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Injunctive Relief and the NLRB

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HISTORY AND PROCEDURE

Section 8(b)(4) of the National Labor Relations Act was originally enacted in 1947 as one of the Taft-Hartley amendments to the Act. It proscribes strikes and other union pressure in furtherance of secondary boycotts and jurisdictional disputes which are engaged in to compel an employer or self-employed person to join a labor organization, or in certain limited instances, to compel an employer to recognize the union. Concurrently with the enactment of section 8(b)(4), Congress in section 10(1) of the Act directed the National Labor Relations Board to seek appropriate injunctive relief in the United States district courts during the pendency of litigation before the Board concerning alleged violations of section 8(b)(4); and in section 10(j) empowered the Board to seek pendente lite relief against all other types of unfair labor practices, whether committed by an employer, labor union, or both.

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The reasons for the enactment of sections 10(1) and 10(j) were cogently stated in the Senate report on the bill which became the Taft-Hartley Act:

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

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

Experience under the National Labor Relations Act has demonstrated that by reason of lengthy hearing and litigation enforcing its orders, the Board has not been able in some instances to correct unfair labor practices until after substantial injury has been done. Under the present act the Board is empowered to seek interim relief only after it has filed in the appropriate circuit court of appeals its order and the record on which it is based. Since the Board's orders are not self-enforcing, it has sometimes been possible for persons violating the act to accomplish their unlawful objective before being placed under any legal restraint and thereby to make it impossible or not feasible to restore or preserve the status quo pending litigation.

In subsections (j) and (l) to section 10 the Board is given additional authority to seek injunctive relief. By section 10(j), the Board is authorized, after it has issued a complaint alleging the commission of unfair labor practices by either an employer or a labor organization or its agent; to petition the appropriate district court for temporary relief or restraining order. Thus the Board need not wait if the circumstances call for such relief,
until it has held a hearing, issued its order, and petitioned for enforcement of its order.4

In 1959 Congress enacted the Landrum-Griffin amendments to the Act, which inter alia, closed certain "loopholes" in section 8(b)(4), prohibited so-called "hot cargo" agreements, with certain exceptions in the construction and garment industries (section 8(e)), and established a comprehensive scheme governing recognition and organizational picketing (section 8(b)(7)). The mandatory injunction provisions of section 10(1) were extended to cases arising under sections 8(e) and 8(b)(7).5 Sections 10(j) and 10(1) in their present form provide as follows:

(j) 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 district court of the United States . . . 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.

(1) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of

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5 Senator Goldwater noted that picketing requires the same sanctions as secondary boycotts, if its use is to be curtailed because like secondary boycotts, its prolonged use forces the employer to go out of business or his employees to join the union. 105 Cong. Rec. 5959 (1959); 2 Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 1192 (1959).
the Board, petition any district court of the United States . . . within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: Provided further, that no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: . . . Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: . . . In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b) (4) (D).8

The "slow procedure" of litigation referred to in the foregoing Senate report normally contemplates the filing of an unfair labor practice charge and its investigation by a regional office of the Board; issuance of a complaint by the regional office when the charge has merit; a hearing before a trial examiner of the Board, followed by the issuance of trial examiner's decision and the filing of exceptions to that decision; and the issuance of the Board's decision and order in the case. The Board order, however, carries no sanctions unless and until it is enforced by a court of appeals. As noted in the Senate report, the Wagner Act

8 61 Stat. 149 (1947), as amended, 73 Stat. 544 (1959), 29 U.S.C. §§ 160(j) (1) (1964). The last sentence of section 10(1) takes cognizance of the unique procedure involved in jurisdictional dispute cases. Where the parties to the dispute have not adjusted, or agreed upon methods for the voluntary adjustment of the dispute, the Board's regional officer, upon determining that there is reasonable cause to believe that a violation has been committed, will not initially issue a complaint, but will set the matter down for hearing in order that the Board on the record of that hearing, may first resolve the dispute out of which the alleged unfair labor practice arose. Appropriate injunctive relief is mandatory, as in other cases covered by section 10(1). See, e.g., Local 450, Operating Engineers v. Elliot (Sline Indus. Painters), 256 F.2d 630 (5th Cir. 1958).
empowered the Board to seek interim injunctive relief only after it had petitioned the court of appeals for enforcement of its final order in the case.

Since 1947 the district courts have granted more than 900 injunctions pursuant to section 10(1) and more than 80 pursuant to section 10(j). In hundreds of other cases, most of which involved violations covered by section 10(1), the filing of a petition for an injunction has resulted in the cessation of the alleged unfair labor practices without the necessity for issuance of an injunction order. One judge was moved to quote a statement to the effect that the lengthy process of litigation before the Board means that "apart from the cases being conducted under the shelter of a preliminary injunction, the ultimate decision almost never makes any practical difference to the labor relations between the parties." Of course time is not of the essence in every case, and the Board's ultimate decision and order may effectively remedy the unfair labor practices found and govern future relations between parties involved. However, the interim injunction is undoubtedly an effective instrument in aid of the Board's jurisdiction.

Section 10(1) directs that the investigation of unfair labor practice charges covered by that section shall be made forthwith and given priority treatment; and that "the officer or regional attorney to whom the matter may be referred" shall petition for an injunction if after the investigation he has reasonable cause to believe such charge is true and that a complaint shall issue. Whether the conduct of a preliminary investigation is a jurisdictional prerequisite to the granting of an injunction, and whether the petitioner's subjective determination that the charge is meritorious is a proper subject for inquiry in the injunction proceeding, are issues which in the past were the subjects of continuing litigation resulting in conflicting deci-

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7 NLRB v. Superior Fireproof Door & Sash Co., 289 F.2d 713, n.6 (2d Cir. 1961) (J. Friendly).
However, these issues were resolved in the negative and apparently put to rest by a trio of appellate decisions.

In *Calumet Contractors*, the Seventh Circuit upheld a district court's refusal to compel Board agents to testify concerning the conduct or extent of the preliminary investigation, or concerning the decisional processes pursuant to which an injunction was sought. The appeals court observed:

It is our opinion that the scope, conduct or extent of the preliminary investigation are not matters relevant or material for consideration on the issue to be adjudicated on hearing of a Section 10(1) petition, i.e., whether reasonable cause exists to believe a violation has occurred. This issue is to be resolved by the evidence adduced by the Board in open court to sustain its petition. The Board is enjoined to make a preliminary investigation but the adequacy of the investigation is judicially tested only by the Board's subsequent ability to sustain its initial determination that the investigation disclosed reasonable cause to believe that a violation occurred.

The First Circuit arrived at a similar conclusion in the *Winwake* decision. That court further held that proceedings under section 10(1) were exempt from the provisions of the Norris-LaGuardia Act.

Ordinarily the petition for an injunction is filed in the name of the director of the regional office wherein the charge was filed, acting on behalf of the Board. However, the regional director's authority to institute injunction proceedings is subordinate to that of the General Counsel of the Board, who pursuant to section 3(d) of the Act exer-

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9 McLeod v. Teamsters Local 239 (Abbey Auto Parts Corp.), 330 F.2d 108 (2d Cir. 1964); Building Trades Council v. Alpert (Winwake, Inc.), 302 F.2d 594 (1st Cir. 1962); Madden v. Hod Carriers Local 41, 277 F.2d 688 (7th Cir.), cert. denied, 364 U.S. 863 (1960). Compare Sperandeo v. Milk Drivers Union (Sealtest Foods), 334 F.2d 381 (10th Cir. 1964), discussed infra.
10 Madden v. Hod Carriers Local 41, 277 F.2d 688 (7th Cir. 1960).
11 Id. at 693.
12 Building Trades Council v. Alpert, 302 F.2d 594 (1st Cir. 1962).
cises general supervision over regional officers and has final authority with respect to the investigation of charges and issuance and prosecution of complaints. Thus the decision to seek a temporary injunction under section 10(1) may have been made in the regional office, or by the regional director in consultation with the office of the General Counsel, or by the General Counsel in reversing or disagreeing with a regional director's determination that no injunction be sought. In Abbey Auto Parts, the second circuit rejected a contention that the district court erred in granting an injunction because the General Counsel had administratively reversed the regional director's determination not to issue a complaint in the case; hence the "officer or regional attorney" did not actually believe that an unfair labor practice had been committed. The appeals court held that section 10(1) did not require that the regional director must make a determination of reasonable cause wholly on the basis of his own independent judgment, without the direction of his superior officer. If the Union felt that the issuance of an injunction was unwarranted, it should have attempted to prove that reasonable cause did not exist, rather than seeking to psychoanalyze the regional director in an effort to demonstrate that he didn't really believe what he had alleged in his petition.

