

INJUNCTIONS AND JURISDICTIONAL DISPUTES

Sections 10(j), 10(k) and 10(l)

I. Introduction

The National Labor Relations Act (hereafter “Act”) empowers the National Labor Relations Board (hereafter “Board”) to order remedial action to be taken when unfair labor practices are found to have been committed. The Board is also empowered to seek from the district courts of the United States appropriate injunctive relief against charged unfair labor practices pending the final adjudication of the charges by the Board itself. The Board most often invokes Section 10(l) of the Act in seeking such interim injunctive relief. That Section requires the Board to seek, through court intervention, the immediate cessation of certain unlawful conduct, principally work stoppages and picketing having proscribed objectives. Although relied upon less often, Section 10(j) of the Act likewise empowers the Board, at its discretion, to seek interim injunctive relief from the district courts.

In addition, special Board procedures, including the discretionary institution by the Board of interim injunctive proceedings, are involved in the processing of charges that allege violations of Section 8(b)(4)(D) of the Act - a Section which applies to **jurisdictional disputes** between unions over work assignments.

II. Mandatory Section 10(l) Injunctions

The Board is required to petition for interim injunctive relief under Section 10(l) when investigation of a charge yields reasonable cause to believe that one of the following Sections of the Act has been violated:

1. Section 8(b)(4)(A), which prohibits union coercion to compel an employer either to join a labor organization or to enter into a hot cargo agreement.
2. Section 8(b)(4)(B), which prohibits secondary boycott pressures by unions.
3. Section 8(b)(4)(C), which prohibits union coercion to compel an employer to bargain with one union when another union has been certified by the Board.
4. Section 8(e), which prohibits unions and employers from entering into **hot cargo** agreements, and
5. Section 8(b)(7), which prohibits or limits organizational or recognition picketing, or threats thereof, by unions.

In one situation, the Act excepts certain alleged violations of Section 8(b)(7) from the mandatory injunction provisions of Section 10(l). An injunction may not be sought in cases arising under that Section when a meritorious charge is filed under Section 8(a)(2) of the Act, which prohibits an employer from dominating, interfering with, or supporting a labor organization.

Regardless of which of the preceding Sections of the Act is alleged to have been violated, the procedure leading to a Board application for 10(l) interim injunctive relief is the same.

Charges alleging such violations are accorded statutory “priority”, and the regional office begins an investigation immediately upon the filing of such a charge. If the investigation reveals that the charge has merit and that the charged conduct is continuing or that, despite the fact that the charged conduct has been discontinued, its resumption appears likely, the regional director must immediately petition for injunctive relief. The issuance of an NLRB complaint charging that an unfair labor practice has been committed is not a prerequisite to an application for 10(l) injunctive relief. Moreover, in most cases in which the investigation reveals that a charge has merit, the regional offices are free to proceed without authorization from the General Counsel. Approval from the members of the Board itself is never required.

Section 10(l) also permits temporary restraining orders to be applied for by the Board and to be issued by the district courts. Such an order provides ancillary interim relief prior to a court hearing on the Board’s injunction petition. The issuance of a temporary restraining order is conditioned, however, upon a showing that the charging party will suffer substantial and irreparable injury unless the order is issued. Such an order may be applied for and issued without giving notice of the date and time at which the application will be made. Ordinarily, however, an application will be made without notice only when circumstances render it impossible to communicate without delay with either the charged party or its attorney. When a Section 10(l) temporary restraining order is issued without notice, the statute provides that it can be effective for no longer than five days.

The following circumstances are illustrative of those that would warrant the Board’s application for a temporary restraining order:

1. A threat of substantial financial loss relative to the size of the employer enterprise
2. The interruption of construction work on a military or similar installation that has an impact on the national defense
3. A real threat of bankruptcy, loss of a business relationship, or substantial unemployment should striking or picketing be allowed to continue
4. Picketing that includes violence or massing
5. A cessation of work that presents a public danger, such as the collapse of a partially completed structure
6. The possibility that perishable goods may spoil
7. Disruption of a business that is essential to public safety, health, or welfare, such as a public utility, and
8. A situation in which time is of the essence, such as one in which a scheduled event or a seasonal business may be disrupted.

