the Association"), and has authorized the Association to bargain collectively on its behalf with the Union and enter into a collective-bargaining agreement concerning wages, hours, and other terms and conditions of employment of its employees.

(H) On or about November 17, 1986, the Association and the Union entered into a collective-bargaining agreement covering Respondent's production and maintenance employees for the period October 20, 1986 to June 30, 1990.

(I) Since on or about January 1, 1987, and continuously thereafter, Respondent has failed and refused to abide by the terms of its collective-bargaining agreement with the Union by failing and refusing to remit to the Union union dues deducted from its employees' wages.

(J) Since on or about February 1, 1987, and continuously thereafter, Respondent has failed and refused to abide by the terms of its collective-bargaining agreement with the Union by failing and refusing to make scheduled pension and welfare contributions on behalf of its employees.

(K) Since on or about March 2, 1987, and continuously thereafter, Respondent has failed and refused to furnish the Union with information concerning its imminent cessation of operations information which is necessary for, and relevant to, the Union's performance of its function as the exclusive collective-bargaining representative of Respondent's employees.

(L) Since on or about March 2, 1987, and continuously thereafter, Respondent has refused to bargain with the Union as the exclusive collective-bargaining representative of its employees with respect to the effects on its employees of Respondent's cessation of its operations.

(M) By each of the acts and conduct described in the Finding of Fact, paragraphs 6(I), (J), (K) and (L) above, Respondent has engaged in, and is engaging in, unfair labor practices affecting commerce as set forth and defined in Section 8(a) (1) and (5) and Section 2(6) and (7) of the Act.

(N) The acts and conduct of Respondent set forth in the Findings of Fact, paragraphs 6(I), (J), (K) and (L) above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states and tend to lead to labor disputes, burdening and obstructing interstate commerce and the free flow of commerce.

(0) The acts and conduct of Respondent described in the Findings of Fact, paragraphs 6(I), (J), (K) and (L), give rise to potential financial liability under the Act and make Respondent potentially liable for backpay to its employees referred to in the Findings of Fact, paragraphs 6(E)(2) and (F), and for dues, pension, and welfare fund payments to the Union, referred to in the Findings of Fact, paragraph 6(E), (F), (G) and (H).

7.

On May 4, 12 and 20, 1987, Respondent, through its agent, John Pandolfi, advised Board Agent Donna Tribel that the facility would be closing on or about March 22, 1987, and that an auction would be held shortly thereafter to liquidate any assets. When Tribel asked if Respondent would be willing to set aside an amount of money to cover the monetary liability described in the Findings of Fact, paragraph 6(0) above, Pandolfi agreed to appear in the Board's offices with a certified check on March 22, 1987. However, he failed to keep the appointment. Tribel called Pandolfi on May 26, 1987, at which time Pandolfi told her that the facility had closed on May 22, 1987 and that he had paid the employees any money due them. He refused to answer any further questions. On June 2, 1987, Tribel visited the shop and observed that the operation was continuing. Supervisor Hilda Torres informed Tribel that Respondent was finishing what work it had and that she believed the shop would be closing by the end of the week.. On or about June 5, 1987, by order of the New Jersey Superior Court, possession of the facility was returned to the lessor who then bolted the premises.

8.

It may fairly be anticipated, based upon the circumstances and conduct of Respondent described in paragraph 7 of the Findings of Fact, that Respondent will in fact dissipate or disperse its assets without adequately providing for its potential monetary liability as described in paragraph 6(0) of the Findings of Fact, and thus unjustifiably deny its employees and the Union any opportunity for backpay, back dues and fund contributions to which they are entitled under the Act.

9.

Unless a temporary sequestration of assets injunction is issued by this Court as requested by Petitioner, Respondent's unfair labor practices will go unremedied, and thus any final order of the Board will be rendered void or meaningless, frustrating the policies and the remedial purposes of the Act.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and of the subject matter of this proceeding, and under Section 10(j) of the Act is empowered to grant temporary injunctive relief.

2. There is, and Petitioner has, reasonable cause to believe that:

(a) Respondent is, and has been at all material times, an employer engaged in commerce or an industry affecting commerce within the meaning of Section 2(2), 2(6) and (7) of the Act.

(b) Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (1) and (5) of the Act, affecting commerce within the meaning of Section 2(6) and (7) of the Act, and a continuation of these practices will impair the fundamental policies of the Act, as set forth in Section 1(b) thereof.

(c) The unfair labor practices give rise to and make Respondent liable for backpay to its employees and back dues and pension and welfare fund payments to the Union.

3. Based upon Respondent's conduct described in paragraph 7 of the Findings of Fact, and the circumstances described in paragraphs 8 and 9 of the Findings of Fact, it is appropriate, just and proper within the meaning of Section 10(j) of the Act that, pending the final disposition of the matters now pending before the Board, Respondent, its officers,

agents, servants, employees and attorneys and all persons acting in concert or participation with it or them are hereby enjoined and restrained from dissipating, transferring or dispersing any assets or funds Respondent may have, as set forth in the Order Granting Temporary Injunction, unless and until Respondent discharges any backpay liability caused by its unfair labor practices or, in the alternative, Respondent furnishes security in the amount of $____ by depositing the sum of $_____ in the registry of the United States District Court for the District of New Jersey as described in the Order Granting Temporary Injunction, and is further enjoined and restrained from concealing or destroying Respondent's financial or other business records.

4. In order to ensure compliance with the Court's temporary injunction Order, Respondent is further directed: (a) to provide reasonable access to agents of Petitioner, upon request, for inspection and copying, all its financial correspondence, books, records, federal, state and local tax returns, bank or brokerage house statements, and other business documents set forth in the temporary injunction Order; (b) to grant reasonable access to agents of Petitioner to Respondent's North Bergen, New Jersey facility; and (c) within ten (10) days of the issuance of the Court's temporary injunction Order, to file an affidavit with the Court, serving a copy on the Petitioner, (i) listing and describing all present business assets valued in excess of $250, including their descriptions, locations, estimated fair market value, and the identities and addresses of all secured creditors having an interest in any such assets, and (ii) stating with specificity what steps Respondent has taken to comply with the terms of the Court's temporary injunction Order.

BY THE COURT:

DATE:

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

****

ALVIN BLYER, Regional Director
of the Twenty-Ninth Region
of the National Labor Relations Board,
for and on behalf of the NATIONAL
LABOR RELATIONS BOARD,

Petitioner

v. Civil No.

UNITRON COLOR GRAPHICS OF
NEW YORK, INCORPORATED

Respondent

****

ORDER GRANTING TEMPORARY RESTRAINING ORDER PURSUANT TO 10(j)
OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED
[29 U.S.C. SECTION 160(j)] AND FED.R.CIV.P. 65(b)

The Petition of Alvin Blyer, Regional Director of the Twenty-Ninth Region of the National Labor Relations Board, having been filed pursuant to Section 10(j) of the National Labor Relations Act, as amended, praying for a temporary restraining order against Unitron Color Graphics of New York, Incorporated, also known as LIC Group, Inc. (herein called Respondent) and for an order directing said Respondent to show cause why a temporary injunction should not be granted as prayed for in said petition; the petition being verified and supported by an affidavit and exhibits; and after said Petition was duly served upon the Respondent and Respondent having had an opportunity to be present at a hearing on Petitioner's request for a temporary restraining order,

IT APPEARING to the Court from said verified Petition, affidavits, exhibits, and legal memoranda as well as the evidence and argument presented by Respondent that:

1.

Petitioner is the Regional Director of the Twenty-Ninth Region of the Board, an agency of the United States Government, and has filed this petition for and on behalf of the Board which has authorized the filing of this petition.

2.

Statutory jurisdiction by this Court over this cause of action and over the parties has been properly invoked by Petitioner pursuant to Section 10(j) of the Act, and Fed.R.Civ.P. 65(b).

3.

(A) On or about the dates set forth below in subparagraphs (1)-(3), Technical, Office and Professional Union, Local 2110, United Automobile Agricultural Implement and Aerospace Workers, AFL-CIO, CLC (herein called the Union or Charging Party), pursuant to the provisions of the Act, filed with the Board charges and amended charges, as follows:

(1) A charge and a first amended charge in Case No. 29-CA-18119 were filed by the Union on April 11, 1994 and May 26, 1994, respectively, alleging that Respondent had engaged in violations of Section 8(a)(1) and (3) of the Act.

(2) The charge in Case No. 29-CA-18381 was filed by the Union on July 6, 1994, alleging that Respondent had engaged in violations of Section 8(a)(1) and (5) of the Act.

(3) The charge in Case No. 29-CA-18421 was filed by the Union on July 18, 1994, alleging that Respondent had engaged in further violations of Section 8(a)(1) and (5) of the Act.

4.

The charges and amended charges were referred for investigation to the Regional Director of the Twenty-Ninth Region of the Board.

(A) After investigation by the Regional Office in which Respondent was afforded the opportunity to present evidence and legal argument on the merits of the charges described above in paragraphs 3 and 4, the Regional Director, for the Board's Twenty-Ninth Region, pursuant to Section 10(b) of the Act, 29 U.S.C. Sec. 160(b), issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (herein called the Consolidated Complaint) against Unitron Color Graphics of New York Incorporated (herein called Respondent) on August 31, 1994 in Case Nos. 29-CA-18119, 29-CA-18381 and 29-CA-18421. The Consolidated Complaint alleges that Respondent violated Sections 8(a)(1), (3) and (5) of the Act by engaging in certain conduct including, *inter alia*, circulating among its employees a petition to decertify the Union and urging said employees to sign the petition; promising employees better benefits if they signed the petition, abandoned their membership in the Union and refrained from engaging in union activities; threatening employees with a reduction in hours and layoffs and issuing disciplinary warning letters to its employee/shop steward Adonica Hull because they engaged in Union activities; failing and refusing to provide relevant information which was requested by the Union and failing and refusing to bargain in good faith over the effects on unit employees of Respondent's decision to close its facility.

(B) In disposition of Case Nos. 29-CA-18119, 29-CA-18381 and 29-CA-18421, Respondent and the Union entered into an informal settlement agreement, which was approved by the Regional Director for Region 29 on June 26, 1996. The settlement agreement provided that Respondent would, *inter alia*, bargain over the effects upon its bargaining unit employees of its decision to close its facility.

6.

(A) A charge and a first amended charge in Case No. 29-CA-20680 were filed by the Union on January 31, 1997, and April 28, 1997, respectively, alleging that Respondent had engaged in further violations of Section 8(a)(1) and (5) of the Act.

(B)The charges and amended charges were referred for investigation to the Regional Director of the Twenty-Ninth Region of the Board.

(C) After investigation by the Regional Office in which Respondent was afforded the opportunity to present evidence and legal argument on the merits of the charges described above in paragraphs 6(A) and (B), an Acting Regional Director, for the Board's Twenty-Ninth Region, pursuant to Section 10(b) of the Act, 29 U.S.C. Sec. 160(b), issued an Order Revoking Informal Settlement Agreement, Order Further Consolidating Cases, Amended Consolidated Complaint and Notice of Hearing (herein called the Amended Consolidated Complaint) in Case Nos. 29-CA-18119, 29-CA-18381, 29-CA-18421 and 29-CA-20680, alleging as violations of the Act, the pre-settlement conduct set forth in the Consolidated Complaint, as described above in paragraph 5(A), and additionally alleging that Respondent failed and refused to furnish the Union with certain requested information, and that Respondent bargained in bad faith by (1) expressing strong disdain for the Union representative and the Union's effects bargaining proposals; (2) evidencing a closed-mindedness to the Union's proposals; (3) failing or refusing to respond or make any counterproposals to the Union's effects bargaining proposals; and (4) failing and refusing to provide certain information, and that by such conduct it failed to comply with and violated the terms of the settlement agreement described above in paragraph 5(B) above.

(D) The Regional Director seeks, in the administrative complaint proceeding described in paragraph 6(C) above, as part of a final remedial order against the Respondent, that the Board

order, under Section 10(c) of the Act, 29 U.S.C. Section 160(c), a make-whole remedy for the affected employees who were the victims of Respondent's alleged violations, which order shall require, as a minimum, two weeks of pay for all of Respondent's employees previously represented by the Union.

7.

(A) At all material times, Respondent was a New York corporation, with its principal office and place of business located at 47-10 32nd Place, Long Island City, New York, where it was engaged in performing pre-press color graphics production services for magazines, and related services.

(B) During the past year, a period representative of all times material herein, Respondent, in the course and conduct of its business operations described above in paragraph 7(A), performed services valued in excess of $50,000 for various enterprises located in the State of New York, each of which enterprises, in turn, is directly engaged in interstate commerce and satisfies a Board standard for the assertion of jurisdiction, exclusive of indirect inflow or indirect outflow.

(C) Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act, 29 U.S.C. Sec. 152(2), (6) and (7).

(D) The Union, is now, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act, 29 U.S.C. Sec. 152(5).

(E) There is and Petitioner has demonstrated reasonable cause to believe that:

(1) Since on or about April 13, 1994, May 16 and June 29, 1994 Respondent failed and refused to bargain collectively in a timely manner with the Union regarding the effects upon unit employees of Respondent's decision to sell its business.

(2) The subject set forth in paragraph (E)(1) relates to the wages, hours and other terms and conditions of employment of the unit employees and is a mandatory subject for the purposes of collective bargaining.

(3) Since on or about May 16, 1994 and May 31, 1994, Respondent failed and refused to furnish, or delayed in furnishing, the Union with certain relevant information requested by the Union.

(4) By the acts described above in paragraphs E(1)-(3), Respondent has failed and refused to bargain collectively, and in good faith with the exclusive collective bargaining representative of its employees, in violation of Section 8(a)(1) and (5) of the Act.

8.

There is and Petitioner has reasonable cause to believe that Respondent, in violation of the terms of the settlement agreement described above in paragraph 5(B) above, engaged in the following conduct:

(1) Respondent failed and refused to furnish the Union with certain relevant information requested by the Union in letters dated November 15, 1996, January 7, 1997, February 25, 1997 and April 22, 1997.

(2) Respondent negotiated in bad faith with the Union regarding the effects of its decision to close its Long Island City, New York facility upon its bargaining unit employees by its overall conduct including:

(a) on or about September 12, 1996, expressing strong disdain for the Union representative and the Union's effects bargaining proposals, evidencing a closed-mindedness to the Union's proposals;

(b) since on or about September 12, 1996, failing or refusing to respond or make any counterproposals to the Union's effects bargaining proposals; and

(c) since on or about November 15, 1996, January 7, 1997, February 25, 1997 and April 22, 1997, failing and refusing to provide and delaying in providing certain information described above.

9.

There is and Petitioner has reasonable cause to believe that Respondent's asset purchaser, Applied Graphics Technologies, L.P., herein called AGT, makes monthly commission payments to Respondent pursuant to a May 10, 1994 Asset Purchase Agreement, but that these commissions will end in May 1998.

10.

There is and Petitioner has reasonable cause to believe that since Respondent discontinued its operations in May of 1994, was dissolved by proclamation on September 24, 1997, because of non-payment of taxes and has not responded to the request of the Regional Office that it voluntarily sequester an amount sufficient to cover the backpay remedy as set forth in Transmarine Navigation Corp., 170 NLRB 389 (1968), that Respondent will dissipate any income earned from AGT and any other sources pending final disposition of the matters involved herein before the Board.

11.

(A) Unless immediate protection is granted to Petitioner pursuant to Fed.R.Civ.P. 65(b) requiring Respondent to set aside sufficient assets and income so as to prevent the imminent dissipation or dispersal of Respondent's assets and income, a frustration to the ultimate administrative order of the Board in NLRB Case Nos. 29-CA-18119, 29-CA-18381, 29-CA-18421 and 29-CA-20680 will result.

(B) There is imminent danger that substantial and irreparable injury will unavoidably result to Petitioner's enforcement of the Act in NLRB Case Nos. 29-CA-18119, 29-CA-18381, 29-CA-

18421 and 29-CA-20680 and that the Board's administrative order will be frustrated if protection is not granted with a temporary restraining order pending a final adjudication by the Court of the merits of the Board's Petition for a temporary injunction.

NOW, THEREFORE, BASED UPON THE ABOVE, IT IS HEREBY ORDERED, that effective the _____ day of March, 1998, at ____.m., Respondent, its principals, officers, agents, attorneys, servants, employees, successors and assigns, and all persons natural or corporate acting in concert or participation with Respondent be, and they hereby are,

(A) ENJOINED AND RESTRAINED until , 1998, at , and no longer without further order of this Court from:

(1) In any manner selling, leasing, transferring, assigning, paying over, alienating, dissipating or otherwise disposing of any and all of Respondent's assets, including but not limited to real property, buildings and fixtures, leasehold interests, equipment or vehicles used to carry out Respondent's business, accounts receivable, monies on hand, monies that will be received in the future, or monies presently deposited in Respondent's bank or brokerage accounts, unless and until Respondent first furnish security in the amount of $23,046.40 by depositing the sum of $23,046.40 in the registry of the United States District Court for the Eastern District of New York to protect the claims created by their alleged unfair labor practices as set forth in the Acting Regional Director's Amended Consolidated Complaint in NLRB Cases 29-CA-18119; 29-CA-18381; 29-CA-18421; 29-CA-20680, PROVIDED HOWEVER, Respondent may sell, transfer or lease assets in bona fide arms length transactions for a full, fair and present consideration or rental value actually paid to Respondent, provided that the receipts from any such sale or transfer, and the rents due pursuant to any such lease shall immediately upon receipt be deposited in the registry of the United States District Court for the Eastern District of New York until the total amount deposited in that Court's registry in connection with this case shall equal

$23,046.40; PROVIDED FURTHER, that Respondent shall keep, and make available to the Board upon request, for inspection and copying, written records of each and every transaction involving expenditures or receipts by Respondent in excess of $100.

(2) Unless and until the sum of $23,046.40 is set aside and retained in the manner set forth above, in any manner or by any means entering into any arrangement or agreement providing for or which would result in, a lien on any of Respondent's current assets or income or pledging any of its current assets or income as security or encumbering any of its other current assets without further order of this Court.

(3) Unless and until the sum of $23,046.40 is set aside and retained in the manner set forth above, distributing any of Respondent's income or assets, or the proceeds from the sale, lease or divestment thereof, to the officers, principals, shareholders or directors of Respondent, or to any other person, enterprise or entity controlled by, or related to or affiliated with, Respondent or its shareholders, officers or directors, including the repayment of loans to Respondent or for the payment of unreasonable salaries to Respondent's officers, shareholders or directors or their relatives, without further order of this Court;

(4) In any manner of by any means concealing, misplacing, altering or destroying any of Respondent's financial correspondence, books, records, federal, state and local tax returns, bank or brokerage house statements, or other financial documents.

(B) Affirmatively Ordered and Directed to:

(1) immediately, based on the income and assets it presently has, and from any income and assets it receives in the future, deposit in the registry of the Court, the total amount of $23,046.40, or whatever amount less than that it presently has or receives in the future, pending final disposition of the administrative matters before the Board and any judicial review thereof.

(2) notwithstanding any other provision of this order, proceeds of the sale, transfer, lease or other disposition of Respondent's assets for a full fair and present consideration or rental value, may be applied to bona fide current expenses including federal, state, county and local taxes, and the satisfaction of bona fide liens of record recorded prior to the entry of this order, provided however, that in no event shall any payment be made to any officer, principal, shareholder or director of Respondent, or to any other person, enterprise or entity controlled by, or related to or affiliated with, Respondent or its shareholders, officers or directors, absent further order of this Court.

(3) provide notice of this order, in writing, to any person natural or corporate to whom Respondent proposes to sell, lease, transfer or otherwise disperse of any of its assets or to any person, natural or corporate holding for Respondent's credit, funds, income or proceeds of any sale of Respondent's assets; copies of such notices shall be promptly provided to the Board.

II. IT IS FURTHER ORDERED that any person, natural or corporate, having notice of this order and holding funds for credit of Respondent, including Applied Graphics Technologies, L.P., is directed to deposit said funds in the registry of the United States District Court for the Eastern District of New York, until the total amount deposited in that Court's registry in connection with this case shall equal $23,046.40; and it is further directed that they stop payment on any checks issued to Respondent as of _March 6_, 1998.

III. IT IS FURTHER ORDERED that service of a copy of this order, when it is issued, be made forthwith by the United States Marshal or an agent of the Board, 21 years of age or older, in any manner provided in the Federal Rules of Civil Procedure for the United States District Courts, or by registered mail, upon Respondent, Applied Graphics Technologies, L.P. and the Charging Party before the Board, and that such proof of such service be filed with the Court.

ORDERED this _____ day of _____, 1998, at Brooklyn, New York.

BY THE COURT:

_____
United States District Judge

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June 2001

Outline of Short Memo of Points in Support of
T.R.O. Request for Protective Order

[2 pages redacted, exem. 5, attorney work product, 2, and 7(E)]

Model Argument for
"Protective Order" or Sequestration
of Assets Injunctions Under Section 10(j)
[29 U.S.C. Section 160(j)]

[7 pages redacted, exem. 5, attorney work product, 2, and 7(E)]

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June 2001

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

RONALD S. COHEN, Acting Regional Director
of the First Region of the
National Labor Relations Board, for
and on behalf of the NATIONAL LABOR
RELATIONS BOARD,

Petitioner

v. Civil No.

ESTORIL CLEANING CO., INC.

Respondent

and

POLAROID CORPORATION,

Party-in-Interest

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION UNDER SECTION 10(J) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, [29 U.S.C. SECTION 160(J)] [AND THE ALL WRITS ACT [28 U.S.C. SECTION 1651(A)]][1]

I

STATEMENT OF THE CASE

This proceeding is before the Court on a petition filed by the Acting Regional Director of the First Region of the National Labor Relations Board (herein called the Board), pursuant to Section 10(j) of the National Labor Relations Act, as amended (29 U.S.C. Sec. 160(j)) (herein called the Act), for a temporary restraining order and a preliminary injunction pending the final disposition of the matters involved herein pending before the Board on a Consolidated Complaint and Notice of Hearing issued by Petitioner on February 28, 2000, in NLRB Cases 1-CA-37811, 1-CA-37828, and 1-CA-37875, (herein called Consolidated Complaint), and a

[1] **[The All Writs Act applies only when the Region is authorized to enjoin a third party tha is not a party to the underlying unfair labor practice case.]**

Complaint and Notice of Hearing issued by the Petitioner on March 7, 2000 in Case 1-CA-37931 (herein called Complaint), alleging that Estoril Cleaning Co., Inc., (herein called Respondent) violated Sections 8(a)(1) and (5) of the Act, by *inter alia*, failing to bargain in good faith with Service Employees International Union, Local 254, AFL-CIO, CLC, (herein called the Union) over the effects on its bargaining unit employees of its decision to cease its operations, and by failing to pay bargaining unit employees for work performed during the month of January 2000. Petitioner seeks a temporary restraining order and other injunctive relief in order to guarantee that, should the Board find Respondent has violated the Act, as alleged in the Consolidated Complaint and the Complaint, there will be money to satisfy the Board's remedial order. Petitioner seeks a temporary restraining order and other injunctive relief in order to prevent the Respondent from dispersing or dissipating assets, thereby frustrating any prospective remedial order of the Board.