Applications by the Board for interim injunctive relief may be filed in any federal district wherein the respondent union or employer resides or transacts business, or wherein the alleged unfair labor practices have occurred; notwithstanding an apparent preference on the part of district court judges that these proceedings be conducted in the latter where practicable. Sections 10(j) and 10(1)

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25 Id. at 112. Section 10(j) empowers the five member Board rather than the Board's regional officer, to seek interim injunctive relief. However, these proceedings are also filed in the name of the regional director, acting on behalf of the Board. The regional director need not plead or prove that the Board authorized him to petition for an injunction, as a government official is entitled to a presumption of regularity in his official acts. See Fusco v. Kaase Baking Co., 205 F. Supp. 465 (N.D. Ohio 1962).
are thus exceptions to the general venue statute governing civil actions in the federal district courts. However, the proceeding is subject to the power of the district court, for the convenience of parties and witnesses and in the interest of justice, to transfer a civil action to any other district or division where it might have been brought.

In practice, upon the filing of the petition for an injunction, the matter is brought on for hearing for the issuance of an order directing the respondent to show cause why the injunction should not be granted. In some courts the petition is set down on the motion calendar. The hearing date, depending upon the court's docket, is usually from four to ten days after the petition is filed. To help frame the issues, the order to show cause usually directs that the respondent file an answer shortly before the hearing. Sections 10(j) and 10(l) thus provide a method of procedure which takes precedence over the provisions of the Federal Rules of Civil Procedure relating to commencement of actions and pleadings. To follow these provisions, with all their attendant delays, would frustrate the congressional intent to provide for speedy injunctive relief. The same consideration, namely the need for speedy injunctive relief, generally governs the applicability of the Federal Rules concerning depositions and discovery. The district courts ordinarily will not permit the taking of depositions, interrogatories, or other discovery which would preclude a swift hearing on the petition for an injunction.

Section 10(l) empowers the district court to grant a temporary restraining order without notice, effective for no longer than five days, upon an allegation by the regional director that substantial and irreparable injury to the charging party will otherwise be unavoidable. The regional director may apply for a temporary restraining order upon

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19 See supra note 4.
the filing of the petition or at any subsequent stage in the proceedings. The term "without notice" has been judicially construed to mean without notice and an opportunity to be heard on the petition; hence the temporary restraining order may be extended without the consent of the respondent once the hearing has commenced.\textsuperscript{21} Temporary restraining orders under section 10(j) are apparently subject to the 10 day limitation specified in Rule 65 of the Federal Rules of Civil Procedure. Although section 10 (l) refers to injury to the charging party, district courts have taken into consideration threatened injury to other persons involved, and to the general public, when issuing temporary restraining orders. Illustrative of situations in which restraining orders have been granted are those which involve violence or mass picketing, or a strike which adversely affects national defense or operation of an industry or facility deemed vital to the public welfare; a work stoppage which threatens the loss of perishable goods; or a strike which will result in insolvency; or substantial financial loss to the employer involved; or the irreparable loss of a business relationship.

The hearing on an application for an injunction usually entails the taking of oral testimony, although some courts have directed that these proceedings be submitted on affidavits. No appellate court has squarely considered the question of whether the Board or the respondent is entitled, as a matter of right, to present oral testimony in these proceedings.\textsuperscript{22} The necessity for oral testimony, including cross-examination, would seem to turn on the extent to which the district court is called upon to resolve issues of credibility.\textsuperscript{23}

The courts are in agreement that as in the case of traditional equity practice with respect to interlocutory relief,

\textsuperscript{22}A thorough discussion of this issue is contained in a recent district court decision. See Kennedy v. Sheet Metal Workers, Local 108 (Reliable Steel Supply Co.), 68 L.R.R.M. 3058, 3070-74 (C.D. Cal. 1968).
\textsuperscript{23}See text accompanying notes 29-32, infra.
the issue before the district court in these proceedings is whether there is reasonable cause to believe that a violation of the Act, as charged, has been committed, and what, if any, injunctive relief is just and proper in the circumstances of the case. However, the courts have differed in their application of the "reasonable cause" test; and the "just and proper" criteria has been the subject of continual litigation, particularly with respect to the Board's discretion to seek injunctive relief under section 10(j).

The "Reasonable Cause" Test

The Third Circuit Court of Appeals has defined the reasonable cause standard and set forth the rationale for that standard:

The Board need not show that an unfair labor practice has been committed, but need only demonstrate that there is reasonable cause to believe that the elements of an unfair labor practice are present. Nor need the Board conclusively show the validity of the propositions of law underlying its charge; it is required to demonstrate merely that the propositions of law which it has applied to the charge are substantial and not frivolous. . . .

If, in a Section 10(1) proceeding, a district court or a court of appeals undertook to finally adjudicate such questions it would not be acting consistently with the congressional policy underlying Section 10(1). That Section's usefulness as a tool with which the status quo may be preserved pending final adjudication would be diminished insofar as the Board would be required to finally litigate questions of substance at a preliminary stage. Moreover, the court would not have the benefit of the Board's opinion on questions of fact and novel questions of labor law when making its decision.

24 Every court of appeals, with the exception of the District of Columbia Circuit, has reviewed the granting or denial of a section 10(j) or 10(1) injunction. All have held that the prerequisite to an injunction is a finding of reasonable cause and that relief is just and proper. The Supreme Court has not reviewed any of these proceedings, but has held that the denial of a 10(1) injunction was not a decision on the merits of the case, and therefore was not res judicata as to the issues involved. NLRB v. Denver Bldg. & Constr. Trades Council (Gould & Preisner), 341 U.S. 675, 681-82 (1951).
Thus, the court would, to some extent, usurp the Board's function as the primary fact finder in cases arising under the Act and its function as primary interpreter of the statutory scheme.\textsuperscript{25}

There is general agreement that in proceedings of this nature the Board need not adduce evidence to the extent required for enforcement of a Board order after full hearing on the merits; that detailed presentation of evidence in an injunction hearing is neither contemplated by the Act nor necessary in fact.\textsuperscript{26} The \textit{Chicago Calumet Stevedoring} case\textsuperscript{27} illustrates this distinction between injunction and enforcement proceedings. In that case the Seventh Circuit affirmed a district court order which enjoined the International Organization of Masters, Mates and Pilots (MMP) from engaging in an alleged secondary boycott. MMP contended in both the injunction and Board proceedings that it was not a labor organization within the meaning of the Act because its membership was composed of supervisory personnel, and therefore the Board did not have jurisdiction over its activities. The Seventh Circuit rejected this contention in the injunction appeal, holding that the district court properly found reasonable cause to believe that MMP was a labor organization, because the evidence showed that MMP and its affiliated locals had conceded in other cases and pleadings that they were labor organizations. However, when the Board ultimately held MMP to be a labor organization on the basis of prior adjudications, pleadings, admissions and the MMP constitution, the Court of Appeals for the District of Columbia refused to grant enforcement, but instead remanded the case to the Board to ascertain whether rank and file employees were included as members of MMP in substantial numbers or proportion, and whether they participated in MMP in a substantial and meaningful manner.\textsuperscript{28}

\textsuperscript{25}Schauffler v. Local 1291, ILA (Northern Metal Co.), 292 F.2d 182, 187-88 (3d Cir. 1961).
\textsuperscript{26}See, e.g., Douds v. Local 294, Teamsters (Conway's Express), 75 F. Supp. 414 (N.D.N.Y. 1947).
\textsuperscript{27}Madden v. Masters, Mates & Pilots, 259 F.2d 312 (7th Cir.), cert. denied, 358 U.S. 909 (1958).
\textsuperscript{28}Masters, Mates & Pilots v. NLRB, 48 L.R.R.M. 2624 (D.C. Cir. 1960).
In ascertaining whether the elements of an unfair labor practice are present, must the district court resolve issues of credibility raised by conflicting testimony? The question suggests three possible approaches, each of which has obtained some judicial support. The opinion of Judge Larkins in *Johnston v. J. P. Stevens & Co.* implies that the court must resolve issues of credibility in the same manner as any other trier of the facts. In that case the Board sought injunctive relief to compel the company to reinstate 18 employees who were allegedly discriminatorily discharged, and to refrain from unlawfully interfering with the union's efforts to organize the company's plants in Roanoke Rapids, North Carolina. The case was submitted on affidavits, but the court was unable to find reasonable cause to believe that the company engaged in unfair labor practices, in part because the Board's affidavits were substantially refuted by the company's affidavits. However, this approach virtually necessitated the taking of oral testimony, including cross-examination, in order to enable the Board to present a case upon which injunctive relief could be granted.