Except in cases involving novel issues, the regional director may apply for the issuance of a temporary restraining order without prior authorization from the General Counsel.

In order to grant 10(l) injunctive relief, the court must first find that the regional director has reasonable cause “to believe [that the] charge is true and that a complaint should issue” and that, under general equitable principles injunctive relief would be “just and proper.” With a fair degree of uniformity, the courts have held that the “just and proper” requirement is met by a showing that the harm or disruption flowing from the charged conduct can best be avoided or reduced by the granting of an injunction. Because the need for injunctive relief from some sort of damage invariably exists in 10(l) cases involving strikes, picketing, or the threats of such conduct, the primary issue before the district court in such cases will normally be whether the regional director has “reasonable cause” to believe that the Act has been violated.

Although the party bringing charges before the Board has certain rights in the injunction proceedings before the district court, it is not a full party to the proceeding. Therefore, the charging party may not present arguments or theories inconsistent with those advanced by the regional director and may not prosecute any appeal from the district court’s ultimate decision. The charging party does, however, have the right to be represented by counsel at court hearings, to introduce evidence and file briefs, to be kept informed of all actions and to receive copies of all documents filed in the case before the court, and to inform the court of any matters it deems pertinent and relevant.

Although the discovery principles of the Federal Rules of Civil Procedure are generally applicable to Section 10(l) injunction proceedings, the need for prompt relief and expeditious handling tempers their actual application. Hence district courts often shorten, and may even eliminate, discovery procedures in order that the injunctive relief sought is not unreasonably delayed. Further, although oral testimony is generally taken with respect to the factual issues involved, even this may be dispensed with and injunctive relief granted based entirely upon a court’s review of the formal papers, supporting affidavits, and briefs or oral argument. Because the ultimate question is whether there is reasonable cause to believe that the Act has been violated, it is unnecessary for the court to make credibility determinations or resolve factual disputes. Neither the grant nor the denial of an application for interim injunctive relief is **res judicata** as to any issue in subsequent unfair labor practice proceedings before the Board, and therefore the parties are not foreclosed from relitigating the entire case in the latter forum.

A 10(l) injunction remains operative only during the pendency of the unfair labor practice proceedings leading to an ultimate Board decision and order. Consequently, because Board orders are not self-enforcing, the conduct enjoined by the court may lawfully be resumed after the Board issues a final decision containing a cease-and-desist order that prohibits the continuation of such conduct. As a practical matter, a resumption seldom occurs; if the conduct is resumed, however, the Board, under Sections 10(e) and (f) of the Act, may apply to a United States court of appeals for a further injunction or restraining order against the continuation of the conduct pending review of the Board’s order by the latter court.

III. Discretionary Section 10(j) Injunctions

Section 10(j) of the Act grants the Board the discretion, upon issuance of a complaint charging the commission of **any** unfair labor practice, to seek appropriate injunctive relief from a district court of the United States prior to the Board’s ultimate adjudication of the merits of the complaint.

The procedures applicable to the Board's handling of a Section 10(j) case differ in several important respects from those pertaining to 10(l) injunction situations. Initially, as in 10(l) procedures, an unfair labor practice charge must be filed with, and investigated by, a regional office. In contrast to 10(l) procedure, however, the actual issuance of a complaint charging the commission of an unfair labor practice is a statutory prerequisite to an application for 10(j) injunctive relief. Moreover, the Board has not delegated to the General Counsel or to the regional directors its statutory power to decide whether to seek 10(j) relief. Accordingly, the applicable 10(j) practice calls for the regional director to issue an unfair labor practice complaint upon a meritorious charge and to refer the question of 10(j) injunctive relief, together with his recommendation thereon, to the General Counsel in Washington. If the General Counsel determines that injunctive relief would be appropriate, the General Counsel requests the Board to authorize an application for such an injunction. Upon the Board's authorization, the regional director petitions a district court for the appropriate injunctive relief.