It is recognized that District Courts have authority to grant temporary restraining orders under Section 10(j). Squillacote v. Local 248, Meat & Allied Food Workers, 534 F.2d 735, 742-743 (7th Cir. 1976); Kobell v. Menard Fiberglass Products, Inc., 678 F. Supp. 1155, 1157 (WD PA 1988).

This Court has the authority to grant a temporary restraining order pursuant to Section 10(j) of the Act **[**and/or the All Writs Act**]**, but may do so only after a respondent is given proper "notice." Adequate and appropriate notice pursuant to Section 10(j) of the Act is provided where, as here, Respondent **[**and counsel for Polaroid Corporation, (herein called Polaroid)**]** were notified at about 2:00 p.m. and 1:45 p.m., respectively on March 7, 2000, that a petition for a temporary restraining order would be filed on March 8, 2000, and that a March 8, 2000 hearing would be requested. Moreover, Respondent **[**, Polaroid and Polaroid's counsel**]** will be served with copies of the pleadings herein on March 8, 2000. Squillacote v. Local 248, Meat & Allied Food Workers, supra, at 743.

II

LEGAL STANDARDS FOR INJUNCTIVE RELIEF

Section 10(j) of the Act was enacted by Congress as a means of protecting the Board's Orders from remedial failure during the pendency of its administrative proceedings. Absent interim relief under Section 10(j), those violating the Act (or seeking to evade their liability thereunder), might be able to accomplish their unlawful objective before being placed under any legal restraint. Kaynard v. Palby Lingerie, 625 F.2d 1047, 1055 (2nd Cir. 1980) [citing S. Rep. No. 105, 80th Cong., 1st Sess. 27 (1947)].

This case meets the standards for obtaining a Section 10(j) injunction under such First Circuit cases as Pye v. Sullivan Brothers Printers, 38 F.3d 58, 147 LRRM 2584 (1st Cir. 1994); Asseo v. Centro Medico del Turabo, Inc., 900 F.2d 445, 454, 133 LRRM 2722, 2729-2730 (1st Cir. 1990); Asseo v. Pan American Grain Co., 805 F.2d 23, 25, 123 LRRM 2996, 3000 (1st Cir. 1986); Fuchs v. Jet Spray, 725 F.2d 664, 116 LRRM 2191 (1st Cir. 1983), aff'g. 560 F. Supp. 1147, 114 LRRM 3493 (D. Mass. 1983); and Maram v. Universidad Interamericana, 722 F.2d 953, 115 LRRM 2118 (1st Cir. 1983).

The First Circuit's standards for a temporary restraining order appear to be similar to those of a standard preliminary injunction, and the same factors are examined. Merril Lynch, Pierce, Fenner & Smith, Inc., v. Bishop, 839 F.Supp. 68 (D.ME.1993)

Under the First Circuit's standards, the district court may grant a Section 10(j) petition upon finding (1) that the Board has "reasonable cause" to believe the Act has been violated, and (2) that injunctive relief would be "just and proper," as expressly required by Section 10(j) itself. Asseo v. Centro Medico del Turabo, Inc., supra at 454; Asseo v. Pan American Grain Co., supra at 25; Fuchs v. Hood Industries, 590 F.2d 395, 397, 100 LRRM 2547, 2549 (1st Cir. 1979). In Pye v. Sullivan Brothers, the court indicated that if the reasonable cause test still survives, it is,

in any event, subservient to the question, posed under the just and proper standard, of whether the Board has demonstrated a likelihood of success on the merits. 147 LRRM at 2588, n. 7. On the basis of the above analysis of the charges, the Petitioner believes that it has satisfied the First Circuit's "reasonable cause" standard establishing that violations of Section 8(a)(1) and (5) of the Act have occurred.

In determining whether injunctive relief is "just and proper," the First Circuit applies the standards it normally applies for preliminary injunctive relief. Specifically, these standards are: (1) that the plaintiff will suffer irrevocable injury if the injunction is not granted; (2) that such injury outweighs any harm which an injunction would inflict on the defendant if granted; (3) that the plaintiff has shown a likelihood of success on the merits; and (4) that the public interest will not be adversely affected by granting the injunction. Maram v. Universidad Interamericana, supra, 115 LRRM at 2121, citing Planned Parenthood League of Mass. v. Bellotti, 641 F.2d 1006, 1009 (1st Cir. 1981).

In applying these "just and proper" standards, the First Circuit follows the "sliding scale" approach used by the Ninth Circuit in Miller v. California Pacific Medical Center, 19 F.3d 449, 145 LRRM 2769 (9th Cir. 1994)(en banc). Under this balancing test, as the degree of irreparable harm increases, the requirement for showing a probability of success on the merits decreases, and vice versa. Id. at 459-460. If the Board demonstrates that it is likely to prevail on the merits, irreparable harm may be presumed. If the charge is disputed, or if the Board has only a fair chance of succeeding on the merits, the court will expressly consider the possibility of irreparable harm. Miller v. California Pacific, 19 F.3d at 460. If the harm to the plaintiff outweighs the harm to the defendant, then a Section 10(j) injunction is just and proper. This is similar to the approach taken by the First Circuit in Pye v. Sullivan Brothers, a case dealing with allegations of withdrawal of recognition, the repudiation of collective-bargaining agreements, and a number of unilateral changes. In discussing its application of the just and proper test, the

court stated: “When, as in this case, the interim relief sought by the Board ‘is essentially the final relief sought, the likelihood of success should be *strong.*’” Pan American Grain Co., 805 F.2d at 29 (emphasis added), 147 LRRM at 2588.

As to the applicability of these standards in a motion for a temporary restraining order (TRO), the purpose of a TRO is to preserve an existing situation in status quo until the court has an opportunity to pass upon the merits of the demand for a preliminary injunction. CTC Communication, Inc., v. Bell Atlantic Corp., 14 F.Supp. 2d 133 (D. ME 1998)

District Courts have recognized the need for injunctive relief under Section 10(j) of the Act to prevent the dissipation of assets or other conduct by respondents that would render a backpay order of the Board meaningless. Schaub v. Brewery Products, Inc., 715 F. Supp. 829 (ED MI 1989); Kobell v. Menard Fiberglass Products, Inc., 678 F. Supp. 1155 (WD PA 1988); and Pascarell v. Alpine Fashion, Inc., 126 LRRM 2242 (D. N.J. 1987). Here, Petitioner asks the Court to enjoin Respondent under Section 10(j) in order to preserve the ability of the Board to render a meaningful backpay order.

The Petitioner herein asks that the Court issue a temporary restraining order enjoining and restraining Respondent from distributing, transferring or disposing of its business assets or funds, except as permitted by the Court and by the terms of the temporary restraining order, and also enjoining and restraining Respondent from concealing, altering or destroying any of his business or personal financial documents. Petitioner asks that the temporary restraining order direct Respondent to deposit any income it presently has or should receive, immediately upon receipt, until the amount of $32,202.80 is reached, in the registry of the Court, in an interest bearing account, pending the Court’s ruling on the merits of the petition for a temporary injunction. **[**Petitioner also asks that the temporary restraining order enjoin Respondent's former customer, Polaroid, from disbursing monies due to Respondent, pending the Court’s ruling on

the merits of the petition for a temporary injunction.**]** Finally, Petitioner respectfully asks the Court to direct Respondent to file an answer to the petition by 1:00 p.m. on March 14, 2000; to hold a hearing on the merits of Petitioner's request for a temporary restraining order on March 8, 2000, and to set a hearing on the merits of Petitioner's request for a temporary injunction for 10:00 a.m. on March 16, 2000, or as soon thereafter as counsel may be heard.

III

STATEMENT OF FACTS

Upon charges filed by the Union, in Cases 1-CA-37811, 1-CA-37828 and 1-CA-37875, the Regional Director of Region One issued a Consolidated Complaint and Notice of Hearing on February 28, 2000, alleging that *inter alia*, by letter dated January 28, 2000, the Union requested that Respondent bargain collectively with it regarding the effects upon bargaining unit employees of Respondent's decision to close its operations effective January 31, 2000, and that Respondent failed and refused to bargain over the effects on unit employees of its decision to close its operations, which subject is related to wages, hours and other terms and conditions of employment and is a mandatory subject of bargaining.

Upon a charge filed by the Union, in Case 1-CA-37931, the Regional Director of Region One issued a Complaint and Notice of Hearing on March 7, 2000, alleging that Respondent failed to pay bargaining unit employees wages earned in January 2000, which subject relates to wages, hours and other terms and conditions of employment and is a mandatory subject of bargaining.

Respondent was in the business of providing cleaning services, and maintained only one cleaning contract, with Poloroid in Waltham, Massachusetts. Respondent employed approximately 46 employees when it closed its operations on January 31, 2000. Approximately

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[2] A copy of the LRRM report in Pascarell v. Alpine Fashion, Inc. is attached as Appendix A.

11 of these employees worked 40 hours per week on the day shift, and about 35 employees worked approximately 20 hours per week during the evenings.

The Union began organizing the Respondent's employees in about September 1998. An election was held on November 12, 1998, and the Union won this election by a vote of 24 to 12. The Region certified the Union as the representative of the Respondent's employees who cleaned at Polaroid on November 24, 1998.

Sometime in January 2000, the Respondent decided not to re-bid its cleaning contract with Polaroid, which was set to expire on January 31, 2000. On January 24, 2000, another cleaning contractor, who is a signatory to the Master Janitorial Agreement, told the Union's business agent, Donald Coleman, (herein Coleman) that it would be taking over the Polaroid cleaning contract as of February 1, 2000 and hiring all of the unit employees. The Respondent never told the Union that it was not re-bidding its cleaning contract with Polaroid or that it was ceasing operations.

On January 28, 2000, Coleman sent a letter to Respondent's Owner, Emilia Delgado, (herein Emilia) and its Senior Vice-President of Operations, Marco Delgado, (herein Marco) requesting to meet with them to bargain over the effects of the Respondent's decision to cease its operations. The Respondent did not respond to Coleman's letter, and has since refused to meet and bargain with the Union over the effects of terminating its cleaning contract with Polaroid.

Since closing its operations on January 31, 2000, Respondent has failed and refused to pay its part-time employees for hours worked between January 17 and January 31, 2000. Additionally, the Respondent has failed to make good on a bounced check that it issued to one of its part-time employees for 40 hours worked during the first half of January 2000. [3]

[3] The Petitioner is seeking a protective order to sequester certain assets of the Respondent so that, in the event that the Region prevails on its Complaints, there will be sufficient funds to satisfy both a remedy pursuant to Transmarine Navigation Corp., 170 NLRB 389 (1968), which provides for a minimum of two-weeks of backpay for all unit employees where an employer has

Before the Respondent failed and refused to bargain with the Union over closing its operations, Respondent violated the Act by refusing to sign an agreed upon collective-bargaining agreement and failing to provide relevant information to the Union.

On September 29, 1999, the Respondent and the Union signed an agreement, effective January 1, 2000, whereby the Respondent agreed to be bound by all terms and conditions of the Master Janitorial Contract, which had been negotiated between the Union and the Maintenance Contractors of New England, Inc. On November 14, 1999, the employees of the unit voted unanimously to ratify this agreement. On November 14, 1999, after the contract ratification vote, Coleman met with Marco and Emilia Delgado. At this time, Coleman notified the Delgados of the results of the ratification vote and told them that the written collective-bargaining agreement ("contract") between the Union and the Respondent would take effect January 1, 2000. Coleman told the Delgados that they had to execute the contract.[4]

Beginning on November 15, 1999, Coleman began calling Marco to set up a meeting where he and the Delgados would execute the contract. Coleman called Marco at least 20 times and left messages for Marco to call him back to set up a meeting. Marco, however, failed to take or return any of Coleman's calls.[5] By letter dated December 6, 1999, Coleman informed Marco that he would be at the Respondent's office at 5:30 p.m. on December 8, 1999 to execute the contract. Coleman went to the Respondent's office for the purpose of executing the contract on

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failed and refused to bargain over the effects of its closing of operation, and to compensate employees for the wages that the Employer failed to pay to them for work performed during January 2000. The Petitioner is not otherwise seeking 10(j) injunctive relief. The portion of this memorandum relating to the Respondent's refusal to execute an agreed-upon collective-bargaining agreement and refusal to furnish information are included for background purposes and to demonstrate the Respondent's total disregard for compliance with the Act, thereby buttressing the need for a protective order.

[4] At some point, Coleman told the Delgados that the pay rates outlined in the contract need not be implemented until February 1, 2000, as the Master Agreement provides for a 30-day grace period.

[5] Marco operated his business primarily by way of a cell phone with a caller identification feature.

December 7, 1999, December 8, 1999, and December 23, 1999. Marco was not at the office on any of these occasions.

On January 6, 2000, Coleman filed the charge in Case 1-CA-37811, alleging that the Employer had failed to execute the agreed-upon contract. Since that time, Marco has told Coleman that he had sent the signed contract, via certified mail, on numerous occasions.

On January 7, 2000, Coleman sent a letter to the Employer requesting that the Employer furnish the Union with the names, dates of hire, addresses, and work schedules of all Unit employees.

On January 24, 2000, Coleman spoke with Marco. Again, Marco told Coleman that Marco would send the signed contract to the Union that day.

On January 28, 2000, Coleman again spoke with Marco. Marco told Coleman that he would not send the signed contract to the Union because the Respondent was his mother, Emilia's, business and Marco did not want to get involved in the business any longer. That same day, Coleman sent a letter to Marco confirming this telephone conversation. After speaking with Marco, Coleman called Emilia Delgado. Emilia told Coleman that she would send the signed contract and forward a current seniority list to the Union if Coleman sent her a letter stating that this would resolve everything between the Employer and the Union. Coleman sent Emilia such a letter, dated January 28, 2000. Also in this January 28th letter, Coleman again requested that the Respondent provide the Union with the names, dates of hire, addresses, and work schedules of all unit employees, as well as the Respondent's complete payroll records for the preceding three months and a list of employees owed wages. To this date, the Respondent has sent none of the requested information to the Union.

Coleman spoke with Marco on numerous occasions when Marco has promised Coleman that the executed contract was "in the mail." Most recently, Coleman spoke to Marco on February 10, 2000, at which time Marco again told Coleman that he was sending the signed

contract to Coleman that day. To this date, the Union has not received the signed contract from the Employer.[6]

The Respondent maintained an office at 1277 Main Street in Waltham until approximately August 1999. At that time, the Respondent's phone was disconnected and its place of business moved to 1273 Main Street. The Respondent did not notify the Union of its address change, nor did it provide the Union with a telephone number at which the Union could reach the Respondent. Throughout the time period of August of 1999 through January 2000, Marco claimed to have been overwhelmed by the vast disarray resulting from the Respondent's office move and has, therefore, been unable to locate certain documents, such as certified mail receipts, requested by the Board agent. The Employer closed its Waltham office upon ceasing its operations at Polaroid on January 31, 2000.

Additionally, as part of its settlement of earlier charges filed against Respondent,[7] the Respondent was to pay $1035 to one discriminatee. This settlement agreement was approved on October 8, 1999. On October 12 and again on November 12, 1999, the Region sent letters to the Respondent requesting that it comply with the terms of the settlement. The Region's compliance officer phoned and left messages for the Respondent, who failed to respond to the compliance officer's messages. Finally, on December 16, 1999, the Region received a check in the amount of $1035 from Marco. While this check was signed by Marco, it was not drawn from a bank account of the Respondent, but rather from a bank account of a different corporation: Delgado Enterprises, Inc. Emilia is the principal officer of Delgado Enterprises, Inc.

The Respondent has submitted its final invoices to Polaroid, and Polaroid was processing those invoices when contacted by the Petitioner on February 17, 2000. Since that time, Polaroid

[6] The Union still needs the signed contract so that the Unit employees do not have to repeat the one-month grace period for contract benefits with their new employer.
[7] Cases 1-CA-36775 and 1-CA-37492.

has agreed to temporarily hold off on paying the money that it owes to the Respondent, but is awaiting a Protective Order that would secure this position.[8]

IV

REASONABLE CAUSE

It is well settled that, in Section 10(j) proceedings, the District Court is not called upon to decide the issues before the Board. Rivera-Vega v. Conagra, Inc., 70 F.3d 153 (1st Cir. 1995); Pye v. Sullivan Brothers Printers, 38 F.3d 58, 147 LRRM 2584 (1st Cir. 1994); Asseo v. Centro Medico del Turabo, Inc., 900 F.2d 445, 454, 133 LRRM 2722, 2729-2730 (1st Cir. 1990); Asseo v. Pan American Grain Co., 805 F.2d 23, 25, 123 LRRM 2996, 3000 (1st Cir. 1986)

Thus, the "reasonable cause" standard does not require the Board to adduce evidence to the extent required in a full hearing on the merits, nor does it require the District Court to resolve disputed issues of fact or credibility; rather, its role is limited to determining whether the NLRB's position is "fairly supported by the evidence." Rivera-Vega v. Conagra, Inc., 70 F.3d 153 (1st Cir. 1995); Pye v. Sullivan Brothers Printers, 38 F.3d 58, 147 LRRM 2584 (1st Cir. 1994); quoting Asseo v. Centro Medico del Turabo, Inc., 900 F.2d 445, 454, 133 LRRM 2722, 2729-2730 (1st Cir. 1990).

The evidence which could be adduced in a hearing before this court shows that there is reasonable cause to believe that Respondent violated Section 8(a)(5) of the Act by failing and refusing to bargain over the effects of its closing of operations and by failing to pay employees wages due for work performed in January 2000, which would be remedied by requiring Respondent to, *inter alia*, compensate employees for the hours that they worked in January 2000,

[8] Polaroid currently owes the Respondent, and is temporarily holding, $54,331.52. Polaroid has informed the Petitioner that the monies are due to be paid to the Respondent on March 10, 2000, and it intends to tender the monies at that time unless enjoined from doing so. The Petitioner's initial calculations indicate that 2-weeks backpay for the unit would total approximately $15,700. Additionally, the unpaid wages alleged to be owing to employees in the recently filed charge would total approximately $10,300.

and pay a backpay remedy of a minimum of 2 weeks backpay per unit employee. Transmarine Navigation Corp., 170 NLRB 389 (1968); NLRB v. National Care Rental System, Inc., 672 F.2d 1182, 1191, 109 LRRM 2832 (3d Cir. 1982). In Transmarine Navigation Corp., an employer unlawfully refused to bargain with a union about the effects on employees of the employer's closing of its operations. The Board held that the union was denied any opportunity to engage in meaningful bargaining, at a meaningful time: before the shut down, when the employer still may have needed the employees' services. The Board ordered a limited backpay remedy, which at a minimum would equal two weeks, in part to make the employees whole, but also to recreate in some practicable manner a situation in which the parties' bargaining position has economic consequences for the employer. Id. This backpay award is not offset by the fact that the unit employees were hired by the new cleaning contractor and suffered no interruption in their work. See, NLRB v. Dallas Times Herald, 315 NLRB 700 (1994) [Transmarine remedy not offset by payments made pursuant to the Workers Adjustment and Retraining Notification Act of 1988 (WARN)].

V

A TEMPORARY RESTRAINING ORDER
IS JUST AND PROPER

The Board's remedies are restorative, rather than punitive. Backpay, specifically provided for in Section 10(c) of the Act, is central to the Board's remedial efforts to restore the lawful status quo. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197 (1941); NLRB v. J.H. Rutter-Rex Mfg. Co., 396 U.S. 258, 265 (1969). It is, therefore, respectfully submitted that, in order to protect the Board's ability it issue a meaningful backpay Order, and indeed its ability to remedy the unfair labor practices of Respondent, the Court should find that it is "just and proper" that a temporary restraining order be granted.

Federal Courts have granted extraordinary injunctions to preserve the assets of a defendant or respondent, where those assets appeared to be in danger of dissipation during the pendency of federal administrative proceedings, including those of the Board. NLRB v. Horizon Hotel Corp., 159 LRRM 2449 (1st Cir. 1998)[9]; Aldred Investment Trust v. SEC, 151 F.2d 254 (1st Cir. 1945), cert. Denied 326 U.S. 795 (1946); Kobell v. Menard Fiberglass Products, Inc., 678 F. Supp. 1155 (WD PA 1988); Schaub v. Brewery Products, Inc., 715 F. Supp 829 (ED MI 1989). See generally: SEC v. American Board of Trade, Inc., 830 F.2d 431, 438-439 (2nd Cir. 1987); SEC v. Bartlett, 422 F.2d 475 (8th Cir. 1970); FTC v. Southwest Sunsites, Inc., 665 F.2d 711 (5th Cir. 1982), cert. denied 456 U.S. 973; FSLIC v. Sahni, 868 F.2d 1096 (9th Cir. 1989); CFTC v. Morgan, Harris and Scott, Ltd., 484 F. Supp. 669, 671 (SDNY 1979) [temporary restraining order granted, prohibiting destruction of records.] Federal Courts have also found that relief such as the protective order requiring Respondent to pay income derived from revenues into the registry of the District Court prayed for here, to be appropriate in other administrative proceedings including those involving the Board. See e.g., U. S. v. Morgan, 307 U.S. 183, 193-94 (1939)(upholding deposit in court of stockyard rate differences pending determination of rates by Secretary of Agriculture); In re Villa Marina Yacht Harbor, Inc., 984 F.2d 546 (1st Cir. 1993), cert. denied 510 U.S. 818 (court has inherent power to order mortgagor to make payments into court account; until judgment, neither party can use the money); NLRB v. A.N. Electric, et al, 141 LRRM 2386 (2nd Cir. 1992)(circuit court granted Section 10(e)(29U.S.C. Section 160(e) injunction to sequester funds in escrow account or registry of the court)[10]; City of New York v. Citisource, Inc., 679 F. Supp. 393 (S.D.N.Y. 1988)(attachment of bank accounts in RICO action because risk of concealment); SEC v. Netelkos, 638 F. Supp. 503 (S.D.N.Y. 1986)(court ordered assets of respondent liquidated and deposited into interest bearing

[9] A copy of the LRRM report in NLRB v. Horizon Hotel Corp. is attached hereto as Appendix B.
[10] A copy of the LRRM report in NLRB v. A.N. Electric, et al is attached hereto as Appendix C.

account under control of the clerk of the court); Bentz v. International Longshoremen's Association, Local 1410, Civil Action 75-507-H (S.D. Ala. Southern Division March 11, 1996) (unpublished)(in Section 10(l) proceeding, 29 U.S.C. Section 160(l), district court ordered disputed funds paid into registry of court pending completion of Board's administrative proceeding).