A diametrically opposite approach was taken by Judge Sarah Hughes in another case in which the Board also sought to reinstate discriminatorily discharged employees and to enjoin employer interference with an organizing campaign. Judge Hughes held that the court, under the Act, was not required to make final or even preliminary findings as to the truth or falsity of the facts alleged in the petition of the Board. This approach suggests that the burden of reasonable cause is met upon the Board's presentation of a prima facie case, and renders the taking of oral testimony unnecessary.

A third approach, and one commensurate with the court's responsibility to act neither as a rubber stamp nor as the "primary fact finder," has attained the widest judicial acceptance. That is, that the court may not resolve conflicting factual evidence and questions of credibility if the Board might reasonably resolve those issues in favor

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of the petitioner. This test would normally warrant the taking of oral testimony, including cross-examination, at least for the purpose of ascertaining whether the evidence adduced in support of the petition for an injunction was inherently incredible or effectively and conclusively refuted by other evidence.

The conclusion that the Board is required to demonstrate merely that the propositions of law which it has applied to the charge are substantial and not frivolous, leaves an apparent gray zone. This writer, and indeed any court, would hesitate to suggest that the General Counsel of the Board ever sought an injunction on the basis of a frivolous proposition of law.

Two district court judges have raised considerations which, if applied to the propositions of law advanced in an injunction proceeding, would impose upon the Board a higher standard than the reasonable cause test. Judge J. Skelly Wright, although conceding that the reasonable cause test applied to the sufficiency of the Board's evidence, stated that this limited statutory jurisdiction "does not blind the court to the fact that it has the most potent weapon in labor management relations in its hands and the First Amendment at its elbow." Noting that there may be some remaining vitality in Thornhill v. Alabama, which would protect non-coercive, peaceful, informational picketing with no substantial side effects, Judge Wright stated that he preferred to construe the proscriptions of the Act so as to avoid enjoining such conduct. Another court, in denying an injunction, cited Supreme Court authority to the effect that section 13 of the Act is a command of Congress to

32 Judge Steel defined a reasonable determination as the antithesis of one which is arbitrary, illogical or irrational. Dooley v. Teamsters Local 107, 192 F. Supp. 193 (D. Del. 1961). On the other hand, Judge Goldsborough commented that "a matter can be logical without being reasonable. Logic is a good servant, but it is a terrible master." Madden v. United Mine Workers, 79 F. Supp. 616, 618 (D.D.C. 1948).
34 310 U.S. 88 (1940).
resolve doubts and ambiguities in favor of an interpretation of the unfair labor practice provisions which safeguard the right to strike as understood prior to passage of the Taft-Hartley Act.\textsuperscript{35}

These considerations—the free speech aspect of picketing, and Congressional intent to preserve the right to strike—if applied to injunction proceedings in the manner suggested in the above opinions, would negate the reasonable cause test with respect to legal issues arising in mandatory injunction actions under section 10(1), as either or both considerations are present to some degree in nearly every alleged unfair labor practice which is subject to the mandatory injunction. Nevertheless, the constitutional power of Congress to proscribe picketing and strikes conducted in furtherance of an object deemed unjustifiable by that body, is well established,\textsuperscript{36} and the intent of Congress to curb the evils it deemed inherent in certain specified strikes, picketing and boycotts, is entitled to at least as much weight as its desire generally to protect the right to strike. While the desire to protect free speech and the right to strike are appropriate considerations when the Board and appellate courts are ultimately resolving issues of statutory interpretation and application of the law, the congressional intent to preserve these issues for orderly determination by the Board through use of the injunction procedure, dictates that in such proceedings the Board need only establish that the propositions of law upon which it relies are reasonable in light of statutory language, legislative history, logic and relevant Board and court decisions.

The limited discretion vested in the district courts by section 10(1) has not precluded some judges from making constructive contributions to the development of labor law. Thus, the "ally" or "struck work" doctrine, as applied to secondary boycott cases under the Act, "had its origin in

\textsuperscript{35} Penello v. Local 59, Sheet Metal Workers (E.I. DuPont), 195 F. Supp. 458 (D. Del. 1961). Section 13 provides: "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

\textsuperscript{36} See Electrical Workers v. NLRB (Samuel Langer), 341 U.S. 694, 705 & n.10 (1951).
a well reasoned opinion by Judge Rifkind in the Ebasco case." 37 Judge Wright's conclusion in the DuPont case, 38 that section 8(b)(4)(D) proscribes only conduct in furtherance of disputes between rival groups of employees and does not extend to claims for work being performed by members of a union which does not dispute the striking union's right to that work, was adopted by the Board in the Safeway case. 39 Similarly, the Board adopted Judge Rayfiel's conclusion that the secondary boycott provisions of the Act did not protect two firms which, although not commonly owned or controlled, had such "identity and community of interests" as would negate the claim that one was neutral as to the other's labor disputes. 40 Judge Wyzanski held that the secondary boycott provision of the Act proscribed appeals (as opposed to threats) only to those individuals who perform manual or clerical services, or minor supervisory functions, and not to those who have power on behalf of their employer to terminate or otherwise control business relations with the primary employer. 41

As the foregoing cases suggest, precedent-making decisions in injunction cases have usually formed the basis for denial, rather than granting, of injunctive relief. This is entirely consistent with the statutory scheme. The propositions of law to be tested are those of the petitioner, and the district courts are not free to seek alternative bases upon which the finding of a violation of the law may be predicated, such as might be suggested by the charging party. To do so would violate the spirit, and probably the letter of the Norris-LaGuardia Act. 42

In *Remington Rand*, the Second Circuit held that the petitioner must demonstrate reasonable cause to believe that the Board will sustain the unfair labor practice charge (because section 10(1) relief is limited to Board adjudication), and reasonable cause to believe that a Board decision finding a violation will be enforced by a court of appeals. The court reversed a district court order enjoining hand-billing of businesses which leased equipment from Rand, with whom the union had its dispute, appealing to the public not to patronize those firms. The court reversed the injunction because recent Board precedents indicated that the Board would not find a violation as alleged by the General Counsel.

However, several decisions at the district court and appellate level have indicated that injunctive relief is not precluded by adverse Board or courts of appeals precedent, so long as the position taken by the General Counsel is inherently reasonable and therefore might ultimately become established law, at the Supreme Court level if necessary. In one case, which arose prior to the Landrum-Griffin amendments, a district court enjoined a union, in furtherance of its dispute with an iron mining company, from picketing to induce railway employees to join its strike. The court noted the anomaly of the General Counsel's requesting an injunction in the face of Board decisions holding that a railway and its employees were not protected by the secondary boycott provisions of the Act. However, the court found that a decision of the Fifth Circuit Court of Appeals, relied upon by petitioner, but contrary to Board law, presented a "sound, realistic and impelling construction of the Act," warranting reasonable cause to believe that railroads fell within the protection of the ban on secondary boycotts. Only two years after the *Remington Rand* decision, a district court in New York was faced with conflicting positions between the Board and the Court of Appeals for the

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45 Id. at 95.
District of Columbia concerning the legality of certain types of contract clauses alleged to be violative of section 8(e), the "hot cargo" provision of the Act. The General Counsel contended, on the basis of the Board precedent, and the district court found, reasonable cause to believe that the clause under attack was unlawful, and enjoined the union from giving effect to that clause. The Second Circuit affirmed the injunction, notwithstanding that the union could have appealed any Board decision finding a violation to the District of Columbia Circuit, which presumably on the basis of its own precedent would have reversed the Board order.46 In another case, involving an alleged jurisdictional dispute, a Delaware district court denied the union's motion to dissolve a section 10(1) injunction because the Board, following its then established precedent, had declined to make an affirmative award of the disputed work, but merely held that the respondent union was not entitled to strike to obtain the disputed work.47 Noting that the Third Circuit had expressly disapproved that practice in prior decisions, the union contended that the injunction should be dissolved because any future Board order in the case, finding a violation, would be unenforceable. However, the district court, notwithstanding the precedent in its own circuit, refused to dissolve the injunction, noting that the issue raised by the conflict between the Board and Third Circuit decisions was pending before the Supreme Court in another case.

