

SECTION 10(j) OF THE NATIONAL LABOR RELATIONS ACT: SUGGESTED REFORMS FOR AN EXPANDED USE

DONALD J. SIEGEL*

The use of the injunction has long been a part of American labor relations. Up to 1932 the injunction was frequently utilized;¹ thereafter, its use was restricted by the Norris-LaGuardia Act² and similar state statutes.³ With the passage of the 1947 amendments to the National Labor Relations Act (NLRA),⁴ however, the injunction became an important tool for the enforcement of that Act. Section 10 (l) of the NLRA directs the National Labor Relations Board (NLRB) to seek temporary injunctive relief in order to remedy certain *union* unfair labor practices.⁵ Section 10(j) of the Act gives the NLRB authority to seek temporary injunctive relief to remedy any other type of unfair labor practice.⁶ Section 10(l) is a mandatory provision; the use of the 10(j) remedy is discretionary with the Board. While union unfair labor practices have been extensively enjoined under section 10(l), the Board has made relatively little use of its authority to enjoin other alleged unfair labor practices pursuant to section 10(j).⁷ The Board's reluctance to use the 10(j) remedy continues, despite congressional encouragement to make more effective use of the section.⁸

At present, with the NLRB caseload rapidly expanding⁹ and the adequacy of Board relief often questioned,¹⁰ it is appropriate to re-

* B.A. University of Wisconsin, 1967; J.D., Harvard Law School, 1971; Member of the Massachusetts Bar; Associate, Segal, Roitman & Coleman, Boston, Massachusetts.

¹ See generally, F. Frankfurter and N. Greene, *The Labor Injunction* (1930).

² 29 U.S.C. §§ 101 et seq. (1970).

³ According to Cox and Bok, *Labor Law: Cases and Materials*, 102 (6th ed. 1965), the following states have anti-injunction statutes very similar to the federal Act: New Jersey, New York, Oregon, Pennsylvania and Wisconsin.

⁴ 29 U.S.C. §§ 151 et seq. (1970).

⁵ 29 U.S.C. § 160(l) (1970).

⁶ 29 U.S.C. § 160(j) (1970).

⁷ See tables at p. 461 *infra*.

⁸ See pp. 470-71 *infra*.

⁹ Charges against employers have increased by 400% from fiscal year 1948 to fiscal year 1970. The growth in the number of charges against unions has been even more pronounced. Many charges of union unfair labor practices lead to 10(l) injunctions. Samoff, *The Case of the Burgeoning Load of the NLRB*, 22 Lab. L.J. 611, 615 (1971).

¹⁰ See generally, Report of the Special Subcomm. on Labor, House Comm. on Education and Labor, 90th Cong., 2d Sess., *National Labor Relations Act Remedies: The Unfulfilled Promise* (Comm. Print 1968); McCulloch, *New Remedies Under the National Labor Relations Act*, 21 N.Y.U. Conference on Labor 223 (1968); McCulloch, *Past, Present and Future Remedies Under Section 8(a)(5) of the NLRA*, 19 Lab. L.J. 131 (1968); Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38 (1964).

See also *International Union of Electrical, Radio and Machine Workers v. National*

assess the relationship between an increased use of the 10(j) remedy and more effective enforcement of the National Labor Relations Act. This article will examine the NLRB internal procedures relative to the use of 10(j) and the role of the courts in granting or denying the injunction. It will demonstrate the need for revision of the criteria which the Board employs to determine its use of 10(j) as well as the necessity for expanded use of this discretionary provision. A set of revised criteria will be proposed which, it is submitted, if adopted would lead to such expanded use and, concomitantly, to a more effective enforcement of the National Labor Relations Act.

I. INTERNAL PROCEDURES OF THE NLRB

A. Powers of the General Counsel

Section 10(j) of the National Labor Relations Act provides that the National Labor Relation Board

shall have power, upon issuance of a complaint . . . charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court . . . for appropriate temporary relief or restraining order.¹¹

Originally, the General Counsel of the Board had authority to initiate and prosecute injunction proceedings on behalf of the Board, apparently without the latter's prior approval.¹² This procedure was held to be a lawful delegation of power from the Board to the General Counsel in *Evans v. International Typographical Union*.¹³ There, the respondent union had moved to dismiss the NLRB's petition on the ground, *inter alia*, that the Board's delegation of "full and final authority and responsibility . . . for initiating and prosecuting injunctive proceedings as provided for in Section 10(j)" was invalid.¹⁴ The court rejected this contention on two grounds. First, observing that the NLRA gave regional directors authority to initiate proceedings¹⁵ and that the Act gave the General Counsel supervision over all personnel in the regional offices,¹⁶ the court concluded that a delegation of authority by the Board

Labor Relations Board (Tiidee I), 426 F.2d 1243 (D.C. Cir.), cert. denied, 400 U.S. 950 (1970), and *Ex-Cello Corp.*, 185 N.L.R.B. No. 20, 74 L.R.R.M. 1740 (1970), rev'd in part, 76 L.R.R.M. 2753 (D.C. Cir. 1971), reversal vacated, 77 L.R.R.M. 2547 (D.C. Cir. 1971).

¹¹ 29 U.S.C. § 160(j) (1970).

¹² "General Counsel shall exercise full and final authority and responsibility, on behalf of the Board, for initiating and prosecuting injunction proceedings as provided for in Section 10(j) and (l)." Statement of Delegation of Certain Powers of the National Labor Relations Board to the General Counsel, § 204.3(a)(4), 13 Fed. Reg. 655 (1948).

¹³ 76 F. Supp. 881 (S.D. Ind. 1948).

¹⁴ See note 12 *supra*.

¹⁵ 76 F. Supp. at 887.

¹⁶ *Id.* at 888.

SECTION 10(j) OF THE NLRA

to the regional directors was, in effect, nothing less than a delegation of authority to the General Counsel.¹⁷ Second, in examining the face of the statute itself, the court found that the provision imposing upon the General Counsel "such other duties as the Board may prescribe" justified the Board's delegation of functions other than those specifically committed to the General Counsel by statute. To conclude otherwise, ruled the court, would be to hold that the provision was "superfluous and without meaning or purpose."¹⁸

In 1958, however, the Board issued a memorandum which effectively withdrew from the General Counsel the authority to initiate proceedings:

On behalf of the Board the General Counsel of the Board will, in full accordance with the directions of the Board . . . initiate and prosecute injunction proceedings as provided in Section 10(j). . . . [P]rovided, however, that the General Counsel will initiate and conduct injunction proceedings under Section 10 (j) . . . only upon approval of the Board¹⁹

The earlier procedure authorizing the General Counsel to initiate proceedings without Board approval appears to be more desirable. The current procedure is inconsistent with the intended division of the National Labor Relations Board into judicial and prosecutive branches.²⁰ The current procedure gives the Board an unfortunate opportunity both to perform a function of a prosecutive nature and to consider, ex parte, facts relating to issues which ultimately it will have to resolve in a quasi-judicial capacity.²¹ Furthermore, since the Board must give

¹⁷ Id.

¹⁸ Id. at 889.

¹⁹ National Labor Relations Board: Delegation of Powers to General Counsel. BNA LRX 4201 (1961).

²⁰ "The combination of the provisions dealing with the authority of the General Counsel, the provision abolishing the Board's review division, and the provisions relating to the trial examiners and their reports effectively limit the Board to the performance of quasijudicial functions." Conference Report to Accompany H.R. 3020, H.R. Rep. No. 510, 80th Cong., 1st Sess. 37-38 (1947).

²¹ 76 F. Supp. at 889. Former Chairman McCulloch's response to this criticism is not sufficient to allay the misgivings expressed:

But does not our discussion and deliberation at this initial phase of the case lead to "prejudging," a blending of the role of prosecutor and judge? I do not think so. We form opinions as we study the facts alleged and set down in the memoranda, but our attention is directed not so much to the merits as to the alleged need for interim relief, to considerations of public and private interest in general. When the case comes to us for decision on the merits, some year-and-a-half and perhaps 3,000 cases later, the earlier impressions often are long since forgotten. The record, intermediate report, exceptions and briefs then before us furnish the real foundation for our final decision. This is the practical answer to the charge of prejudgment.