Here, Respondent discontinued its operations on January 31, 2000. The assets of Respondent are uncertain as Respondent has failed to furnish the Union with requested information**[**; however, according to Polaroid, Polaroid will pay monies due to Respondent in the amount of $54,331.52 on March 10, 2000**]**.[11]

The Respondent's actions with regards to the investigation of the charges at hand as well as prior charges indicates that there is a strong likelihood that Respondent will dissipate its assets as quickly as possible if not precluded from doing so. In addition to violating the Act by refusing to notify the Union of its decision to close and thereafter refusing to bargain over the effects of ceasing its operations, the Respondent has also unlawfully refused to execute an agreed upon collective-bargaining agreement and refused to furnish information to the Union. The Respondent's conduct in these, as well as prior cases, demonstrates a total disregard for its employees' rights under the Act. Not only has the Respondent abruptly ceased its operations without informing the Union, the Respondent recently has: moved its office without informing the Union; disconnected its business telephone without providing the Union with a new telephone number; failed to return numerous telephone calls both from the Union and from the

[11] As noted above, there is reasonable cause to believe that Respondent engaged in statutory violations which would be remedied by requiring Respondent to, *inter alia*, pay a backpay remedy of a minimum of 2 weeks backpay per unit employee. See Transmarine Navigation Corp., 170 NLRB 389 (1968); NLRB v. National Care Rental System, Inc., 672 F.2d 1182, 1191, 109 LRRM 2832 (3d Cir. 1982). As noted in the affidavit of Compliance Officer Elizabeth Gemperline, the Petitioner estimates the minimum backpay liability, also including money due to Unit employees for unpaid wages earned in January 2000 and estimated interest, to be $32,202.80.

Region; refused to accept certified letters from the Region; issued checks to employees that have bounced; allegedly failed to pay employees for their last eleven working days, and paid the Employer's indebtedness for an earlier unfair labor practice charge from a different corporation's bank account. Finally, the Employer has totally ceased operations and the only assets known to exist that may be available to satisfy a Board order are the monies currently being held by Polaroid. Based upon the above, the Region believes that it may fairly be anticipated that Respondent will in fact dissipate its remaining assets and thus unjustifiably deny employees any opportunity to recover backpay and remedies pursuant to Transmarine Navigation Corp., 170 NLRB 389, as well as the unpaid wages Unit employees earned in January 2000. In these circumstances, not protecting the Respondent's assets would likely cause irreparable harm as it is very likely that no assets of the Respondent will exist by the time that a decision is rendered in this case.

In this case, it is "just and proper" to secure a protective order to secure the Respondent's remaining assets. NLRB v. Horizon Hotel Corp., 159 LRRM 2449 (1st Cir. 1998); Aldred Investment Trust v. SEC, 151 F.2d 254 (1st Cir. 1945), cert. denied 326 U.S. 795 (1946); Jensen v. Chamtech Services Center, 155 LRRM 2058, 2059-60 (C.D. CA 1997)(10(j) sequestration of assets injunction granted; court balanced potential threat of dissipation of assets on respondent's inchoate NLRA backpay obligation against injunction's restrictions on respondent's use of its own assets)[12]; Kobell v. Menard Fiberglass Products, Inc., 678 F. Supp. 1155 (WD PA 1988); Schaub v. Brewery Products, Inc., 715 F. Supp 829 (ED MI 1989); Pascarell v. Alpine Fashions, Inc., 126 LRRM 2242 (D. N.J. 1987); Norton v. New Hope Industries, Inc., 119 LRRM 3086 (M.D. LA 1985)[13].

[12] A copy of the LRRM report in Jensen v. Chamtech Services Center is attached hereto as Appendix D.
[13] A copy of the LRRM report in Norton v. New Hope Industries, Inc. is attached hereto as Appendix E.

An order precluding Respondent from dissipating its assets would preserve the status quo and prevent a frustration of a Board order in the Union's favor. While the hearing before an administrative law judge has been scheduled for April 3, 2000, an immediate final Board decision cannot issue in time to preserve these assets. Finally, an order preserving the assets would not interfere with any ongoing business operation, since the Respondent no longer operates.

[In addition, Petitioner requests that this Court issue a Temporary Restraining Order directed to Polaroid, enjoining Polaroid from disbursing monies due to Respondent, pending a hearing on Petitioner's request for a temporary injunction. It is appropriate to name Polaroid as a party-in-interest in the 10(j) proceedings and there is ample law to assert jurisdiction over it in this case. Under the All Writs Act,[14] the district court has authority to protect its jurisdiction for the purpose of issuing an effective Section 10(j) injunction against the Respondent. See, e.g., Whitney Bank v. New Orleans Bank, 379 U.S. 411, 425-426 and n. 7 (1965)(lower court could properly issue All Writs Act decree against non-defendant public official to preserve its own jurisdiction); FTC v. Dean Foods Co., 384 U.S. 597, 603-608 (1966)(federal agencies may use All Writs Act proceedings in order to ensure effective judicial review). Thus, the district court has jurisdiction under the All Writs Act to enjoin Polaroid to make payment directly into the court's registry for the purpose of safeguarding the efficacy of the 10(j) decree against the Respondent. Such a course of action is not unprecedented for the Board. See Aguayo v. Chamtech Service Center, 157 LRRM 2299, 2300 (C.D. Ca. 1997)(ex parte TRO protective order under Section 10(j) and All Writs Act included parties not yet named in underlying Board administrative proceeding).

[14] 28 U.S.C. §1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable

VI

CONCLUSION

Based on the petition, the affidavits and exhibits attached thereto, and on the points and authorities cited herein, Petitioner respectfully asks the Court to issue a temporary restraining order as prayed for in the petition herein.

DATED: March 8, 2000
Boston, Massachusetts

Respectfully submitted,
LEONARD PAGE, General Counsel
BARRY J. KEARNEY, Associate General Counsel
ELLEN A. FARRELL, Assistant General Counsel
ROSEMARY PYE, Regional Director
RONALD S. COHEN, Acting Regional Attorney

Sara R. Lewenberg, BBO #634257
Counsel for Petitioner
National Labor Relations Board
10 Causeway Street, Sixth Floor
Boston, MA 02222

CERTIFICATION OF SERVICE

I hereby certify that a true copy of the above document was served upon Respondent Estoril Cleaning Co., Inc., and Party-in-Interest Polaroid Corporation and the attorney of record for Polaroid Corporation, by hand, on March 8, 2000.

Sara R. Lewenberg, BBO #634257

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June 2001

to the usages and principles of law.

APPENDIX J

GUIDELINES FOR FILING MOTIONS FOR TEMPORARY RESTRAINING ORDERS UNDER SECTION 10(j)

[3 pages redacted, exem. 5, attorney work product, 2, and 7(E)]

APPENDIX K

SAMPLE MOTIONS & MEMORANDA TO HEAR 10(j) CASE ON AFFIDAVITS OR ALJ TRANSCRIPT

1. Sample Motion for Hearing on Affidavits in Cohen v. Estoril Cleaning Co., Inc.

2. Sample Motion to Try 10(j) Petition on the Basis of the Record Developed before the ALJ in Benson v. Maintenance Unlimited, Inc.

3. Sample Brief in Support of Motion Limiting Section 10(j) Hearing on the Issue of "Reasonable Cause to Believe" to the Administrative Record and Supplementing the Record with Evidence on Whether Injunctive Relief is "Just and Proper" in Benson v. Maintenance Unlimited, Inc.

4. Model Argument to Support Motion to District Court to Try 10(j) or 10(l) Petition on Basis of Affidavits and/or ALJ Hearing Transcript and Exhibits

In ruling on whether to grant the preliminary injunctive relief sought by the Board pursuant to 29 U.S.C. at Section 160(j), the District Court's role is properly limited to determining whether there is reasonable cause to believe that a respondent has violated the National Labor Relations Act, herein called the Act, and whether temporary injunctive relief is just and proper. Pye v. Excel Case Ready, 238 F.3d 69, 72 (1st Cir. 2001). In addition, petitions under Section 10(j) or 10(l) of the Act receive statutory priority in the United States district courts under 28 U.S.C. Section 1657(a).

In light of this statutory scheme, it is well settled that district courts in proceedings under Section l0(j) or l0(l)[1] are not called upon to finally determine the merits of the unfair labor practice charges, but should only evaluate the evidence to determine whether the Regional Director has "reasonable cause" to believe that the respondent has violated the Act.[2] See, e.g., Maram v. Universidad Interamericana de Puerto Rico, Inc., 722 F.2d 953, 958-59 (1st Cir. 1983) (Sec. 10(j)); Kobell v. United Paperworkers Int'l. Union, 965 F.2d 1401, 1406-1407 (6th Cir. 1992) (Sec. 10(j)); Arlook v. S. Lichtenberg & Co., Inc., 952 F.2d 367, 371-372 (11th Cir. 1992) (Sec. 10(j)); Gottfried v. Sheet Metal Workers, Local No. 80, 876 F.2d 1245, 1248 (6th Cir. 1989) (Sec. 10(l)); Aguayo v. Tomco Carburetor Co., 853 F.2d 744, 748 (9th Cir. 1988) (Sec. 10(j)); Kaynard v. Mego Corp., 633 F.2d 1026, 1032-33 (2d Cir. 1980) (Sec. 10(j)); Squillacote v. Graphic Arts International Union, 540 F.2d 853, 858 (7th Cir. 1976) (Sec. 10(l)); Gottfried v. Samuel Frankel, et al., 818 F.2d 485, 493 (6th Cir. 1987) (Sec. 10(j)); Lewis v. New Orleans Clerks & Checkers, I.L.A., Local No. 1497, 724 F.2d 1109, 1114-

[1] Section 10(l), 29 U.S.C. Section 160(l), the companion provision to Section 10(j), mandates that the NLRB seek a temporary injunction in district court after the preliminary investigation of a charge reveals reasonable cause to believe that a charged party has violated certain specified unfair labor practice provisions of the Act, e.g., union secondary boycotts. See, e.g., Hirsch v. Building and Construction Trades Council, 530 F.2d 298, 302 (3d Cir. 1976).

[2] The Petitioner's additional burden of showing that injunctive relief is "just and proper" includes a showing of a likelihood of success on the merits. Maram v. Universidad Interamericana, 722 F.2d at 959; Asseo v. Pan American Grain Co., 805 F.2d at 25. The First Circuit has held, however, that a showing of reasonable cause satisfies the "likelihood of success on the merits" requirement. Asseo v. Centro Medico del Turabo, Inc., 900 F.2d at 454-455. Thus, the Court's inquiry into the likelihood of success on the merits does not require litigation of the underlying unfair labor practice.

15 (5th Cir. l984) (Sec. 10(l)); Boire v. Pilot Freight Carriers, Inc., 515 F.2d 1185, 1191 (5th Cir. 1975), cert. denied 426 U.S. 934 (1976) (Sec. 10(j)); Kobell v. Suburban Lines, Inc., 731 F.2d 1076, 1083-84 (3d Cir. 1984) (Sec. l0(j)); San Francisco-Oakland Newspaper Guild v. Kennedy, 412 F.2d 541, 544-45 and n. 3 (9th Cir. l969) (Sec. l0(l)); Levine v. C & W Mining Co., Inc., 610 F.2d 432, 435 (6th Cir. 1979) (Sec. 10(j)).

Moreover, it is reversible error for a district court to go beyond this limited inquiry and to make findings on the ultimate merits of the charge. See Maram v. Universidad Interamericana de Puerto Rico, Inc., 722 F.2d at 958-959 (Sec. 10(j)); Arlook v. S. Lichtenberg & Co., 952 F.2d at 372-373; Scott v. El Farra Enterprises, Inc., d/b/a Bi-Fair Market, 863 F.2d 670, 676 (9th Cir. 1988) (Sec. 10(j)); Solien v. United Steelworkers of America, 593 F.2d 82, 86-87 (8th Cir. l979), cert. denied 444 U.S. 828 (Sec. 10(l)); Kaynard v. Independent Routemen's Assn., 479 F.2d 1070, 1072 (2d Cir. 1973) (Sec. 10(l)).

The District Court is thus not called upon to resolve disputed issues of fact or the credibility of witnesses; this function is reserved exclusively for the Board in the underlying administrative proceeding. See, Maram v. Universidad Interamericana de Puerto Rico, Inc., 722 F.2d at 958-959 (Sec. 10(j)); NLRB v. Electro-Voice, Inc., 83 F.3d 1559, 1570, 1571 (6th Cir. 1996)(Sec. 10(j)); Kobell v. United Paperworkers Int'l. Union, 965 F.2d at 1407 (Sec. 10(j)); Fuchs v. Jet Spray Corporation, 560 F. Supp. 1147, 1150-51 at n. 2 (D. Mass. 1983), affd. per curiam 725 F.2d 664 (1st Cir. l983) (Sec. 10(j)); Balicer v. I.L.A., 364 F. Supp. 205, 225-226 (D. N.J. 1973), affd. per curiam 491 F.2d 748 (3d Cir. 1973) (Sec. 10(l)); Dawidoff v. Minneapolis Building & Construction Trades Council, 550 F.2d 407, 411 (8th Cir. 1977) (Sec. 10(l)); Local 450, International Union of Operating Engineers, AFL-CIO v. Elliott, 256 F.2d 630, 638 (5th Cir. 1958)

(Sec. 10(l)); San Francisco-Oakland Newspaper Guild v. Kennedy, 412 F.2d at 546 (Sec. 10(l)).[3]

Indeed, it is settled that, in these preliminary proceedings, the courts should give the Regional Director's version of the disputed facts the "benefit of the doubt", and should accept the reasonable inferences he draws therefrom if they are "within the range of rationality". Seeler v. The Trading Port, Inc., 517 F.2d 33, 36-37 (2d Cir. 1975) (Sec. 10(j)); Accord: Maram v. Universidad Interamericana de Puerto Rico, Inc., 722 F.2d at 958-959 (Sec. 10(j)); Arlook v. S. Lichtenberg & Co., 952 F.2d at 371-372 (Sec. 10(j)); Kaynard v. Palby Lingerie, Inc., 625 F.2d 1047, 1051 (2d Cir. 1980) (Sec. 10(j)); Kobell v. Suburban Lines, Inc., 73l F.2d at 1084 (Sec. 10(j)); Squillacote v. Graphic Arts International Union, 540 F.2d at 858-859 (Sec. 10(l)); Hendrix v. Operating Engineers, Local 571, 592 F.2d 437, 442 (8th Cir. 1979) (Sec. 10(l)); Levine v. C & W Mining Co., Inc., 610 F.2d at 435 (Sec. 10(j)); Humphrey v. International Longshoremen's Association, 548 F.2d 494, 498 (4th Cir. 1977) (Sec. 10(l)).

Accordingly, in view of the Regional Director's "relatively insubstantial burden of proof,"[4] it is not necessary for a district court to hold a full, evidentiary hearing to enable it to conclude whether "reasonable cause" has been established. See, Gottfried v. Samuel Frankel, 818 F.2d at 493 and 494 (Sec. 10(j)); San Francisco-Oakland Newspaper Guild v. Kennedy, 412 F.2d at 546 (Sec. 10(l)). See also, Aguayo v. Tomco Carburetor Co., 853 F.2d at 750-751.

In view of the foregoing, the weight of judicial authority holds that it is proper for a district court to base its "reasonable cause" determinations in Section 10(j) and 10(l) cases upon evidence presented in the form of affidavits or record testimony in a hearing

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[3] See also, Jaffee v. Henry Heide, Inc., 115 F. Supp. 52, 57 (S.D.N.Y. 1953); Fusco v. Richard W. Kaase Baking Co., 205 F. Supp. 465, 476 (N.D. Ohio 1962); Taylor v. Circo Resorts, Inc., 458 F. Supp. 152, 154 (D. Nev. 1978); Hoffman v. Cross Sound Ferry Service, Inc., 109 LRRM 2884, 2887 (D. Conn. 1982) (all Sec. 10(j) cases).

[4] Kobell v. Suburban Lines, Inc. , 731 F.2d at 1084; Levine v. C & W Mining Co., 610 F.2d at 435; Gottfried v. Samuel Frankel, 818 F.2d at 493; Aguayo v. Tomco Carburetor, Inc., 853 F.2d at 748.

before an administrative law judge. See, Sharp v. Webco Industries Inc., 225 F.3d 1130, 1134 (10th Cir. 2000)(affidavits); Silverman v. JRL Food Corp., 196 F.3d 334 (2d Cir. 1999)(ALJ transcript); San Francisco-Oakland Newspaper Guild v. Kennedy, 412 F.2d at 546 (affidavits); Aguayo v. Tomco Carburetor Co., 853 F.2d at 750-751 (same); Squillacote v. Graphic Arts International Union, 540 F.2d at 860; Kennedy v. Teamsters, Local 542, 443 F.2d 627, 630 (9th Cir. 1971) (same); Squillacote v. Automobile, Aerospace & Agricultural Implement Workers, 383 F. Supp. 491, 493 (E.D. Wis. 1974) (same).

Finally, neither Rule 43(e) nor Rule 65 of the Federal Rules of Civil Procedure requires oral testimony in this type of statutory, temporary injunction proceeding, Kennedy v. Sheet Metal Workers, 289 F. Supp. 65, 87-91 (C.D. Cal. 1968),[5] and such procedures do not deny a fair hearing or due process to the Respondents. See, Aguayo v. Tomco Carburetor Co., 853 F.2d at 750-751; Asseo v. Pan American Grain Co., 805 F.2d at 25-26; Gottfried v. Samuel Frankel, 818 F.2d at 493; Squillacote v. Graphic Arts International Union, 540 F.2d at 860; Kennedy v. Teamsters, Local 542, 443 F.2d at 630; San Francisco-Oakland Newspaper Guild v. Kennedy, 412 F.2d at 546. Cf. Brock v. Roadway Express, Inc., 481 U.S. 252, 263-64, 107 S.Ct. 1740 (1987) (Secretary of Labor may order temporary reinstatement of unlawfully discharged employee pending full administrative hearing; not a denial of due process to deny respondent full evidentiary hearing at preliminary stage).

In sum, submission of this Section 10(j) matter on the affidavits submitted by the Board will avoid the delay inherent in scheduling and conducting a full evidentiary hearing, will avoid duplicative litigation, will facilitate a speedy decision, and will conserve the time and resources of the court and the parties. Such procedure fully comports with the statutory priority that should be given to this proceeding under 28

[5] There is nothing in the texts of Section 10(j) and 10(l) that mandates oral testimony in these proceedings. See San Francisco-Oakland Newspaper Guild v. Kennedy, 412 F.2d at 546.

U.S.C. Section 1657(a) and the original intent of the 1947 Congress which enacted Section 10(j). See Legislative History LMRA 1947, 414, 433 (Government Printing Office 1985).

Dated at Boston, Massachusetts this 8th day of March, 2000.

Respectfully submitted,

_____

Sara R. Lewenberg, BBO # 634257
Counsel for the Petitioner
National Labor Relations Board
First Region
Thomas P. O'Neill, Jr. Federal Building
10 Causeway Street, Sixth Floor
Boston, Massachusetts 02222-1072

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was served upon Estoril Cleaning Co, Inc. and Polaroid Corporation as well as the attorney of record for Polaroid Corporation, by hand, on March 8, 2000.

_____
Sara R. Lewenberg, Attorney

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IN THE UNITED STATES DISTRICT,COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.

B. ALLAN BENSON, REGIONAL
DIRECTOR OF REGION 27 OF THE
NATIONAL LABOR RELATIONS BOARD,
FOR AND ON BEHALF OF THE NATIONAL
LABOR RELATIONS BOARD,

Petitioner,

v.

MAINTENANCE UNLIMITED, INC.,

Respondent.

MOTION OF THE NATIONAL LABOR RELATIONS BOARD
TO TRY COMPLAINT AND PETITION FOR TEMPORARY INJUNCTION
ON THE BASIS OF THE RECORD DEVELOPED BEFORE THE
ADMINISTRATIVE LAW JUDGE

To the Honorable, the Judges of the United States District Court for the State of Colorado:

The petitioner moves the court to try the issues in this matter on the basis of Administrative Law Judge Transcript and Exhibits and exhibits submitted by the Board and the Respondent rather than holding an evidentiary hearing. The Petitioner suggests that trying this case on the basis of the Administrative Law Judge Hearing Transcript and Exhibits can both expedite the proceeding and conserve the resources of the court and the parties.

Section 10(j) of the Act authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. This provision embodies Congress' recognition that because the Board's administrative proceedings often are protracted, absent interim relief, a respondent in many instances could accomplish its unlawful objective before being placed under any legal restraint, and it could thereby render a final Board order ineffectual. The legislative history is cited in cited in Sharp v. Webco Industries, Inc., 225 F.3d 1130, 1136 (10th Cir. 2000) and Angle v. Sacks, 382 F.2d 655, 659-660 (10th Cir. 1967). Section 10(j) was intended to prevent the potential frustration or nullification of the Board's remedial authority caused by the passage of time inherent in Board administrative litigation. Id. at 659.

To resolve a Section 10(j) petition, a district court in the Tenth Circuit considers only two issues: whether there is "reasonable cause to believe" that a respondent has violated the Act and whether temporary injunctive relief is "just and proper." See Sharp v. Webco Industries, 225 F.3d at 1133, 1137; Angle v. Sacks, 382 F.2d at 658, 660.

In light of this statutory scheme, it is well settled that district courts in proceedings under Section 10(j) or 10(l) [1] are not called upon to finally determine the merits of the unfair labor practice charges, but should only evaluate the evidence to determine whether the Regional Director has "reasonable cause" to believe that the respondent has violated the Act. See, e.g., Kobell v. United Paperworkers Int'l. Union, 965 F.2d 1401, 1406-1407 (6th Cir. 1992) (Sec. 10(j)); Arlook v. S. Lichtenberg & Co., Inc., 952 F.2d 367, 371-372 (11th Cir. 1992) (Sec. 10(j)); Gottfried v. Sheet Metal Workers, Local No. 80, 876 F.2d 1245, 1248 (6th Cir. 1989) (Sec. 10(l)); Aguayo v. Tomco Carburetor Co., 853 F.2d 744, 748 (9th Cir. 1988) (Sec. 10(j)); Kaynard v. Mego Corp., 633 F.2d 1026, 1032-33 (2d Cir. 1980) (Sec. 10(j)); Squillacote v.