The reverse of the coin, that is, Board or court precedent in support of the General Counsel's proposition of law, affords no assurance that a district court will grant an injunction on the basis of that proposition of law. One district court judge refused to enjoin a strike to compel an employer association to enter into an alleged "hot cargo" agreement covering subcontracting of construction work, because he believed that Board precedent holding such con-

duct to be unlawful was contrary to the plain language of the Act.\(^8\) The judge quoted *Norwegian Nitrogen Co. v. United States*,\(^49\) to the effect that "the construction of a new statute by the agency administering it is entitled to 'peculiar weight,'" but that "administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction."\(^50\)

In evaluating the petitioner's legal theories, the district court may take into consideration 1) relevant statutory language; 2) Board and judicial decisions; 3) the legislative history of the Act; and 4) the rules of logic, which become particularly significant when the other factors offer no guidance. When a proposition of law is supported by at least one of these factors, the district court will usually hold for the petitioner unless that factor is clearly outweighed by the other considerations. Thus, in the *DuPont* case,\(^51\) where the petitioner's interpretation of section 8(b)(4)(D), the jurisdictional dispute provision of the Act, was supported by the literal language of that section and by Board precedent, the district court concluded that these factors were outweighed by 1) the language of section 10(k), the companion provision to section 8(b)(4)(D); 2) the rationale of the Supreme Court in the *CBS* case,\(^52\) which although not directly in point, appeared to refute petitioner's interpretation of section 8(b)(4)(D); 3) the apparent irrationality of reaching a section 10(k) determination on the facts of the case; and, 4) legislative history. The court discounted the Board decisions relied upon by the petitioner because they were "pre-*CBS.*"

Perhaps the best illustration of the reasonable cause test as applied to a legal issue may be found in the *Knight Newspapers* case.\(^53\) A Miami local union, in furtherance

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\(^{49}\) 288 U.S. 294 (1933).

\(^{50}\) 207 F. Supp. at 944.


of its dispute with the Miami Herald, picketed the premises of the Detroit Free Press. Both newspapers were owned by the Knight Newspaper chain, though in the form of separate corporate entities. The petitioner contended that the picketing was unlawful because the newspapers were not commonly controlled. The court questioned the applicability of this "common control doctrine" to secondary boycott situations, noting that the concept of neutrality as a condition of an employer's claim to protection from an alleged secondary boycott was supported by court decisions and legislative history, and that Knight Newspapers was clearly not neutral to the dispute between the Miami Herald and the union. The court commented that the reason for the "common control doctrine" was not clear, but that its applicability to secondary boycott situations had been upheld by decisions of the First and Eighth Circuits, and concluded that:

The difficulties involved in reaching coherent interpretations of our labor law are manifest. They ought not to be compounded by requiring the settling of these questions in the context of a hastily called injunction proceeding.

The rule of law relied upon by the petitioner may be questioned, but as it certainly cannot be characterized as unsubstantial or 'frivolous,' it is not for me at this time to pass upon its correctness. . . .

Nevertheless, as the petitioner's view of this unsettled corner of the law is certainly not without merit, nor 'frivolous' or unsubstantial, I must grant the temporary injunction if the evidence adduced indicates that petitioner has reasonable cause to believe that respondent violated the Act as petitioner interprets it.54

The court found on the facts, reasonable cause to believe that the two newspapers were not commonly controlled, and enjoined the picketing.

In the Mack Trucks case,55 the union, in furtherance of a strike against that company, picketed at an entrance which had been marked and set aside for the use of contractors and their employees who were engaged in construc-

54 Id. at 853-54.
tion work on Mack's premises. The petitioner contended that the entrance, which consisted of a dirt road leading across an unfenced field from a street to one of the company's buildings, was a "gate" within the meaning of the "reserve gate" doctrine enunciated by the Supreme Court in the General Electric case,\(^56\) and that the picketing was secondary and therefore unlawful. The court concluded that this legal proposition "may be uncertain when tested by appropriate legal standards," but is not "unreasonable or frivolous . . . since the inferences to be drawn from the decided cases do not completely exclude the possibility that the Board's position is correct."\(^57\) The court further concluded that the rationale of the Phelps Dodge\(^58\) decision, approved by the Supreme Court in General Electric, was consistent with equating "entrance" with "gate," although the entrance in the instant case was not a gate within the generally accepted usage of the term.

The preponderance of authority suggests that in testing the reasonableness of the proposition of law advanced by the petitioner, the district court may take into consideration relevant statutory language, Board and court decisions, legislative history and applicable logic; but that in the absence of a final and binding decision of the Supreme Court, no one factor is decisive. However, the proposition of law is ordinarily deemed substantial if supported by any one of the considerations, unless that proposition is clearly untenable in light of the other considerations. The petitioner ought not to be precluded from obtaining injunctive relief because of an adverse Board or court decision, if there is a reasonable basis for concluding that his position will ultimately become settled law. Every case is potentially a Supreme Court case, and Congress empowered the district courts to grant injunctive relief to preserve the issues for the orderly determination as pro-

\(^{57}\) 201 F. Supp. at 638-39.
\(^{58}\) United Steel Workers v. NLRB, 126 NLRB 1367, aff'd, 289 F.2d 591 (2d Cir. 1961).
vided in the Act, at least during the pendency of litigation before the Board.\textsuperscript{69}

The reasonable cause test applies to all of the legal and factual elements upon which the petitioner premises his conclusion that the Act has been violated, including some which might be deemed jurisdictional. For example, the petitioner need only establish reasonable cause to believe that the employer or employers involved are engaged in commerce or in industry affecting commerce, or meet the Board's self-imposed standards for asserting jurisdiction in a particular case; or that a respondent is a labor organization or the agent of a labor organization within the meaning of the Act.\textsuperscript{60}

The district court ordinarily will not consider issues whose resolution is peculiarly within the discretion of the Board. Thus, in an action to enjoin a strike or related conduct in furtherance of an alleged jurisdictional dispute, the court will not consider the merits of that dispute, except insofar as they bear on the question of whether in fact the union is striking to obtain disputed work; nor whether or not there is satisfactory evidence that the parties have agreed upon a method for the voluntary adjustment of the dispute, which would preclude the Board from determining the merits of that dispute.\textsuperscript{61}

The extent to which the district court may inquire into the validity of a Board-conducted election or of the Board's certification of the results of that election, is not clear. Section 9 of the Act empowers the Board to conduct representation elections and to certify the results thereof. A

\textsuperscript{69}For other cases which illustrate the reasonable cause test as applied to legal issues, see American Fed'n of Television & Radio Artists v. Getreu (L.B. Wilson), 238 F.2d 698 (6th Cir. 1958); McLeod v. Local 32-E, Build. Service Employees (Dutch Lane Apartments, Inc.), 227 F. Supp. 242 (S.D.N.Y. 1944); Getreu v. Armco Steel Corp., 241 F. Supp. 376 (S.D. Ohio 1964).


\textsuperscript{61}See Schauffler v. Local 1291, ILA (Northern Metal Co.), 292 F.2d 182 (3d Cir. 1961); Operating Eng'rs Local 450 v. Elliot (Sline Indus. Painters), 256 F.2d 630 (5th Cir. 1958); Schauffler v. United Ass'n of Journeymen (Frank W. Hake), 218 F.2d 476 (3d Cir. 1955).
Board order certifying the results of an election or any other order entered by the Board in a representation proceeding, is an interim order rather than a final order adjudicating the rights of the parties. Such orders are therefore normally reviewable by a court of appeals only where the dispute concerning the correctness of the certification eventuates in a finding that an unfair labor practice has been committed, as where an employer refuses to bargain with a certified union on the ground that the election was held in an inappropriate bargaining unit, or where a union charged with picketing an employer for recognition or organizational purposes within a year of a Board-conducted election contends that the employer engaged in misconduct which rendered the election invalid. The entire election procedure becomes part of the record upon which the final Board order is based and is then fully reviewable in a court of appeals. The federal district courts have very limited jurisdiction to enjoin the conduct of Board representation proceedings, only when the Board has acted in excess of its delegated powers and contrary to a specific prohibition of the Act, and possibly when the Board has infringed upon a constitutional right.