Address by former Board Chairman Frank McCulloch, Eighth Annual Joint Industrial

careful study to each request for authorization to use section 10(j),²² the time it spends deliberating upon each request no doubt delays the initiation of necessary proceedings in the district court.²³

B. *Procedure and Criteria for Board Action*

Generally, requests for section 10(j) relief are submitted to a regional office by a party indicating that interim injunctive relief is required to enjoin the continuation of an unfair labor practice. The regional office then submits to the District Court Branch of the General Counsel's Office in Washington, D.C., a report of its investigation and a recommendation as to whether or not 10(j) proceedings should be instituted. This procedure may be followed even in the absence of a request from a party, if, in the opinion of the regional director, 10(j) relief is warranted. If the General Counsel concludes that 10(j) proceedings are not warranted, no further action is taken on the request. If he decides that 10(j) proceedings are necessary, he must request authority from the Board to institute such proceedings.²⁴

Relations Conference of Michigan State University, April 19, 1962. Reprinted in 49 L.R.R.M. 74, 83 (1962).

²² We have an internal system of checks and balances also which deters abuse. The Board has delegated to the General Counsel the responsibility for screening the 60 or so annual requests for injunctive relief. He has authority to reject those he regards as completely lacking in merit and refers the remainder to the Board with a detailed memorandum and a recommended course of action either for or against seeking injunctive relief. Then follows discussion among the five Board members, friendly, but often sharp; and finally comes a decision which usually follows the recommendations of the General Counsel, but not always. In short, the group discussion by Presidentially-appointed, independent (and we are that) members minimizes the potential for abuse.

Id.

²³ The average amount of time spent by the Board in disposing of a request for authorization to use section 10(j) was not available to the author. In reply to a request for the length of time required to process 10(j) authorization requests, Assistant General Counsel Serot responded:

[T]he time span varies from case to case depending upon the complexity of the facts, the novelty of the issues and the legal research required in such connection. Additionally, there may be need for further investigation and, in many instances, the parties ask for an opportunity orally to present their respective positions to the General Counsel, and sometimes to submit written memoranda, all of which will add to the length of time a given case is considered.

Because of the time and work required to do so, we have not collected and analyzed the information in this connection for the past 10 years. However, we are in a position to give you some information for fiscal year 1970 (July 1, 1969 to June 30, 1970) which might be of value to you. During that period, 69 requests for 10(j) injunctions were considered by the General Counsel's office to the point where a determination was made. The average time to process these cases in the General Counsel's office from the time all necessary information was received in Washington was 11 days, which includes Saturdays, Sundays and holidays.

Letter from Julius G. Serot, Assistant General Counsel, National Labor Relations Board, to the author, Feb. 19, 1971.

SECTION 10(j) OF THE NLRA

The number of requests from regional directors for authorization to use section 10(j) varies from year to year. The following chart provides figures for the period from January, 1962, to December 16, 1970:

Requests by Regional Directors for 10(j) Authorization²⁵

Year	Number of Requests
1962	143
1963	170
1964	141
1965	148
1966	212
1967	192
1968	190
1969	235
1970	191

Eight Year Period—Total Requests 1622

Reference to the number of petitions actually filed by the General Counsel reveals that most of the requests are disapproved:

Year	Petitions Actually Filed
1962	1128
1963	1527
1964	1828
1965	1829
1966	1730
1967	2231
1968	1632
1969	1533
1970	1734

Eight Year Period—Total Petitions Filed 149

The criteria by which the Board rules on requests for authorization to use section 10(j) are set out in the *NLRB Internal Instruction and Guidelines Manual—Unfair Labor Practice Proceedings*, and they will soon be made public in the NLRB Field Manual.³⁵ Section 10310.2

²⁴ Id.

²⁵ This chart was based on information supplied by Julius G. Serot's letter, *supra* note 23. The figures are based on calendar years.

²⁶ 27 NLRB Ann. Rep. 280 (1962). Figures in this chart are based on fiscal years.

²⁷ 28 NLRB Ann. Rep. 184 (1963).

²⁸ 29 NLRB Ann. Rep. 203 (1964).

²⁹ 30 NLRB Ann. Rep. 143 (1965).

³⁰ 31 NLRB Ann. Rep. 151 (1966).

³¹ 32 NLRB Ann. Rep. 175 (1967).

³² 33 NLRB Ann. Rep. 165 (1968). In four more 10(j) cases, the Board authorized the filing of a petition but none was filed because the case was settled shortly after the Board action.

³³ 34 NLRB Ann. Rep. 238 (1969).

³⁴ 35 NLRB Ann. Rep. 196 (1970).

³⁵ The Board has been criticized before for not making public the criteria by which it decides whether or not to authorize utilization of section 10(j). See, for example, *McLeod v. General Electric Company*, 257 F. Supp. 690 (S.D.N.Y. 1966), where the court stated:

of the Internal Instructions Manual, entitled "Guidelines for the Utilization of Section 10(j)," is prefaced by an acknowledgment that there is neither statutory nor case law guidance for determining whether proceedings under 10(j) are appropriate. The section, however, does suggest several criteria which Board experience has shown to be relevant:

1. the clarity of the alleged violation;
2. whether the case involves the shutdown of important business operations which, because of their special nature, would have an extraordinary impact on the public interest;
3. whether the alleged unfair labor practice involves an unusually wide geographic area, and thus creates special problems of public concern;
4. whether the unfair labor practice poses special remedy problems so that resort solely to the Act's regular enforcement proceedings would probably render it impossible either to restore the *status quo* or to dissipate effectively the consequences of the unfair labor practice;
5. whether the unfair labor practice involves interference with the conduct of an election or constitutes a clear and flagrant disregard of Board certification of a bargaining representative or other Board procedure;

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

Id. at 708 n.14.

On December 9, 1970, the author wrote to H. Stephen Gordon, Associate General Counsel, National Labor Relations Board, to request a copy of § 10310 of the Internal Instructions Manual. On December 17, 1970, Eugene Rosenfeld, Deputy Assistant General Counsel, wrote to the author stating that § 10310 of the Internal Instructions Manual was not available to the public because it was considered to come within the exceptions to § 102.117(a)(1)(ii) of the Board Rules and Regulations, Series 8, as amended.

On January 6, 1971, Professor David Shapiro of the Harvard Law School wrote to the Honorable Edward Miller, Chairman, National Labor Relations Board, in support of the author's request for a copy of § 10310 of the Internal Instructions Manual. The author renewed his request for same in that letter. Professor Shapiro argued that the NLRB was obligated to make the requested information available to the author pursuant to 5 U.S.C. 552, the Freedom of Information Amendments to the Administrative Procedure Act.

Chairman Miller responded in a letter dated Jan. 15, 1971, in which he said that he had reexamined the unreleased portions of § 10310. The Chairman announced that he had decided to release § 10310 to the public and that it would soon be published in the publicly available NLRB Field Manual.

SECTION 10(j) OF THE NLRA

6. whether the continuation of the alleged unfair labor practice will cause exceptional hardship to the charging party;
7. whether the current unfair labor practice is part of a continuing or repetitious pattern;
8. whether, if violence is involved, the violence is of such a nature as to be out of control of local authorities or otherwise widespread and susceptible of control by 10(j) relief.³⁶

These criteria, however, appear to be little more than a list of the factors which the Board has considered in the past in determining whether to authorize the use of section 10(j). Their indefinite status before the Board is indicated in the last paragraph of the section itself:

These factors are not all inclusive, nor does the presence of one or more factors enumerated above necessarily require that we institute 10(j) proceedings³⁷

A further illustration of the purely advisory status of the guidelines is the following statement of the Chairman of the National Labor Relations Board:

[T]he *Guidelines*, as stated in the preface to the *Field Manual*, are issued by the General Counsel "to establish procedural and operational instructions for the guidance of agency staff [They] are not Board rulings or directives, and are not a form of authority binding upon the Board."³⁸

On the rare occasions where the Board has publicly listed the eight criteria of section 10310.2, it has referred to them not as criteria but, rather, as factors which the Board may consider when deciding whether to authorize a petition for injunctive relief.³⁹

³⁶ NLRB Internal Instructions and Guidelines Manual, § 10310.2.