1. Section 10(l), 29 U.S.C. Section 160(l), the companion provision to Section 10(j), mandates that the NLRB to seek a temporary injunction in district court after the preliminary investigation of a charge reveals reasonable cause to believe that a charged party has violated certain specified unfair labor practice provisions of the Act, e.g., union secondary boycotts. See, e.g., Hirsch v. Building and Construction Trades Council, 530 F.2d 298, 302 (3d Cir. 1976).

Graphic Arts International Union, 540 F.2d 853, 858 (7th Cir. 1976) (Sec. 10(l)); Gottfried v. Samuel Frankel, et al., 818 F.2d 485, 493 (6th Cir. 1987) (Sec. 10(j)); Lewis v. New Orleans Clerks & Checkers, I.L.A., Local No. 1497, 724 F.2d 1109, 1114-15 (5th Cir. 1984) (Sec. 10(l)); Boire v. Pilot Freight Carriers, Inc., 515 F. 2d 1185, 1191 (5th Cir. 1975), cert. denied 426 U.S. 934 (1976) (Sec. 10(j)); Kobell v. Suburban Lines, Inc., 731 F.2d 1076, 1083-84 (3d Cir. 1984) (Sec. 10(j)); San Francisco-Oakland Newspaper Guild v. Kennedy, 412 F.2d 541, 544-45 and n. 3 (9th Cir. 1969) (Sec. 10(l)); Maram v. Universidad Interamericana de Puerto Rico, Inc., 722 F.2d 953, 958-959 (1st Cir. 1983) (Sec. 10(j)); Levine v. C & W Mining Co., Inc., 610 F.2d 432, 435 (6th Cir. 1979) (Sec. 10(j)).

Moreover, it is reversible error for a district court to go beyond this limited inquiry and to make findings on the ultimate merits of the charge. See Arlook v. S. Lichtenberg & Co., 952 F.2d at 372-373; Scott v. El Farra Enterprises, Inc. d/b/a Bi-Fair Market, 863 F.2d 670, 676 (9th Cir. 1988) (Sec. 10(j)); Solien v. United Steelworkers of America, 593 F.2d 82, 86-87 (8th Cir. 1979), cert. denied 444 U.S. 828 (Sec. 10(l)); Raynard v. Independent Routemen's Association, 479 F.2d 1070, 1072 (2d Cir. 1973) (Sec. 10(l)); Maram v. Universidad Interamericana de Puerto Rico, Inc., 722 F.2d at 958-959 (Sec. 10(j)).

The district court is thus not called upon to resolve disputed issues of fact or the credibility of witnesses; this function is reserved exclusively for the Board in the underlying administrative proceeding. See NLRB v. Electro-Voice, Inc., 83 F.3d 1559, 1570, 1571 (7th Cir. 1996)(Sec. 10(j)); Balicer v. I.L.A., 364 F. Supp. 205, 225-226 (D.N.J. 1973), affd. per cumiam 491 F.2d 748 (3d Cir. 1973) (Sec. 10(l)); Dawidoff v. Minneapolis Building & Construction Trades Council, 550 F.2d 407, 411 (8th Cir. 1977) (Sec. 10(l)); Local 450, International Union of Operationg Engineers, AFL-CIO v. Elliott, 256 F.2d 630, 638 (5th Cir. 1958) (Sec. 10(l)); San Francisco-Oakland Newspaper Guild v. Kennedy, 412 F.2d at 546 (Sec. 10(l)); Maram v. Universidad Interamericana de Puerto Rico, Inc., 722 F.2d at 958-959 (Sec. 10(j)); Kobell v. United Paperworkers Int'l. Union, 965 F.2d at 1407 (Sec. 10(j)); Fuchs v. Jet Spray Corporation,

560 F. Supp. 1147, 1150-51 at n. 2 (D. Mass. 1983), affd. per curiam 725 F.2d 664 (1st Cir. 1983) (Sec. 10(j)).[2]

Indeed, it is settled that, in these preliminary proceedings, the courts should give the Regional Director's version of the disputed facts the "benefit of the doubt", and should accept the reasonable inferences he draws therefrom if they are "within the range of rationality". Seeler v. The Trading Post, Inc., 517 F.2d 33, 36-37 (2d Cir. 1975) (Sec. 10(j)); Sequillacote v. Graphic Arts International Union, 540 F.2d at 858-859 (Sec. 10(l)). Accord: Arlook v. S. Lichtenberg & Co., 952 F.2d at 371-372 (Sec. 10(j)); Kaynard v. Palby Lingerie, Inc., 625 F.2d 1047, 1051 (2d Cir. 1980) (Sec. 10(j)); Hendrix v. Operating Engineers, Local 571, 592 F.2d 437, 442 (8th Cir. 1979) (Sec. 10(l)); Levine v. C & W Mining Co., Inc., 610 F.2d at 435 (Sec. 10(j)); Maram v. Universidad Interamericana de Puerto Rico, Inc., 722 F.2d at 958-959 (Sec. 10(j)); Kobell v. Suburban Lines, Inc., 731 F.2d at 1084 (Sec. 10(j)); Humphrey v. International Longshoremen's Association, 548 F.2d 494, 498 (4th Cir. 1977) (Sec. 10(l)).

Accordingly, in view of the Regional Director's "relatively insubstantial burden of proof",[3] it is not necessary for a district court to hold a full, evidentiary hearing to enable it to conclude whether "reasonable cause" has been established. See Gottfried v. Samuel Frankel, 818 F.2d at 493 and 494 (Sec. 10(j)); San Francisco-Oakland Newspaper Guild v. Kennedy, 412 F.2d at 546 (Sec. 10(l)). See also Aguayo v. Tomco Carburetor Co., 853 F.2d at 750-751.

In view of the foregoing, the weight of judicial authority holds that it is proper for a district court to base its "reasonable cause" determinations in Section 10(j) and 10(l) cases upon evidence presented in the form of affidavits. See Sharp v. Webco Industries, Inc., 225 F.3d 1130, 1134 (10th Cir. 2000)(affidavits); Silverman v. JRL Food Corp., 196 F.3d 334 (2d Cir.

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[2] See also, Jaffee v. Henry Heide, Inc., 115 F. Supp. 52, 57 (S.D.N.Y. 1953); Fusco v. Richard W. Kaase Baking Co., 205 F. Supp. 465, 476 (N.D. Ohio 1962); Taylor v. Circo Resorts, Inc., 458 F. Supp. 152, 154 (D. Nev. 1978); Hoffman v. Cross Sound Ferry Service, Inc., 109 LRRM 2884, 2887 (D. Conn. 1982) (all Sec. 10(j) cases).

[3] Kobell v. Suburban Lines, Inc., 731 F.2d at 1084; Levine v. C & W Mining Co., 610 F.2d at 435; Gottfried v. Samuel Frankel, 818 F.2d at 493; Aguayo v. Tomco Carburetor, Inc., 853 F.2d at 748.

1999)(ALJ transcript); Aguayo v. Tomco Carburetor Co., 853 F.2d at 750-751; Squillacote v. Graphic Arts International Union, 540 F.2d at 860. Accord: Gottfried v. Samuel Frankel, 818 F.2d at 493 (combination of affidavits and ALJ transcript); San Francisco-Oakland Newspaper Guild v. Kennedy, 412 F.2d at 546 (affidavits); Kennedy v. Teamsters, Local 542, 443 F.2d 627, 630 (9th Cir. 1971) (same); Squillacote v. Automobile, Aerospace & Agricultural Implement Workers, 383 F. Supp. 491, 493 (E.D. Wis. 1974) (same).[4] A fortiorari, reasonable cause determinations can also properly be based upon the transcript of sworn testimony given before an NLRB administrative law judge, subject to cross examination, in the underlying administrative proceeding. See Gottfired v. Samuel Frankel, 8181 F.2d at 493; Asseo v. Pan American Grain Co., 805 F.2d at 493; Asseo v. Pan american Grain Co., 805 F.2d 23, 25-26 (1st Cir. l979) (the use of an ALJ transcript "could be of considerable assitance in expediting the work of the [district] court."); Eisenberg v. Honeycomb Plastics Corp., 125 LRRM 3257, 3262 (D. N.J. l987).[5]

Finally, neither Rule 43(e) nor Rule 65 of the Federal Rules of Civil Procedure requires oral testimony in this type of statutory, temporary injunction proceeding, Kennedy v. Sheet Metal Workers, 289 F. Supp. 65, 87-91 (C..D. Cal. 1968),[6] and such procedures do not deny a fair hearing or due process to the Respondent. See Aguayo v. Tomco Carburetor Co., 853 F.2d at 750-751; Asseo v. Pan American Grain Co., 805 F.2d at 25-26; Gottfried v. Samuel Frankel, 818 F.2d at 493; Squillacote v. Graphic Arts International Union, 540 F.2d at 860; Kennedy v. Teamsters, Local 542, 443 F.2d at 630; San Francisco-Oakland Newspaper Guild v. Kennedy, 412 F.2d at 546. Cf. Brock v. Roadway Express, Inc. 481 U.S. 252, 263-64, 107 S.Ct. 1740

[4] See generally F.T.C. v. Rhodes Pharmacal Co., 191 F.2d 744 (7th Cir. 1951); U.S. v. Wilson Williams, Inc., 277 F.2d 535 (2d Cir. 1960); Johnston v. J.P. Stevens & Company, Inc., 341 F.2d 891 (4th Cir. 1965).

[5] In Kaynard v. Palby Lingeir, Inc., 625 F.2d 1047, 1050-51 (2d Cir. l980), the Second Circuit affirmed a Section 10(j) injunction issued by a district court on the basis of the transcript and exhibits adduced before the administrative law judge in the underlying administrative proceeding.

[6] There is nothing in the texts of Section 10(j) and 10(l) that mandates oral testimony in these proceedings. See San Francisco-Oakland Newspaper Guild v. Kennedy, 412 F.2d at 546.

(1987) (Secretary of Labor may order temporary reinstatement of unlawfully discharged employee pending full administrative hearing; not a denial of due process to deny respondent full evidentiary hearing at preliminary stage).

In sum, submission of this Section 10(j) matter on the affidavits and exhibits submitted by the Board and the Respondent will avoid the delay inherent in scheduling and conducting a full evidentiary hearing, will avoid duplicative litigation, will facilitate a speedy decision, and will conserve the time and resources of the court and the parties. Such procedure fully comports with the statutory priority that should be given to this proceeding under 28 U.S.C. Section 1657 and the original intent of the 1947 Congress which enacted Section 10(j). See I Legislative History LMRA 1947 414, 433 (Government Printing Office 1985).

Donald E. Chavez, Attorney Reg. No. 07429
T. Michael Patton, Attorney Reg. No. 6602
Daniel C. Ferguson, Attorney Reg. No. 024113
Counsel for Petitioner
South Tower, Dominion Plaza
600 Seventeenth Street
Denver, Colorado 80202-5433
Telephone: (303) 844-3551

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June 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 98-B-1144

B. ALLAN BENSON,
REGIONAL DIRECTOR FOR REGION 27
OF THE NATIONAL LABOR RELATIONS BOARD,
FOR AND ON BEHALF OF THE NATIONAL
LABOR RELATIONS BOARD,

Petitioner,

v.

MAINTENANCE UNLIMITED, INC.,

Respondent.

BRIEF OF NATIONAL LABOR RELATIONS BOARD IN SUPPORT OF MOTION LIMITING SECTION 10(J) HEARING ON THE ISSUE OF "REASONABLE CAUSE TO BELIEVE" TO THE ADMINISTRATIVE RECORD AND SUPPLEMENTING THE RECORD WITH EVIDENCE ON WHETHER INJUNCTIVE RELIEF IS "JUST AND PROPER"

I. INTRODUCTION

Petitioner, National Labor Relations Board (herein Board), submits this brief to address the issue of the scope of the hearing that should be held before this Court in the instant Section 10(j) injunctive proceeding, 29 U.S.C. Section 160(j). On May 20, 1998, Petitioner filed a Motion to Try Complaint and Petition for Temporary Injunction on the Basis of the Record Developed Before the Administrative Law Judge ("ALJ"). Respondent opposed said Motion,

arguing that though the Court may utilize the administrative record, Respondent should not be limited to that record, and that the Court should set a hearing which permits the introduction of additional evidence and argument in the form of affidavits, live testimony and argument of counsel.

Petitioner believes that Respondent is not entitled to a hearing de novo before the Court concerning whether the Regional Director has "reasonable cause to believe" that the Respondent has violated the National Labor Relations Act as alleged in the administrative complaint now pending before the Board. Nor has Respondent requested such a hearing. It is Petitioner's position that only the administrative record which has now been created in the underlying unfair labor practice proceeding should be used by the Court to make a determination of "reasonable cause," as the subject matters of such an inquiry are fully addressed therein and constitute the best evidence which exists for the limited issues before the Court.

Petitioner does not argue that a "just and proper" determination, i.e., the propriety of temporary injunctive relief, should be limited to the administrative record. The evidence necessary to make this determination is not necessarily part of the administrative record, as such inquiries in and of themselves were not germane to the underlying administrative proceeding. Therefore, Petitioner submits that the administrative record by itself should be relied upon by the Court to determine the issue of "reasonable cause," and that supplemental evidence in the form of testimony and/or affidavits be permitted on the "just and proper" issue. Such a bifurcated approach would best respect the limited issues before the Court in a Section 10(j) proceeding and expedite a decision in this matter.

II. ARGUMENT

A. The Nature of a Section 10(j) Injunctive Proceeding

The nature of the instant cause of action before the Court is a statutorily limited proceeding for temporary injunctive relief under section 10(j) of the National Labor Relations Act, as amended, 29 U.S.C. Section 160(j)("The Act").[1] Section 10(j) of the Act authorizes United States district courts to grant temporary injunctions to remedy ongoing unfair labor practices pending the Board's resolution of unfair labor practice proceedings. This provision embodies Congress' recognition that because the Board's administrative proceedings often are protracted, absent interim relief a respondent in many instances could accomplish its unlawful objective before being placed under any legal restraint, and it could thereby render a final Board order ineffectual. Angle v. Sacks, 382 F.2d 655, 659-660 (10th Cir. 1967).

In this proceeding, the Court is not called upon, and in fact has no jurisdiction, to resolve the merits of the underlying dispute – that is, whether Respondent has in fact committed the alleged unfair labor practices. That function is reserved exclusively for the National Labor Relations Board under Section 10(a) of the Act, 29 U.S.C. Section 160(a), subject to limited appellate review by the courts of appeals pursuant to Section 10(e) or (f) of the Act, 29 U.S.C. Section 160(e) or (f). See, e.g., Aguayo v. Tomco Carburetor Co., 853 F.2d 744, 748-49 and n.3 (9th Cir. 1988); Kobell v. Suburban Lines, Inc., 731 F.2d 1076, 1083 (3d Cir. 1984); Boire v.

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[1] Section 10(j) of the National Labor Relations Act provides:

> The Board shall have power, upon issuance of a Complaint as provided in subsection (b) [of this section] charging that any person has engaged in 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 petition the court shall cause notice thereof

International Brotherhood of Teamsters, 479 F.2d 778, 792 (5th Cir. 1973). Rather, since Petitioner's requested injunctive relief is ancillary in nature, and lasts only during the time the administrative case is pending before the Board,[2] the Court's inquiry is limited to a determination whether the conflicting evidence, viewed in the light most favorable to Petitioner, could ultimately be resolved by the Board in favor of Petitioner. See Arlook v. S. Lichtenberg & Co., 952 F.2d 367, 371 (11th Cir. 1992); Gottfried v. Frankel, 818 F.2d 485, 493 (6th Cir. 1987).

Therefore, a Section 10(j) injunction hearing has a limited evidentiary scope and purpose. It is not intended to determine which litigant should ultimately prevail on the merits of the administrative case before the Board. Further, the requisite proof on the basic issues in the administrative hearing is more exacting than in a Section 10(j) injunctive hearing. The district court's findings in the Section 10(j) proceeding are only effective to the extent that they support the granting or denial of interlocutory relief. NLRB v. Acker Industries, Inc., 460 F.2d 649, 652 (10th Cir. 1972)(result in 10(j) litigation not binding upon Board in underlying administrative proceeding). Once the record before the Administrative Law Judge has been closed, the Board will not and cannot consider any other evidence in making a determination on the merits of the unfair labor practice allegations, consistent with the Administrative Procedure Act, 5 U.S.C. Section 556(e)(1998). See also NLRB v. Johnson, 310 F.2d 550, 552 (6th Cir. 1962); Marathon Oil Co. v. EPA, 564 F.2d 1253, 1264 (9th Cir. 1977); Marmon v. Califano, 459 F. Supp. 369, 371 (D. Mont. 1978).

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to be served upon such person, and thereupon shall have jurisdiction to grant the Board such temporary relief or restraining order as it deems just and proper.

[2] See Barbour v. Central Cartage, Inc., 583 F.2d 335 (7th Cir. 1978)(10(j) decree terminates by operation of law upon issuance of Board's final administrative order).

B. The Standards for Granting a Section 10(j) Injunction

The only issues before a district court in the Tenth Circuit in this type of ancillary injunction proceeding are whether there is "reasonable cause to believe" that Respondent has violated the Act, and whether Petitioner's requested temporary injunctive relief is "just and proper" pending final Board adjudication of the administrative proceeding. See Sharp v. Webco Industries, Inc., 225 F.3d 1130, 1137; Angle, 382 F.2d at 660; Frankel, 818 F.2d at 493.

1. "Reasonable Cause"

In determining whether there is reasonable cause to believe that the Act has been violated, a United States District Court in the Tenth Circuit may not decide the ultimate merits of the case. Rather, the merits of the unfair labor practice allegations are to be resolved solely by the Board. Angle, 382 F.2d at 661. It is well settled that district courts in proceedings under Section 10(j) are not called upon to finally determine the merits of the unfair labor practice charges, but should only evaluate the evidence to determine whether the Regional Director has "reasonable cause" to believe that the respondent has violated the Act. See, e.g., Kobell v. United Paperworkers Int'l. Union, 965 F.2d 1401, 1406-1407 (6th Cir. 1992); Lichtenberg, 952 F.2d at 371-372; Frankel, 818 F.2d at 493. To sustain this burden, the Regional Director need only advance legal theories that are substantial and not frivolous and introduce evidence sufficient "to permit a rational fact finder, considering the evidence in the light most favorable to the Board, to rule in favor of the Board." Lichtenberg, 952 F.2d at 371.

The burden of establishing reasonable cause consists of two prongs. First, the Regional Director must put forth a substantial and non-frivolous legal theory, be it implicit or explicit; and second, taking the facts favorably to the Board, there must be sufficient evidence to support that

theory. Frankel, 818 F.2d at 493; Suburban Lines, Inc., 731 F.2d at 1084. The burden of the Board in showing reasonable cause is "relatively insubstantial"[3] and the Regional Director is not required to prove that an unfair labor practice occurred, but must only produce some evidence in support of the petition. Frankel, 818 F.2d at 493. The district court is thus not called upon to resolve disputed issues of fact or the credibility of witnesses; this function is reserved exclusively for the Board in the underlying administrative proceeding. NLRB v. Electro-Voice, Inc., 83 F.3d 1559, 1570, 1571 (7th Cir. 1996). Furthermore, it is reversible error for a district court to go beyond this limited inquiry and to make findings on the ultimate merits of the charge. See Lichtenberg, 952 F.2d at 372-373; Maram v. Universidad Interamericana de Puerto Rico, Inc., 722 F.2d 953, 958-959 (1st Cir. 1983). The district court may not decide whether or not to issue relief based on its own belief as to whether an unfair labor practice has been committed. Suburban Lines, Inc., 731 F.2d at 1083. It is well settled that, in these preliminary proceedings, the courts should give the Regional Director's version of the disputed facts the "benefit of the doubt," and should accept the reasonable inferences he draws therefrom if they are "within the range of rationality." Seeler v. Trading Port, Inc., 517 F.2d 33, 36-37 (2d Cir. 1975); Lichtenberg, 952 F.2d at 371-372.

2. "Just and Proper"

For the Court to determine a Section 10(j) injunction is "just and proper," the circumstances of the case must demonstrate that there exists a probability that the purposes of the Act will be frustrated unless temporary relief is granted. Angle, 382 F.2d at 660. Injunctive

[3] See Suburban Lines, Inc., 731 F.2d at 1084; Levine v. C & W Mining Co., 610 F.2d 432, 435 (6th Cir. 1979); Frankel, 818 F.2d at 493; Tomco Carburetor Co., 853 F.2d at 748.

relief is proper when the circumstances of a case create a reasonable apprehension that the efficacy of the Board's final order may be nullified or the administrative procedures will be rendered meaningless in the absence of interim relief. Id. The district court is afforded a certain range of equitable discretion in making the "just and proper" determination. See Boire v. Pilot Freight Carriers, Inc., 515 F.2d 1185, 1189 (5th Cir. 1975), cert. denied 426 U.S. 934 (1976). The burden is on Petitioner to show that there is a reasonable apprehension that the purposes of the Act will be defeated absent interim relief. See Angle, 382 F.2d at 660. Finally, preservation and restoration of the status quo are appropriate considerations in granting a Section 10(j) injunction. Id.

The purpose of the underlying administrative proceeding is to determine whether unfair labor practices have in fact occurred. Testimony regarding the effects of those unfair labor practices is largely irrelevant to the administrative hearing and is therefore not necessarily contained in the administrative record. In the instant case, Petitioner alleges that there has been a "chilling" effect on employees that will render a regular Board remedy ineffective.[4] Additional evidence is necessary for Petitioner to meet its burden in showing this. At least two circuits have suggested that an evidentiary hearing may be necessary to determine the equitable necessity of Section 10(j) injunctive relief. See Squillacote v. Food Workers, 534 F.2d 735, 749 (7th Cir. 1976); Eisenberg v. The Hartz Mountain Corp., 519 F.2d 138, 143 n.5 (3d Cir. 1975). Therefore, both Petitioner and Respondent should be allowed to present evidence, either in the form of affidavits or live testimony, on the "just and proper" issue to supplement the administrative

[4] See, e.g., Pascarell v. Vibra Screw Inc., 904 F.2d 874, 878-79 (3d Cir. 1990)("chilling" impact upon employees justified grant of 10(j) injunction).

record, as such evidence will be necessary in order for the Court to make a determination on the propriety of injunctive relief.