Some courts have suggested that where a Board certification eventuates in an unfair labor practice charge, and the regional director petitions a district court for injunctive relief pending disposition of that charge by the Board, the district court may pass upon the validity of a Board certification order only to the extent of ascertaining whether the Board had acted within the scope of its statutory powers and whether the election had comported with due process of law. In the New York Shipping Association case, a section 10(j) proceeding, the district court enjoined the union from striking to compel the employer association to bargain for a coastwide unit, although the Board had certified the union as bargaining

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63 Douds v. International Longshoremen's Ass'n, 147 F. Supp. 103 (S.D. N.Y. 1956), aff'd, 241 F.2d 278 (2d Cir. 1957); a similar result was reached in McLeod v. National Maritime Union (Moore McCormack), 157 F. Supp. 691 (S.D. N.Y. 1957).
representative of longshoremen only for the Port of Greater New York. The court assumed that the certification encompassed a unit appropriate for collective bargaining purposes, noting that the sole jurisdiction to review Board representation proceedings lies in the court of appeals, and that it would not usurp that function.

In *Kansas Color Press*, a district court enjoined the union from engaging in recognitional picketing of an employer within one year of a Board-conducted election in which the employees had voted against representation by any union. The union contended that the election was invalid, *inter alia*, because the employer had committed unfair labor practices which affected the outcome of the election. The district court declined to pass upon the validity of the election, except to ascertain that the representation proceeding had accorded with the due process of law. However, the tenth circuit remanded the case to the district court for the purpose of considering the issues raised by the union, at least for the purpose of ascertaining whether there was reasonable cause to believe that the election was valid.*

The conflict between the rationale of the *New York Shipping* case, and the decision of the tenth circuit in *Kansas Color Press*, may be more apparent than real. The Board has wide discretion in determining whether a unit is appropriate for collective bargaining purposes. In the absence of evidence indicating that the Board had abused its discretion by violating a statutory proscription, *e.g.*, by including guards in a unit with other employees, the district court would be warranted in assuming that there was reasonable cause to believe that the certified unit was appropriate. Because of this discretion vested in the Board, district courts have usually refrained from considering issues raised with respect to the appropriateness of a bargaining unit, even in the absence of a Board deter-

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65 356 F.2d 53 (10th Cir. 1966).
66 See Brown v. Pacific Tel. & Tel. Co., 218 F.2d 542 (9th Cir. 1954).
mination. Thus, when the regional director has contended that certain employees were included in a certified bargaining unit, or conversely, that they were not included in a bargaining unit, the courts have acquiesced in that conclusion, for the purposes of an injunction proceeding, because the Board could resolve the matter "with equal propriety" either way. However, where the continuing vitality of a certification has been questioned not because the unit is no longer appropriate for bargaining, but because the certified union has allegedly lost the support of a majority of the employees, or has abandoned its representative status, the district courts have considered such issues in the same manner as any other issue; that is, subject to the reasonable cause test. The reasonable cause test is applicable to any issue raised concerning the validity of a certification, which is not peculiarly within the Board's discretion to resolve, because an injunction order, unlike a Board certification order, has the operative effect of adjudicating the rights of the parties involved, if only temporarily. The district court is therefore warranted in making a preliminary determination with respect to all elements of the petitioner's case before granting injunctive relief.

WHAT IS JUST AND PROPER RELIEF?

Sections 10(j) and 10(l) each empower the district court, upon the filing of the petition, to grant to the Board such temporary relief or restraining order "as it deems just and proper." Neither section defines the term "just and proper." However, most courts are in agreement that the propriety of injunctive relief in these cases turns not upon traditional equity criteria applicable in suits between private parties, but upon the necessity for effectuating the statutory policy.

The weight of judicial authority does not accord with the Tenth Circuit's statement that a section 10(1) proceeding "is an equitable action in which the maxims of equity are fully applicable and under . . . the statute the lower court has discretionary power to issue or deny an injunction." Application of specific maxims of equity has been rejected in both section 10(1) and 10(j) injunction proceedings. In the *Delaware Valley Beer Distributors Association* case, a secondary boycott action, the union by way of affirmative defense contended that injunctive relief should be denied because some of the employer members of the association, with whom the union had its primary dispute, had engaged in inequitable behavior and/or unfair labor practices. The court rejected this defense holding that the clean hands doctrine was not applicable in a proceeding where a government agency was seeking to enforce its order in the public interest. The court noted that in any event the regional director, and not Delaware Valley, was the party of record. In another 10(1) proceeding, a district court rejected the union's contention that the petitioner was tardy in not asserting his rights to injunctive relief promptly after the unfair labor practice charge was filed, because "no laches of a public servant can bar relief in this type of a case." However, the court noted that it might take into consideration any unreasonable delay by the Board in processing the case, when determining whether an injunction should be granted or permitted to remain in effect. Application of the maxim *de minimus non curat lex* was rejected by the Second Circuit in the *Abraham Kaplan* case, when that circuit reversed a district court order refusing to enjoin the ILA from threatening employees represented by the Painters Union in furtherance of ILA's

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69 Sperandeo v. Local 537, Milk Drivers (Sealtest Foods), 334 F.2d 381 (10th Cir. 1964).
72 Douds v. International Longshoremen's Ass'n., 242 F.2d 808 (2d Cir. 1957).
claim for work being performed by those employees, because the district court, *inter alia*, considered the dispute too trivial to warrant an injunction. Similarly, the Ninth Circuit declined to “balance the equities” when it reversed a district court order denying a 10(j) injunction in *Brown v. Pacific Telephone & Telegraph Co.* In that case the Board sought to enjoin the company from refusing to bargain with a union which was the certified bargaining representative for three separate geographical units of maintenance employees, and from merging one of the groups into a plantwide bargaining unit represented by another union. The company contended that it had acted in good faith in reliance upon the language of a Board decision which noted technological and other changes in the company’s operations, and thereby seemed to question the continued appropriateness of the certified units. The company offered to maintain the status quo as of the date the Board issued a supplemental decision indicating that it had not passed upon the appropriateness of the certified units. Commenting upon this argument, Judge Pope stated in a concurring opinion that “[h]owever valid this contention might be were we dealing with private rights in private litigation, I think that since this injunction is sought for the protection of the public interest and in aid of a policy which Congress itself has made plain, the area for the exercise of the traditional discretion not to grant an injunction is much more limited.” The majority opinion noted that lapse of time and good faith were no defense to the employer’s refusal to bargain in the certified units.

The Tenth Circuit’s conclusion in the *Sealtest* case that the maxims of equity were fully applicable in these proceedings, was made in the context of an apparent refusal by the regional director to produce Board records subpoenaed by the respondent union. The regional director had sought to enjoin the union from maintaining and giving

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73 218 F.2d 542 (9th Cir. 1954).
74 Id. at 544.
75 Sperandeo v. Local 537. Milk Drivers (Sealtest Foods), 334 F.2d 381 (10th Cir. 1964).
effect to an alleged "hot cargo" agreement. The union contended that the records were needed to substantiate its defense that the regional director had acted arbitrarily and capriciously in bringing the action. The director moved to quash the subpoena because the records were privileged from disclosure by the Board's rules. The district court denied the motion and directed that the records be produced in camera. The director agreed to this proceeding on the understanding that he could thereafter decline to comply with any order to produce the records in open court, and move to dismiss the case. The court construed this conditional offer as a refusal to comply with its directive, and dismissed the petition for an injunction.

On appeal, the Tenth Circuit affirmed the district court's conclusion that "it was for the court, not the governmental agency, . . . to determine whether the documents sought to be withheld under a claim of privilege are entitled to the protection of that privilege." 76 The appellate court further concluded that good cause was shown for the production of the records by the fact the petitioner had not sought relief against two other parties who, it was alleged, engaged in the same misconduct as the union. "Thus, the appellants' good faith is squarely in issue, and obviously, the [subpoenaed documents] may be relevant to that issue." 77

Wholly apart from the questions of procedure and governmental privilege raised in the Sealtest case, the Tenth Circuit's conclusion that good cause had been shown for production of the records based on the Board's failure to proceed against all parties is questionable. The fact that the district court dismissed the case without receiving the records, of course precluded a direct confrontation on the issue of whether the regional director had acted arbitrarily in petitioning for an injunction. However, the law is well established that the Board cannot proceed against a person unless that person has been named in an unfair labor practice charge; and that the Board may issue a complaint

76 Id. at 384.
77 Id. at 385.
against one party to an allegedly unlawful contract without proceeding against other parties to that contract.\textsuperscript{78} Considering that 1) the Board's jurisdiction to decide unfair labor practice cases is invoked only upon the filing of a charge; 2) the discretion exercised by the General Counsel in determining whether a complaint shall issue is not subject to judicial review; and 3) the district court in these injunction proceedings may grant relief only with respect to the unfair labor practices alleged in the petition, it would appear that the court may not withhold injunctive relief by reason of the failure of the regional director to proceed against persons not named as respondents. However, a close question might be presented if the petitioner alleged that two or more respondents had engaged in the same or related unfair labor practices which were subject to the mandatory injunction procedure of section 10(1), and that a complaint should issue against them (or in the case of a jurisdictional dispute, that a notice of hearing should issue), but the director did not request an injunction against all of them. Such a situation was presented in the \textit{Newark & Essew Plastering} case,\textsuperscript{79} which involved a jurisdictional dispute between the Lathers and Carpenters Unions. The Carpenters struck to obtain the disputed work; the employer capitulated to their demand; whereupon the Lathers struck. The district court refused to enjoin the Lathers unless the Carpenters were also named as a party respondent. A confrontation was avoided when the regional director reconsidered his position that an injunction against the Carpenters was not warranted, and complied with the court's directive. On appeal by the Carpenters Union, the third circuit noted that had the regional director elected to challenge this action of the court, "a serious question would have been presented" as to how far a court may go in interfering with administrative judgment.

