

UNITED STATES GOVERNMENT
National Labor Relations Board



Memorandum

Date: June 2, 2010

To: The Board

From: Ronald Meisburg
General Counsel

Subject: End-of-Term Report on Utilization of Section 10(j) Injunction Proceedings January 4, 2006 through April 30, 2010

Attached is my report on the use of Section 10(j) proceedings during my term as General Counsel. I have used the same format for this report as was used by former General Counsels save the addition of Appendix C which describes the procedures for processing Section (j) cases in the Regions, in the Office of the General Counsel and at the Board.

It has been the practice of former General Counsel's to release this Quadrennial Report to the public and, absent objections from the Board, I will do so on June 14.

R. M.

A handwritten signature in black ink, appearing to be 'R. Meisburg', written over the printed name 'R. M.'.

cc: Mr. Les Heltzer
Mr. William Cowen

UNITED STATES GOVERNMENT
memorandum

**NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL**

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SUBJECT: End-of-Term Report on Utilization of Section 10(j) Injunction Proceedings
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A. Introduction

General Counsels have traditionally provided the Board with a report on the use of Section 10(j) injunction proceedings during their terms as General Counsel. This memorandum constitutes my report of Section 10(j) activity between January 4, 2006 and April 30, 2010.

During my tenure as General Counsel, I continued to support the use of Section 10(j) as an essential tool in the effective administration of the Act. As has long been recognized, in some unfair labor practice cases, the passage of time inherent in the Board's normal administrative processes render its ultimate remedial orders inadequate to protect statutory rights and to restore the status quo ante. Accordingly, during my term as General Counsel, I took steps to assure that the Regional Offices used Section 10(j) to protect the Board's ability to issue a meaningful remedy.

We also announced an initiative that emphasized the need to protect bargaining in first contract cases. Initial contract bargaining constitutes a critical stage of the negotiation process because it protects employee free choice and forms the foundation for the parties' future labor-management relationship. Consistent with these views, I directed Regional Offices to focus

particular attention on two approaches to violations that occur during the period after certification when parties are or should be bargaining for an initial collective bargaining agreement: Section 10(j) relief and special remedies as part of the Board's order.¹ In addition, the initiative included close evaluation by Regional Offices of the need for Section 10(j) relief during organizing campaigns where the unfair labor practices have undermined employees' right to make a free and informed choice.

During my tenure, we continued the practice in selected cases of requesting authorization to initiate 10(j) court filings after the issuance of the administrative law judge decisions (ALJDs). Generally speaking, these are cases that appear to warrant Section 10(j) relief but present potentially difficult litigation problems. In such cases, post-trial analysis and a successful ALJD help demonstrate in a Section 10(j) request that there is "reasonable cause to believe" an unfair labor practice occurred and that there is a "likelihood of success" in establishing that the Act was violated. Thus, in a variety of cases during the reporting period, Section 10(j) proceedings were authorized, and interim injunctions were granted, after litigation and sometimes after an ALJD had issued.

I also continued the efforts of prior General Counsels in the areas of staff training and monitoring of Regional Office 10(j) programs. We began the practice of conducting videoconference moot courts for all attorneys arguing Section 10(j) cases in district courts. These moot court practice sessions have significantly enhanced the ability of the Regional Office attorneys to persuasively argue these cases. I continued to support the training of Regional Office staff in the early identification of appropriate 10(j) cases, the proper submission of such cases to Washington and the Board, and the successful litigation of those cases in the courts. In

¹ See Memorandum GC 06-05, "First Contract Bargaining Cases," dated April 19, 2006.

addition, we continued to monitor Regional Office programs to assure that consideration of the need for Section 10(j) relief is regularly incorporated into their case-processing routines. Finally, we instructed Regions to seek expedited hearings before administrative law judges because of the need to expedite these cases and to enable Regions to utilize the administrative record in support of Section 10(j) petitions. These procedures and practices are among those described in Appendix C, an outline of the Regional Office and Injunction Litigation Branch process in Section 10(j) cases.

The Board's Section 10(j) activity from January 4, 2006 through April 30, 2010 is detailed in the following report. I have categorized the authorized Section 10(j) cases according to the framework, first developed by former General Counsel John S. Irving, of 15 situations or categories that typically give rise to the need for injunctive relief and used these categories in Parts B and C.

Part B contains general statistics on the Section 10(j) program, summarizing the number of cases submitted by Regional Offices to Washington for consideration of Section 10(j) relief, as well as those in which the General Counsel or the Board granted authorization to seek such relief.² In Part B, we also analyze the types of situations in which we initiated Section 10(j) proceedings during this period. Part C provides a general description of the individual 10(j) case categories and statistical information regarding the authorized cases in each of the 15 categories. Part D deals with other developments in Section 10(j) litigation that occurred during the report period.

² As discussed more fully in Part D, Section 1, the General Counsel authorized Section 10(j) proceedings pursuant to the Board's delegation from December 28, 2007 through April 5, 2010.

I wish to acknowledge the efforts of the Divisions of Advice and Operations-Management in supporting, promoting, and encouraging the effective use of this important remedial tool during these past 4½ years.

B. Cases Submitted and Authorized

During the period covered by this report, the Regional Offices submitted 320 cases³ to the Injunction Litigation Branch of the Division of Advice with a recommendation concerning Section 10(j) relief. During the period from January 4, 2006 through December 27, 2007, I sought authorization from the Board to institute Section 10(j) proceedings in 65 cases; the Board authorized Section 10(j) proceedings in 49 of those cases.⁴ During the period of the Board's delegation of Section 10(j) authorization to the General Counsel, i.e., from December 28, 2007 through April 5, 2010, I authorized Section 10(j) proceedings in 62 cases. From April 5, 2010 through April 30, 2010, the end of this reporting period, the Board authorized Section 10(j) proceedings in one case. Thus, Section 10(j) proceedings were authorized in 112 cases during the period of this report, a period of approximately 52 months.