C. It is Proper for the Court to Base its "Reasonable Cause" Determination on the Administrative Record

In view of the Regional Director's "relatively insubstantial burden of proof," it is not necessary for a district court to hold a full, evidentiary hearing to enable it to conclude whether "reasonable cause" has been established. See Frankel, 818 F.2d at 493-494. Reasonable cause determinations can thus properly be based upon the transcript of sworn testimony given before a NLRB Administrative Law Judge, subject to cross examination, in the underlying administrative proceeding. See Frankel, 818 F.2d at 493 (upheld grant of 10(j) injunction based upon use of partially completed ALJ hearing transcript, supplemented by affidavits); Fuchs v. Hood Industries, Inc., 590 F.2d 395, 398 (1st Cir. 1979)(the use of an ALJ transcript "could be of considerable assistance in expediting the work of the [district] court."); Eisenberg v. Honeycomb Plastics Corp., 125 LRRM 3257, 3262 (D.N.J. 1987)(district court utilized the administrative record to determine reasonable cause and granted the parties leave to supplement the record with evidence relevant to the issue of whether the injunctive relief sought was just and proper).[5]

As discussed *supra*, it is important to note that the Board, which will make ultimate findings of fact in this labor dispute, as well as the reviewing appellate tribunals, are limited to the testimony and other evidence adduced in the administrative record. Neither the Board nor the reviewing courts can rely upon evidence outside of the official record. See 5 U.S.C. Section

[5] In Kaynard v. Palby Lingerie, Inc., 625 F.2d 1047, 1050-51 (2d Cir. 1980), the Second Circuit affirmed a Section 10(j) injunction issued by a district court on the basis of the transcript and exhibits adduced before the administrative law judge in the underlying administrative proceeding. In Asseo v. Pan American Grain Co., 805 F.2d 23, 25-26 (1st Cir. 1986), the First Circuit affirmed a Section 10(j) injunction based upon a partially completed ALJ hearing transcript, supplemented by live testimony before the district court.

556(e). See also Innovative Communications Corp., 333 NLRB No. 86, slip op. at 1, n. 2 (March 23, 2001)(Board refused to consider documents entered in related 10(j) proceeding but not made part of administrative record); Johnson, 310 F.2d at 552; Marathon Oil Co., 564 F.2d at 1264; Marmon, 459 F. Supp. at 371. Therefore, any new testimony or other evidence on "reasonable cause" created after the close of the administrative hearing is irrelevant to the merits of the unfair labor practice allegations and cannot be considered by the Board in the ultimate resolution of the underlying administrative case. Thus, the admission of additional "reasonable cause" evidence by the Court in this Section 10(j) proceeding could not assist the Court in determining whether the Board could reasonably sustain the allegations of the General Counsel's unfair labor practice complaint. See Lichtenberg, 952 F.2d at 372-373. In fact, this Court's reliance on "new" evidence could hinder its ability to make this determination, as such evidence will never get before the Board in the unfair labor practice proceeding. In sum, there is simply no justification to permit a respondent to, in essence, re-litigate the unfair labor practice case before the district court. The "reasonable cause" standard under Section 10(j) "bars the district court from behaving as if it had general jurisdiction over the nation's labor laws." Suburban Lines, Inc., 731 F.2d at 1083.

Finally, a district court's failure to hold an evidentiary hearing does not deny a fair hearing or due process to the Respondent. See Frankel, 818 F.2d at 493; Pan American Grain, 805 F.2d at 25-26; Tomco Carburetor Co., 853 F.2d at 750-751; Squillacote v. Graphic Arts International Union, 540 F.2d 853, 860 (7th Cir. 1976). Cf. Brock v. Roadway Express, Inc., 481 U.S. 252, 263-64, 107 S.Ct. 1740 (1987) (Secretary of Labor may order temporary reinstatement

of unlawfully discharged employee pending full administrative hearing; not a denial of due process to deny respondent full evidentiary hearing at preliminary stage). Since the Court is not permitted to resolve conflicts in the evidence, a "complete" story is not necessary to make a reasonable cause determination. See Frankel, 818 F.2d at 493. Accordingly, district courts do not abuse their discretion in denying a respondent's request for a full evidentiary hearing. Id.

Furthermore, in the instant case the unfair labor practice "story" is now complete, as there was a full evidentiary hearing before the Board's Administrative Law Judge at which Respondent had every opportunity to present its case. Respondent had the opportunity to cross-examine all of the Board's General Counsel witnesses and to present its own witnesses. In addition, pursuant to Board Rule 102.118(b)(1), 29 C.F.R. Section 102.118(b)(1)(1998),[6] the Board's Jencks (353 U.S. 657 (1957)) rule,[7] Respondent had an opportunity to examine the pre-trial affidavits of all General Counsel witnesses before commencing its cross-examination. Given these circumstances, there is no denial of due process if Respondent is prohibited from introducing new evidence as to "reasonable cause" issues before the district court.

Finally, it should be noted that neither Rule 43 nor Rule 65 of the Federal Rules of Civil Procedure requires oral testimony in this statutory temporary injunction proceeding. See

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[6] The relevant portion of the Rule reads as follows:

> [A]fter a witness called by the General Counsel … has testified … the administrative law judge shall, upon motion of the respondent, order the production of any statement of such witness in the possession of the General Counsel which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the administrative law judge shall order it to be delivered directly to the respondent for his examination and use for the purpose of cross-examination.

[7] See also Harvey Aluminum v. NLRB, 335 F.2d 749 (9th Cir. 1964); Inland Shoe, 211 NLRB 724, n. 3 (1974).

Kennedy v. Sheet Metal Workers, 289 F. Supp. 65, 87-91 (C.D. Cal. 1968).[8] Likewise, there is nothing in the text of Section 10(j) which mandates oral testimony in this proceeding.

III. CONCLUSION

In sum, submission of this Section 10(j) matter regarding "reasonable cause" issues on the transcript of the testimony and exhibits adduced in the administrative proceeding will avoid the delay inherent in scheduling and conducting a full evidentiary hearing, will avoid duplicative litigation, will facilitate a speedy decision, will ensure that the Court bases its "reasonable cause" determinations on the same record which the Board and reviewing courts will evaluate, and will conserve the time and resources of the Court and the parties. Such procedure fully comports with ample case authority as well as the statutory priority that should be given to this proceeding under 28 U.S.C. Section 1657(a)(1998)[9] and the original intent of the 1947 Congress which enacted Section 10(j). See 1 Legislative History LMRA 1947 414, 433 (Government Printing Office 1985). If the Court agrees to utilize the record developed before the Administrative Law Judge, Petitioner also requests that the Court grant leave to supplement such record with either oral testimony or affidavit evidence limited to the issue of whether injunctive relief is "just and

[8] In its Objection and Response to Petitioner's Motion to Try Complaint and Petition for Temporary Injunction on the ALJ Record, Respondent points out that under Fed.R.Civ.P. 65(a)(2) the Court may order the trial on the merits consolidated with hearing of the application for injunction and that Fed.R.Civ.P. 43(a) requires that in every trial testimony of witnesses shall be taken in open court. However, in the instant case, the trial on the merits was already held before the ALJ. No trial will be held in District Court on the merits. Rather, the Court is only called upon to decide whether an injunction should issue. Consequently, Rule 43(a) simply does not apply in this case.

[9] 28 U.S.C. Section 1657(a) provides:

> Section 1657. Priority of Civil Actions
>
> (a) Notwithstanding any other provision of law, each court of the United States shall determine the order in which civil actions are heard and determined, except that the court shall expedite the consideration of any action brought under chapter 153 or section 1826 of this title, any action for temporary or preliminary injunctive relief … (emphasis added)

proper" in this case, as that issue was not a question before the ALJ in the administrative proceeding.

DATED AT Denver, Colorado, this ____ day of August 1998.

Respectfully Submitted,

PETITIONER: B. ALLAN BENSON, REGIONAL REGIONAL DIRECTOR OF THE NATIONAL LABOR RELATIONS BOARD, REGION 27

By: _____

Angie L. Harmeyer, Attorney Reg. No. 1024146
Leticia Peña, Attorney Reg. No. 014789
Daniel C. Ferguson, Attorney Reg. No. 024113
700 North Tower, Dominion Plaza
600 Seventeenth Street
Denver, Colorado 80202-5433
Telephone: (303) 844-3551

ARGUMENT TO SUPPORT MOTION TO DISTRICT COURT TO TRY l0(j) OR l0(l) PETITION ON BASIS OF AFFIDAVITS AND/OR ALJ HEARING TRANSCRIPT AND EXHIBITS [1]

[Bracketed material exempt from disclosure pursuant to exemptions 5, attorney work product, 2, and 7(E), but disclosed at the discretion of the General Counsel.]

[[The Region should first discuss (or briefly review) the statutory scheme under the Act for Section l0(j) or l0(l) (see Appendix D of this Manual for the Section 10(j) standards by circuit), and the statutory priority of these petitions in the U.S. district courts under 28 U.S.C. Section l657(a). The Region should then argue that the court can both expedite the proceeding and conserve the resources of the court and the parties by hearing the case on affidavits and/or on the evidentiary record developed in the administrative hearing before an ALJ. The following analysis will support the contention that neither the Act nor the Federal Rules of Civil Procedure require a full evidentiary hearing.]]

[In light of this statutory scheme, it is well settled that district courts in proceedings under Section l0(j) or l0(l),[2] are not called upon to finally determine the merits of the unfair labor practice charges, but should only evaluate the evidence to determine whether the Regional Director has "reasonable cause" to believe **[or, a likelihood of success in proving]** that the respondent has violated the Act.**]**

[Indeed, it is settled that, in these preliminary proceedings, the courts should give the Regional Director's version of the disputed facts the "benefit of the doubt", and should accept the reasonable inferences he draws therefrom if they are "within the range

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[1] **[One paragraph redacted, exem. 5, attorney work product, 2, and 7(E)]**

[2] **[**Section 10(l), 29 U.S.C. Section 160(l), the companion provision to Section 10(j), mandates that the NLRB to seek a temporary injunction in district court after the preliminary investigation of a charge reveals reasonable cause to believe that a charged party has violated certain specified unfair labor practice provisions of the Act, e.g., union secondary boycotts. See, e.g., Hirsch v. Building and Construction Trades Council, 530 F.2d 298, 302 (3d Cir. 1976).**]**

of rationality". Seeler v. The Trading Port, Inc., 5l7 F.2d 33, 36-37 (2d Cir. l975) (Sec. l0(j)); Squillacote v. Graphic Arts International Union, 540 F.2d 853, 858-859 (7th Cir. 1976)(Sec. l0(l)).**]**

[Accordingly, in view of the Regional Director's "relatively insubstantial burden of proof",[3] it is not necessary for a district court to hold a full, evidentiary hearing to enable it to conclude whether "reasonable cause" **[or, a likelihood of success on the merits]** has been established, (see Dunbar v. Landis Plastics, Inc., 977 F.Supp. 169, 177 (N.D.N.Y. 1997), reconsideration denied 996 F.Supp 174 (N.D.N.Y. 1998), remanded on other grounds 152 F.3d 917 (2nd Cir. 1998); Gottfried v. Samuel Frankel, 818 F.2d 485, 493 and 494 (6th Cir. 1984) (Sec. 10(j)); Pye v. Teamsters Local Union No. 122, 875 F.Supp 921, 928 (D.Mass. 1995), aff'd 61 F.3d 1013 (1st Cir. 1995); San Francisco-Oakland Newspaper Guild v. Kennedy, 412 F.2d 541, 546 (9th Cir. 1969) (Sec. 10(l))[4] or to resolve credibility conflicts in the evidence. NLRB v. Electro-Voice, Inc., 83 F.3d 1559, 1570, 1571 (7th Cir. 1996).**]**

[In view of the foregoing, the weight of judicial authority holds that it is proper for a district court to base its "reasonable cause" **[or, likelihood of success]**determinations in Section l0(j) and l0(l) cases upon evidence presented in the form of affidavits. See Aguayo v. Tomco Carburetor Co., 853 F.2d at 750-751; Squillacote v. Graphic Arts International Union, 540 F.2d at 860. Accord: Sharp v. Webco Industries Inc., 225 F.3d 1130, 1134 (10th Cir. 2000) (affidavits); Gottfried v. Samuel Frankel, 818 F.2d at 493 (combination of affidavits and ALJ transcript); San

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[3] **[**Kobell v. Suburban Lines, Inc. , 73l F.2d 1076, l084 (3rd. Cir. 1984); Levine v. C & W Mining Co., 6l0 F.2d 432, 435 (6th. Cir. 1979); Gottfried v. Samuel Frankel, 818 F.2d 485, 493 (6th. Cir. 1987); Aguayo v. Tomco Carburetor, Inc., 853 F.2d 744, 748 (9th Cir. 1988).**]**

[4] **[One paragraph redacted, exem. 5, attorney work product, 2, and 7(E)]**

Francisco-Oakland Newspaper Guild v. Kennedy, 412 F.2d at 546 (affidavits); Kennedy v. Teamsters, Local 542, 443 F.2d 627, 630 (9th Cir. 1971) (same); Squillacote v. Automobile, Aerospace & Agricultural Implement Workers, 383 F. Supp. 491, 493 (E.D. Wis. 1974) (same).[5]) A fortiorari, reasonable cause **[or, likelihood of success]**determinations can also properly be based upon the transcript of sworn testimony given before an NLRB administrative law judge, subject to cross examination, in the underlying administrative proceeding. See Silverman v. JRL Food Corp., 196 F.3d 334 (2d Cir. 1999); Gottfried v. Samuel Frankel, 818 F.2d at 493; Asseo v. Pan American Grain Co., 805 F.2d 23, 25-26 (1st Cir. 1986) (combination of live testimony and ALJ transcript); Fuchs v. Hood Industries, Inc., 590 F.2d 395, 398 (1st Cir. 1979) (the use of an ALJ transcript "could be of considerable assistance in expediting the work of the [district] court."); Eisenberg v. Honeycomb Plastics Corp., 125 LRRM 3257, 3262 (D. N.J. 1987).[6] There is particularly no need for additional testimony since the ALJ record is the only evidence the Board will have in determining the final outcome of the case. See NLRB v. Johnson, 310 F.2d 550, 552 (6th Cir. 1962); Marathon Oil Co. v. EPA, 564 F.2d 1253, 1264 (9th Cir. 1977).**]**

[Finally, neither Rule 43(e) nor Rule 65 of the Federal Rules of Civil Procedure requires oral testimony in this type of statutory, temporary injunction proceeding, Silverman v. Red & Tan Charters, Inc., 1993 WL 498062 (S.D.N.Y. Nov. 30, 1993)[7]

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5 **[**See generally F.T.C. v. Rhodes Pharmacal Co., 191 F.2d 744 (7th Cir. 1951); U.S. v. Wilson Williams, Inc., 277 F.2d 535 (2d Cir. 1960); Johnston v. J.P. Stevens & Company, Inc., 341 F.2d 891 (4th Cir. 1965). [But see n. 1 supra.]**]**

6 **[**In Kaynard v. Palby Lingerie, Inc., 625 F.2d 1047, 1050-51 (2d Cir. 1980), the Second Circuit affirmed a Section 10(j) injunction issued by a district court on the basis of the transcript and exhibits adduced before the administrative law judge in the underlying administrative proceeding.**]**

7 **[**The Region should refer to its Local Rules in citing to cases that are only cited in Westlaw.**]**

(declining to find that Rule 65 requires the holding of an evidentiary hearing on a Section 10(j) petition); Kennedy v. Sheet Metal Workers, 289 F. Supp. 65, 87-9l (C.D. Cal. l968),[8] and such procedures do not deny a fair hearing or due process to the Respondent. See Aguayo v. Tomco Carburetor Co., 853 F.2d at 750-751; Asseo v. Pan American Grain Co., 805 F.2d at 25-26; Gottfried v. Samuel Frankel, 818 F.2d at 493; Squillacote v. Graphic Arts International Union, 540 F.2d at 860; Kennedy v. Teamsters, Local 542, 443 F.2d at 630; San Francisco-Oakland Newspaper Guild v. Kennedy, 4l2 F.2d at 546.**]**

[In sum, submission of this Section [l0(j) or l0(l)] matter **[on the affidavits and exhibits submitted by the Board and the Respondent and/or on the transcript of the testimony and exhibits adduced in the administrative proceeding, supplemented by "just and proper" affidavits or testimony]** will avoid the delay inherent in scheduling and conducting a full evidentiary hearing, will avoid duplicative litigation, will facilitate a speedy decision, and will conserve the time and resources of the court and the parties. Such procedure fully comports with the statutory priority that should be given to this proceeding under 28 U.S.C. Section l657(a) and the original intent of the l947 Congress which enacted Section [10(j) or 10(l)]. See I Legislative History LMRA 1947 414, 433 (Government Printing Office l985). **[Add if appropriate, and see notes 1 and 4, supra.:** If the Court grants this motion to utilize the record developed before the administrative law judge, Petitioner also requests that the Court grant leave to supplement such record with either oral testimony or affidavit evidence bearing on the issue of the equitable necessity of injunctive relief in this case, as such evidence may not be germane in the administrative proceeding.**]**

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[8] **[**There is nothing in the texts of Section 10(j) and 10(l) that mandates oral testimony in these proceedings. See San Francisco-Oakland Newspaper Guild v. Kennedy, 412 F.2d at 546.**]**

APPENDIX K

Cases

APPENDIX K

APPENDIX L

QUESTIONS BY THE COURT AND POSSIBLE ANSWERS IN SECTION 10(j) PROCEEDINGS

[5 pages redacted, exem. 5, attorney work product, 2, and 7(E)]

APPENDIX M

OPPOSITION TO INTERVENTION BY CHARGING PARTIES

- **1. Sample Argument to Support a Motion to Oppose Intervention**

- **2. Memorandum GC 99-4, Participation by Charging Parties in Section 10(j) Injunction and Section 10(j) Contempt Proceedings**

Sample Argument to Support a Motion to Oppose Intervention

[The substance of this section exempt from disclosure under Exemptions 5, attorney work product, 2, and 7(E), but disclosed at the discretion of the General Counsel.]

Board's Exclusive Authority to Seek Section 10(j) and 10(l) Injunctions, Including the Authority to Seek Contempt Under 10(j) and 10(l) Decrees

In seeking temporary injunctive relief under Section 10(j) and 10(l) of the Act, the NLRB acts solely "in the public interest and not in vindication of purely private rights." Senate Report No. 105 on S.1126, 80th Cong., 1st Sess., (April 17, 1947), reprinted in I Legislative History LMRA 1947 414 (G.P.O. 1985). See, e.g., Seeler v. The Trading Port, Inc., 517 F.2d 33, 39-40 (2d Cir. 1975)(Section 10(j)); Hendrix v. Operating Engineers Local 571, 592 F.2d 437, 441-42 (8th Cir. 1979)(Section 10(l)). It is thus well established that the right to seek a temporary injunction to enjoin unfair labor practices pursuant to Section 10(j) or 10(l) of the Act is exclusively within the authority of the Board. See Amalgamated Clothing Workers of America v. Richman Brothers Co., 348 U.S. 511, 516-17 (1955).[1] In this regard, a proposed amendment to Section 10(l) of the Act to allow private parties to seek directly in the district courts injunctive relief for certain unfair labor practices, was defeated by the 1947 Congress which enacted Section 10(l) and 10(j). See Muniz v. Hoffman, 422 U.S. 454, 465-67 (1975)(discussion of legislative history).

It is also well established that a private party cannot intervene by right (see Fed.R.Civ.P. 24(a)(2)) in such proceedings in the district court, Sears, Roebuck & Co. v.

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[1] Accord: Walsh v. I.L.A., 630 F.2d 864, 871-72 (1st Cir. 1980); California Assoc. of Employers v. BCTC of Reno, Nevada, 178 F.2d 175 (9th Cir. 1949); Amalgamated Assoc. of Street and Motor Coach Employees v. Dixie Motor Coach Corp., 170 F.2d 902 (8th Cir. 1948); Amazon Cotton Mill Company v. Textile Workers Union of America, 167 F.2d 183 (4th Cir. 1948); Brown & Sharpe Mfg. Co. v. District 64, IAM, 535 F.Supp. 167, 169 n. 2 (D. R.I. 1982).

Carpet, etc. Union, 410 F.2d 1148, 1150-51 (10th Cir. 1969), vacated on other grounds as moot, 397 U.S. 655 (1970),[2] for to do so would interfere with the exclusive jurisdiction which has been vested in the NLRB by Congress and would give such party a right independently to appeal or to seek a contempt citation. See Penello v. Burlington Industries, Inc., 54 LRRM 2165 (W.D. Va. 1963). See also McLeod v. Business Machine Conference Board, 300 F.2d 237, 242-43 (2d Cir. 1962)(charging party not permitted to raise issues in 10(l) proceeding which are not raised by the Regional Director). In addition, a private party cannot intervene in such proceedings at the appellate level. See Hirsch v. Building and Construction Trades Council of Phila. & Vicinity, AFL-CIO, 530 F.2d 298, 307-08 (3d Cir. 1976).[3]

It is similarly well established that the right to seek contempt of a court decree enforcing a NLRB order resides exclusively in the NLRB, inasmuch as the NLRB seeks judicial enforcement of its orders as a "public agent." See Amalgamated Utility Workers

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[2] Accord: Squillacote v. Local 578, Auto Workers, 383 F.Supp. 491, 492 (E.D. Wisc. 1974); Wilson v. Liberty Homes, Inc., 500 F.Supp. 1120, 1123 (W.D. Wisc. 1980), affd. as mod. 108 LRRM 2699 (7th Cir. 1981), vacated as moot 109 LRRM 2492, 673 F.2d 1333 (7th Cir. 1982); Reynolds v. Marlene Industries Corp., 250 F.Supp. 722, 723-24 (S.D. N.Y. 1966); Philips v. Mine Workers, District 19, 218 F.Supp. 103, 105-06 (E.D. Tenn. 1963); Boire v. Pilot Freight Carriers, Inc., 86 LRRM 2976, 2978 (M.D. Fla. 1974), aff'd. 515 F.2d 1185 (5th Cir. 1975), reh. denied, 521 F.2d 795, cert. denied, 426 U.S. 934 (1976).