\textsuperscript{78} See, e.g., Local 546, Milk Drivers and Dairy Employees (Minnesota Milk Co.), 133 NLRB 1314, 1321-22, enf'd, 314 F.2d 761 (8th Cir. 1963). \textit{Compare} Retail Clerks v. Food Employers Council, 351 F.2d 525 (9th Cir. 1965).

\textsuperscript{79} Douds v. Wood, Wire & Metal Lathers, 245 F.2d 223 (3d Cir. 1957).
As already noted, Congress mandated the Board to seek injunctive relief against jurisdictional disputes, secondary boycotts, and strikes for specifically defined objectives because "time is usually of the essence in these matters," and the relatively slow administrative procedure fell short of the desired objectives of eliminating the obstructions to commerce and encouraging peaceful collective bargaining. As "the proper working of the scheme fashioned by Congress to determine industrial controversies fairly and peaceably demands that the courts quite as much as the administrative body act as Congress has required," the courts are generally in agreement that once having found reasonable cause to believe that a violation has been committed, their discretion to withhold relief in 10(1) proceedings is extremely limited. It is not for the district court to pass upon the "public interest or necessity" for injunctive relief in these cases, because these matters were decided upon by Congress when it passed the Taft-Hartley Act. Judge Sweigert noted in the *Employing Lithographers* case, that in no instance has a court finding reasonable cause to believe that there has been a violation, and that the violation is of a continuing nature, been sustained in its denial of a 10(1) injunction upon discretionary considerations concerning its conception of what might or might not be in the public interest. Accordingly, Judge Sweigert enjoined the union from striking an employer association to obtain a contract containing certain alleged hot cargo provisions, notwithstanding his conclusion that an injunction might upset an established and theretofore legal practice, and tend to prevent or delay settlement of a strike.

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32 See Douds v. Int. Longshoremen's Ass'n, 242 F.2d 808 (2d Cir. 1957).
34 For a contrary view see LeBaron v. Los Angeles Bldg. & Constr. Trades Council (Westinghouse), 84 F. Supp. 629 (S.D. Cal. 1949).
As Judge Sweigert indicated, a district court has discretion to withhold injunctive relief where the alleged unlawful conduct has ceased and is not likely to resume. For example, where a union engages in alleged secondary picketing in furtherance of its dispute with the primary employer, but terminates that conduct upon the execution of a collective bargaining agreement with the employer, thereby resolving the primary dispute, injunctive relief would no longer be warranted, even though the employer might wish to pursue its unfair labor practice charge before the Board in order to establish a legal precedent or obtain the sanction of a Board order in the event of a future dispute with the union. Even in the absence of a resolution of the primary dispute, the court may decline to grant an injunction where the alleged unlawful conduct was of short duration and did not achieve its objective, the union has assured the court that it will not resume the unlawful conduct, and the circumstances of the case indicate that the court may rely upon that assurance. In such cases the practice has been for the district court to retain the case on its docket subject to the right of the regional director to renew his application in the event of a threatened or actual resumption of the unlawful conduct. However, the district court is not bound to accept the assurances of a respondent or its counsel as a satisfactory substitute for an injunction, which carries sanctions not present if there is a failure to comply with such assurances.85

An injunction proceeding is not rendered moot where the unlawful conduct has ceased because the respondent has attained the proscribed object, e.g., where as a result of a strike or picketing, a neutral employer has agreed to cease handling the products of the primary employer, or an employer involved in a jurisdictional dispute has reassigned

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the disputed work, unless in either case there has been a resolution of the primary dispute by all parties involved.\textsuperscript{86} Nor, in a construction industry situation, is the proceeding moot because the particular project involved has been completed, where the facts indicate that a respondent union will engage in a repetition of alleged unlawful conduct at some future time and place.\textsuperscript{87}

Unlike section 10(1), which imposes a mandatory duty on the Board to seek injunctive relief whenever a complaint is to be issued alleging unfair labor practices covered by that section, section 10(j) gives the Board discretion to seek injunctive relief when a complaint is issued alleging other unfair labor practices. The legislative history indicates that Congress imposed no readily identifiable limitation on the Board's exercise of that discretion; the Board may seek relief "if the circumstances call for such relief."\textsuperscript{88}

The courts are in general agreement that their discretion in 10(j) cases, although governed by the necessity for effectuating the statutory policy, is greater than in 10(1) proceedings, and that an injunction must be predicated on something more than reasonable cause to believe that an unfair labor practice has been committed. The extent of that discretion has been the subject of three recent appellate decisions. In \textit{Angle v. Sacks},\textsuperscript{89} the Tenth Circuit undertook to define the standard for the exercise of judicial dis-

\textsuperscript{86} See Douds v. International Longshoreman's Ass'n (Abraham Kaplan), 242 F.2d 808 (2d Cir. 1957); Graham v. ILWU (Alaska Salmon Indus., Inc.), 26 L.R.R.M. 2290 (W.D. Wash. 1950).

\textsuperscript{87} Shore v. Building & Constr. Trades Council (Petredis & Fryer), 173 F.2d 678 (3d Cir. 1949).

\textsuperscript{88} Angle v. Sacks, 382 F.2d 655 (10th Cir. 1967). In practice the Board has invoked section 10(j) very selectively. During the fourteen-year period immediately following passage of the Taft-Hartley Act, the Board applied for pendente lite relief in only 46 cases. In 1961, a subcommittee on the National Labor Relations Board of the House Committee on Education and Labor criticized the Board for not utilizing section 10(j) more extensively. Since that time the Board has expanded its use of the discretionary injunction procedure. However, during the four-year period from July 1, 1963 through June 30, 1967, the Board filed an average of nineteen petitions for 10(j) relief per year, in contrast to an average of more than two hundred 10(l) petitions filed during the same period.

\textsuperscript{89} Id.
cretion, using the legislative history of section 10(j) as a guide:

We find nothing in the legislative history of section 10(j) declaring or suggesting that the Board’s discretion in seeking section 10(j) relief should be limited to those emergencies endangering the national welfare or to situations with ‘heavy and meaningful repercussions,’ or to situations that have a demonstrably prejudicial impact on the public. The concern of Congress was rather that the purposes of the National Labor Relations Act could be defeated in particular cases by the passage of time. . . . We do think, however, that the legislative history indicates a standard in addition to the ‘probable cause’ finding that must be satisfied before a district court grants relief. 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. Administration of the Act is vested by Congress in the Board, and 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, temporary relief may be granted under section 10(j). Preservation and restoration of the status quo are then appropriate considerations in granting temporary relief pending determination of the issues by the Board.90

Although preservation and restoration of the status quo are “appropriate considerations,” two other courts of appeals have differed as to whether the need to preserve the status quo or prevent irreparable harm is an indispensable prerequisite for injunctive relief. In the General Electric case,91 the Second Circuit reversed a section 10(j) injunction because the Board had not demonstrated that the injunction was necessary to preserve the status quo or to prevent any irreparable harm. However, the Eighth Circuit indicated that where the public interest is affected, such considerations might not control the allocation of temporary injunctive relief.92 In the words of the district court judge in the

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90 Id. at 660.
92 See Minnesota Mining & Mfg. Co. v. Meters, 385 F.2d 265 (8th Cir. 1967).
General Electric case, "the remedy of Section 10(j) is surely appropriate and available when the impact upon the public interest is grave enough to justify swifter corrective action than the normal process of Board adjudication and court enforcement." 93

Past judicial practice indicates that the courts are disposed to grant relief where the alleged unfair labor practices, if permitted to continue, would have an adverse impact on the public interest. For example, the courts have enjoined strikes in the coal and newspaper publishing industries to perpetuate or obtain closed shop conditions, because those industries were deemed vital to the public welfare.94 Similarly, the Second Circuit affirmed an order enjoining a union from striking to modify or terminate an existing contract without the requisite notices having been given the federal and state mediation services.95 The strike had resulted in failure to complete the concreting of a sewer under construction, thereby endangering water mains, sewers and power cables in the street. The court of appeals agreed with the district court that an injunction was necessary for the protection of the public interest and preservation of the status quo. Section 10(j) has also been utilized to enjoin mass picketing and violence which was not effectively checked by local authorities, and to enjoin interference with Board proceedings, such as acts of reprisal against witnesses in a Board conducted hearing and unfair labor practices which tended to interfere with the conduct of a Board election.