³⁷ *Id.*

³⁸ Letter from Honorable Edward B. Miller, Chairman, National Labor Relations Board, to Professor David Shapiro, January 15, 1971.

³⁹ See, for instance, Petitioner's Brief for Certiorari at 17 n.16, *McLeod v. General Electric Co.*, 366 F.2d 847 (2d Cir. 1966), wherein the eight criteria are introduced with the following phrase: "An analysis of past cases indicates that consideration has been given to such *factors* as . . ." (emphasis added).

See also the statement of former General Counsel Stuart Rothman, made at the Hearings on General Study into the Procedures of the NLRB and its Administration of the Labor-Management Relations Act of 1947 as Amended Before the Subcomm. on Nat'l Labor Relations Board of the House Comm. on Education and Labor, 87th Cong., 1st Sess., pt. 2, at 1236 (1961) [hereinafter cited as 1961 Hearings], where the list of eight criteria was introduced as follows: "No rigid criteria for the authorization of Section 10(j) action has been adopted by the Board: rather, each case has been considered on its own merits. An analysis of past cases, however, indicates that consideration has been given to such *factors* as . . ." (emphasis added).

C. *Proposed New Criteria*

Clearly, a new and more meaningful set of criteria is needed. These standards should be made public and should serve to "guide the public, the courts, the agency itself, and [to] give a measure of assurance that the action taken in the individual cases is reasonably principled."⁴⁰ The National Labor Relations Act⁴¹ itself does not indicate what criteria the Board should use in deciding whether to authorize the use of Section 10(j). Reference, therefore, must be made to the legislative history of the Act. With regard to why subsection (j) was added to former section 10, the Senate Report indicated that:

Experience under the National Labor Relations Act has demonstrated that by reason of lengthy hearings 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.⁴²

Congressional concern with delay inherent in the Board's regular enforcement procedures is further highlighted in the following passage:

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

⁴⁰ See note 35 *supra*.

⁴¹ 29 U.S.C. § 151 et seq. (1970).

⁴² S. Rep. No. 105, 80th Cong., 1st Sess. 27 (1947).

SECTION 10(j) OF THE NLRA

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 such relief in the case of strikes and boycotts defined as unfair labor practices.⁴³

The above quoted excerpts from the legislative history suggest that Congress was concerned principally with realization of the objectives of the National Labor Relations Act—specifically, the prompt elimination of any obstruction to the free flow of commerce, and the encouragement of free and private collective bargaining. The legislative history further suggests that Congress had previously identified certain practices which were inconsistent with the above objectives and that it declared additional acts to be unfair labor practices in an effort to realize the objectives of the NLRA. Congress also recognized that the Board's pre-Amendment enforcement powers often were inadequate to insure achievement of the Act's objectives. In many instances the Board could not act quickly enough—with the result that persons violating the Act achieved their unlawful goals. To the extent that violators were thus successful, the congressionally defined public interest suffered substantial injury. Congress sought to remedy such injury to the public interest by giving the Board a means to preserve the status quo pending Board adjudication of the complaint.

The foregoing analysis of the legislative history suggests several criteria by which the Board can determine whether to authorize the use of section 10(j). It is submitted that the Board should consider the following three criteria:

1. the clarity of the violation;
2. the extent to which the alleged violator will achieve an unlawful objective if preliminary relief is not sought and obtained; and
3. the difficulty in restoring and/or preserving the pre-violation status quo if preliminary relief is not sought and obtained.

These criteria form an analytical framework within which every request for authorization to use 10(j) may be evaluated. They are general enough to be flexible but definite enough to provide a sound basis

⁴³ Id. at 8. These excerpts are the only parts of the legislative history of the Labor Management Relations Act that deal in a substantive manner with § 10(j). The House version, H.R. 3020, did not contain § 10(j) or anything similar to it; the Senate version, S. 1126, contained § 10(j) in substantially the same language in which it was enacted. The House conferees accepted the Senate view and 10(j) was incorporated in the act. See Conference Report, *supra* note 20, at 57.

upon which the decision to invoke 10(j) may be properly determined. The three proposed standards would replace the above noted list of factors heretofore considered by the Board in deciding whether or not to authorize the use of 10(j).

It is likely that faithful implementation of the proposed criteria would lead to an increase in the number of 10(j) requests in several areas of enforcement. The first of these is pre-election misconduct. Often an employer will achieve an unlawful objective by engaging in unfair labor practices prior to an NLRB election. The issuance of an unfair labor practice complaint will usually postpone the election until adjudication of that complaint;⁴⁴ such an adjudication may take months or even years to complete.⁴⁵ The union may find it difficult, if not impossible, to maintain its strength during the pendency of litigation; this is especially so if the employer has discharged some or all union leaders just prior to the election. Despite the opportunity for their reinstatement with back pay, immediate relief is necessary in order to prevent irreparable injury.⁴⁶ Continuous employment is more satisfactory than reinstatement with compensation long after the fact. As one scholar has noted, even greater injury may be suffered by the union and the remaining employees. Given the dependence of a union on an effective committee of employees within the plant, the discharge of several principal activists may seriously damage the union's campaign.⁴⁷

It is probable that normal Board remedies will not restore to the union the strength it had prior to the violations. Many of the discharges might refuse the opportunity for reinstatement, preferring a lump sum settlement instead. Even if the discharges were to accept reinstatement with back pay, their ardor for unionization may be diminished. Other employees, even though observing colleagues reinstated with back pay, may nevertheless be reluctant to gamble on suffering similar treatment.

Only a Board order to bargain can restore to the union its pre-violation status quo in this context. If the union had authorization cards from a majority of employees in the unit prior to the employer's violations, a bargaining order would be possible.⁴⁸ If, however, the union

⁴⁴ Cox and Bok, *supra* note 3, at 312.

⁴⁵ The median time from charge to complaint is 59 days. It takes an average of 73 days from the docketing of the case until it is tried and an additional 114 days for the Trial Examiner to write his opinion. The average time for the Board to dispose of an appeal from the decision of a Trial Examiner is 105 days. In 1966, 64% of all Board decisions were appealed to the circuit courts of appeal. Report of the Special Subcomm. on Labor, *supra* note 10, at 39-40.

⁴⁶ Bok, *supra* note 10.

⁴⁷ *Id.* at 130-31.

⁴⁸ See *NLRB v. Gissell Packing Co.*, 395 U.S. 575 (1969).

SECTION 10(j) OF THE NLRA

did not have authorization cards from a majority of employees prior to the violations, such an order would probably not be made.⁴⁹ Even if made and upheld, an order to bargain might have the disadvantage of imposing an unwanted bargaining representative upon the employees.⁵⁰ A section 10(j) petition would seem to be appropriate in such a situation. It would serve to preserve the pre-violation status quo and would permit the election to take place as scheduled, if the union so desired.⁵¹ It would also reduce the likelihood that the Board, in order to deny the employer the fruits of his unfair labor practice, would have to impose an unwanted bargaining representative upon the employees.

A second situation where the suggested criteria would probably lead to more 10(j) petitions is that of the refusal to bargain. Such violations also lead to lengthy litigation during which the strength of a union often diminishes. The employer's unlawful objective in this situation would be (1) to avoid having to deal with the union at all, or (2) to avoid or postpone dealing with the union for the pendency of the litigation. The first objective can be frustrated by an order to bargain. Such an order, however, is subject to the possibility that, when made, it might result in the imposition upon employees of a bargaining representative they no longer desire. A section 10(j) petition would be useful in avoiding such a situation. The second objective can be prevented only by preliminary relief granted pursuant to section 10(j). Indeed, under the Board's current interpretation of the Act,⁵² a 10(j) injunction is the only way to insure that during the pending litigation the employees will receive from the employer that which they would have received from him had he bargained in good faith.