[3] Accord: Solien v. Miscellaneous Drivers etc., 440 F.2d 124, 129-32 (8th Cir. 1971), cert. denied 403 U.S. 905; Henderson v. Operating Engineers, Local 701, 420 F.2d 802, 806 fn. 2 (9th Cir. 1969); Compton v. N.M.U., 533 F.2d 1270, 1276 fn. 4 (1st Cir. 1976).

v. Consolidated Edison Company of New York, Inc., 309 U.S. 261, 269 (1940); May Department Stores Co. v. NLRB, 326 U.S. 376, 388 (1945).[4]

Since the NLRB similarly acts to vindicate solely the public interest under Section 10(j) and 10(l) of the Act, see Fleischut v. Nixon Detroit Diesel, Inc., 859 F.2d 26, 30 (6th Cir. 1988) and cases cited therein, the right to seek a contempt adjudication of an order granting a temporary injunction pursuant to Section 10(j) or 10(l) of the Act similarly resides exclusively in the NLRB. See Shore v. Building and Construction Trades Council, 50 LRRM 2139 (W.D. Pa. 1962)(motion by nonparty employer in 10(l) proceeding to adjudicate respondent union in contempt, denied on basis that only NLRB can bring contempt action; Fed.R.Civ.P. 71 held not applicable).[5] Thus, while the courts have the inherent power to enforce compliance with their lawful orders through civil contempt, e.g., Shillitani v. U.S., 384 U.S. 365, 370 (1966), charging parties may not be permitted to pursue independently contempt petitions in 10(l) and 10(j) cases which would intrude upon the Board's exclusive authority to initiate and enforce these types of proceedings. See Shore v. Building and Construction Trades Council, 50 LRRM at 2141. Accord: Philips v. Mine Workers, District 19, 218 F.Supp. at 107-08 (charging party has no right to continue 10(l) decree or to seek contempt adjudication over objection of Regional Director).[6]

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[4] See also NLRB v. Shurtenda Steaks, Inc., 424 F.2d 192 (10th Cir. 1970); Vapor Blast Shop Worker's Association v. Simon, 305 F.2d 717 (7th Cir. 1962); NLRB v. Retail Clerks International Association, 243 F.2d 777 (9th Cir. 1956).

[5] See also Moore v. Tangipahoa Parish School Board, 625 F.2d 33, 34 (5th Cir. 1980)(Fed.R.Civ.P. 71 does not allow a nonparty to enforce a court decree where such person has no standing to sue). Cf. Evans v. International Typographical Union, 81 F. Supp. 675, 678 (S.D. Ind. 1948)(power to initiate and prosecute temporary injunction proceeding under Section 10(j) carries with it the incidental and inherent authority to institute contempt proceedings).

[6] Compare the Ninth Circuit's decision in NLRB v. Retail Clerks International, 243 F.2d at 782-83 (charging party has no standing to seek injunctive relief to enforce prior court

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decrees where Board was not seeking such relief) with Retail Clerks v. Food Employers Council, 351 F.2d 525, 529 (9th Cir. 1965) (district court has jurisdiction, once Regional Director files 10(l) petition, to grant appropriate relief different from that proposed by the Regional Director).

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 99-4 June 3, 1999

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

FROM: Fred Feinstein, General Counsel

SUBJECT: Participation by Charging Parties in Section 10(j)Injunction and Section 10(j) Contempt Proceedings

1. Introduction

The purpose of this Memorandum is to detail the degree to which charging parties in the underlying unfair labor practice proceeding may participate in the U.S. district court Section 10(j) injunction proceeding. Charging parties in Section 10(j) proceedings should be given the same rights as charging parties in 10(l) proceedings: the "opportunity to appear by counsel and present any relevant testimony." Section 10(l), 29 U.S.C. 160(l). This participation does not, however, include the right to formally intervene as a party in the 10(j) proceeding. It is more analogous to that of an active amicus curiae.

Such participation should apply not only to the initial 10(j) proceeding which seeks the temporary injunction, but also to any subsequent proceedings to modify, amend, reconsider or to oppose a stay of any decree obtained, and any contempt proceeding which seeks a civil contempt adjudication and purgation order.[1]

Set forth below is the legal analysis in support of the argument that charging parties should be denied formal intervention as parties in the injunction proceeding, as well as that supporting the position that charging parties in 10(j) proceedings should be accorded the right of participation due to charging parties in Section 10(l) proceedings. Any charging party motion to intervene should be opposed and any charging party motion for amicus status should be supported, relying upon the analysis set forth below.

[1] Similarly, charging parties should be granted amicus status in any appeal.

2. The Legislative History of Section 10(j) and the Policies under the Federal Rules Demonstrate that Charging Parties Have No Right to Intervene in 10(j) and 10(l) Proceedings.

In seeking temporary injunctive relief under Section 10(j), the National Labor Relations Board (NLRB or Board) acts solely "in the public interest and not in vindication of purely private rights." Senate Report No. 105 on S.1126, 80th Cong., 1st Sess., p. 8 (April 17, 1947), reprinted in I Legislative History LMRA 1947 414 (Government Printing Office 1985).[2] Thus, it is well established that the right to seek a temporary injunction to enjoin unfair labor practices pursuant to Section 10(j) is exclusively within the authority of the Board. See Amalgamated Clothing Workers of America v. Richman Brothers Co., 348 U.S. 511, 516-517 (1955).[3] Indeed, during the debate on Section 10(j) and (l) in 1947, Congress defeated a proposed amendment to Section 10(l) to allow private parties direct access to the district courts to seek injunctive relief for certain unfair labor practices. See Muniz v. Hoffman, 422 U.S. 454, 465-467 (1975)(discussing legislative history of Taft-Hartley Amendments). Since intervention would permit a party independently to appeal or to seek a contempt citation, granting intervention would inappropriately interfere with the Congressional intent to vest in the Board the exclusive authority to prosecute injunction proceedings. Penello v. Burlington Industries, Inc., 54 LRRM 2165 (W.D. Va. 1963). See also Sears, Roebuck & Co. v. Carpet, etc. Union, 410 F.2d 1148, 1150-1151 (10th Cir. 1969), vacated on other grounds as moot, 397 U.S. 655 (1970) (denying intervention at appellate level); Philips v. Mineworkers, 218 F. Supp. 103, 105-106 (E.D. Tenn. 1963) (denying intervention for purposes of dissolving the injunction and instituting contempt proceedings).

Courts have also reasoned that because the statutory power to petition for 10(j) and 10(l) relief is limited to the Board, a charging party has no independent interest protectable by intervention under Fed.R.Civ.P., Rule

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[2] See also Seeler v. The Trading Port, Inc., 517 F.2d 33, 40 (2d Cir. 1975).

[3] Accord: Walsh v. I.L.A., 630 F.2d 864, 871-872 (1st Cir. 1980); California Assoc. of Employers v. BCTC of Reno, Nevada, 178 F.2d 175, 179 (9th Cir. 1949); Amalgamated Assoc. of Street and Motor Coach Employees v. Dixie Motor Coach Corp., 170 F.2d 902, 907 (8th Cir. 1948); Amazon Cotton Mill Company v. Textile Workers Union of America, 167 F.2d 183, 185-187 (4th Cir. 1948); Brown & Sharpe Mfg. Co. v. District 64, IAM, 535 F. Supp. 167, 169 n. 2 (D. R.I. 1982).

24(a)(2) or (b)(2). Accordingly, courts have routinely denied charging parties motions to intervene under that Rule. Reynolds v. Marlene Industries Corp., 250 F. Supp. 722, 723-724 (S.D.N.Y. 1966); Boire v. Pilot Freight Carriers, Inc., 86 LRRM 2976, 2978 (M.D. Fla. 1974), aff'd. 515 F.2d 1185 (5th Cir.), reh. denied, 521 F.2d 795 (1975), cert. denied 426 U.S. 934 (1976); Squillacote v. Local 578, Auto Workers, 383 F. Supp. 491, 492 (E.D. Wisc. 1974); Wilson v. Liberty Homes, Inc., 500 F. Supp. 1120, 1123 (W.D. Wisc. 1980).[4]

3. Charging Parties in Section 10(j) Proceedings Should Enjoy the Same Rights of Participation as in Section 10(l) Proceedings

Section 10(l) expressly directs that charging parties "shall be given an opportunity to appear by counsel and present any relevant testimony." Given the functional similarity of section 10(j) and 10(l)[5] it is appropriate to

[4] Other district courts have denied intervention without reference to Rule 24. See, NLRB v. Ona Corp., 605 F. Supp. 874, 876 (N.D. Ala. 1985); Gottfried v. Mayco Plastics, Inc., 472 F. Supp. 1161, 1163, 1164 (E.D. Mich. 1979), affd. 615 F.2d 1360 (6th Cir. 1980)(table). Other appellate courts have also denied intervention. See, Hirsch v. Building and Construction Trades Council of Phila. & Vicinity, AFL-CIO, 530 F.2d 298, 307-308 (3d Cir. 1976); Compton v. N.M.U., 533 F.2d 1270, 1276 n. 4 (1st Cir. 1976); Solien v. Miscellaneous Drivers etc., 440 F.2d 124, 129-132 (8th Cir.), cert. denied 403 U.S. 905 (1971); Henderson v. Operating Engineers, Local 701, 420 F.2d 802, 806 n. 2 (9th Cir. 1969).

[5] The two provisions were enacted as companion provisions: section 10(l) mandates the Board to seek injunctive relief in cases involving certain enumerated unfair labor practices (chiefly, unlawful secondary boycotts); 10(j) authorizes the Board, in its discretion, to seek injunctive relief in all other cases. The standards for determining the propriety of injunctive relief are generally the same. Kobell v. Suburban Lines, Inc., 731 F.2d 1076, 1084 (3d Cir. 1984); Kinney v. Local 150, 994 F.2d 1271, 1276 (7th Cir. 1993). Although one court has held that the absence of any reference in 10(j) to charging party participation distinguishes it from 10(l) (see Wilson v. Liberty Homes, Inc., 500 F. Supp. at 1123), that view has not been adopted generally and that decision has not been read as a rejection of all right to participate in 10(j) proceedings. See Dunbar v. Landis Plastics, Inc., 996 F. Supp. 174, 179-180 (N.D.N.Y. 1998), remanded on other grounds 152 F.3d 917 (2d Cir. 1998) (table) (distinguishing Liberty Homes and granting amicus curiae status to charging party).

accord the same degree of participation to charging parties in 10(j) proceedings. Such participation comes under the general rubric of an amicus curiae, a status courts have often granted to charging parties in Section 10(j) cases.[6] Often the court has granted the charging party amicus the same privileges as would be granted under 10(l).[7]

To be sure, a 10(j) charging party amicus, like the 10(l) charging party, is not a full party in the district court proceeding[8] and may not vary the theory of violation being advanced by the Regional Director or initiate an appeal.[9]

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[6] See, e.g., Dunbar v. Landis Plastics, Inc., 996 F. Supp. at 179-180; D'Amico v. United States Service Industries, Inc., 867 F. Supp. 1075, 1079 (D. D.C. 1994); Garner v. Macclenny Products, Inc., 859 F. Supp. 1478, 1479 (M.D. Fla. 1994); Zipp v. Caterpillar, Inc., 858 F. Supp. 794, 795 (C.D. Ill. 1994); Gottfried v. Mayco Plastics, Inc., 472 F. Supp. 1161, 1163, 1164 (E.D. Mich. 1979), aff'd. 615 F.2d 1360 (6th Cir. 1980); NLRB v. Ona Corp., 605 F. Supp. 874, 876 (N.D. Ala. 1985); McLeod v. General Electric Company, 257 F. Supp. 690, 692 n. 1 (S.D.N.Y.), revd. on other grounds 366 F.2d 847 (2d Cir. 1966), stay granted 87 S.Ct. 5, vacated and remanded 385 U.S. 533 (1967).

[7] See McLeod v. General Electric Company, 257 F. Supp. at 692, n. 1 (may appear by counsel, examine and cross examine witnesses and make legal submissions); NLRB v. Ona Corp., 605 F. Supp. at 876 (afforded full opportunity to be heard, to examine and cross-examine witnesses and present evidence bearing upon the issues); Dunbar v. Landis Plastics, Inc., 996 F. Supp. at 180 (permitted to file memoranda and evidentiary affidavits and to participate in oral argument).

[8] See rationale above p.2, for denying intervention by charging parties. See also The Miller-Wohl Co., Inc. v. Commission of Labor and Industry, State of Montana, 694 F.2d 203, 204 (9th Cir. 1982) (amici are not parties; grant of motion to intervene is necessary to confer party status); Morales v. Turman, 820 F.2d 728, 732 (5th Cir. 1987) (same).

[9] See McLeod v. Business Machine Conference Board, 300 F.2d 237, 242-243 (2d Cir. 1962); Sears Roebuck & Co. v. Carpet, etc. Union, 410 F.2d at 1150-1151. See also Moten v. Bricklayers, Masons, etc., 543 F.2d 224, 227 (D.C. Cir. 1976) (where litigant did not seek intervention, its position was analogous to amicus; as such it had no authority to appeal); Richardson v. Alabama State Board of Education, 935 F.2d 1240, 1247 (11th Cir. 1991) and cases cited (refusing to consider arguments of amici not presented by party).

4. Charging Party's Right of Participation Extends to Section 10(j) Civil Contempt Proceedings

The right to institute proceedings for civil contempt of a temporary interim injunction resides exclusively in the NLRB as a "public agent;" a charging party has no independent authority to bring contempt proceedings. Shore v. Building and Construction Trades Council, 50 LRRM 2139 (W.D. Pa. 1962). See also NLRB v. Retail Clerks International Association, 243 F.2d 777, 782-783 (9th Cir. 1956)(charging party has no standing to seek injunctive relief to enforce prior court decrees where Board was not seeking such relief); Philips v. Mine Workers, District 19, 218 F. Supp. at 107-108 (charging party has no right to continue 10(l) decree or to seek contempt adjudication over objection of Regional Director); Moore v. Tangipahoa Parish School Board, 625 F.2d 33, 34 (5th Cir. 1980)(Fed.R.Civ.P. 71 does not allow a nonparty to enforce a court decree where such person has no standing to sue). However, consistent with the general policy set forth above, Regions should consent to the participation of charging parties as amicus curiae in Section 10(j) civil contempt proceedings.

5. Conclusion

Consistent with the analysis set forth above, the Regions should deny all requests and oppose all motions of charging parties to obtain formal party status in any Section 10(j) proceeding. However, the Regions should consent to granting the charging parties the status of amicus curiae and the same degree of participation granted to charging parties under Section 10(l) of the Act.

If the Regions have any questions concerning this guideline memorandum, or if issues arise not clearly covered herein, prompt telephonic advice should be sought from the Injunction Litigation Branch in Washington.

F. F.

cc: NLRBU

Release to the Public

APPENDIX N

DISCOVERY DOCUMENTS

1. Model Motion for Protective Order to Limit Discovery Pursuant to Fed.R.Civ.P. 26(c)(1)

2. Model Memorandum in Support of Motion for Protective Order to Limit Discovery Pursuant to Fed.R.Civ.P. 26(c)(1)

3. Model Order Limiting Discovery Pursuant to Fed.R.Civ.P. 26(c)(1)

4. Sample Motion to Quash Notice of Deposition Pursuant to Fed.R.Civ.P. 26(c)(1)

5. Sample Memorandum in Support of Motion to Quash Notice of Deposition Pursuant to Fed.R.Civ.P. 26(c)(1)

Model Motion for Protective Order to Limit Discovery Pursuant to Fed. R. Civ. P. 26(c)(1)

[4 pages redacted, exem. 5, attorney work product, 2, and 7(E)]

Model Memorandum of Points and Authorities in Support of Motion for Protective Order to Limit Discovery Pursuant to Fed. R. Civ. P. 26(c)(l)

[28 pages redacted, exem. 5, attorney work product, 2, and 7(E)]

Model Order Limiting Discovery
Pursuant to Fed. R. Civ. P. 26(c)(1)

[2 pages redacted, exem. 5, attorney work product, 2, and 7(E)]

SAMPLE MOTION TO QUASH NOTICE OF DEPOSITION

[3 pages redacted, exem. 5, attorney work product, 2, and 7(E)]

SAMPLE MEMORANDUM IN SUPPORT OF MOTION TO QUASH NOTICE OF DEPOSITION

[11 pages redacted, exem. 5, attorney work product, 2, and 7(E)]

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June 2001

APPENDIX O

appendix o

United States Government

NATIONAL LABOR RELATIONS BOARD
Region 29
One MetroTech Center North
Jay Street and Myrtle Avenue - 10th Floor
Brooklyn, New York 11201-4201

October 11, 2000

The Honorable Frederick Block
United States District Court
For the Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: ALVIN BLYER V. PRATT TOWERS, INC.
Case No. CV-00-2499

Dear Judge Block:

Enclosed please find a copy of the Decision and Recommended Order issued by Administrative Law Judge Jesse Kleiman concerning the above-captioned case. In his Decision and Recommended Order, Judge Kleiman finds all of the violations of the National Labor Relations Act alleged by Counsel for the General Counsel (Petitioner herein) in the Consolidated Complaint in Case Nos. 29-CA-22657, 29-CA-22660 and 29-CA-22666[1]. Specifically, Judge Kleiman found, *inter alia*, that Respondent violated Section 8(a)(3) of the National Labor Relations Act by unlawfully refusing to reinstate six striking employees to their former positions of employment upon their unconditional offer to return to work. Respondent has been ordered to reinstate the six strikers with full backpay and interest. In addition, the Judge found that Respondent "engaged in a predetermined and planned course of conduct designed to undermine the status of the Union and to convince employees that it would be futile to continue to support the Union..." in violation of Section 8(a)(5) of the Act. Respondent has been ordered, upon request, to bargain in good faith with the Union over the terms and conditions of employment of its employees.

Judge Kleiman's Decision strongly bolsters the Petitioner's contention that there is reasonable cause to believe that Respondent violated the Act as alleged by the Regional Director in the Petition for injunctive relief under Section 10(j) of the National Labor Relations Act. See, e.g. *Silverman v. JRL Food Corp.*, 196 F.3d 334, 335-337 (2d Cir. 1999); *Seeler v. Trading Port, Inc.*, 517 F.2d 33, 37, n.7 (2d Cir. 1975); *Rivera-Vega v. ConAgra, Inc.*, 70 F.3d 153, 157 n.3, 161 (1st Cir. 1995).

As noted in earlier correspondence, the Administrative Law Judge's decision is not the final administrative decision of the Board. See, e.g. *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d 962, 968 (6th Cir. 2001); *Sharp v. Webco Industries, Inc.*, 225 F.3d 1130, 1136 (10th Cir. 2000). The Petitioner has been advised by Respondent that it will file exceptions to the ALJ's decision, and that

[1] The ALJ did not decide on the allegation that Respondent unlawfully withdrew recognition from the Union, as alleged in Case No. 29-CA-23137. Petitioner anticipates that the ALJ will issue his Decision and Order in that matter in the very near future.

Respondent intends to request a one month extension of time for filing from the current deadline of October 25, 2000. Furthermore, in accordance with the Board's Rules and Regulations, Petitioner may file an answering brief opposing Respondent's exceptions, and Respondent could then file a reply brief. In view of the numerous stages remaining in this administrative proceeding, along with the length of the Judge's decision, it is likely that the Board will require a considerably long period of time to review the record, analyze the ALJ's 75-page decision, analyze the exceptions to the ALJ's factual and legal findings, and issue its Decision. Thus, Petitioner anticipates many more months of administrative litigation. See, e.g. *Levin v. Fry Foods, Inc.*, 108 LRRM 2208, 2209 (N.D. Ohio 1979), aff'd. 108 LRRM 2280 (6th Cir. 1981) (issuance of ALJD does not terminate 10(j) decree.) See also, *Fleischut v. Nixon Detroit Diesel, Inc.*, 859 F.2d 26, 28 and 31, 129 LRRM 2660 (6th Cir. 1988) (error for district court to limit duration of 10(j) decree to commencement of ALJ hearing.) Thus, as the administrative litigation is still ongoing and the time before a final Board Order may be considerable, the risk of irreparable harm to the discriminatees and to the Union's bargaining strength not only continues, but also increases. Moreover, in light of the ALJ's finding that Respondent never intended to bargain in good faith with the Union and that Respondent deliberately devised a plan to rid itself of the Union by, among other things, dragging out negotiations to allow for the expiration of the certification year (ALJD, p.67, ln. 36-45, p.69, ln. 12-15), the Respondent should not further benefit from its unlawful conduct by allowing more time to pass without interim injunctive relief.

Based on the above, it is clear that the Administrative Law Judge has found that Respondent has violated the Act in the manner set forth in the 10(j) Petition. Further, despite the ALJ's decision, injunctive relief is still warranted.

Thank you for your consideration of this matter.

Respectfully submitted,

Nancy K. Reibstein
Counsel for Petitioner

APPENDIX P

Instructions and Sample Letter, Motion and Memorandum to Expedite District Court Decision

1. Instructions for Expediting a District Court Decision

2. Sample letter to district court to expedite decision in Blyer v. Pratt Towers, Inc.

3. Sample Motion to Expedite Decision in Moore-Duncan v. Aldworth Company, Inc.

4. Sample Memorandum in Support of Motion to Expedite in Moore-Duncan v. Aldworth Company, Inc.

Instructions for Expediting District Court Decision

[2 pages redacted, exem. 5, attorney work product, 2, and 7(E)]

United States Government

NATIONAL LABOR RELATIONS BOARD
Region 29
One MetroTech Center North
Jay Street and Myrtle Avenue - 10th Floor
Brooklyn, New York 11201-4201

September 13, 2000

The Honorable Frederick Block
United States District Court
For the Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: ALVIN BLYER V. PRATT TOWERS, INC.
Case No. CV-00-2499

Dear Judge Block:

On May 2, 2000, this office filed a petition for injunctive relief pursuant to Section 10(j) of the National Labor Relations Act with the Court in the above referenced matter. On May 9, 2000, Petitioner filed a Motion to Try the 10(j) Petition on the Basis of Administrative Hearing Transcripts and Exhibits. All such materials were submitted to the Court by May 25, 2000. On August 8, 2000, Counsel for Petitioner spoke with law clerk Patrick Walsh who indicated that the matter is pending, but that he did not know when a decision would be made…

Although we recognize that the Court is faced with a heavy calendar, we were hopeful that by this time we would have a decision, keeping in mind the need for expedition, in light of the priority nature of this case under 29 U.S.C. Section 1657(a) and the legislative intent behind Section 10(j) of the National Labor Relations Act. See, *Kaynard v. MMCI, Inc.*, 734 F.2d 950, 954 (2d Cir. 1984)(Congress intended Section 10(j) as a "swift interim remedy to halt unfair labor practices.") See also *Hoeber v. IBEW, Local No. 3*, 498 F. Supp. 122 (D.N.J. 1980) (while district court has authority to refer 10(j) petition to a magistrate, court remained cognizant of statutory priority and mandated expedited processing.)

Moreover, any further delay only increases the on-going risk of irreparable harm to the discriminatees, the Union and the public interest. See *Maram v. Universidad Interamericana*, 722 F.2d 953, 960 (1st Cir. 1983) (even if passage of time while case is pending before court may "diminish the curative effect of the relief," an interim injunction would still be more effective to restore the status quo than the Board's ultimate order

without interim relief.) Cf. *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 181 (2d Cir. 1965), cert. denied 384 U.S. 972 (remedial action must be speedy in order to be effective.")