It is sometimes suggested that Section 10(j) authorization in 112 cases over an approximately four-year period does not seem to indicate a vibrant 10(j) program, particularly where during that same period our total unfair labor practice charge case intake was approximately 90,862 cases for the four complete fiscal years 2006-2009.

³ That number does not include "short-form" submissions pursuant to General Counsel Memorandum 06-05, "First Contract Bargaining Cases," April 19, 2006. In those cases, the Regional Offices submit a short recommendation on the need for either interim injunctive relief and/or special remedies, accompanied by the Region's "decisional documents," such as the final investigative report and agenda minute.

⁴ Some of the General Counsel's 10(j) requests to the Board were withdrawn prior to a Board authorization, based upon a settlement of the underlying administrative case or due to changed circumstances.

The explanation is of course that not every charge is a Section 10(j) case. First and foremost, the merit factor – the percentage of cases which, upon investigation, are deemed to merit issuance of a complaint – ranged between 35% and 40% during my term. For purposes of illustration, I will choose a median for those years of 37.5%, or 3/8 of the case intake. That means, of course, that 5/8 of the cases are either dismissed or withdrawn for lack of merit. Thus, the number of meritorious cases over the four years of my term was approximately 34,000.

Most merit cases settle. Indeed, during my term the case settlement rate was approximately 96% for the four complete fiscal years 2005-2009. Settled cases do not require or warrant 10(j) relief. This means that of the total case intake for those four years, the number of unsettled meritorious cases was approximately 1360.

And finally, of course, most meritorious cases do not meet the standards that the courts have established for injunctive relief. In short, the 112 authorized cases do, in my view, represent an active and vital 10(j) program and, given intake, merit factor and settlement rate differences is quite high in historical comparison with other four-year periods.

Appendices A and B attached to this report summarize the results of the cases authorized during this period.

Appendix A is a numerical summary of the cases authorized divided into the traditional 15 Section 10(j) situations or categories. It provides, for each Section 10(j) category and for the cases as a whole, the total number of cases authorized, the number settled before and after a petition was filed in district court, the number of cases in which injunctions were granted and denied, the number of cases in which changed circumstances caused us not to proceed with the litigation, and the number of cases which were still pending at the end of the reporting period.

Appendix B is a list of all cases within each Section 10(j) category. In addition to identifying information about the case, it provides the outcome of the Section 10(j) authorization.

As Appendix A shows, of the 112 cases authorized, 93 had been pursued to conclusion at the end of the reporting period.⁵ Of these cases, 40 were resolved by a successful settlement, either before or after a 10(j) petition was filed in court. The proportion of authorized and pursued cases adjusted by settlement, 43%, is higher than the settlement/adjustment of 37% during the last reporting period. Of the remaining 53 cases resolved by court decision, injunctions were granted in whole or in substantial part in 41 cases. Thus, in litigated cases, we were successful in 77% of the cases. This compares to the 88% litigation success rate in the period from June 2001-December 2005 and the 72% litigation success rate in the reporting period ending in January 2001. Altogether, we obtained a successful settlement or favorable court decision in 81 of 93 cases, a “success” rate of 87% of the cases pursued to a conclusion. This success rate was slightly lower than the comparable figure of 93% in the 2001-2005 period and is equal to the comparable figure of 87% obtained in the reporting period ending in 2001.

About 29% of the cases authorized since the last Section 10(j) report arose out of a union organizational campaign (Category 1, 23%; Category 2, 6%). This was equal to the 29% proportion in the 2001-2005 Section 10(j) report.⁶ Category 1 cases increased from 16% of the total 10(j) cases authorized in the 2001-2005 reporting period to the current 23%, the largest

⁵ We have excluded five cases that were pending at the end of the reporting period and 14 cases in which we decided not to pursue further proceedings, either because of the issuance of a Board order or an adverse ALJ decision, or because of other changed circumstances.

⁶ Categories 1 and 2 both involve cases arising out of a union organizing campaign. Category 2 involves cases in which we sought an interim remedial bargaining order based upon union authorization cards consistent with the Supreme Court’s decision in NLRB v. Gissel Packing Co., 395 U.S. 575 (1969), in addition to other relief. See the discussion *infra*, Part C, Sections 1 and 2.

single category during this reporting period. Category 2 cases declined from 13% in the 2001-2005 reporting period to 6% during my tenure. After Category 1, two other large categories during this period were Category 4, involving cases in which an employer unlawfully withdrew recognition from an incumbent union, and Category 5, involving cases where an employer was undermining its employees' collective-bargaining representative: 23 cases were authorized in each category, each representing 21% of all cases authorized. That 21% figure is comparable to the 20% in the last report period for Category 4 cases and a four-fold increase from the 5% in the Category 5 cases.

Another category that experienced noticeable growth in authorized 10(j) cases was Category 7, which involves a successor employer's refusal to recognize and bargain with the employees' incumbent union. In the 2001-2005 report Category 7 accounted for 13% of the authorized cases, while it accounted for 17% of the authorized cases during this period. A category which returned to lower levels was Category 6, which involves illegal employer assistance to and unlawful recognition of minority unions. In the 2001 report this category constituted only 1% of the cases authorized; in the 2001-2005 report it increased to 14% of the cases authorized, and during this period fell back to 2% of the cases authorized.