A third situation where the suggested criteria would likely lead to increased requests for 10(j) relief is that of employer assistance to, or domination of, a labor organization during an organizational drive

⁴⁹ In *Heck's Inc.*, 191 N.L.R.B. No. 146, 77 L.R.R.M. 1513 (1971), the NLRB declined to issue an order to bargain where less than a majority of members of the bargaining unit had signed authorization cards. The Board noted that "the Union asks the Board to do something that it has never done throughout its history: to order bargaining with a union which has at no time established its majority status in the unit in which bargaining is requested." *Id.* at 1516.

⁵⁰ Yet the order is the only way to prevent the employer from achieving an unlawful purpose at this late date.

⁵¹ Cox and Bok, *supra* note 3, at 312, point out: "For many years, it has been the Board's policy not to proceed with an election while substantial unfair labor practice charges are pending. Nevertheless, the Board has proceeded with an election if the party filing the charge consented, but the charge has then been considered waived and the charging party could not seek to set aside the election on the basis of the allegations in question. The significance of the last rule, however, has been seriously qualified by the *Bernel Foam* decision . . . for a party may now proceed to an election and, if the election is lost, make objections to the election and file charges based on allegations of unlawful conduct occurring prior to the election."

⁵² See generally sources cited in note 10 *supra*.

between that organization and a second union. In such a situation the employer will often recognize the favored union, bargain with it, and enter into a contract containing a strong union security provision. The employer's objective may be either permanent or temporary. He may hope to avoid dealing with the second union altogether, or he may only want to postpone bargaining with it. Although the permanent objective can be frustrated by an order to bargain with the second union, such an order has distinct disadvantages.

It is probable that the strength of the second union will have suffered considerably during the period in which the employer has bargained and contracted with the favored union. In addition, it is possible that many, if not most, employees will be satisfied with the favored union and its representation and will not be anxious to be represented by the second union. In this context, an order to bargain definitely imposes an unwanted bargaining representative upon the majority. If a 10(j) injunction were granted in this situation, the bargaining relationship between employer and favored union could be restrained, and any loyalty of the employees to the favored union would be based on factors other than its current representation. If the employer's objective is temporary then, clearly, only preliminary relief can frustrate it. A preliminary injunction in the form of an order to bargain with the second union would be appropriate if the latter could prove that it represented a clear majority of the employees.

Several advantages will flow from adoption of the new criteria. First, an analytical framework based on legislative history will replace the not too meaningful list of factors which the Board has heretofore considered in disposing of requests to authorize preliminary relief. This framework would provide a definite basis upon which the parties could argue about the advisability of 10(j) relief,⁵³ and upon which the Board could consistently and rationally dispose of each request. It would "give a measure of assurance that the action taken in individual cases is reasonably principled."⁵⁴ Second, the new criteria would permit a more effective enforcement of the Act. In cases where the employer previously would have been able to achieve an unlawful objective, and thereby cause substantial injury to the public interest as declared by Congress, he would no longer be able to do so. Upon showing of a reasonable likelihood that a violation has taken place, that employer would

⁵³ Under current procedures the parties actively argue to the General Counsel about the advisability of 10(j) relief, but evidently, no arguments are made directly to the Board: "[I]n many instances, the parties ask for an opportunity orally to present their respective positions to the General Counsel, and sometimes to submit written memoranda. . . ." Letter from Julius G. Serot, Assistant General Counsel, National Labor Relations Board, to the author, Feb. 19, 1971.

⁵⁴ See note 35 *supra*.

be subject to a 10(j) petition under the proposed criteria. Finally, the new criteria, and the expanded use of section 10(j) which should result from their faithful implementation, might deter the commission of numerous unfair labor practices:

Greater use of the preliminary injunction would also do much to make this remedy more realistic in the eyes of the parties and thus enhance its deterrent effect. In this way, the Board might find it much easier to settle cases where employers would otherwise be content to profit from the delay resulting from a full dress administrative proceeding.⁵⁵

It should be noted that adoption and implementation of the proposed criteria would not be without problems. A larger workload for the General Counsel, but presumably not for the Board, would surely follow. The increased workload would occur on two levels. The General Counsel's Washington, D.C., staff would be required to dispose of more requests to use section 10(j), and the regional offices would be required to prosecute more petitions in the district courts. Quite often, 10(j) hearings resemble a presentation of the merits of the complaint and may take several days;⁵⁶ sufficient manpower would be required to make such a presentation on relatively short notice. If this manpower is not now available to both the General Counsel and the regional offices, it should be made available at the earliest possible time. The suggested criteria cannot be faithfully implemented without it.

Until such manpower is made available, however, the General Counsel should seek to supplement his own resources. One means of doing so would be to permit the charging party to intervene in the 10(j) hearing and to assist the regional office in the preparation and/or presentation of its case.⁵⁷ In the past, the Board has opposed such intervention and the courts have denied it.⁵⁸ With the implementation of the suggested criteria, however, the Board may reconsider its view about intervention. Under the old criteria, there was nothing to be gained from intervention because the 10(j) caseload was very light.⁵⁹ Given the present increased caseload, there now would be an advantage—

⁵⁵ Bok, *supra* note 10, at 131.

⁵⁶ It is not unusual for such hearings to take a full week. For instance, the evidentiary hearing in *McLeod v. General Electric Co.* took one full week. 257 F. Supp. at 692.

⁵⁷ No instances where the Agency has cooperated in such an intervention can be found.

⁵⁸ See, e.g., *Reynolds v. Marlene Indus. Corp.*, 250 F. Supp. 722 (S.D.N.Y. 1966).

⁵⁹ In fiscal 1969, only fifteen petitions for 10(j) relief were authorized and three of these were settled before they reached the hearing stage. 34 NLRB Ann. Rep. 160 (1969). The record number of 10(j) petitions authorized in any one year occurred in fiscal 1967, when 22 were approved. 32 NLRB Ann. Rep. 175. The Board has over 30 regional offices and some of those offices have subregional offices.

additional manpower to implement the new criteria and to enforce the Act more effectively.

Although intervention with the approval of the General Counsel would alleviate the shortage of manpower, intervention as a matter of right could have the opposite effect.⁶⁰ If the Board opposed the intervention, staff attorneys would have to spend time preparing an argument against the intervention. If the intervention were granted, considerable time might be spent arguing over differences between the Board and the intervenor. In order to get the benefits of intervention without incurring the attendant disadvantages, it would not be unreasonable for the Board to require assurances from the charging party that the Board would have the final word on any differences that might arise between them during the hearing.⁶¹ This informal agreement could be the price for the Board's support of the charging party's request to intervene. Once such an agreement is reached the Board is assured of control of the suit and the charging party is assured that manpower problems will not preclude an otherwise meritorious request for preliminary relief.

One final problem which will result from faithful implementation of the new criteria will be additional work for the federal district courts. A hearing for 10(j) relief is often quite lengthy and may involve complex issues of law and fact. There is little that the Board can do to ease this problem. Only additional judges or some type of court action can resolve it. In any event, the advantages flowing from the implementation of the new criteria outweigh this particular concern.

D. *Congressional Review of NLRB Internal Procedures*

The only congressional review of the internal procedures described above was made in 1961 by the Subcommittee on the National Labor Relations Board, House Committee on Education and Labor. That subcommittee made the following recommendation:

The names of Norris and LaGuardia are constant reminders of the dangers inherent in conducting labor-management relations by way of injunction. Nevertheless, this subcommittee finds that injunctions are now utilized extensively against union activities and to an almost nonexistent extent against employer unfair labor practices. Failure to utilize the 10(j) discretionary injunction sometimes results in irreparable injury. This subcommittee therefore recommends that the Labor Board give careful consideration to greater utilization of the

⁶⁰ Currently, the charging party does not have a right to intervene in 10(j) hearings. *Reynolds v. Marlene Indus. Corp.*, 250 F. Supp. 722 (S.D.N.Y. 1966).

⁶¹ For instance, the parties might differ among themselves on the terms of a settlement or the scope of the decree.