It should be noted that the existing practice gives the General Counsel what is, in effect, a preclusive power of sorts over the Board's discretionary 10(j) decisional powers. For, in those instances in which the General Counsel believes that injunctive action would be inappropriate, the Board is not presented with the question of whether to authorize a 10(j) injunction.

The regional director's belief that injunctive relief is unnecessary is another factor that can inhibit actual use of the Board's 10(j) injunction authority. The regional director who entertains such a belief will not even raise the matter with the General Counsel unless there is a specific request for injunctive relief. Accordingly, it is most important that the charging party desirous of obtaining 10(j) injunctive relief should file with the regional director or the General Counsel a written request for such relief at the time of filing the charge or immediately thereafter. Such action will ensure that the matter is at least brought to the attention of the General Counsel. In addition, a charging party's request for 10(j) injunctive relief will qualify the underlying charge for expeditious consideration by the regional office.

It should also be noted that in those instances where the General Counsel elects to request from the Board authorization to petition a district court for 10(j) injunctive relief, the Board will not accept a submission either from the charging party showing the need for such relief or from the charged party opposing the relief. Nor will the Board allow either party to make an oral presentation concerning the matter. Thus, only the General Counsel is allowed to make a presentation to the Board justifying a 10(j) application to the district court.

As under Section 10(l), temporary restraining orders under Section 10(j) may be issued upon the Board's application. Unlike 10(l), however, 10(j) does not affirmatively provide for the issuance of such orders without notice - that is, **ex parte**. It nevertheless appears that Rule 65(b) of the Federal Rules of Civil Procedure empowers the district courts to issue such orders **ex parte** upon a showing that "immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition." Because the Board is the applicant for the temporary relief, what this means, in effect, is that there must be a showing of irreparable injury to the purpose and policies of the Act. Further, because Rule 65(b) is controlling, the maximum duration of a temporary restraining order issued without notice is 10, rather than 5, days. In addition, this Rule permits the order to be extended for a 10-day period upon a showing of "good cause."

Because the Board has the discretion whether to seek 10(j) injunctive relief and because no statutory criteria govern the use of Section 10(j), it is well to note the considerations that have guided the Board in the past. The major consideration has been whether the continuation of alleged unlawful conduct is likely to frustrate the Board's remedial processes in the absence of an injunction. Stated otherwise, the main consideration is whether the alleged unfair labor practices, if allowed to continue, can be effectively remedied and the **status quo** restored by a Board order and its subsequent judicial enforcement. Among other factors that have been taken into consideration are the following: the clarity of the alleged violations; the extent of the impact of the unfair labor practices on public interests; the geographical breadth of the violation; a continuing or repetitious pattern of violations; the degree of impairment of employee rights under the Act; and, when the unfair labor practices involve violence, the ability and willingness of local authorities to stop or control it.

The district courts will normally issue 10(j) injunctions when two basic requirements are met: (1) when there is reasonable cause to believe that the alleged unfair labor practices have been committed, and (2) when, equitably, an injunction is necessary, or, in the words of Section 10(j), it is "just and proper". The courts generally decide whether the first requirement has been met on the basis of the same tests and standards that are applied in 10(l) injunction cases. See § 7.02, **supra**. With respect to the second requirement, the weight of judicial authority seems to hold that injunctive relief is "just and proper" whenever an injunction is necessary to prevent frustration of the basic remedial purposes of the Act.