C. Types of Cases

1. Interference with organizational campaign (no majority)

Section 10(j) proceedings are authorized in Category 1 cases to either prevent the irreparable destruction of a union's organizational campaign or to restore the "laboratory conditions" necessary to conduct a fair Board election. In each of these cases an employer responded to a union organizational campaign with serious unfair labor practices: threats of discharge or other retaliation, coercive interrogations, surveillance of protected activities,

statements of futility, improper solicitation of grievances and/or grant of benefits, and unlawful employee discipline, including discriminatory discharges. Such violations threaten to permanently destroy the union's campaign if not immediately enjoined and, in some cases, prevent the union from proceeding to a fair Board election. Accordingly, we typically seek an order enjoining the violations alleged, as well as an affirmative order to properly reinstate any discriminatee who has suffered an unlawful discharge, layoff, transfer or more onerous work duties. See, e.g., Schaub v. West Michigan Plumbing & Heating, Inc., 250 F.3d 962 (6th Cir. 2001); Pye v. Excel Case Ready, 238 F.3d 69 (1st Cir. 2001); Sharp v. Webco Industries, Inc., 225 F.3d 1130 (10th Cir. 2000); Blyer v. P & W Electric, Inc., 141 F. Supp.2d 326 (E.D.N.Y. 2001); Kentov v. Point Blank Body Armor, Inc., 2003 WL 253063 (S.D. Fla. January 30, 2003).

Of the 21 cases resolved during this period under this category, we were successful in 18 cases. See Appendix A. Thirteen cases were settled or adjusted, and in five cases the district courts granted injunctions. In one of the litigated cases, the court ordered the interim reinstatement of two employees discharged during the early stages of an organizing campaign. See Lineback v. Frye Electric, 539 F.Supp.2d 1111 (S.D. Ind. 2008). In another case, Hoffman v. Pennant Foods Co., 2008 WL 1777382, 184 LRRM 2950 (D. Conn. 2008), the employer discriminatorily refused to reinstate the key union activist from workers' compensation leave and imposed a light duty policy to exclude union supporters. The district court ordered the interim reinstatement of the employee and rescission of the light duty policy.

2. Interference with organizational campaign (majority)

Like the cases in the previous category, these cases arise out of a union's organizing campaign. In addition, the union has obtained an authorization card majority in an appropriate unit. The Region's administrative complaint pleads that the employer's unfair labor practices are

sufficiently serious to undermine the union's majority and preclude the holding of a fair election even with traditional Board remedies, and thus warrant the imposition of a remedial bargaining order under NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). In these cases we typically seek a broad cease and desist order and affirmative relief similar to that in Category 1 cases.

In addition, to assure that the Board's ultimate remedial Gissel bargaining order will not be a nullity, i.e., for the benefit of a union totally bereft of employee support, and to provide the employees the benefits of collective bargaining during Board litigation, we also seek an interim bargaining order in favor of the union. See, e.g., NLRB v. Electro-Voice, Inc., 83 F.3d 1559 (7th Cir. 1996), cert. denied 519 U.S. 1055 (1997); Scott v. Stephen Dunn & Associates, 241 F.3d 652 (9th Cir. 2001); Moore-Duncan v. Aldworth Co., Inc., 124 F. Supp.2d 268 (D. N.J. 2000); Sharp v. Ashland Construction Co., Inc., 190 F. Supp.2d 1164 (W.D. Wis. 2002).

Of the four cases in this category pursued to a conclusion, we were successful in all, including two cases in which injunctions were granted. In Barker v. Regal Health and Rehab Center, Inc., 632 F.Supp.2d 817 (N.D. Ill. 2009), the district court ordered the interim reinstatement of three union supporters, who had been terminated amidst an employer campaign of threats and other unlawful conduct in response to a successful union organizing campaign, as well as an interim remedial bargaining order. In a second significant case, Kendellen v. Evergreen America Corp., 428 F.Supp. 2d 243 (D. N.J. 2006), the district court granted an interim Gissel bargaining order based on widespread Section 8(a)(1) violations and the granting of numerous benefits to discourage employee support for the union.

3. Subcontracting or other change to avoid bargaining obligation

These cases involve an employer's implementation of a major entrepreneurial-type decision that adversely affects unit employees: for example, subcontracting or relocating entire

plants, departments, or product lines. Such changes can be discriminatorily motivated, i.e., designed either to interfere with a union organizational campaign or to escape from an incumbent union, and thus violative of Section 8(a)(3).⁷ The change can also be independently violative of Section 8(a)(5) if undertaken without satisfying an employer's bargaining obligation to an incumbent union.⁸

We typically seek an order restoring the prior operation and prohibiting similar conduct in the future. Such relief is necessary because, when these actions unlawfully eliminate all or large portions of an operation and the jobs of unit employees, they undermine the status of an incumbent union or one seeking recognition. Moreover, an interim restoration order preserves the Board's ability to issue (and courts to enforce) a final order restoring operations⁹ without it being too burdensome for the respondent because of the passage of time or the prior alienation of the old facility or equipment.¹⁰ Based on these considerations, courts have granted interim restoration of operations in these situations. See, e.g., Maram v. Universidad Interamericana de Puerto Rico, Inc., 722 F.2d 953 (1st Cir. 1983); Aguayo v. Quadrtech Corporation, 129 F. Supp. 2d 1273 (C.D. Cal. 2000). In certain cases the courts have granted a less drastic interim remedy of preventing the sale or alienation of a facility pending a Board decision. See, e.g., Hirsch v.