SECTION 10(j) OF THE NLRA

10(j) injunction in situations when unfair labor practice charges are filed and the Board finds reasonable cause to believe that such unfair labor practice is continuing and will be continued unless restrained, and will cause irreparable property or personal injury or injury to the exercise of rights guaranteed by section 7. Illustrative are the situations of flagrant and aggravated acts of picket line force and violence, the situations of repeated discharge of union adherents, the situations where employers or unions flagrantly refuse to bargain in good faith, and the situations wherein the employer threatens to intimidate his employees by closing the plant or shifting work to affiliated factories.⁶²

In a speech shortly after the subcommittee made its report, then Chairman McCulloch stated, "I am mindful of the Pucinski Committee recommendations, and they appear valid."⁶³ He pledged that the Board would make greater use of the 10(j) injunction. Then he became specific:

Turning to the employer unfair labor practices, the greatest number of charges received by the Board continues to be the illegal discharges because of union activities. There could appropriately be a greater emphasis on the use of the injunction to prevent recurring, anti-union campaigns designed to stifle organizational drives. Thus, the Board could well seek injunctions to restore discharged employees to their jobs, if they are the leading union adherents and discharged at the outset of an organizational drive. Experience has taught us that our remedy of ultimate reinstatement with back pay is regarded in some quarters as no more than a fee for a union-hunting license. . . .

The second largest area of employer unfair labor practice cases concerns refusal to bargain. Experience has shown that an employer's successful postponement of bargaining for the year or two it takes to process a Labor Board case and the additional year or two it takes to secure judicial enforcement of the Labor Board order, frequently dissipates the union's majority status and weakens its bargaining power to the extent that it can no longer effectively represent the employees. This justifies a more extensive use of Section 10(j)

⁶² Subcomm. on National Labor Relations Board of the Comm. on Education and Labor, 87th Cong., 1st Sess., Administration of the Labor-Management Relations Act by the NLRB 52 (Comm. Print 1961).

⁶³ McCulloch, *New Problems in the Administration of the Labor-Management Relations Act: The Taft-Hartley Injunction*, 16 Sw. L.J. 82, 95 (1962).

in respect to limited refusals to bargain, such as unilateral changes, refusals to discuss certain matters, refusals to furnish required information, insistence on illegal demands, and the like.⁶⁴

Statistics indicate that use of the 10(j) injunction did increase during the 1960's. However, the extent of its use was substantially limited. Prior to 1960, the 10(j) injunction had been used just forty-seven times.⁶⁵ In fiscal years 1960-69, it was used on 138 occasions, or, on the average, approximately fourteen times per year.⁶⁶ As then Chairman McCulloch noted, "in recent years the Board has increased the number of its applications for interim injunctive relief under Section 10(j), although that number is still quite modest."⁶⁷

It would seem that former Chairman McCulloch's hopeful response to the Pucinski Committee's recommendations has not been implemented by the Board. The limited increase in the use of 10(j) hardly fulfills the expectations raised by the former Chairman's comments; nor does it make utilization of preliminary relief a common enough threat to deter the commission of unfair labor practices. The Board itself may have realized the inadequacy of its limited use of section 10(j) when it stated in a recent case that:

We have given most serious consideration to the Trial Examiner's recommended financial reparations Order, and are in complete agreement with his finding that current remedies of the Board designed to cure violations of Section 8(a)(5) are inadequate

Much as we appreciate the need for more adequate remedies in 8(a)(5) cases, we believe that, as the law now stands, the proposed remedy is a matter for Congress, not the Board. In our opinion, however, substantial relief may be obtained immediately through procedural reform, giving the highest possible priority to 8(a)(5) cases combined with full resort to the injunctive relief provisions of Section 10(j) and (e) of the Act.⁶⁸

Only time will tell whether the Board implements the recommendation contained in the above dictum more substantially than it did Chairman McCulloch's remarks. If the Board does make greater use of 10(j)

⁶⁴ Id. at 99.

⁶⁵ 1961 Hearings, *supra* note 39, at 1235-36.

⁶⁶ See 25 NLRB Ann. Rep. 199 (1960), 26 NLRB Ann. Rep. 238 (1961) and notes 26-33 *supra*.

⁶⁷ McCulloch, Past, Present and Future Remedies Under Section 8(a)(5) of the NLRA, 19 Lab. L.J. 131, 137 (1968).

⁶⁸ *Ex-Cell-O Corp.*, 185 N.L.R.B. No. 20, 74 L.R.R.M. 1740, 1741, 1743 (1970).

SECTION 10(j) OF THE NLRA

relief in the future, the problems of who should have the power to authorize such relief, and under what criteria, take on even greater significance.

II. THE COURTS AND SECTION 10(j)

Promoting an expanded use of the 10(j) remedy through revision and clarification of the applicable criteria is only the first step in achieving a more effective enforcement of the National Labor Relations Act. Once the Board files a petition for interim relief, the focus of attention shifts to the judiciary. The courts have no uniform standard by which to rule on requests for preliminary relief pursuant to section 10(j). At least three different standards have been applied:

1. a showing of reasonable cause for belief that the Act has been violated; or
2. a showing of reasonable cause for belief that the Act has been violated *plus* a showing that the injunction is necessary to preserve the status quo and/or prevent irreparable harm; or
3. a showing of reasonable cause for belief that the Act has been violated *plus* a showing that the purposes of the Act will probably be frustrated if interim relief is not granted.

It can be seen that common to all three is a finding of reasonable cause to believe that the Act has been violated.⁶⁹ The first standard requires *only* a showing of reasonable cause. Illustrative is *Johnston v. Evans*,⁷⁰ where the court stated that "[t]his court, to determine whether injunctive relief is warranted, needs only find that the Regional Director has reasonable cause to believe that an unfair labor practice has been committed."⁷¹ The propriety of granting the relief follows automatically from the finding of reasonable cause.⁷²

The second and third standards both require, in addition to the

⁶⁹ Reasonable cause has been defined as "a 'reasonable possibility' that the unfair labor charges will be sustained." *Greene v. Mr. Wicke, Ltd.*, 270 F. Supp. 1012, 1016 (D. Conn. 1967). "[T]he test is whether a reasonable person would believe the facts to constitute a violation of the law. The facts are not required to be sufficient to constitute such violation, or to establish that the charges are true. A prima facie case, or a probability of violation, is all that is required." *Brown v. National Union of Marine Cooks and Stewards*, 104 F. Supp. 685, 688 (N.D. Cal. 1951).

⁷⁰ 223 F. Supp. 766 (E.D.N.C. 1963).

⁷¹ *Id.* at 769.

⁷² Several courts have applied this standard: *Johnston v. Evans*, 223 F. Supp. 766 (E.D.N.C. 1963); *Fusco v. Kaase Baking Co.*, 205 F. Supp. 465 (N.D. Ohio 1962); *Kennedy v. Telecomputing Corp.*, 43 Lab. Cas. ¶ 17,297 (S.D. Cal. 1961); *Boire v. Tiffany Tile Corp.* 13 NLRA Ct. Decisions 1442 (D.C. Fla. 1963); *Getreu v. Gas Appliance Supply Corp.*, 58 L.R.R.M. 2189 (S.D. Ohio 1963); *Alpert v. Trailways of New England, Inc.*, 51 Lab. Cas. ¶ 19,529 (D.C. Mass. 1965).

requirement of reasonable cause, an independent finding as to the necessity of interim relief. The latter two standards, however, differ significantly. The second was applied in *McLeod v. General Electric Co.*,⁷³ where the court indicated that it is just and proper to issue 10(j) relief only "to preserve the status quo or to prevent any irreparable harm."⁷⁴ The court did not define "status quo" or elaborate upon its requirement of "irreparable harm."⁷⁵ The third standard is set out in *Angle v. Sacks*.⁷⁶ There the court held that "[t]he 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."⁷⁷

⁷³ 366 F.2d 847 (2d Cir. 1966).

⁷⁴ *Id.* at 850.