Furthermore, it should be noted that even when the Administrative Law Judge's decision issues, it will not be the final administrative decision of the Board, and the Board's review of exceptions which may be filed by either party may entail many more months of administrative litigation. See, e.g. *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d 962, 968 (6th Cir. 2001); *Sharp v. Webco Industries, Inc.*, 225 F.3d 1130, 1136 (10th Cir. 2000). See also, *Fleischut v. Nixon Detroit Diesel, Inc*., 859 F.2d 26, 28 and 31 (6th Cir. 1988) (error for district court to limit duration of 10(j) decree to commencement of ALJ hearing.)

Accordingly, this letter is to inquire about the status of the case and again request an expeditious decision and recommended order.

Respectfully submitted,

April M. Wexler
Counsel for Petitioner

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June 2001

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

DOROTHY L. MOORE-DUNCAN, Regional Director of the Fourth Region of the **NATIONAL LABOR RELATIONS BOARD**, for and on behalf of the **NATIONAL LABOR RELATIONS BOARD**,

Petitioner

v.

ALDWORTH COMPANY, INC. and DUNKIN' DONUTS MID-ATLANTIC DISTRIBUTION CENTER, INC., JOINT EMPLOYERS

Respondents

Civil No. 99-CV-3568 (JBS)

PETITIONER'S MOTION TO EXPEDITE DECISION

The Petitioner hereby moves this Court for an expedited decision on the Petition for Injunction Under Section 10(j) of the National Labor Relations Act, As Amended, filed on July 28, 1999 in the above-captioned case. The Petitioner urges that the action herein for injunctive relief under Section 10(j) of the National Labor Relations Act, as amended, is a matter designated under 28 U.S.C. Sec. 1657 as warranting expedited treatment. The reasons supporting this motion are set forth in the accompanying memorandum. Oral argument is not requested.

Respectfully submitted this 9th day of August, 2000.

RICHARD P. HELLER
Counsel for the Petitioner
National Labor Relations Board, Region Four
One Independence Mall, 7th Floor
615 Chestnut Street
Philadelphia, Pennsylvania 19106
(Telephone: (215) 597-7633)

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June 2001

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

DOROTHY L. MOORE-DUNCAN, Regional Director of the Fourth Region of the **NATIONAL LABOR RELATIONS BOARD**, for and on behalf of the **NATIONAL LABOR RELATIONS BOARD**, Petitioner v. **ALDWORTH COMPANY, INC. and DUNKIN' DONUTS MID-ATLANTIC DISTRIBUTION CENTER, INC., JOINT EMPLOYERS** Respondents	Civil No. 99-CV-3568 (JBS)

MEMORANDUM IN SUPPORT OF MOTION TO EXPEDITE

I. Statement of the Case

This proceeding is before this Court on a petition filed by the Regional Director for Region Four of the National Labor Relations Board, herein called the Board, pursuant to Section 10(j) of the National Labor Relations Act, as amended (61 Stat. 149; 73 Stat. 544; 20 U.S.C. Sec. 160(j)), herein called the Act, for a temporary injunction pending final disposition of the matters involved herein pending before the Board on charges filed by United Food and Commercial Workers Union Local 1360 a/w United Food and Commercial Workers International Union, AFL-CIO-CLC, herein called the Union, and by William A. McCorry, an individual. The charges allege that Aldworth Company, Inc. and Dunkin' Donuts Mid-Atlantic Distribution Center, Inc., Joint Employers, herein called Respondent Aldworth and Respondent Dunkin', respectively, or Respondents, have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1), (3) and (5) of the Act.

The Petition herein is predicated upon the Petitioner's conclusion that there is reasonable cause to believe that Respondents have engaged in the unfair labor practices charged and that injunctive relief is necessary in order to effectuate the purposes of the Act.

A hearing on the same factual issues as those raised by the Petition herein was duly held before Administrative Law Judge William G. Kocol of the Board beginning on June 21, 1999, and ending on September 16, 1999, with all parties being present and participating therein. On July 28, 1999, the Petitioner moved this Court to receive the transcript and exhibits before the Administrative Law Judge and to have this Court base its determination as to whether the Petitioner has shown reasonable cause to believe that Respondents have violated the Act as alleged in the Petition on that record. This Court received copies of the transcript and exhibits before the Administrative Law Judge. The parties appeared before this Court on November 18, 1999, and again on December 20, 1999, and made their arguments concerning the propriety of the injunction sought by the Petitioner. Briefs were filed with this Court by the Petitioner on November 16, 1999 and December 2, 1999, and by Respondents on November 9 and 10, 1999.

By letter of March 6, 2000, the undersigned inquired concerning the status of this matter and respectfully requested an expeditious decision and order. This Court responded to this request on March 10, 2000. On April 20, 2000, Administrative Law Judge Kocol issued his Decision in the administrative proceeding. By letter of April 25, 2000, the undersigned enclosed a copy of Judge Kocol's decision, and set forth the pages of his Decision which supported the allegations of the Petition and the injunctive relief requested therein. The letter also noted the continuing risk of irreparable harm to the individual employees Judge Kocol found to be victims of Respondents' discriminatory conduct and the likely erosion of bargaining strength the Union was being forced to sustain in the absence of injunctive relief.

The Court acknowledged receipt of Judge Kocol's Decision on April 27, 2000, and afforded Respondents until May 11, 2000 to file their responses to his Decision which would complete the record in the proceeding before the Court. On April 28, 2000, Respondent Aldworth notified this Court that it had new evidence to present, and followed that letter with an 18-page letter brief attaching a petition purporting to show that Respondents' employees did not wish to be represented by the Union. For its part, Respondent Dunkin' submitted a response on May 10, 2000, asking the Court to act affirmatively on the positions advocated by Respondent Aldworth and to urge that the Petition be denied. Because Respondents' submissions raised new matters, the undersigned sought leave to respond and attached a letter of May 19, 2000 setting forth the Petitioner's objections to Respondent Aldworth's new information. The Petitioner submitted that the attachments to Respondent Aldworth's letter were procedurally improper and of no legal effect. The Petitioner urged the Court to consider this "evidence" as affirmation of the need for injunctive relief. In this regard, the undersigned's letter noted, and it is well-settled, that anti-union petitions, like the one attached to Respondent Aldworth's May 10 letter, are not reliable indicators of employee sentiments concerning union representation since they are the unfortunate consequence of Respondent's prolonged and unremedied coercion. This legal principle was noted in the undersigned's May 19 response. On May 30, 2000, Respondent Aldworth forwarded to the Court 55 statements from employees purporting to show that their signatures on the anti-union petition were uncoerced. By letter of June 6, 2000, the undersigned requested that these newly-submitted documents be excluded from the record.

In the May 19, 2000 letter objecting to Respondent Aldworth's submission of these documents, the Court was advised that the Union had filed unfair labor practice charges alleging that Respondents had unlawfully solicited employees to sign the petition and engaged in further coercive conduct surrounding the circulation of the petition. The Regional Director has recently determined

that the unfair labor practice charges have merit and that Respondents' agents were responsible for circulating the anti-union petition and soliciting employees to sign it. Accordingly, an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing issued on July 28, 2000, a copy of which is attached hereto. The Consolidated Complaint further alleges that Respondents have unilaterally implemented new working conditions and a disciplinary policy pursuant to which at least five bargaining unit employees have been suspended. Finally, the Consolidated Complaint alleges that an agent of Respondents unlawfully interrogated an employee. In bringing this information to the Court's attention, the Petitioner does ***not*** seek additional relief, nor does she wish to contribute to any further delay in the Court's consideration of the extant Section 10(j) Petition. The injunctive relief already sought, if granted, would be entirely adequate to restrain Respondents from the conduct found by Judge Kocol as well as that set forth in the Consolidated Complaint attached hereto. All parties understand that the Regional Director's determinations are not conclusive and that these new allegations must be proven in a separate proceeding before an Administrative Law Judge of the Board, not before this Court. However, just as the allegations of the Consolidated Complaint have yet to be proven, Respondents should not be able to maintain that the anti-union petition enjoys some presumptive validity. As noted above, the petition is defective as a matter of law, and, ultimately, may be found, as a matter of fact, to be the latest unlawful salvo in Respondents' crusade against the Union.

An Expedited Decision is Warranted In This Matter

The instant petition warrants expedited treatment. Until 1984, Section 10(i) of the Act provided that "petitions filed under [the NLRA should] be heard expeditiously, and if possible within 10 days after they have been docketed." Public Law 98-620, "The Federal Courts Civil Priorities Act' (FCCPA) repealed Section 10(i) of the Act and other such priority statutes and replaced them with a uniform provision, 28 U.S.C. Sec. 1657(a) which requires the courts to

"…expedite the consideration of…any action for temporary or preliminary injunctive relief." Therefore, based upon the priorities established by the FCCPA, this matter warrants expedited treatment. See also *Kaynard v. MMIC, Inc.*, 734 F.2d 950, 954 (2d Cir. 1984) (Congress intended Section 10(j) as a "swift interim remedy to halt unfair labor practices"); *Hoeber v. IBEW Local No. 3*, 498 F.Supp. 122, 125 (D.N.J. 1980) (while district court has authority to refer 10(j) petition to a magistrate, Court remained cognizant of statutory priority and mandated expedited processing). Moreover, any further delay only increases the on-going risk of irreparable harm to the discriminatees, the Union and the public interest. See *Maram v. Universidad Interamericana*, 722 F.2d 953, 960 (1st Cir. 1983) (even if passage of time while the case is pending before the Court may "diminish the curative effect of the relief," an interim injunction would still be more effective to restore the status quo than the Board's ultimate order without interim relief). Cf. *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 181 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1966) ("remedial action must be speedy in order to be effective").

In addition, the Courts have recognized that the very nature of 10(j) and 10(l) cases qualifies them for expedited treatment independent of the statutory provisions for expedition. In *Fuchs v. Hood Industries, Inc.*, 590 F.2d 305, 397 (1979), for example, the First Circuit held that a 10(j) or a 10(l) petition must be granted priority status not solely as a result of the mandate of Section 10(j) of the Act, but because the very nature of these proceedings dictates expeditious judicial consideration. The Court held in *Fuchs* that it was an abuse of judicial discretion for a District Court to refuse to consider the merits of a 10(j) petition until after the issuance of an Administrative Law Judge's Decision in the underlying administrative proceeding. The Court concluded:

> The injunctive relief provided for in Section 10(j) is interlocutory in nature; it is designed to fill the considerable gap between the filing of the complaint by the Board and the issuance of its final decision…By declining even to review the petition before the administrative law judge renders his decision, … the court in effect summarily denied the petition for the duration of much of its useful life. 590 F.2d at 397.

With specific reference to Section 10(l) cases, the courts have similarly concluded that the enumerated violations require prompt judicial relief to avoid obstructions to the free flow of commerce and to prevent violators of the Act from carrying out their unlawful objectives before the Board can act. See, e.g. *Hirsch v. BCTC of Philadelphia*, 530 F.2d 298, 302 (3rd Cir. 1976); *Henderson v. the I.U.O.E., Local 701*, 420 F.2d 802, 808-809 (9th Cir. 1969); *Squillacote v. Graphic Arts International Union (GAIU), Local 277*, 513 F.2d 1017, 1023 (7th Cir. 1975). Thus, "judicially created priority" with respect to petitions filed pursuant to Section 10(j) or 10(l) of the Act, has been recognized. The legislative history of the FCCPA makes it clear that it was not intended to eliminate or discourage the continuation of judicially created priorities which experience has shown are warranted. Sec. 130 Cong. Rec. No. 129, S 12930 (daily ed. October 3, 1984)(remarks of Sen. Leahy and Sen. Dole). Based on the foregoing, there are two bases upon which to expedite the decision in this matter, the statutory mandate of the FCCPA and the judicially created priority.

The Petitioner recognizes that the Court has a heavy calendar and that the record in this case is extensive. However, due to the need for expedition noted above, and especially since the issuance of Administrative Law Judge Kocol's decision, it is respectfully submitted that too much time has passed without a decision on the Petition. The position of the aggrieved parties has continued to seriously erode during this long hiatus. The Petition already chronicles instances of unilateral changes implemented by Respondents, some of which have led to the suspensions or discharges of bargaining unit employees, several of whom are major Union activists. The attached Consolidated Complaint refers to more unilateral changes that have resulted in the suspensions of additional bargaining unit employees. The employees no doubt sought Union representation, in part, to negotiate changes in their terms and conditions of employment and to enjoy the benefits and protections that flow from collective bargaining. It is asking a great deal of them to keep in mind that ultimately a retroactive bargaining order may protect them, especially as they witness the

decline in their ranks under new rules and policies. Without an immediate decision on the merits of the Section 10(j) Petition, the strength of the Union may be irretrievably lost. See e.g. *Frye v. Specialty Envelope, Inc.*, 10 F. 3d 1221, *1226 (6th Cir. 1993)(citing *Asseo v. Centro Medico del Turabo*, 900 F. 2d 445 (1st Cir. 1990), (10(j) order the only effective way to prevent irreparable erosion of employee support for the Union, notwithstanding intervening decertification petition). The Petitioner therefore respectfully submits that prompt judicial consideration is mandated herein by the Congressional and judicially recognized need for the interim relief in such proceedings and to avoid frustration of the policies and remedial purposes of the Act. See generally, *Sheeran v. American Commercial Lines, Inc., et al.*, 683 F2d 970, 979 (6th Cir. 1982).

III. Conclusion

The facts herein, as set forth in the Petition and the record evidence, establish a need for an expedited decision due to the great volume of unfair labor practices committed by the Respondents and their continuing nature.

Respectfully submitted,

RICHARD P. HELLER
Counsel for the Petitioner
National Labor Relations Board, Region Four
One Independence Mall, 7th Floor
615 Chestnut Street
Philadelphia, Pennsylvania 19106
(Telephone: (215) 597-7633

APPENDIX Q

SAMPLE CONTEMPT MEMO AND PETITION FOR CONTEMPT

1. Sample memorandum authorizing the institution of contempt proceedings in Aguayo v. South Coast Refuse Corp.

2. Sample Petition for Adjudication and Order in Civil Contempt and for Other Civil Relief in Bloedorn v. Wire Products Mfg. Corp.

Sample Memorandum Authorizing the Institution of Contempt Proceedings
Aguayo v. South Coast Refuse Corp.

[15 pages redacted, exem. 5, attorney work product, 2, and 7(E)]

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

PHILIP E. BLOEDORN, Acting Regional Director of the Thirtieth Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

Petitioner

v. Civil No. 95-C-0524-C

WIRE PRODUCTS MANUFACTURING CORPORATION,

Respondent, and

ROGER C. DUPKE, ROBERT E. HILL, and RAYFORD T. BLANKESNHIP,

Additional Respondents in Contempt

PETITION FOR ADJUDICATION AND ORDER IN CIVIL CONTEMPT AND FOR OTHER CIVIL RELIEF

Comes now Philip E. Bloedorn, Acting Regional Director of Region 30 of the National Labor Relations Board (herein Board or Petitioner), and petitions this Court, for and on behalf of the Board, to adjudicate Wire Products Manufacturing Corporation (herein Respondent), and certain additional respondents in contempt, Roger C. Dupke (herein Dupke), Robert E. Hill (herein Hill) and Rayford T. Blankenship (herein Blankenship)(herein collectively Additional Respondents), in civil contempt of this Court and to grant other civil relief for having violated and disobeyed, and for continuing to violate and disobey, the temporary injunction Order issued by this Court on

September 28, 1995. In support thereof, Petitioner respectfully shows as follows:

1. On July 20, 1995, Petitioner filed in this Court a Petition for Injunction under Section 10(j) of the National Labor Relations Act, as amended (herein Act), 29 U.S.C. Section 160(j), seeking a temporary injunction order enjoining and restraining Respondent from engaging in certain conduct violative of the Act, and affirmatively directing Respondent to take certain ameleorative action including, inter alia, to bargain, upon request, with District No. 200, International Association of Machinists and Aerospace Workers, AFL-CIO (herein Union), as the exclusive collective-bargaining representative of Respondent's production and maintenance employees employed at its Merrill, Wisconsin facility.

2.(a) On September 28, 1995, District Judge Barbara B. Crabb issued an Opinion and Order in Civil No. 95-C-0524-C granting Petitioner's request for a temporary injunction during the pendency of the administrative litigation now pending before the Board in Cases 30-CA-12645, et al. (attached hereto as Exhibit A);

(b) The Court's Order of September 28, 1995 enjoined and restrained Respondent from a variety of unlawful conduct, including, inter alia,: (1) refusing to meet and bargain with the Union (cease and desist para. 9); (2) withdrawing recognition from the Union (cease and desist

para. 10); (3) dealing directly with employees regarding wages, hours and conditions of employment (cease and desist para. 7); (4) unilaterally changing wages, hours and the terms and conditions of employment (cease and desist para. 8); (5) refusing to recall employees from layoff because of their union activities (cease and desist para. 1); and (6) in any like or related manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act (29 U.S.C. Section 157)(cease and desist para. 11);

(c) The Court's Order of September 28, 1995 also affirmatively ordered Respondent to: (1) on request, bargain with the Union as the exclusive representative of Respondent's production and maintenance employees employed at its Merrill, Wisconsin facility (affirmative para. 1); (2) rescind, and notify all employees that the Respondent has rescinded any rule prohibiting union solicitation and activity on company premises (affirmative para. 2); (3) post copies of the Court's Opinion and Order at the Merrill, Wisconsin facility at all locations where Respondent notices to employees are customarily posted (affirmative para. 3); and (4) within 20 days of the issuance of the Court's Order, file an affidavit from a responsible official setting forth with specificity the manner in which Respondent has complied with the terms of the Order (affirmative para. 4).

3.(a) The Court mailed copies of its September 28, 1995 Opinion and Order on that date to counsel for the parties;

(b) Counsel for the Board received a copy of the Court's September 28, 1995 Opinion and Order on September 29, 1995;

(c) Consistent with U.S. Postal regulations and practice, service of the Court's September 28, 1995 Opinion and Order upon counsel for the Respondent, R. Scott Summers, was presumptively effected on or before October 2, 1995.

4.(a) The Court's temporary injunction Order in Civil No. 95-C-0524-C has been in full force and effect since its issuance on September 28, 1995 and has been binding upon Respondent, its officers, attorneys and agents within the meaning of Rule 65(d) of the Federal Rules of Civil Procedure (Fed. R. Civ. P.) since service was effected upon Respondent's counsel on or before October 2, 1995;

(b) This Court has jurisdiction under Section 10(j) of the Act to enforce the terms and conditions of the Court's injunction Order of September 28, 1995 through appropriate civil contempt proceedings.

5. At all times material herein, and as admitted in the record before the Court on the Petition for a temporary injunction in Civil No. 95-C-0524-C, the following persons have been and continue to be agents of Respondent acting

within the meaning of Fed. R. Civ. P. 65(d) and the scope of their agency authority:

(a) Roger C. Dupke is a co-owner of Respondent and is its President and Treasurer;

(b) Robert E. Hill is a co-owner of Respondent and is its Vice-President and Secretary;

(c) Rayford T. Blankenship is labor representative of Respondent and is the designated bargaining representative of Respondent.

6. Based upon information and belief, Petitioner has and there is clear and convincing evidence that Respondent and the Additional Respondents have disobeyed and failed and refused, and continue to disobey and fail and refuse, to comply with the provisions of the Court's temporary injunction order described above in paragraph 2. More particularly:

(a)(1) On October 2, 1995, by letter to Rayford T. Blankenship, as labor representative of Respondent, the Union requested a resumption of bargaining on behalf of the production and maintenance employees employed by Respondent at its Merrill, Wisconsin facility;

(2) Since October 12, 1995 and continuing to date, Respondent has failed or refused to negotiate in good faith with the Union concerning the wages, hours and other terms or conditions of employment of Respondent's production

and maintenance employees at its Merrill, Wisconsin facility.

(b)(1) On October 2, 3, 4, 5 and 9, 1995, and on various dates in December 1995 known more particularly by Respondent, Respondent laid off involuntarily production and maintenance employees at its Merrill, Wisconsin facility;

(2) The layoffs described above in paragraph 6.(b)(1) are a mandatory subject of collective bargaining within the meaning of Section 8(d) and 8(a)(5) of the Act, 29 U.S.C. Sections 158(d) and 158(a)(5);

(3) The acts and conduct described above in paragraph 6.(b)(1) were implemented unilaterally without prior notice to and bargaining with the Union in good faith to impasse or agreement as to the manner and means of their implementation.

(c)(1) On October 18, 1995, Roger C. Dupke issued a notice to Respondent's Merrill, Wisconsin production and maintenance employees that laid off employees would receive an additional 30 days (to 60 days) of Employer-paid portions of unit employee health insurance premiums;

(2) The Employer health insurance premiums described above in paragraph 6.(c)(1) are a mandatory subject of collective bargaining within the meaning of Section 8(d) and 8(a)(5) of the Act;

(3) The acts and conduct described above in paragraph 6.(c)(1) were implemented unilaterally without

prior notice to and bargaining with the Union in good faith to impasse or agreement as to the manner and means of their implementation.

(d)(1) On October 19, 1995, by letter to Rayford T. Blankenship, the Union requested information regarding the layoffs described above in paragraph 6.(b)(1);

(2) On November 17, 1995, at a negotiating session between the parties, the Respondent, through its labor representative, Rayford T. Blankenship, denied the Union's request for a copy of written information compiled by Respondent regarding the layoffs described above in paragraph 6.(b)(1);

(3) The Respondent has failed or refused since October 19, 1995 to provide the Union with the reasons for the layoffs described above in paragraph 6.(b)(1).

(e)(1) Commencing on October 9, 1995, and on various dates thereafter, Respondent began recalling employees laid off as described above in paragraph 6.(b)(1);

(2) The manner of recall of laid off employees described above in paragraph 6.(e)(1) is a mandatory subject of collective bargaining within the meaning of Section 8(d) and 8(a)(5) of the Act;

(3) The acts and conduct described above in paragraph 6.(e)(1) were implemented unilaterally without prior notice to and bargaining with the Union in good faith

to impasse or agreement as to the manner and means of their implementation.

(f)(1) Subsequent to September 28, 1995 and during the month of October 1995, on a date unknown to Petitioner but known to Respondent and its agents, Respondent caused to be transported an existing employee bulletin board from the east restroom in its Merrill, Wisconsin facility to the employee break area;

(2) Commencing on October 2, 1995 and continuing to date, Respondent has failed or refused to post a copy of the Court's Opinion and Order of September 28, 1995 on its east restroom employee bulletin board and on an employee press room bulletin board at its Merrill, Wisconsin facility.

(g) Since October 2, 1995, Respondent has failed or refused to properly and adequately notify all production and maintenance employees at its Merrill, Wisconsin facility that the Respondent has rescinded any rule prohibiting union solicitation and activity on company premises.