⁷ See, e.g., NLRB v. Joy Recovery Technology Corp., 134 F.3d 1307, 1314-15 (7th Cir. 1998); Carrier Corp. v. NLRB, 768 F.2d 778, 783 (6th Cir. 1985).

⁸ See, e.g., Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964); Naperville Ready Mix, Inc. v. NLRB, 242 F.3d 744, 753-54 (7th Cir. 2001).

⁹ See, e.g., St. George Warehouse, Inc. v. NLRB, 420 F.3d 294, 299-300 (2d Cir. 2005); Lear Siegler, Inc., No-Sag Products Division, 295 NLRB 857, 861 (1989).

¹⁰ See, e.g., Pan American Grain, Inc. v. NLRB, 558 F.3d 22, 29 (1st Cir. 2009); Teamsters Local Union No. 171 v. NLRB, 863 F.2d 946, 957-58 (D.C. Cir. 1988), cert. denied sub nom., A.G. Boone Co. v. NLRB, 490 U.S. 1065 (1989) and the cases discussed therein.

Dorsey Trailers, Inc., 147 F.3d 243 (3d Cir. 1998). See also Dunbar v. Carrier Corp., 66 F. Supp.2d 346 (N.D.N.Y.), stay denied 66 F. Supp.2d 355 (N.D.N.Y. 1999).

The two cases authorized in this category during the reporting period were successfully litigated. Overstreet v. Advanced Architectural Metals, Inc., CV-S-07 00781-PMP-LRL (D. Nev. Aug. 22, 2007), involved a recidivist employer's creation of alter ego corporations in an attempt to evade its obligations to the incumbent union. The district court ordered interim bargaining with the union, interim reinstatement of all unit employees, and withdrawal of recognition from a minority union. When the employer failed to comply with the court's injunction, we sought and obtained a civil contempt order against the employer. The other case, San Luis Trucking, Inc., CV-07-1454-PHX-ROS (D. Ariz. 2007), which involved unlawful subcontracting, the constructive discharge of three employees and closing of its operation, resulted in a temporary restraining order enjoining the employer from disposing of its assets.

4. Withdrawal of recognition from incumbent

These cases involve an employer's withdrawal of recognition from an incumbent union, often where the union's alleged loss of employee support was preceded by the employer's independent unfair labor practices designed to undermine that support.¹¹ We seek 10(j) relief in these cases, including affirmative bargaining orders, to ensure that the unit employees will not be denied the benefits of their choice of union representation for the entire period of litigation before the Board and to prevent the irreparable injury to the union's support among the unit employees, which would predictably occur if the union were unable to represent them pending a

¹¹ See generally Lee Lumber & Building Material Corp., 322 NLRB 175, 177 (1996), affd. in rel. part, 117 F.3d 1454, 1459-1460 (D.C. Cir. 1997); Master Slack Corp., 271 NLRB 78, 84 (1984). Cf. NLRB v. Narricot Industries, L.P., 587 F.3d 654, 664-65 (4th Cir. 2009) (causation analysis unnecessary where employer unlawfully participated in creation or encouragement of anti-union petition).

final Board order. See, e.g., Brown v. Pacific Telephone and Telegraph Co., 218 F.2d 542 (9th Cir. 1955) (as amended); Glasser v. Heartland Health Care Center, 333 F.Supp. 2d 607 (E.D. Mich. 2003); Blyer v. Pratt Towers, Inc., 124 F. Supp. 2d 136 (E.D.N.Y. 2000); Dunbar v. Park Associates, Inc., 23 F. Supp. 2d 212 (N.D.N.Y. 1998), affd. mem. 166 F.3d 1200 (2d Cir. 1998).

During this reporting period, we were successful in 15 of the 20 resolved cases. Five of these cases are described below.

In one case, Norelli v. HTH Corporation, ___ F. Supp. 2d ___, 2010 WL 1222318 (D. Haw. 2010), the court granted an injunction, including an interim bargaining order, after the favorable ALJ decision had issued. The three interrelated corporations that owned a hotel and controlled its labor relations policies engaged an independent management company that negotiated a first collective-bargaining agreement with the union after a long period of bad-faith bargaining by the owners. As the independent company neared completion of an agreement with the union, however, the ownership group terminated the management contract. A few months later, the employer withdrew recognition from the union, allegedly relying on reports from employees that the union had lost majority support. Relying on Levitz Furniture, 333 NLRB 717 (2001), the court found that the Board likely would succeed in establishing that the employer had withdrawn recognition unlawfully and that any showing of loss of support was tainted by a variety of unfair labor practices.

Another court granted an interim bargaining order where an employer withdrew recognition from a recently certified union after the employer had sponsored anti-union petitions, unlawfully promised pay raises if employees would sign it, and unlawfully coerced employees in other ways. See Gold v. State Plaza, Inc., 481 F. Supp. 2d 43 (D.D.C. 2006).

Further, a district court granted an interim bargaining order where the employer withdrew recognition after the incumbent union, which represented a unit of about 2,400 employees, had affiliated with another labor organization. See Reichard v. Foster Poultry Farms, 425 F. Supp. 2d 1090 (E.D. Cal. 2006). The court rejected the employer's claims that the affiliation was effectuated without due-process safeguards and that there was a significant lack of continuity between the recognized union and the union with which it became affiliated.

In Norelli v. SFO Good Nite Inn, 191 LRRM 2559, 2007 WL 662477 (N.D. Cal. 2007), the district court ordered the employer, on an interim basis, to recognize and bargain with the union after it had withdrawn recognition based on an anti-union petition. The court noted the ALJ decision finding that the withdrawal of recognition was unlawful and concluded that there was a likelihood of success in proving a causal connection between the employer's multiple unfair labor practices and the employees' signing the petition.