The party bringing charges before the Board occupies the same status in a Section 10(j) district court proceeding as in an injunction proceeding under Section 10(l). Issues that pertain to the application of discovery principles, the taking of oral testimony, the making of credibility determinations, and the resolution of factual disputes are treated similarly by the courts in both types of proceedings. In addition, as in 10(l) proceedings, nothing decided in a 10(j) court proceeding is **res judicata** in the subsequent complaint proceeding before the Board. See § 7.02, **supra**. As contrasted with 10(l), however, there is no statutory requirement that a 10(j) injunction be dissolved upon the issuance of the Board's decision. See § 7.02, **supra**. Accordingly, although the Board takes a contrary position, it is arguable that such an injunction may be continued in effect by the district court pending the outcome of circuit court enforcement proceedings.

IV. Special Procedures For Jurisdictional Disputes

Section 10(k) of the Act mandates a special procedure when a charge is filed alleging a violation of Section 8(b)(4)(D), which prohibits strikes, picketing, boycotts, threats, and coercion in **jurisdictional**, or work assignment, disputes. Section 10(k) both empowers and directs the Board "to hear and determine the dispute" - that is, to decide the merits of the controversy, or who is entitled to do the work in dispute - unless, within 10 days after notice that an 8(b)(4)(D) charge has been filed, the parties submit evidence that the dispute has been adjusted or that all parties have agreed upon a method for the voluntary adjustment of the dispute. (One of the more common methods for voluntarily adjusting jurisdictional disputes involves submitting the dispute to the Plan for the Settlement of Jurisdiction Disputes in the Construction Industry, the successor to the Impartial Jurisdiction Disputes Board and the National Joint Board for Settlement of Jurisdiction Disputes.)

As soon as possible after the filing of a charge alleging a violation of Section 8(b)(4)(D), the regional director must serve upon the parties a notice of the filing and a copy of the charge. If, after investigation, the regional director deems injunctive relief to be “appropriate,” it may be sought pursuant to Section 10(l). **Rules** § 102.89. Unlike other 10(l) proceedings, injunction proceedings pertaining to Section 8(b)(4)(D) are discretionary rather than mandatory. The regional director will normally seek an injunction when picketing or a work stoppage is in progress and work on a construction project is, or is likely to be, halted.

The regional office does not issue an unfair labor practice complaint even if its investigation indicates that the Section 8(b)(4)(D) charge has merit. Instead, when no voluntary method for adjustment exists or when such a method cannot be agreed upon, the regional director issues a notice of hearing under Section 10(k), setting a date for a hearing to be held not less than 10 days after service of the notice that the charge has been filed. The notice of hearing, which is served on all parties to the dispute, including all employers, sets forth the time and place of the hearing and a simple statement of the issues involved. Section 10(k) hearings are conducted by a hearing officer and conform, insofar as possible, to the procedures used in representation matters. **Rules** § 102.90.

After the close of a 10(k) hearing, the matter is transferred to the Board. The hearing officer may file a report that sets forth the issues and summarizes the evidence, but is prohibited from making any recommendation concerning the dispute. The Board determines the merits of the jurisdictional controversy either immediately upon the record or after oral argument or the submission of briefs. In 10(k) cases that are designated in the notice of hearing as involving the national defense, the parties are limited to oral argument at the close of the hearing and may not file briefs except with specific Board approval. Such approval is sought by means of an application that must be filed “expeditiously” with the Board after the close of the hearing. **Rules** § 102.90.

The Board’s determination on the merits, reflecting a consideration of “all relevant factors,” consists of a decision as to which of the contending groups of employees is entitled to perform the work in dispute. In actual practice, the Board’s award almost always coincides with the employer’s original work assignment.

If the charged labor organization fails to comply with the Board determination of the dispute or, when a method of adjustment has been agreed upon, with the determination resulting from that method, the regional director issues an unfair labor practice complaint and a notice of hearing based on the original Section 8(b)(4)(D) charge. The case is then processed in the same manner as are other unfair labor practice cases. See § 6.11, **supra**. If the Board determines in the 10(k) proceeding that the charged labor organization is entitled to the work in dispute, the regional director will dismiss the underlying Section 8(b)(4)(D) charge, and the union deemed to be so entitled may continue to picket or engage in conduct in support of the work award, which would otherwise be unlawful.

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