⁷⁵ The factual background of the case is as follows: General Electric (GE) had for some time conducted separate collective bargaining negotiations with the approximately 80 unions that represented its employees. Most of the bargaining was held with at least 3 unions. In 1965 the AFL-CIO formed a special Committee on Collective Bargaining consisting of the several unions that bargain with GE. The Committee's objective was to adopt national goals and to utilize a coordinated approach in the 1966 negotiations. A steering committee of this group was formed and it attempted to meet with GE representatives on several occasions. The company consistently refused to meet with or recognize the steering committee. In April, 1966, the IUE, the largest of the GE unions, and one of the members of the Committee on Collective Bargaining, dropped its demand that the company negotiate with the steering committee. A meeting was set up between GE and the IUE's Negotiating Committee. At the May 4 meeting company officials discovered that 7 members of the IUE Negotiating Committee were affiliated with other unions that belonged to the Steering Committee. After making that discovery, company officials left the room and refused to meet with the IUE Negotiating Committee as long as it contained members of the other unions.

Both the IUE and GE filed unfair labor practice charges and the Board issued a complaint against GE, alleging that it had violated section 8(a)(5) by its refusal to negotiate with the IUE Committee as constituted. The Board then petitioned for preliminary relief pursuant to § 10(j). A temporary injunction was issued by the district court. *McLeod v. General Electric Co.*, 257 F. Supp. 690 (S.D.N.Y. 1966). The district court required an independent showing that relief was "just and proper" but not on the same basis for such a finding that the Second Circuit required. After rejecting a flagrancy test, the court held that "the remedy of Section 10(j) is surely appropriate and available when the impact upon the public interest is grave enough to justify swifter corrective action than the normal process of Board adjudication and court enforcement." 257 F. Supp. at 708. The Second Circuit, of course, reversed. 366 F.2d 847 (2d Cir. 1966).

The Board obtained a stay of the Second Circuit judgment pending certiorari proceedings. *McLeod v. General Electric Co.*, 87 S. Ct. 5 (1966). In his memorandum granting the stay, Mr. Justice Harlan observed: "The underlying issue in this case—the standards governing the application of Section 10(j)—has not heretofore been passed upon by this Court and is of continuing importance in the proper administration of the Labor Act." *Id.* at 6.

In a per curiam opinion, the Court granted the petition for certiorari. 385 U.S. 533 (1967). The Court did not decide the issue of standards for 10(j) because GE and the IUE had signed a collective bargaining contract between the date the stay had been issued and the date that certiorari was granted. The Court set aside the judgment of the Second Circuit and ordered it to enter a new judgment, setting aside the order of the district court and remanding to that court for such further proceedings as may be appropriate in light of the supervening event.

⁷⁶ 382 F.2d 655 (10th Cir. 1967).

⁷⁷ *Id.* at 660. Elaborating on the standard, the court continued:

SECTION 10(j) OF THE NLRA

Although the *McLeod* and *Angle* standards are similar in literal terms, they may not be similar in application. In *McLeod*, the court's reference to "preservation of the status quo" as a standard on which 10(j) relief should be granted is confusing.⁷⁸ The court's reference to

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.

Id. In affirming the district court's injunction, the Tenth Circuit stated: "We conclude that the circumstances of the case at bar were sufficient to raise a reasonable apprehension that the purposes of the Act could be defeated if temporary relief were not granted under Section 10(j)." Id.

In *Angle*, the union commenced an organizational drive at the employer's plant in June, 1966. An NLRB election was scheduled for September 28, 1966. In September, the employer began a series of private interviews with individual employees in an effort "to find the root of the discontent and dissension in the plant" and not to influence the election. On September 20, the employer discharged 6 of the 20 employees in the unit and gave the others pay increases. The union filed unfair labor practice charges and the regional director postponed the election pending disposition of those charges. A complaint was filed against the employer alleging violations of §§ 8(a)(1) and 8(a)(3) and a petition for § 10(j) relief was filed in the United States District Court for Kansas. The court granted an injunction and ordered the reinstatement of all 6 discharges. The court of appeals made some modifications in the decree but generally affirmed the lower court.

A similar standard was adopted by the Eighth Circuit in *Minnesota Mining & Mfg. Co. v. Meter*, 385 F.2d 265 (8th Cir. 1967): "In determining the propriety of injunctive relief the district court should be able to conclude with reasonable probability from the circumstances of each case that the remedial purpose of the Act would be frustrated unless immediate action is taken." Id. at 270.

The *Minnesota Mining* court quoted language from *Angle* with approval, including that cited in note 77 supra. The facts of the *Minnesota Mining* case were almost identical to those of *McLeod v. General Electric Co.* See note 75 supra. The district court granted an injunction, but the Eighth Circuit reversed. The appellate court agreed that there was reasonable cause to believe that the Act had been violated but held that the Board had not shown that injunctive relief was just and proper under the circumstances of this case. *Angle* was also quoted with approval in *NLRB v. Aerovox Corp.* 389 F.2d 475 (4th Cir. 1967). *Aerovox* was a § 10(e) case in which the court stated that if § 10(j) standards are met, then relief under § 10(e) is also proper. The court then quoted *Angle* as the source of the preferred standard for § 10(j) relief. The standard developed in *Angle* and *Minnesota Mining* was perhaps best summarized by the district court in *Sachs v. Davis & Hemphill, Inc.*, 295 F. Supp. 142 (D. Md. 1969):

Whether it would be just and proper to issue the proposed injunction in this case turns on whether there exists a probability that the purposes of the Act will be frustrated unless temporary relief is granted.

Id. at 148. In affirming, the Fourth Circuit stated:

As to the first prerequisite for relief pending appeal, the Board must establish reasonable cause to believe the Act has been violated. This alone, however, is insufficient to show why the normal processes of court enforcement should not be followed. A second test should be applied. It must appear from the circumstances of the case that the remedial purposes of the Act will be frustrated unless relief *pendente lite* is granted. These standards, we believe, will generally satisfy the Act's requirement that temporary relief be just and proper.

71 L.R.R.M. 2126, 2128 (1967).

⁷⁸ See discussion p. 477 infra.

"irreparable harm" may lead other courts to hold that any violation that theoretically can be remedied under the Act should not be enjoined pursuant to section 10(j). The *Angle* standard, on the other hand, is not as restrictive. Under *Angle*, the crucial consideration is not whether there is a remedy, but whether the remedy available will be effective when imposed.

Reference to other statutory provisions similar to section 10(j) yields no clear cut standards employed by the courts to decide upon the propriety of injunctive relief. The wording of most such statutes is that injunctions will be granted upon a "proper showing."⁷⁹ What is, or is not, a "proper showing," however, differs from court to court. At least one decision, however, provides a basis for an argument that the "irreparable harm" concept of the *McLeod* standard is not a proper criterion for granting injunctive relief. In *Hecht Company v. Bowles*⁸⁰ the Supreme Court had to determine whether Section 205(a) of the Emergency Price Control Act of 1942⁸¹ gave the courts discretion to grant injunctive relief. This section provided that:

Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order *shall* be granted without bond.⁸²

The issue was decided in favor of discretion. The Court relied upon the wording of the statute⁸³ and the traditional flexibility of equity practice to reach its result. In discussing the discretion that inheres to the district courts, the Supreme Court stated that "their discretion under Section 205(a) must be exercised in light of the large objectives of the Act. For the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunc-

⁷⁹ See, e.g., § 13 of the Federal Trade Commission Act, 15 U.S.C. § 53 (a) (1970); the Securities Act of 1933, 15 U.S.C. § 77t(b) (1970); and the Securities Exchange Act of 1934, 15 U.S.C. § 78u(e) (1970).

⁸⁰ 321 U.S. 321 (1944).

⁸¹ Act of Jan. 30, 1942, ch. 26, 56 Stat. 23.

⁸² *Id.* (emphasis added).