Finally, in Overstreet v. El Paso Disposal, L.P., 668 F. Supp. 2d 988 (W.D. Tex. 2009), the district court found reasonable cause to believe that employees engaged in an unfair-labor-practice strike caused, at least in part, by the employer's surface bargaining and other violations during the certification year. The court found reasonable cause to believe that the employer unlawfully refused to reinstate the strikers upon their unconditional offer to return to work and that the employer could not lawfully withdraw recognition by relying on anti-union petitions signed, for the most part, by replacement workers and non-strikers because those petitions were tainted by its multiple, serious unfair labor practices. The court granted an interim injunction requiring reinstatement of unfair-labor-practice strikers and recognition and bargaining with the union.

5. Undermining of bargaining representative

Cases in this category involve a variety of employer unfair labor practices designed to undermine employee support for an incumbent union, short of actual withdrawal of recognition. The violations can include threats, promises and grants of new benefits, the discharge of key union officers or activists, and unilateral and/or discriminatory changes in important terms or conditions of employment, implemented without satisfying the employer's bargaining obligation to the incumbent union. We seek 10(j) relief to prevent the predictable, irreparable loss of employee support for the incumbent union. See, e.g., Ahearn v. Jackson Hospital Corp., d/b/a Kentucky River Medical Center, Inc., 351 F.3d 226 (6th Cir. 2003); Arlook v. S. Lichtenberg & Co., Inc., 952 F.2d 367 (11th Cir. 1992); Pascarell v. Vibra Screw Inc., 904 F.2d 874 (3^d Cir. 1990); Mattina v. Chinatown Carting Corp., 290 F. Supp.2d 386 (S.D.N.Y. 2003); Dunbar v. Colony Liquor and Wine Distributors, LLC, 15 F. Supp.2d 223 (N.D.N.Y. 1998); Overstreet v. Thomas Davis Medical Centers, P.C., 9 F. Supp.2d 1162 (D. Ariz. 1997).

In the 23 cases in this category that reached a conclusion, we were successful in 21 cases, with 11 settlements reached. In the 12 litigated cases, district courts granted injunctions in ten cases. Those cases included Lineback v. Spurlino Materials, LLC, 546 F.3d 491 (7th Cir. 2008), in which the Seventh Circuit affirmed the district court's order enjoining the employer from its unilateral changes in assigning work after the employees selected the union as their representative. In another case, the district court enjoined the employer from unilaterally ceasing making benefit fund contributions, which had resulted in employees losing their health insurance coverage and had caused an employee unfair labor practice strike to protest the employer's actions. The court further ordered the employer to reinstate some 200 strikers upon their unconditional offer to return to work. Mattina v. Kingsbridge Heights Rehabilitation and Care

Center, 2008 WL 3833949 (S.D.N.Y. 2008), affd. 329 Fed.Appx. 319 (2d Cir.2009)(unpublished).

6. Minority union recognition

Cases in this category typically involve alleged violations of Section 8(a)(2) and 8(b)(1)(A) where an employer recognizes a union which does not represent an uncoerced majority of employees in the unit.¹² The cases may also include other forms of illegal employer assistance to and/or domination of a labor organization. Interim relief is needed because, absent such relief, the unlawfully assisted union will become so entrenched in the unit that the affected employees will be unable freely to exercise their Section 7 rights to select or reject union representation after the Board order issues. See generally Kaynard v. Mego Corp., 633 F.2d 1026 (2d Cir. 1980); McDermott v. Dura Art Stone, Inc., 298 F. Supp. 2d 905 (C.D. Ca. 2003); Moran v. LaFarge North America, Inc., 286 F. Supp. 2d 1002 (N.D. Ind. 2003); Fuchs v. Jet Spray Corp., 560 F. Supp. 1147 (D. Mass. 1983), affd. 725 F.2d 664 (1st Cir. 1983); Zipp v. Dubuque Packing Co., 112 LRRM 3139 (N.D. Ill. 1982). Interim relief can also be warranted to permit the prompt holding of a fair Board election based upon a representation petition filed by a rival union. Cf. Kaynard v. Mego Corp., 633 F.2d at 1034 (10(j) injunction under Section 8(a)(2) should permit a “quick resolution of the underlying dispute” through the election process).

In the two authorized cases in this category, one settled and the district court granted the injunction in the other case in an unreported decision. In both cases, the employers recognized unions based on insufficient authorization cards or cards tainted by employer solicitation, where rival unions had filed representation petitions to represent the same units of employees. Also, in

both cases the petitioning unions were willing to proceed to prompt elections if injunctions were granted and to waive their rights to file election objections based on the minority recognition.

MV Transportation, Case 5-CA-32994; Dedicated Services, Inc., Case 29-CA-28447.

7. Successor Refusal to Recognize and Bargain

This category deals with employers that acquire a business and continue the "employing enterprise" with the predecessor's unionized work force, but refuse to acknowledge their legal obligation to maintain the bargaining relationship that existed under the predecessor.¹³ In some cases, where the successor employer has discriminatorily refused to hire the predecessor's employees in a deliberate attempt to avoid any bargaining obligation, the element that the predecessor workforce has continued may be satisfied by inference that the employer would have hired the predecessor employees, absent its discriminatory motive.¹⁴ The danger of irreparable injury to statutory rights is that, as in the withdrawal of recognition situation, the employees have chosen union representation and will be denied the benefits of union representation for the entire duration of the Board proceeding. During that time employees likely will sever irrevocably their ties and loyalties to the incumbent union. See, e.g., Bloedorn v. Francisco Foods, Inc., 276 F.3d 270 (7th Cir. 2001); Hoffman v. Inn Credible Caterers, Ltd., 247 F.3d 360 (2d Cir. 2001); Frye v. Specialty Envelope, Inc., 10 F.3d 1221 (6th Cir. 1993); Asseo v. Centro Medico del Turabo, Inc., 900 F.2d 445 (1st Cir. 1990).