There appears to be general agreement with the holding of Angle v. Sacks, that injunctive relief is warranted to preserve or restore the status quo or to prevent irreparable injury to the employees, union or employer involved, even in the absence of any demonstrable impact upon the public

93 257 F. Supp. at 708.
interest. Typical of such situations was that in Angle v. Sacks itself, where an employer, confronted with a union organizational drive, engaged in acts of intimidation, threats and discharge of union adherents, which if unchecked would have effectively dissipated the union's strength, and thereby rendered any prospective Board order an empty formality. District courts have joined such conduct and directed the reinstatement of the alleged discriminatees pending Board disposition of the case.96 Similarly, the courts have been disposed to grant injunctive relief where an employer, confronted with conflicting claims for recognition by rival unions, has unlawfully assisted one union by staffing its operations exclusively with members of that union, or by recognizing and executing a collective bargaining agreement with that union. As such conduct tends to entrench the assisted union at the expense of its rival, injunctive relief has been deemed warranted to prevent the irreparable harm which the disfavored union may suffer by the drifting away of its members to the union favored by the employer. Such relief may include an order directing the employer to recognize and bargain with the disfavored union where that union is entitled to recognition by reason of a Board certification, incumbent status as bargaining representative, or demonstrated support of that union by a majority of employees. The court may not condition its injunction on the holding of an election, if under applicable law the Board itself would not direct an election, as such condition would run contrary to the statutory scheme.97

A particularly troublesome area for the exercise of the court's discretion has been those cases in which the Board requests injunctive relief which would effectively alter rather

96See, e.g., Elliott v. DuBois Chem., 201 F. Supp. 1 (N.D. Tex. 1962). Both the Angle and DuBois cases involved relatively small units of employees, hence even a strike by the employees in protest of the employer's unfair labor practices would probably have had little demonstrable impact upon the general public.
than preserve or restore the status quo, e.g., where the Board seeks to compel an employer to bargain with a newly certified union, and the employer contests that union's right to recognition. A recent decision of the Fourth Circuit indicated that a bargaining order might be warranted if the union was being eroded and its strength undercut during the litigation of the unfair labor practice charge based on the employer's refusal to bargain. The Eighth Circuit also implied that injunctive relief would be available if the employer's conduct threatened or resulted in a strike.

The General Electric and Minnesota Mining cases each involved a refusal by the company to bargain with the union because of the presence on the union's negotiating committee of individuals who were also representatives of other labor organizations. Prior negotiations between the parties had been conducted without the participation of such "outsiders." In General Electric, the Second Circuit reversed the injunction because that order was not necessary to preserve the status quo or prevent irreparable harm. District Court Judge Frankel had concluded that the case warranted injunctive relief to protect the public interest, as the employer was "a huge and basic enterprise with substantial impact upon the national defense and the economy generally." The parties negotiated a contract before the Supreme Court could determine the applicable standard for injunctive relief. In Minnesota Mining, the Eighth Circuit reversed the injunction order because it concluded that the circumstances demonstrated neither an adverse impact upon the public interest, nor a need to maintain the status quo or prevent irreparable harm.

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99 LeBus v. Manning, Maxwell & Moore, Inc., 218 F. Supp. 702 (W.D. La. 1963), cited with approval in Minnesota Mining & Mfg. Co. v. Meters, 385 F.2d 265 (8th Cir. 1967). The Aerovox case involved an application by the Board pursuant to section 10(e) of the Act, for enforcement pendente lite of a Board order directing the company to bargain with the union. The court concluded that the prerequisites for relief pending appeal were the same as those applicable in 10(j) proceedings.
Must the Board meet a higher burden of proof than that of "reasonable cause" in order to justify its request for an injunction which is "mandatory" in character, e.g., which affirmatively requires an employer to reinstate alleged discriminantees or bargain with a union pending litigation before the Board? In the Wellington Manufacturing case,\(^\text{103}\) a district court enjoined an employer from discharging union adherents and otherwise engaging in coercive conduct during the course of a union organizing campaign, but refused to order reinstatement of three alleged discriminantees in the absence of a "clear" showing that their discharges were unlawful, as opposed to a mere showing of reasonable cause. The court cited as authority an earlier decision of a California district court.\(^\text{104}\) However, these cases appear to stand alone in support of the proposition that the right to reinstatement pendente lite must be established by a clear case. A somewhat comparable theory was rejected by the Supreme Court when it held that the courts of appeals in reviewing Board orders may not apply a more onerous test of substantiality of evidence in reinstatement cases than that applied in other cases.\(^\text{105}\)

Two seemingly contradictory considerations of congressional intent are present in those cases in which the Board seeks an injunction to compel an employer to recognize and bargain with a union pending litigation before the Board. One is the intent of Congress that the remedial purposes of the Act should not be frustrated by the continuing effect of unfair labor practices during the pendency of litigation before the Board. The other consideration is that Congress, in making it an unfair labor practice for an employer to refuse to bargain with the representative of his employees, thereby enabled an employer who doubted the validity of a Board election, or otherwise questioned whether he was obligated to bargain with a union, to refuse to bargain and thereby permit his doubts to be tested in an unfair

labor practice proceeding. Where the employer has engaged in other unfair labor practices, or has otherwise evidenced that his refusal to bargain is based not upon a good faith doubt of his obligation to do so, but upon a desire to gain time in which to undermine the union, the latter consideration may be disregarded. The *Aerovox* case suggests that even when an employer in good faith questions his obligation to bargain, injunctive relief is warranted if the continuing effect of the employer's refusal to deal with a union tends to erode that union's support among his employees. In the absence of such circumstances, district courts have tended to deny an injunction where the employer has raised a substantial question concerning his asserted obligation to bargain, but to grant an injunction where the employer has refused to bargain on grounds which are frivolous or unsupported by applicable law.

The scope of relief in both section 10(j) and 10(1) cases is generally governed by standards applicable to Board decisions. The district court is empowered to enjoin acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the respondent's conduct in the past. The court may direct such affirmative relief, including the posting or mailing of notices, as is necessary to dissipate the effect of the alleged unfair labor practices.

**Duration of the Injunction**

Section 10(1) mandates the regional director to petition for injunctive relief "pending the final adjudication of the Board with respect to" the unfair labor practice charge.

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105 See *ILGWU v. NLRB* (Bernhard-Altmann), 366 U.S. 731 (1961). An employer who executed a collective bargaining agreement in the good faith but mistaken belief that a union represented a majority of his employees in an appropriate bargaining unit would be guilty of an unfair labor practice.

107 *NLRB v. Aerovox Corp.*, 389 F.2d 475 (4th Cir. 1967).


"Final adjudication" may take one of several forms, depending upon the ultimate disposition of the case, such as: Board approval of a withdrawal of the charge, and the dismissal of any complaint based thereon; closing of the case upon full compliance with the terms of an informal settlement agreement, or with a trial examiner's decision; the entry of a consent order of the Board in accordance with the terms of a formal settlement agreement; or the entry of the Board's decision and order in a contested case. In a jurisdictional dispute case, the injunction does not expire upon the Board's determination of the dispute against the striking union, as such determination is preliminary to a dismissal of the unfair labor practice charge upon compliance with the Board's award or to the issuance of a complaint in the event of noncompliance. However, an award of the disputed work in favor of the striking union, or a Board order quashing the notice of hearing (e.g., because the facts do not indicate the existence of a jurisdictional dispute) necessitates dismissal of the unfair labor practice charge and therefore constitutes the Board's ultimate disposition of the case. The courts, in agreement with the Board, have construed the language of section 10(1) as limiting their jurisdiction to grant relief only during the pendency of a case before the Board. This conclusion is reinforced by sections 10(e) and (f) of the Act, which vest exclusive jurisdiction in the court of appeals upon the filing of a petition for enforcement or review of a final Board order (together with the record in the case), including the power to grant temporary relief or a restraining order at the request of the Board.