⁸³ "It seems apparent on the face of Section 205(a) that there is some room for the exercise of discretion on the part of the Court. For the requirement is that a 'permanent or temporary injunction, restraining order, or other order' be granted." 321 U.S. at 328.

tive relief in these cases.”⁸⁴ To the extent that *Hecht* invalidated the equity criteria of private litigation in cases concerning statutory injunctive relief, the second standard’s requirement of “irreparable injury,” as expressed in *McLeod*, is inappropriate.⁸⁵

McLeod also spoke in terms of preservation of the status quo: “[t]he Board has not demonstrated that an injunction is necessary to preserve the status quo or to prevent any irreparable harm.”⁸⁶ It is unclear whether the court intended to suggest “preservation of the status quo” as a standard upon which a court should grant interim relief.⁸⁷ If the court did so intend, it did not elaborate. Preservation of the pre-violation status quo, although an appropriate goal of interim relief, is not a clear standard upon which such relief should be granted.⁸⁸

There remain the first and third standards.⁸⁹ Under the first, the Board would have to establish reasonable cause in both fact and law. If the Board could establish the facts in a given case, but could not establish that the facts constitute an unfair labor practice at law, then the reasonable cause requirement would not have been met. Convincing a court that a given set of facts constitutes an unfair labor practice may be especially difficult where there are no decisions in point.⁹⁰ Although it is not an “easy” standard for the Board to meet, it is nevertheless the easiest of those here considered. If the courts were to adopt this standard, the percentage of cases in which injunctions were granted would probably increase. This increase, together with an increase in the number of injunctions sought, would lead to more effective enforcement of the Act. It might also lead to the deterrence of certain types of unfair labor practices.

Those who oppose the adoption of this standard fear that an increased use of the preliminary injunction would “muddle the proper allocation of administrative and judicial functions”⁹¹ by depriving the

⁸⁴ Id. at 331.

⁸⁵ See, e.g., *Douds v. Anhauser-Busch Inc.*, 99 F. Supp. 474 (D. N.J. 1951); *Davis v. Huttig Sash & Door Co.* 288 F. Supp. 82 (W.D. Okla. 1968).

⁸⁶ 366 F.2d at 850.

⁸⁷ The Court may have intended to state that the standard is whether the Board can show the necessity of preserving the status quo pending final adjudication. “Irreparable harm” may have been mentioned as one, perhaps the only, way in which the Board could establish the necessity of preserving the status quo.

⁸⁸ See, e.g., *Fusco v. Kaase Baking Co.*, 205 F. Supp. 465 (N.D. Ohio 1962); *Sachs v. Davis & Hemphill, Inc.*, 295 F. Supp. 142 (D. Md. 1969).

⁸⁹ See p. 473 *supra*.

⁹⁰ The Second Circuit in the *McLeod* case was especially concerned that no court had passed on the legality of GE’s actions. But the court did note that the basic legal question underlying the company’s conduct had indeed been decided by the Board. 366 F.2d at 850.

⁹¹ See, e.g., *Minnesota Mining & Mfg. Co. v. Meter*, 385 F.2d 265, 270 (8th Cir. 1967).

courts of the NLRB's expertise in this area of the law. Two points should be made in response to this argument. First, it appears that a certain amount of muddling was envisioned by Congress when it enacted section 10(j). Provisions similar to section 10(j)—authorizing injunctive relief while administrative agencies adjudicate the merits of a complaint—are not uncommon.⁹² Furthermore, as stated in *Hecht*, it is the large objectives of the Act that govern in resolving the question whether interim relief should be granted.⁹³ Second, the importance of Board expertise is diminished when there is Board precedent in point. The Board's belief that existing precedent is in point is demonstrated by the Board's own decision to seek interim relief.⁹⁴ In the absence of applicable Board precedent, the burden of showing "reasonable cause" becomes much greater.

Another argument proffered against the "reasonable cause" standard is that it is not supported by the legislative history.⁹⁵ This argument is not persuasive for several reasons. First, the legislative history does not speak in terms of standards that courts should adopt in disposing of 10(j) petitions; second, both the statute and the legislative history envision some discretion to be exercised by the court in fashioning standards; and finally, there is certainly nothing in the history which intimates that adoption of a "reasonable cause" standard is beyond the court's discretion. It should be noted that adoption of this or any other standard does not limit the traditional flexibility of an equity court. If the defendant can show exceptional circumstances that militate against the court's use of its own standard, the court would certainly be free to deviate from that standard.

Several courts have rejected the first standard and adopted the third⁹⁶—i.e., the "reasonable cause for belief" requirement plus a showing that the purposes of the Act will probably be frustrated if interim

⁹² See statutes cited in notes 79 and 81 *supra*.

⁹³ *Hecht v. Bowles*, 321 U.S. at 331.

⁹⁴ It might be argued that if the General Counsel has final authority to decide whether 10(j) relief will be sought, the possibility of circumventing the Board increases. The argument is unrealistic for the following reasons. First, it assumes that the General Counsel would pay little attention to Board precedents and decisions as they relate to the facts in a given case. Second, it fails to note that the General Counsel's power is delegated to him from the Board and that delegation is not necessarily permanent.

⁹⁵ See discussion of the legislative history of section 10(j) at pp. 470-73 *supra*.

⁹⁶ See, e.g., *Minnesota Mining and Mfg. Co. v. Meter*, 385 F.2d 265 (8th Cir. 1967) where the court stated: "In our view, as suggested by the quoted excerpt from the Senate Report, the district judge's discretion in granting temporary relief under Section 10(j) cannot be activated and motivated solely by a finding of 'reasonable cause' to believe that a violation of the Act has occurred. More is required to guide his permissive range of discretion In determining the propriety of injunctive relief the district court should be able to conclude with reasonable probability from the circumstances of each case that the remedial purpose of the Act would be frustrated unless immediate action is taken. *Id.* at 270.

SECTION 10(j) OF THE NLRA

relief is not granted. Among the arguments made for adoption of this standard are the following: first, that it is most consistent with the legislative history of section 10(j);⁹⁷ second, that it is most consistent with the general scheme of the Labor Act;⁹⁸ third, that it places a reasonable limit upon the situations in which interim relief will be granted; and finally, that it provides for the most efficient allocation of enforcement responsibilities between the Board and the district courts.

The first argument is not persuasive for the reasons noted above. The legislative history does not indicate any standards which the courts should adopt in ruling on requests for 10(j) relief. Indeed, both the statute and the legislative history envision discretion by the court in developing a standard. Furthermore, nothing in the legislative history limits such discretion to this particular standard. The second argument should be noted but not carried too far. By adopting Section 10(j), Congress added it to the general scheme of the Act; it must be considered as much a part of the Act as any other provision.

The third and fourth arguments are somewhat more persuasive. It must be recalled that one of the consequences of the Board's adoption and faithful implementation of the proposed criteria would be an increased workload upon the district courts.⁹⁹ It was noted that only court and not Board action could resolve the workload problems.¹⁰⁰ The "reasonable cause plus frustration" standard does place a limitation upon the number of situations in which interim relief will be granted. Any such limitation would soon be reflected in the number of requests which the Board makes for 10(j) relief. The reasonableness of the limitation is evident. In those cases where the *regular* Board procedures would achieve the purposes of the Act, interim relief is not necessary to protect the parties. Whatever positive benefit interim relief might provide would be overshadowed by the great amount of time needed to dispose of each 10(j) request. On the other hand, where interim relief is necessary to prevent frustration of the purposes of the Act, the advantages to the court in providing it would far outweigh the time disadvantages.

The fourth argument, which is related to the third, concerns judicial efficiency. In those cases where Board action itself would safeguard the purposes of the Act, it would be most inefficient for a

⁹⁷ See note 95 *supra*.

⁹⁸ The general scheme is one where an administrative agency adjudicates whether or not an unfair labor practice has been committed; appeal then may be had to the courts. General enforcement responsibilities rest with the administrative agency.

⁹⁹ See discussion at p. 470 *supra*.

¹⁰⁰ *Id.*

court to spend its time deliberating upon a 10(j) request.¹⁰¹ It is equally inefficient from the context of the entire enforcement system of the Act to have both the Board and the judiciary become involved in a task that one can handle adequately alone. On the other hand, if court action is needed to prevent frustration of the Act's objectives, relief should be granted under this standard.

The "reasonable cause plus frustration" standard has certain advantages over the "reasonable cause" test. It would provide for the most efficient allocation of the Act's enforcement responsibilities. It would provide interim relief in those cases where such relief is needed to prevent frustration of the Act's objectives. It would deny interim relief where regular Board procedures are sufficient to prevent frustration of the Act's objectives. Finally, this standard would go far toward easing the workload problem created by the Board's adoption and faithful implementation of the new criteria.