¹² See Garment Workers (Bernhardt-Altmann Texas Corp.) v. NLRB, 366 U.S. 731, 738-739 (1961).

¹³ See NLRB v. Burns Int'l Security Services, 406 U.S. 272 (1972); Fall River Dyeing & Finishing Corporation v. NLRB, 482 U.S. 27 (1987).

¹⁴ See, e.g., U.S. Marine Corp. v. NLRB, 944 F.2d 1305 (7th Cir. 1991)(en banc), cert. denied 503 U.S. 936 (1992).

We were extremely successful in this category; of the 16 cases in this category, there were six settlements and nine injunctions granted.

In Hoffman v. Parksite Group, 596 F. Supp. 2d 416 (D. Conn. 2009), the successor discriminated against some predecessor employees when it hired its initial complement, but, notwithstanding those violations, a majority of the successor's employees had worked for the predecessor. Noting that a favorable ALJ decision had issued, the court ordered the successor to recognize and bargain with the union pending the Board's order. Furthermore, in order to restore employee confidence in the union and reverse the employer's efforts to undermine the union's collective-bargaining efforts and dilute employee support for the union, the court ordered the employer to offer interim employment to the predecessor employee-applicants who had not been hired.

Similarly, an employer that discriminatorily refused to hire employees who had worked at the facility it purchased was ordered to offer interim employment in Muffley v. Massey Energy Co., 184 LRRM 3302, 2008 WL 4103881 (S.D. W.Va. 2008), aff'd sub nom. Muffley v. Spartan Mining Co., 570 F.3d 534 (4th Cir. 2009).

Finally, in Peck v. Horizons Youth Services, LLC, 2009 WL 2381761, 186 LRRM 3112 (E.D. Cal. 2009), the employer refused to recognize a union that previously represented two units of employees, a majority of which it hired when it took over the operation. The court issued an interim bargaining order with respect to both units, notwithstanding the successor's initial, temporary subcontracting of a portion of one unit's work to a joint employer.

8. Conduct during bargaining negotiations

In these cases one party to a collective bargaining relationship refuses to bargain in good faith in violation of Section 8(a)(5) or 8(b)(3). These cases involve a wide variety of violations,

e.g., a refusal to meet at reasonable times for bargaining, a refusal to supply relevant and necessary information requested by the other party, an insistence to impasse during negotiations on a permissive or illegal subject of bargaining, or a course of conduct reflecting the absence of "good faith" bargaining with an open mind and a sincere desire to reach an acceptable agreement. Where such violations pose the real danger of creating industrial unrest and/or stymieing the collective-bargaining process, 10(j) relief is often warranted. See, e.g., Kobell v. United Paperworkers Int'l. Union, AFL-CIO, 965 F.2d 1401 (6th Cir. 1992); Fleischut v. Burrows Paper Corp., 162 LRRM 2719 (S.D. Miss. 1999); Calatrello v. NSA, a Division of Southwire Company, 164 LRRM 2500 (W.D. Ky. 2000); Kobell v. United Refining Co., 159 LRRM 2762 (W.D. Pa. 1998).

We were successful in settling all three resolved cases in this category, which involved employer unfair labor practices during bargaining for a first contract. In one significant case, Galesburg Terrace and Camelot Terrace, Cases 33-CA-15584, 115587, I authorized Section 10(j) proceedings against an employer that had engaged in bad-faith bargaining from the onset of negotiations in order to avoid reaching an agreement with the Union. As a remedy we sought an interim order requiring the employer to bargain with the union for 24 hours per month, at least six hours per session or any other mutually agreeable bargaining schedule until they reach agreement or good faith impasse. A similar bargaining schedule was included in the settlement.

9. Mass Picketing and Violence

This category encompasses cases in which a labor organization or its agents restrains or coerces employees, typically those who choose to refrain from engaging in Section 7 activities such as a strike. These violations of Section 8(b)(1)(A) include mass picketing that blocks ingress and egress to a worksite, violence and threats thereof at or away from a picket line and

damage to private property. In these cases there is, of course, a concurrent state interest which may be protected through local police authorities and the state court system. If, however, state authorities are unwilling or unable to control the situation, 10(j) relief is warranted because the threatened injury to employee statutory rights cannot be adequately remedied by a Board order due course. See, e.g., Frye v. District 1199, The Health Care and Social Services Union, 996 F.2d 141 (6th Cir. 1993); Squillacote v. Local 248, Meat & Allied Food Workers, 534 F.2d 735 (7th Cir. 1976); Kollar v. United Steelworkers of America, Local No. 2155-7, et al., 161 LRRM 2307 (N.D. Ohio 1999).

No cases were authorized during the period under this category.

10. Notice requirement for strike or picketing (8(d) and 8(g))

These cases involve strikes or picketing undertaken in contravention of the notice and waiting periods required by Section 8(d)(federal and state mediation) and 8(g)(notices to health care institutions). When unions engage in such violations, and their economic activity substantially impairs or threatens to impair the employer's operations, the Board's final order may be too late to restore the status quo and assure that the parties' dispute will be open to the ameliorative effects of timely mediation under 8(d), or that adequate arrangements for the continuity of patient care may be made by the affected institution under 8(g). See, e.g., McLeod v. Compressed Air, etc., Workers, 292 F.2d 358 (2d Cir. 1961).