(h)(1) By letter of November 1, 1995, more than twenty (20) days after issuance of the Court's Opinion and Order of September 28, 1995, Respondent by counsel transmitted to the Court the sworn affidavit of Roger C. Dupke of October 31, 1995, concerning Respondent's compliance with the terms of the Court's injunction Order;

(2) In the affidavit described above in paragraph 6.(h)(1), Respondent inaccurately described when certain notices from Respondent manager Dennis Glenn had been posted in Respondent's Merrill, Wisconsin facility and whether the Court's Opinion and Order of September 28, 1995 had been posted at all of Respondent's employee bulletin boards customarily used.

(i)(1) Since October 2, 1995, Respondent has failed or refused to recall from layoff employee George Gaydos;

(2) Respondent has engaged in the conduct described above in paragraph 6.(i)(1) because of George Gaydos' Union membership, activities or support.

(j)(1) On November 22, 1995, Respondent announced that the Merrill, Wisconsin facility would shut down operations from December 21, 1995 through January 1, 1996; as part of such shutdown unit employees with accrued paid vacation days are required to take such vacation days; and unit employees without accrued vacation days are to be laid off without pay;

(2) On November 22, 1995, Respondent announced that unit employee pay for December 31, 1995 and January 1, 1996 would be included in employee paychecks for the period ending December 30, 1995;

(3) The terms or conditions of employment described above in paragraph 6.(j)(1) and (2) are mandatory

subjects of collective bargaining within the meaning of Section 8(d) and 8(a)(5) of the Act.

(4) On November 29, 1995, the Union requested that the Respondent bargain over implementing the terms or conditions of employment described above in paragraph 6.(j)(1) and (2); to date the Respondent has not responded to the Union's bargaining request.

(k)(1) By letter of November 30, 1995, Respondent announced that effective December 4, 1995, work hours per week for production and maintenance employees at its Merrill, Wisconsin facility would be reduced from 40 hours per week to 32 hours per week;

(2) The reduction in unit employee work week hours described above in paragraph 6.(k)(1) is a mandatory subject of collective bargaining within the meaning of Section 8(d) and 8(a)(5) of the Act;

(3) The acts and conduct described above in paragraph 6.(k)(1) were implemented unilaterally without prior notice to and bargaining with the Union in good faith to impasse or agreement as to the manner and means of their implementation.

7. By the acts and conduct described above in paragraph 6, Respondent and the Additional Respondents have failed or refused, and are failing or refusing, to obey and comply with the terms of the Court's injunction Order of

September 28, 1995 in Civil No. 95-C-0524-C and are in civil contempt of said decree. More particularly:

(a) By the acts and conduct described above in paragraph 6.(a)(1) and (2), Respondent and the Additional Respondents have disobeyed and failed to comply with cease and desist paragraphs 9 and 10 and affirmative paragraph 1 of the Court's Order;

(b) By the acts and conduct described above in paragraphs 6.(b)(1), (2) and (3), Respondent and Additional Respondents Dupke and Hill have disobeyed and failed to comply with cease and desist paragraphs 7, 8, 9 and 10 and affirmative paragraph 1 of the Court's Order;

(c) By the acts and conduct described above in paragraphs 6.(c)(1), (2) and (3), Respondent and Additional Respondents Dupke and Hill have disobeyed and failed to comply with cease and desist paragraphs 7, 8, 9 and 10 and affirmative paragraph 1 of the Court's Order;

(d) By the acts and conduct described above in paragraphs 6.(d)(1), (2) and (3), Respondent and the Additional Respondents have disobeyed and failed to comply with cease and desist paragraphs 9 and 10 and affirmative paragrpah 1 of the Court's Order;

(e) By the acts and conduct described above in paragraphs 6.(e)(1), (2) and (3), Respondent and Additional Respondents Dupke and Hill have disobeyed and failed to

comply with cease and desist paragraphs 7, 8, 9 and 10 and affirmative paragraph 1 of the Court's Order;

(f) By the acts and conduct described above in paragraphs 6.(f)(1) and (2), Respondent and the Additional Respondents have disobeyed and failed to comply with affirmative paragraph 3 of the Court's Order;

(g) By the acts and conduct described above in paragraphs 6.(g), Respondent and Additional Respondents Dupke and Hill have disobeyed and failed to comply with affirmative paragraph 2 of the Court's Order;

(h) By the acts and conduct described above in paragraphs 6.(h)(1) and (2), Respondent and Additional Respondents Dupke and Hill have disobeyed and failed to comply with affirmative paragraph 4 of the Court's Order;

(i) By the acts and conduct described above in paragraphs 6.(i)(1) and (2), Respondent and Additional Respondents Dupke and Hill have disobeyed and failed to comply with cease and desist paragraphs 1 and 11 of the Court's Order;

(j) By the acts and conduct described above in paragraphs 6.(j)(1), (2), (3) and (4), Respondent and the Additional Respondents have disobeyed and failed to comply with cease and desist paragraphs 7, 8, 9 and 10 and affirmative paragraph 1 of the Court's Order;

(k) By the acts and conduct described above in paragraphs 6.(k)(1), (2) and (3), Respondent and Additional

Respondents Dupke and Hill have disobeyed and failed to comply with cease and desist paragraphs 7, 8, 9 and 10 and affirmative paragraph 1 of the Court's Order.

WHEREFORE, Petitioner respectfully prays for the following:

1. That the Court issue an order causing this Petition, its exhibits, attachments, affidavits and accompanying Memorandum of Points and Authorities, to be served upon Respondent and each of the Additional Respondents, individually, in an appropriate manner under the Federal Rules of Civil Procedure, and that proof of such service be given to the Court;

2. That the Court issue an order directing Respondent and each of the Additional Respondents, individually, to file with the Court and serve upon Petitioner, by a date certain, answers to this Petition, specifically admitting or denying, or meeting by affirmative defense, each and every allegation of this Petition, and to file with the Court and serve upon Petitioner, by a fixed date, counter affidavits or declarations in support of any such denials or affirmative defenses;

3. That the Court issue an order directing Respondent and the Additional Respondents to appear before this Court at a time and place to be fixed by the Court, and show cause, if any there be, why said Respondent and Additional

Respondents should not be adjudged in civil contempt for disobeying and refusing to comply with the Court's injunction Order of September 28, 1995;

4. That upon return of said order to show cause, and after a hearing on the merits of this Petition, Respondent and the Additional Respondents should be adjudged in civil contempt of the Court's September 28, 1995 injunction Order and that the Court issue the following purgation orders:

(a) That Respondent Wire Products Manufacturing Corporation and the Additional Respondents in Contempt, Roger C. Dupke, Robert E. Hill, jointly and severally, shall:

(1) Fully comply with all the terms and provisions of the Court's September 28, 1995 injunction Order;

(2) Within three (3) business days after service of the Court's contempt purgation order, recognize in writing the Union, District No. 200, International Association of Machinists and Aerospace Workers, AFL-CIO, as the exclusive collective-bargaining representative in the appropriate unit described in the Court's Order of September 28, 1995 and commence bargaining with the Union in good faith at reasonable times concerning said employees' wages, hours and other terms and conditions of employment, including the need for and manner of implementing any employee layoffs, plant shutdowns, reduction in work hours and/or the manner of

recalling employees from layoff and restoring normal employee work hours;

(3) Notify by individual writing all unit employees that the Respondent has rescinded any rule prohibiting union solicitation and activity on company premises;

(4) Restore the east restroom employee bulletin board in its Merrill, Wisconsin facility as it existed on September 28, 1995 and post thereon a copy of the Court's Opinion and Order of September 28, 1995; post a copy of such opinion and order on the press room employee bulletin board; post a copy of the Court's contempt opinion and purgation order at all three customary bulletin board locations, i.e., east restroom, press room and near the employee time clock; maintain all such postings while the Court's Order of September 28, 1995 is outstanding, free from all obstructions and defacements; and grant to agents of the Board reasonable access to its Merrill, Wisconsin facility to monitor this posting requirement;

(5) Mail to their known address or deliver personally to all unit employees employed at the Merrill, Wisconsin facility as of July 20, 1995, copies of the Court's September 28, 1995 injunction Order and the Court's contempt opinion and purgation order;

(6) Within three (3) business days of service of the Court's contempt purgation order, reinstate to their former jobs all employees who have been improperly laid off under

the terms of the Court's Order since October 2, 1995, via a normal layoff or plant shutdown, who have not yet been recalled; after computation, make all improperly laid off employees whole by paying to them net backpay, plus interest normally charged in Board proceedings, for all lost wages; in the event that the parties cannot agree on the amounts owed, the Court shall set the matter for a supplemental hearing;

(7) Immediately restore the unit employees to a 40 hour work week, and maintain this schedule until the Respondent has bargained with the Union in good faith to an agreement or impasse concerning any reduction in the work week; after computation, make whole all unit employees who have lost wages as a result of the unilateral reduction in the work week by paying to them net backpay, plus interest normally charged in Board proceedings, for all lost wages; in the event the parties cannot agree on the amounts owed, the Court shall set the matter for a supplemental hearing;

(8) Immediately reinstate employee George Gaydos to his former position or a substantially equivalent position; after computation, make Glados whole by paying to him all lost wages that he suffered as a result of the Respondent's refusal to recall him from layoff, plus interest normally charged in Board proceedings; in the event that the parties cannot agree upon the amount owed, the Court shall set the matter for a supplemental hearing;

(9) Promptly provide the Union, in writing, with all requested relevant information not yet provided concerning the layoff and recall of unit employees commencing in September 1995;

(10) Within ten (10) days after service of the Court's contempt purgation order, file with the Court and serve a copy upon Petitioner, a sworn affidavit by a responsible official of Respondent, and by each individual Additional Respondent Dupke and Hill, setting forth with specificity the manner in which each Respondent has complied with the terms of the Court's contempt purgation order, including the exact manner and location in Respondent's Merrill, Wisconsin facility of posting the required material and the manner of mailing or personally serving the required documents; and

(11) Pay to the Board compensatory damages for all the costs and expenditures incurred in the investigation and prosecution of this contempt proceeding; these costs shall include attorneys fees of Board personnel; in the event that the parties cannot agree upon the amount owed, the Court shall set the matter for a supplemental hearing.

(b) That Additional Respondent Rayford T. Blankenship shall:

(1) Fully comply with all the terms and provisions of the Court's September 28, 1995 injunction Order;

(2) Within three (3) business days after service of the Court's contempt purgation order, recognize in writing the Union, District No. 200, International Association of Machinists and Aerospace Workers, AFL-CIO, as the exclusive collective-bargaining representative in the appropriate unit described in the Court's Order of September 28, 1995 and commence bargaining with the Union in good faith at reasonable times concerning said employees' wages, hours and other terms and conditions of employment, including the need for and manner of implementing any employee layoffs, plant shutdowns, reduction in work hours and/or the manner of recalling employees from layoff and restoring normal employee work hours;

(3) Restore the east restroom employee bulletin board in Respondent Wire Products Manufacturing Corporation's Merrill, Wisconsin facility as it existed on September 28, 1995 and post thereon a copy of the Court's Opinion and Order of September 28, 1995; post a copy of such opinion and order on the press room employee bulletin board; post a copy of the Court's contempt opinion and purgation order at all three customary bulletin board locations, i.e., east restroom, press room and near the employee time clock; maintain all such postings while the Court's Order of September 28, 1995 is outstanding, free from all obstructions and defacements; and grant to agents of the

Board reasonable access to its Merrill, Wisconsin facility to monitor this posting requirement;

(4) Promptly provide the Union, in writing, with all requested relevant information not yet provided concerning the layoff and recall of unit employees commnecing in September 1995; and

(5) Within ten (10) days after service of the Court's contempt purgation order, file with the Court and serve a copy upon Petitioner, a sworn affidavit setting forth with specificity the manner in which Additional Respondent Blankenship has complied with the terms of the Court's contempt purgation order, including the exact manner and location in Respondent's Merrill, Wisconsin facility of posting the required material.

5. That to further assure future compliance with the Court's contempt purgation order and to prevent further breaches of the Court's September 28, 1995 injunction Order, the Court should impose suspended compliance fines against each of the Respondents in the following amounts:

Wire Products Manufacuring
Corporation - $50,000 (fifty thousand dollars)
Roger C. Dupke - $10,000 (ten thousand dollars)
Robert E. Hill - $10,000 (ten thousand dollars)
Rayford T. Blankenship - $10,000 (ten thousand dollars)

Such fines fines should be suspended upon future compliance with the Court's injunction Order of September 28, 1995 and the contempt purgation order. Upon the failure of

Respondent or the Additional Respondents in Contempt to comply with any of the terms of the purgation order, or upon further breach of the Court's September 28, 1995 injunction Order by any of them, the Court should, upon motion of Petitioner, rescind the suspensions and impose the stated fines upon the appropriate Respondent(s).

6. That upon the failure of Respondent and/or any of the Additional Respondents in Contempt to fully purge themselves of civil contempt, the Court should, upon motion of Petitioner, cause a writ of body attachment to be issued for the persons of Roger C. Dupke, Robert E. Hill and/or Rayford T. Blankenship, which will incarcerate Messrs. Dupke, Hill and/or Blankenship until such time as Respondent and the Additional Respondents have completely purged themselves of their contumacious conduct, or until the expiration of the Court's September 28, 1995 injunction Order, whichever occurs sooner.

7. That the Court order any further relief or procedure of a remedial nature that the Court deems "just and proper" to coerce future compliance with the terms of the Court's injunction Order of September 28, 1995.

8. That the Court grant expedited consideration to this Petition consistent with 28 U.S.C. Section 1657(a) and the Congressional intent underlying Section 10(j) of the Act.

Respectfully submitted this __ day of December, 1995.

APPENDIX R

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 01-62 **May 10, 2001**

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

FROM: Richard A. Siegel, Associate General Counsel

SUBJECT: Use of Special Informal Settlement Language in Cases with Outstanding Section 10(j) - 10(l) Injunctions

From time to time, cases in which the Board has obtained interim Section 10(j) or 10(l) relief are subsequently settled by an informal settlement agreement. This Memorandum provides revised settlement language that should be used in such cases to avoid any questions that the injunction continues in effect during the compliance period. Use of this language will insure that there is no procedural impediment to instituting proceedings for contempt of the injunction if a respondent fails to comply with the settlement.

Section 10(j) and 10(l) of the Act permit the Board to obtain temporary injunctive relief to remedy unfair labor practices pending the entry of the Board's final remedial order. It is well settled that any Section 10(j) or 10(l) injunctive order terminates by operation of law upon the Board's final disposition of a case.[1] We would normally take the position that the closing of a case on compliance, rather than execution of a settlement agreement, is the more accurate time for determining that a settled case has been "finally disposed of."

The language of the standard form informal settlement agreement currently provides, however, that approval of the settlement agreement constitutes withdrawal of the complaint. This provision creates the potential for a

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[1] See Sears, Roebuck & Co. v. Carpet, Linoleum, etc. Local Union No. 419, 397 U.S. 655 (1970) (final decision of Board in ULP proceeding ends 10(l) jurisdiction); Levine v. Fry Foods, Inc., 596 F.2d 719 (6th Cir. 1979) (same principle under Section 10(j)); Barbour v. Central Cartage Co., 583 F.2d 335 (7th Cir. 1978) (same); Johansen v. Queen Mary Restaurant Corp., 522 F.2d 6 (9th Cir. 1975) (same).

respondent to conclude that the case has been disposed of with the execution of the settlement and that the injunction thereupon expires by operation of law. Such an interpretation could interfere with our ability to institute proceedings for contempt of the injunction based on continued misconduct during the compliance period, even if such action would constitute a breach of the settlement agreement sufficient to justify setting aside the agreement and litigating the unfair labor practice case.

Accordingly, to preserve the Board's authority to seek contempt sanctions under the 10(j) or 10(l) decree, and to avoid a controversy over the continued viability and enforceability of the outstanding 10(j) or 10(l) injunction during the compliance period of the settlement, the Region should modify the language of the standard form Board settlement agreement to make it perfectly clear that the respondent's entering into the settlement will not result in the withdrawal of the ULP complaint, dismissal of the charge or the vacating of the 10(j) or 10(l) injunction. Rather, by use of the special language set forth infra, the Region will clearly put the respondent on notice that the ULP complaint will be withdrawn and/or the charge will be dismissed only after the case is closed on compliance and that the 10(j) or 10(l) decree will remain in effect and enforceable as long as the complaint is outstanding or the charge still pending. This will permit the Board to initiate contempt proceedings before the district court, when otherwise warranted, where the misconduct takes place prior to the close of the compliance process.

Thus, when informally settling the underlying administrative case where the Board has obtained a Section 10(j) or 10(l) injunction, the Region should modify the standard informal settlement agreement by substituting, for the final sentence in the paragraph "Refusal to Issue Complaint," the following:

> The Complaint and any Answer(s) in [the captioned administrative cases and numbers] shall be withdrawn only upon closing of these matters on compliance. The Respondent agrees not to move to vacate, modify, dissolve, clarify or alter the injunction decree in [caption and case number of the Section 10(j) or 10(l) decree] on the basis that this Settlement Agreement has been reached. The closing of these matters on compliance will be considered the final adjudication of these cases before the Board for the purposes of [caption and case number of the Section 10(j) or 10(l) decree]. Until these matters have been closed on compliance, the injunction in [caption and case number of the Section 10(j) or 10(l) decree] will continue in full force and effect for all purposes.

If a Section 10(l) decree is obtained prior to the issuance of the ULP complaint, the special language of the settlement should be modified to provide

that the dismissal of the charge will be held in abeyance until the case closes on compliance.

The Regions are instructed to seek such special language in all cases where respondents are prepared to enter into informal settlements after the entry of Section 10(j) or 10(l) injunctions. The Regions should continue to use established criteria in deciding whether a particular case can be adjusted through an informal settlement agreement. See Casehandling Manual (Part One), Section 10140.2. If a respondent is unwilling to accept the special language described supra, the Region should consult with the Injunction Litigation Branch.

Any questions concerning this matter should be addressed to your Assistant General Counsel or Deputy.

/s/
R. A. S.

cc: NLRBU

Release to Public

MEMORANDUM OM 01-62

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June 2001

APPENDIX S

APPENDIX S

[The substance of this section exempt from disclosure pursuant to Exemptions 5, attorney work product, 2, and 7(E), but disclosed at the discretion of the General Counsel]

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

HUGH FRANK MALONE, Regional Director of Region 15 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, Petitioner, v. BEAIRD INDUSTRIES, INC., Respondent.	CIVIL ACTION NO.

Model

STIPULATION AND ORDER CONTINUING CASE
UNDER 29 U.S.C. SECTION 160(j)

IT IS HEREBY STIPULATED AND AGREED by and between the Petitioner, Hugh Frank Malone, Regional Director of Region 15 of the National Labor Relations Board, for and on behalf of the National Labor Relations Board ("the Board") and the Respondent, Beaird Industries, Inc. ("the Company"), by their respective attorneys and subject to the approval of the Court, that:

1. On [date], after securing authorization from the Board, the Petitioner, for and on behalf of the Board, filed a petition with this Court pursuant to Section 10(j) of the National Labor

Relations Act, 29 U.S.C. Section 160(j), seeking a temporary injunction against the Company, pending the final administrative disposition of certain unfair labor practice charges now pending before the Board, from violating Section 8(a)(1)[, (3) and (5)] of the Act, 29 U.S.C. Section 158(a)(1)[,(3) and (5)].

2. In consideration of the following undertakings of the Company, the Board agrees that the hearing before the Court on this Petition [now scheduled for {date}]shall be postponed indefinitely and that this cause of action shall be placed on the Court's inactive docket.

3. The parties further agree that the Company, pending the Board's final administrative adjudication of NLRB Cases 15-CA-11334-1, et al., will cease and desist from:

(a) Failing or refusing to recognize the United Automobile, Aerospace and Agricultural Implement Workers of America ("the Union") as the exclusive collective-bargaining representative of its employees in the appropriate unit, of which the Union was certified as the exclusive bargaining representative on March 30, 1990;

(b) Failing or refusing to meet and bargain in good faith with the Union upon request;

(c) Failing or refusing to provide relevant information requested by the Union; and

(d) In any other manner failing or refusing to recognize and, upon request, bargain in good faith with the Union as the

exclusive collective-bargaining representative of its employees in the unit of which the Union was certified as the exclusive bargaining representative on March 30, 1990.

4. The parties further agree that the Company will affirmatively continue, pending administrative completion of NLRB Cases 15-CA-11334-1, et al., to engage in the following affirmative conduct:

(a) Recognize and, upon request, meet and bargain in good faith with the Union as the exclusive collective-bargaining representative of its employees in the unit of which the Union was certified as the exclusive bargaining representative on March 30, 1990; and

(b) Promptly provide the Union with all requested information relevant to bargaining.

5. The parties further agree that if, upon investigation, the Board concludes that there is [reasonable cause to believe][a likelihood of success in demonstrating][1] that the Company, after the date of this stipulation, has resumed any of the acts or conduct described in paragraph 3, above, or failed to perform any of the acts or conduct set out in paragraph 4, above,

(a) the Board shall by motion apply to this Court for, and be granted, notwithstanding any local rule of this Court, an

[1] Choose the language appropriate to the 10(j) standards in the applicable circuit.

expedited hearing to be conducted no less than seven (7) days after said motion is filed, for the purpose of determining whether such [reasonable cause][likelihood of success][2] exists that the Company has failed to comply with the undertakings described in paragraphs 3 or 4, above; and

(b) if the Court concludes that such [reasonable cause][likelihood of success][3] as alleged by the Board does exist, the Company shall not contest that interim injunctive relief is otherwise just and proper and the Court shall enter a temporary injunctive order to require the Company, pending the Board's final administrative adjudication of NLRB Cases 15-CA-11334-1, et al., to cease and desist from the conduct as described in paragraph 3, above, and to comply with the affirmative conduct described in paragraph 4, above.

6. Unless the provisions of paragraph 5, above are invoked by the Board, this case shall remain on the inactive docket of the Court pending the Board's final administrative adjudication of NLRB Cases 15-CA-11334-1, et al. After final disposition of these unfair labor practice cases, currently pending before the Board, the Board shall cause this proceeding, including any injunctive order(s) issued by the Court pursuant to the provisions of paragraph 5, above, to be dismissed with prejudice and without costs to either party.

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[2] See fn. 1, ante.

[3] See fn. 1, ante.

DONE at New Orleans, Louisiana on the date set forth below:

_____	_____
[Name]	[Name]
Counsel for Petitioner	Counsel for Respondent
[Address]	[Address]

Dated at _____
this ___ day of _____, 1995

APPROVED AND SO ORDERED this ___ day of _____, 1995.

_____
Judge [name]
UNITED STATES DISTRICT COURT