Adoption of the "reasonable cause plus frustration" standard, however, leaves unanswered a crucial question: what is required in order to show that the Act's purposes will probably be frustrated if interim relief is not granted? This question can only be answered in a case by case manner. Some general observations about the suggested standard seem appropriate. First, it should be emphasized that only a *probability* of frustration must be shown. The Board need not show that the Act's purposes will be frustrated in the absence of interim relief.¹⁰² Second, it should also be emphasized that the standard does not limit the court to *negative* rather than *affirmative* relief. Orders to reinstate discharges or to bargain are not necessarily improper. The propriety of such affirmative relief has been the subject of some dispute.

The question of affirmative relief in cases involving section 8(a)(3) discriminatory discharges has been most controversial. In *Johnston v. Wellington Manufacturing Division*,¹⁰³ the district court found the evidence sufficient to enjoin future discrimination, but re-

¹⁰¹ After the district court grants interim relief pursuant to 10(j), normal Board processes must still take place.

¹⁰² Imposition of a burden to show that the Act's purposes *will* be frustrated would be an almost impossible obstacle on the road to interim relief. Employer unfair labor practices preceding a representation election offer a good example. Assume that the employer commits violations of 8(a)(1) and 8(a)(3) immediately before the election and in the midst of the campaign, and that the Board has established in a district court 10(j) proceeding that it has reasonable cause to believe that the Act has been violated. Under the suggested standard, the Board must show a probability that a free and uncoerced choice of a bargaining representative will not take place without interim relief. Under the "will-be-frustrated" variable, the Board would have to prove an absolute: that the free and uncoerced choice of a bargaining representative was impossible without interim relief. A strong employer showing might rebut the impossibility argument but not necessarily the probability contention.

¹⁰³ 49 L.R.R.M. 2536 (W.D.S.C. 1961).

SECTION 10(j) OF THE NLRA

fused to reinstate the already discharged employees because it was not "clear" that the employees were entitled to reinstatement.¹⁰⁴ This special burden to justify reinstatement has been criticized by commentators¹⁰⁵ and rejected by a majority of the courts which have considered the issue.¹⁰⁶ The better rule was stated by the federal district court in *Elliot v. Dubois*.¹⁰⁷

In the pending case delay might well defeat the purpose of the Act. Discharged employees may move away or obtain other jobs resulting in dissipation of union strength.

In order to carry out the intention of Congress, the status quo must be maintained. Ordering respondent to reinstate the employees and enjoining it from discriminating against them for the purpose of discouraging membership in a union and from interfering with their right to organize simply preserves the status quo and to that extent the application for injunction must be sustained.¹⁰⁸

Assuming that no special burden is imposed upon the Board when petitioning for reinstatement of dischargees,¹⁰⁹ proof of reasonable cause to believe that a violation has occurred may be difficult. As one commentator has noted:

[T]he discharge has been used with increasing sophistication in recent years. Neutral employees may be dismissed along with union activists in order to disguise the employer's motive. Particular operations and even product lines may be discontinued, at least temporarily, to ease key union supporters out of plants. More generally, increasing care has been exercised to develop a variety of plausible reasons for dismissing union members.¹¹⁰

If the Board can establish reasonable cause to believe a section 8(a)(3) violation has taken place,¹¹¹ the suggested standard imposes no special

¹⁰⁴ Id. at 2538.

¹⁰⁵ See, e.g., Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 130 (1964).

¹⁰⁶ For cases where reinstatement of dischargees was ordered without imposition of any special burden, see *Angle v. Sacks*, 65 L.R.R.M. 2098 (D. Kan. 1967), aff'd as modified, 382 F.2d 655 (10th Cir. 1967); *Elliot v. Dubois Chemicals, Inc.*, 201 F. Supp. 1 (N.D. Tex. 1962); *Reynolds v. Curley Printing Co.*, 247 F. Supp. 317 (M.D. Tenn. 1965); *Davis v. Le Tourneau, Inc.*, 78 L.R.R.M. 2616 (E.D. Tex. 1971).

¹⁰⁷ 201 F. Supp. 1 (N.D. Tex. 1962).

¹⁰⁸ Id. at 3.

¹⁰⁹ No special burden would be imposed under the suggested standard.

¹¹⁰ Bok, *supra* note 105, at 132.

¹¹¹ For a case where the Board was unable to meet the "reasonable cause" test, see *Johnston v. J.P. Stevens & Co., Inc.*, 234 F. Supp. 244 (E.D.N.C. 1964).

burden to gain reinstatement of the dischargees. The Board need only show that the purposes of the Act will probably be frustrated if reinstatement is not granted.¹¹²

Affirmative orders to bargain have also been somewhat controversial. However, there is nothing in the proposed standard which would prevent them; if the Board can meet its burden, an affirmative order to bargain could be made. In fact, several courts have entered such orders.¹¹³ Aside from these generalizations, the proposed standard's requirement of a showing that the Act's objectives will probably be frustrated unless interim relief is granted can only be defined on a case by case basis.

CONCLUSION

An examination of NLRB internal procedures reveals that they do not encourage the effective use of section 10(j). To minimize delay and to diminish the opportunity for prejudgment, the General Counsel should be given authority to institute 10(j) proceedings. In order to give all parties an opportunity to argue intelligently concerning the propriety of temporary relief, a set of meaningful criteria for the use of 10(j) should be adopted. If the hereinabove proposed criteria are adopted and faithfully implemented, increased utilization of section 10(j) will follow.

Similarly, this article has examined the three major standards used by the courts in disposing of 10(j) requests. Of those examined, the "reasonable cause for belief" requirement plus a showing that the purposes of the Act will probably be frustrated appears to be the standard which will promote greater use of the 10(j) remedy without unduly burdening the judicial system. An expanded use of the 10(j) remedy in turn will lead to a more effective enforcement of the National Labor Relations Act. Alleged violators would not be allowed to benefit from the long delays inherent in normal Board procedures and hope-

¹¹² For cases where such a showing has been made, see note 106 supra.

¹¹³ *Davis v. Huttig Sash & Door Co.*, 288 F. Supp. 82 (W.D. Okla. 1968); *Henderson v. Gibbons & Reed Co.*, 53 Lab. Cas. ¶ 11,081 (D.N.M. 1966); *Johnston v. Georgetown Steel Corp.*, 76 L.R.R.M. 2515 (D.S.C. 1970); *Lebus v. Manning, Maxwell and Moore, Inc.*, 218 F. Supp. 702 (W.D. La. 1963); *Rains v. East Tenn. Packing Co.*, 240 F. Supp. 770 (E.D. Tenn. 1965).

One context in which the order to bargain has proven particularly controversial is where the employer refuses to bargain for the sole purpose of testing the legality of a Board certification. The courts have divided on this problem. For a decision holding such an order proper when all other requirements have been met, see *Lebus v. Manning, Maxwell and Moore, Inc.*, 218 F. Supp. 702 (W.D. La. 1963). For a decision holding that such an order is improper under the statute, see *Greene v. David Buttrick Co.*, unreported case no. 65-153-W. (D. Mass. 1965). Under the suggested standard, such an order would not be proper. If all other requirements were met such an order to bargain should be made.

SECTION 10(j) OF THE NLRA

fully would be deterred in some cases from committing unfair labor practices.

Section 10(j) cannot and should not be the "normal" remedy for employer unfair labor practices.¹¹⁴ However, it can and should be an effective tool for an improved enforcement of the NLRA. The suggestions made in this article are designed to make this little used section of the Act a more meaningful provision and one that will contribute significantly to the realization of the Act's objectives.

¹¹⁴ This article has been limited to a discussion of *employer* unfair labor practices. It should be noted that *union* unfair labor practices may also be subject to requests for 10(j) relief and injunctions. All the suggestions made in the article regarding internal NLRB procedures and court standards for disposition of 10(j) petitions are also applicable to union unfair labor practices.