No cases were authorized during the period under this category.

11. Refusal to permit protected activity on property

These cases involve an employer's interference with the right of employees to engage in protected Section 7 activity, or to receive information from nonemployees, in nonworking areas on the employer's private property. Such activity can include employee picketing or handbilling

arising from a labor dispute or nonemployee efforts to disseminate organizational material to employees. Whether such efforts are protected requires balancing the employer's private property right with employees' Section 7 rights.¹⁵ When an employer's allegedly illegal conduct substantially impairs protected activity, 10(j) relief may be warranted, if an ultimate Board order granting access will be too late to permit the employees to use legitimate economic weapons while the dispute continues or to revive the organizational campaign. See Eisenberg v. Holland Rantos Co., Inc., 583 F.2d 100 (3d Cir. 1978).

No cases were authorized during the period under this category.

12. Union coercion to achieve unlawful object

These cases involve union conduct violative of Sections 8(b)(1)(B), 8(b)(2) or 8(b)(3) of the Act. Typically, the union insists in negotiations to the point of impasse that an employer agree to a permissive or illegal subject of bargaining, or it engages in conduct that restrains or coerces the employer in its selection of representatives for collective bargaining or grievance adjustment. Where the union's misconduct creates industrial unrest and is having a substantial adverse impact on the employer's operations, or is affecting employees in a unique and possibly irreparable manner, 10(j) relief becomes appropriate. See Boire v. I.B.T., 479 F.2d 778 (5th Cir.), reh. denied 480 F.2d 924 (5th Cir. 1973); D'Amico v. Industrial Union of Marine & Shipbuilding Workers of America, 116 LRRM 2508 (D. Md. 1984).

No cases were authorized during the period under this category.

13. Interference with access to Board processes

These cases involve employer or union retaliation against employees or their union for having resorted to the processes of the Board, typically for filing charges or giving testimony

¹⁵ See generally Lechmere v. NLRB, 502 U.S. 527 (1992); Four B Corp. d/b/a Price Choppers,

under the Act. Such retaliation may include threats, discharges, the imposition of internal union discipline, or even the institution of groundless lawsuits meant to retaliate against or harass employees and their unions for their resort to the Board's processes. Such violations are often worthy of 10(j) relief, as the chilling impact of such violations may preclude other employees from filing timely charges with the Board, or from giving testimony needed in ongoing administrative proceedings. See, e.g., Sharp v. Webco Industries, Inc., 265 F.3d 1085 (10th Cir. 2001); Hirsch v. Pilgrim Life Insurance Co., 112 LRRM 3147 (E.D. Pa. 1982).

No cases were authorized during the period under this category.

14. Segregating assets

In these cases an unfair labor practice complaint or a backpay proceeding being litigated before the Board will, if sustained, give rise to backpay for affected employees, but the respondent begins to close down its operations and/or to liquidate or alienate its physical assets without making adequate arrangements to satisfy any potential backpay order. These circumstances create a danger that the respondent's assets will be dispersed or dissipated before a final Board backpay order issues. We seek a 10(j) "protective order" to restrict the respondent's alienation of assets or require it to sequester an amount of money equal to the anticipated net backpay plus Board interest. See, e.g., Schaub v. Brewery Products, Inc., 715 F. Supp. 829 (E.D. Mich. 1989); Kobell v. Menard Fiberglass Products, Inc. et al., 678 F. Supp. 1155 (W.D. Pa. 1988); Jensen v. Chamtech Services Center, 155 LRRM 2058 (C.D. Ca. 1997).

Of the three cases authorized under this category, one was settled, one was withdrawn, and the district court denied the injunction in the third case. In one case, SRC Painting, LLC, et al., Case 30-CA-17243, the ALJ found that the employer, its non-union alter egos, and individual

325 NLRB 186 (1997), enfd. 163 F.3d 1177 (10th Cir. 1998).

family members were liable for violations of Section 8(a)(1), (3), and (5). After one of the family members dissipated assets, the Board authorized Section 10(j) proceedings to sequester funds necessary to satisfy a potential Board monetary remedy and to prevent further dissipation of assets.

15. Miscellaneous

This category includes those cases which, in the Board's judgment, require extraordinary injunctive relief and yet are not easily placed in any one of the 14 previous categories. Their common denominator is that the Board's ultimate remedial order will be unable to fully restore the status quo and thereby to undo the damage caused by the violations. See generally I Legislative History LMRA of 1947 433 (Government Printing Office 1985). See, e.g., Lineback v. Printpack, Inc., 979 F. Supp. 831 (S.D. Ind. 1997) (district court temporarily enjoined under Section 10(j) respondent's prosecution of alleged baseless and retaliatory federal court Section 303 LMRA suit (29 U.S.C. Section 187)).

Two cases involving protected concerted activity were authorized during the period in this category, both of which were withdrawn. In one of the cases, Success Village Apartments, Inc., Case 34-CA-10718, the employer filed and maintained a preempted state court lawsuit against two individuals who testified adversely to the employer in a Board investigation and hearing. A temporary injunction was authorized to protect the Board's primary jurisdiction to determine if the same conduct alleged in the lawsuit, i.e. breach of fiduciary duty, was protected under the Act. The second case, Coastal Insulation Corp, Sealrite Insulation of New York, and Elmsford Insulation Corp., a Single Employer, Case 22-CA-28439, involved the interim reinstatement of 22 discharged employees who engaged in a work stoppage to protest pay inequities.