Section 10(j) contains no language respecting the duration of the injunction. One district court held that once the Board has entered its decision in a case, 10(j) relief is not appropriate and that the Board instead should apply to

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110 See Schauffler v. United Ass'n of Journeymen (Frank W. Hake), 218 F.2d 476 (3d Cir. 1955).
111 See LeBus v. Seafarers' Union (Delta Steamship Line), 398 F.2d 281 (5th Cir. 1968).
the court of appeals pursuant to section 10(e). However, in the absence of qualifying statutory language, the district courts apparently have jurisdiction to grant injunctive relief pending compliance with the Board's order, or absent compliance, with the filing of the case record in the court of appeals in connection with a petition for enforcement or review.

Should an injunction be dissolved or modified because the Board's trial examiner recommends that the unfair labor practice complaint be dismissed in whole or in part? The mandate of section 10(1) apparently precludes an affirmative answer.

The discretionary nature of section 10(j) relief poses the question in a different light. The Board's own rules and regulations direct that in the event a trial examiner hearing a complaint, concerning which the Board has processed 10(j) relief, recommends dismissal in whole or in part, the regional attorney "shall forthwith suggest to the district court . . . the possible change in circumstances arising out of the findings and recommendations of the trial examiner." Accepting the rationale of the tenth circuit in Angle v. Sacks, made in a different context, it could be argued that injunctive relief would no longer be warranted "to protect the efficacy" of a final Board order, because the trial examiner's recommended dismissal constitutes "the last ruling . . . by the agency concerned." However, where the facts before the district court indicated that the efficacy of the Board's final order might be nullified or that administrative procedures might be rendered meaningless, in the absence of an injunction, it is difficult to see how the need for injunctive relief would be rendered any less

114 See Slater v. Denver Bldg. & Constr. Trades Council (Grauman), 175 F.2d 603 (10th Cir. 1949). The court noted that since the General Counsel filed timely exceptions to the trial examiner's decision, the case remained pending before the Board without final decision, and rejected what it characterized as the respondent union's suggestion that the district court substitute the advisory determination of the trial examiner for its own, made on a different record.
115 29 C.F.R. § 102.94(b) (1968).
116 382 F.2d 655 (10th Cir. 1967).
acute by reason of the adverse interim decision of the trial examiner. The significance of the trial examiner's decision lies not in whether the trial examiner found that the Act was violated as alleged, but in whether the evidence adduced at the hearing before him disclosed a failure of proof as would render unlikely a Board order finding a violation, or disclosed facts which mitigated the urgency of the need for injunctive relief.

Notwithstanding the mandatory language of section 10(1), can the duration of an injunction become so long by the passage of time, as to be unreasonable, thereby warranting its dissolution? Certainly, as the tenth circuit recognized in the Grauman case, section 10(1) was designed to preserve the status quo pending the entire procedures before the Board. Nevertheless, several courts have held that a district court has discretion to dissolve an injunction which in all the circumstances of the case has apparently remained in effect for an unreasonable length of time. In an appeal from an order enjoining a jurisdictional strike, the third circuit criticized the Board for delay in disposing of the case, noting that nine months had elapsed from the issuance of the section 10(k) notice of hearing to the oral argument before the court of appeals, without any decision by the Board on the merits of the dispute. The court suggested that the injunction might raise a serious issue before the district court if continued so long as to be no longer equitable, but nevertheless denied the appeal. However, in another appeal involving an alleged secondary boycott, where ten months had elapsed from the close of hearing before the trial examiner without a Board decision, although counsel had told the district court that the Board would probably decide the case within two months, the tenth circuit affirmed the injunction but remanded the case to the district court to determine whether the writ should be modified or terminated in advance of

117 Slater v. Denver Bldg. & Constr. Trades Council (Grauman), 175 F.2d 608 (10th Cir. 1949).
118 Douds v. Wood, Wire & Metal Lathers Int'l Ass'n, 245 F.2d 223 (3d Cir. 1957).
the final adjudication of the Board.\footnote{United Bhd. of Carpenters v. Sperry, 170 F.2d 863 (10th Cir. 1948). The Board decided the case before the district court could consider the remand.} In the \textit{Greenfield Printing} case,\footnote{Getreu v. International Typographical Union (Greenfield Printing), 205 F. Supp. 931 (S.D. Ohio 1962).} a district court, on motion of the union, dissolved an injunction which had been in effect for two years. The case involved alleged recognitional picketing. Although a trial examiner's decision had issued, finding no violation, the Board's counsel was unable to state when a Board decision would be forthcoming. The court construed its injunction order as limited to the final disposition of the case before the Board (the express term of the order) or to the passage of an unreasonable period of time, whichever shall occur first, and concluded that in the absence of unusual circumstances, two years was unreasonable.

The foregoing decisions suggest that the power to terminate a section 10(1) injunction should be used sparingly, where there is apparent inexcusable and unusually long delay in the disposition of a Board case. As in the \textit{Greenfield} case, the usual injunction order provides that the alleged unlawful conduct shall be enjoined pending the final disposition of the matters involved pending before the Board. However, a few district courts have limited injunctions to a specific period of time (usually from three to six months), in the absence of a showing of good cause why the injunction should remain in effect, or have provided that the respondent may move to vacate the writ if the Board did not dispose of the case during such time.\footnote{See, e.g., Alpert v. International Bhd. of Electrical Workers, 163 F. Supp. 774 (D. Conn. 1958); McLeod v. Mailers Union, 50 L.R.R.M. 2001 (S.D.N.Y. 1962). No court of appeals has passed on the validity of such an order although the entry of an order containing a time limitation was noted in \textit{Building \\& Constr. Trades Council v. LeBaron}, 181 F.2d 449 (9th Cir. 1949).}

Congress in enacting sections 10(j) and 10(1) recognized the shortcomings inherent in "the relatively slow procedure of the Board hearing and order, followed many months later by an enforcing decree of the Circuit Court
of Appeals," and precisely because of those shortcomings, empowered the Board to seek interim injunctive relief.\textsuperscript{122} The nature of the administrative process, coupled with the volume of litigation before the Board, usually precludes the swift disposition of a contested unfair labor practice case.\textsuperscript{123} Therefore, it is not surprising, as one judge noted, that the duration of an injunction may extend over a period of six months or longer.\textsuperscript{124} A district court cannot place a time limit on injunctive relief, short of final Board disposition of the case, without 1) disregarding the congressional intent to resolve the inequities resulting from the nature of the administrative process in favor of injunctive relief in certain cases and 2) failing to take into consideration factors beyond the control of the Board such as availability of personnel and caseload volume, or procedural problems in individual cases. Nevertheless, in light of the swift moving realities of labor relations, the temporary injunction contemplated by sections 10(j) and 10(1) might remain in effect for such a long period of time as to amount to a final determination of the rights of the parties involved. An answer consistent with the statutory scheme would seem to be as suggested by the third and tenth circuits and in the \textit{Greenfield Printing} case, that the injunction ordinarily should remain in effect during the pendency of the entire case before the Board, but that an unusual delay in the disposition of the case, in the absence of circumstances tending to excuse such delay, constitutes grounds for modifying or dissolving the injunction.

\textbf{SUMMARY}

In brief, Congress has empowered the district courts to grant to the Board appropriate pendente lite injunctive relief upon a showing that there is reasonable cause to believe that an employer or labor union has engaged in,

\textsuperscript{122} See \textit{supra} note 4.
\textsuperscript{123} In fiscal 1967, the five-member Board issued a total of 1262 decisions in contested cases. \textit{31 N.L.R.B. Ann. Rep.} 14 (1967).
or is engaging in, unfair labor practices. The district courts are not powerless to withhold relief in such cases, but their discretion to do so in cases covered by section 10(1) is extremely narrow, because of the mandate of that section. In all the proceedings, whether under section 10(j) or section 10(1), the necessity for effectuating the statutory policy, rather than traditional equity criteria applicable in suits between private parties, governs the exercise of the court's discretion. The preponderance of judicial authority indicates that injunctive relief is warranted under section 10(j) to protect the public interest, to preserve or restore the status quo, or to prevent irreparable harm to the employer, union or employees involved.