D. Other Major Section 10(j) Issues

1. Temporary Delegation of Section 10(j) Authority to the General Counsel

On December 28, 2007, the Board delegated to the General Counsel the authority to petition federal district courts for interim injunctions pursuant to Section 10(j) of the Act. This delegation provided that when the Board has fewer than three members, the General Counsel will have full authority on all court litigation matters, including Section 10(j) proceedings, that would otherwise require Board authorization. The delegation terminated when the Board returned to three members on April 5, 2010.

During the 27-month delegation period, Regional Offices submitted 179 requests for Section 10(j) authorization to the General Counsel. Of those requests, the General Counsel authorized Section 10(j) proceedings in 62 cases and denied none.¹⁶ The median time for processing these cases in the Injunction Litigation Branch, minus deferral time, was 23 days, and approximately 98% of these cases were processed to authorization in 30 days, minus deferral time. Of the authorized cases, 45 petitions were filed in court; 21 cases settled before or after the petitions were filed; 4 petitions were withdrawn; and 6 cases were pending in district court at the end of the period. Of the fully litigated cases, the Agency won 17 cases, and lost 8 cases. The litigation success rate (settlements and wins) during the delegation period was approximately 85%.

In a significant number of cases litigated during the delegation period, respondents argued that the courts lacked subject matter jurisdiction because the Board itself had not authorized the case and the Section 10(j) delegation to the General Counsel was invalid. The

¹⁶ The cases submitted by the Regional Offices that were not authorized were settled, were returned to the Regional Offices for completion of the administrative record, were moot, withdrawn or without merit, or had problems in meeting the Section 10(j) standards.

Regional Offices successfully litigated this issue in eight district court proceedings, and the Injunction Litigation Branch successfully litigated it in one appellate court proceeding. In the only appellate decision concerning this issue, the Fourth Circuit held that Section 3(d) of the Act, 29 U.S.C. § 153 (d) expressly authorizes the Section 10(j) delegation. Muffley v. Spartan Mining Co., 570 F.3d 534 (4th Cir. 2009). No court has held to the contrary.

2. Section 10(j) Civil Contempt Proceedings

District courts that issue Section 10(j) injunctions have the inherent power to secure compliance with their orders through adjudication of civil and criminal contempt.¹⁷ In civil contempt cases, the Board must show a respondent's noncompliance with the order by "clear and convincing" evidence.¹⁸ A civil contempt purgation order can impose additional strictures to compel compliance with the decree and/or direct compensation for injuries caused by non-compliance.¹⁹

One case during the reporting period involved an employer's formation of three alter ego corporations and its unlawful terminations of unit employees in an effort to displace an incumbent union. The single employer failed to comply with the injunction's reinstatement, recognition, and rescission-of-unilateral-changes provisions during the four-month period between issuance of the injunction and the Board's order. Accordingly, the court found the single employer and its principal in contempt of the injunction and granted compensatory fines in the form of backpay to the employees who were not reinstated pursuant to the injunction;

¹⁷ See, e.g., Szabo v. U.S. Marine Corp., 819 F.2d 714 (7th Cir. 1987)(civil contempt); U.S. v. Hochschild, 977 F.2d 208 (6th Cir. 1992), cert. denied 506 U.S. 1067 (1993)(criminal contempt); Asseo v. Bultman Enterprises, Inc., 951 F. Supp. 307 (D. P.R. 1996)(civil contempt).

¹⁸ See, e.g., Squillacote v. Local 248, Meat & Allied Food Workers, 534 F.2d 735, 746-747 (7th Cir. 1976).

backpay to all unit employees who received lower wages and benefits due to the unilateral changes; payments to benefits funds for amounts not paid due to the unilateral changes; and the Board's costs and expenditures, including attorneys' fees, incurred in the investigation and prosecution of the contempt proceeding. The single employer's principal was held personally liable. Overstreet v. Advanced Architectural Metals, Inc., Civ. No. 2:07-CV-00781-PMP-LRL (April 23, 2008; June 6, 2008; March 31, 2009).

In the other case litigated during the reporting period, the district court found clear and convincing evidence that the employer had failed to comply with a consent injunction by fully reinstating the alleged discriminatees. Accordingly, the court ordered, inter alia, payment of backpay to those employees and suspended compliance fines payable to the Board. Mattina v. Saigon Grill Gourmet Restaurant, Inc., 2009 WL 323507 (S.D.N.Y. 2009).

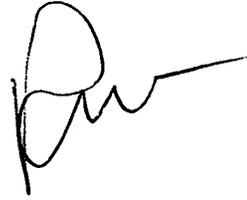
3. Discovery in Section 10(j) Proceedings

Occasionally, respondents in Section 10(j) proceedings seek to depose Board Regional Directors under the discovery provisions of the Federal Rules of Civil Procedure. In Barker v. Regal Health and Rehab Center, Inc., 632 F.Supp.2d 817 (N.D. Ill. 2009), the district court denied the employer's motion to depose the Regional Director because there was no reason that his deposition would produce or lead to admissible evidence. The court held that the Regional Director's verification of the petition for injunctive relief did not "mean that the Director

¹⁹ See, e.g., Local 28, Sheet Metal Workers' Int'l v. EEOC, 478 U.S. 421, 443 (1986).

participated in or has any personal knowledge of the underlying facts” of the alleged unfair labor practices. 632 F.Supp.2d at 836.

Ronald Meisburg
General Counsel

A handwritten signature in black ink, appearing to be 'RM', written over a horizontal line.

Attachments (3)

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