OFFICE OF THE GENERAL COUNSEL

MEMORANDUM 75-18 April 22, 1975

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

FROM: Peter G. Nash
General Counsel

SUBJECT: Authorization of Regional Directors to Process Without Clearance Requests and Applications for Temporary Restraining Orders in Section 10(l) Proceedings -- Guide for Processing

Regional Directors are hereby authorized to act on requests for TRO's and to apply for TRO's in appropriate Section 10(l) cases without prior Washington clearance. 1/

The extensive experience acquired by Regional Offices over the years in handling issues related to the application for temporary restraining orders, the obvious need for expedition in determining whether temporary relief is required, and the fact that decisions in this area are best made by those closest to the controversy and the practicalities of the situation support fully the authorization here given.

The following material has been prepared to assist Regions in this area.

Prerequisites and Time Limitations For Temporary Restraining Orders

Section 10(l) empowers the district court to grant a temporary restraining order without notice, upon a showing of reasonable cause to believe that substantial and irreparable injury to the charging party will otherwise be unavoidable. The Regional Director may apply for a TRO upon the filing of the petition or at any subsequent stage in the proceedings. Douds v. Wine, Liquor & Distillery Workers Union, 75 F. Supp. 184, 186 (S.D.N.Y., 1947). A TRO is to be effective for no longer than a five-day period, but in computing the five-day period, Saturdays, Sundays and legal holidays are excluded (Rule 6 F.R.C.P.). 2/

The language of Section 10(l) to the effect that a TRO "shall be effective for no longer than five days and will become void at the expiration of such period" is identical to the language of Section 7 of the Norris-LaGuardia Act, and was apparently derived from that Act. Although the legislative

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1/ This delegation of authority to seek temporary restraining orders does not apply to 10(j) cases where authorization of the 10(j) proceeding itself must still be obtained from the Board. Except as indicated herein, the standards for TRO requests in 10(j) cases are similar to those under Section 10(l).

2/ TRO's under Section 10(j), on the other hand, would appear to be subject to the limitation of Rule 65(b), F.R.C.P. (10-day limitation; may be extended for an additional 10 days).

history of Section 10(l) does not cast any light on this language, the legislative history of Norris-LaGuardia indicates that Congress considered but decided against allowing extensions of TRO's during the pendency of the hearing on an application for a preliminary injunction. See, Senate Committee on the Judiciary, To Define and Limit the Jurisdiction of Courts Sitting in Equity, S. Rep. No. 163, 72d Cong. 1st Sess. 22 (1932) and (Minority Rep.) S. Rep. No. 163 pt. 2, 72d Cong. 1st Sess. 22 (1932). An amendment intended to grant such authority was specifically rejected in the House and Senate debates. House Debate on H.R. 5315, 75 Cong. Rec. 5508 (1932); Senate Debate on S. 435, 75 Cong. Rec. 4702 (1932). Moreover, Rule 65 (e) of the Federal Rules of Civil Procedure provides that "These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee." In sum, it would appear that Congress intended to limit TRO's in 10(l) proceedings to five days, without the possibility of any extension being granted as in the case, for example, of a TRO under Section 10(j). In practice, in 10(l) proceedings where TRO relief is sought, the Petitioner has invariably requested that the hearing on the preliminary injunction be scheduled within the TRO's five-day period.

It appears that the five-day time limitation of Section 10(l) would apply to any order entered prior to an evidentiary hearing, findings of fact, and conclusions of law. Thus, in Granny Goose Foods, Inc. v. Teamsters, 415 U.S. 423, 85 LRRM 2481, 2487-88 (1974), the Supreme Court ruled that the phrase "temporary restraining order . . . granted without written or oral notice," as used in Rule 65(b), encompasses any order entered without an evidentiary hearing, findings of fact, and conclusions of law. 3/ In view of the comparable phrasing "without notice" of the TRO provision of Section 10(l), it would appear that the five-day limitation in that Section would have a similar application. Moreover, the fact that respondent may have been given notice of the hearing, and the fact that the issue of irreparable injury may have been litigated at the hearing, would apparently neither serve to remove the order from the five-day time limitation of Section 10(l) nor convert the order into a preliminary injunction, where there have been no findings of fact and conclusions of law based on an evidentiary hearing. In view of this, any application for injunctive relief beyond the five-day period should not be made without a full 10(l) hearing on the merits and should be supported by proposed findings of fact and conclusions of law. 4/

3/ See, also, Pan American World Airways, Inc. v. Flight Engineers' International Ass'n., 306 F. 2d 840, 842 (C.A. 2, 1962), and Sims v. Greene, 160 F. 2d 512 (C.A. 3, 1947); cited by the Supreme Court in Granny Goose (n. 14), where the courts equated the term "notice" with a hearing and determination on the merits of the preliminary injunction.

4/ Should circumstances arise where the court fails to set an early date for a 10(l) hearing so that a five-day TRO will expire before the completion of that hearing, the Region should apprise the Division of Advice of the situation. The Region may, of course, seek to obtain an agreement from Respondent, under the aegis of the court that Respondent will refrain from engaging in the conduct at issue for a period longer than five days.

When application is made for a TRO (typically, but not necessarily, at the time the injunction petition is filed), an effort should be made to advise the respondent that an application for such a TRO will be made at a given time, so that respondent might be present then. (See Rule 65(b)(1)(2), F.R.C.P.). The application should be set forth in the petition for an injunction, or if at a later stage, may be made by motion or amendment to the petition. The application should be supported by an affidavit or affidavits of persons having knowledge of the facts, setting forth the facts which demonstrate the threatened or actual irreparable injury, and specifically describing the irreparable injury. The petition should summarize the facts supporting the TRO and should allege, in addition to irreparable injury to the charging party, other probable consequences, e.g., irreparable injury to the public interest, the community, national defense, employees or their rights, other employees or persons, and in all cases, irreparable injury to the policies of the Act.

The grant or denial of a temporary restraining order is apparently not an interlocutory decision within the meaning of 28 U.S.C. 1292 providing for review of interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve and modify injunctions," and is therefore apparently not appealable. Austin v. Altman, 332 F.2d 273 (C.A. 2, 1964); Pennsylvania Motor Truck Ass'n. v. Port of Philadelphia Marine Terminal Ass'n., 276 F.2d 931 (C.A. 3, 1960). Wright and Miller, 11 Federal Practice and Procedure §2962 at 616 n. 92. If a TRO is denied, the Region should request that the matter be promptly set down for hearing on the petition forpreliminary injunction. If the request for prompt hearing is denied the Region should call the Division of Advice. Consideration can then be given to whether the denial of a TRO and prompt hearing would, in the circumstances amount to denial of the petition for a preliminary injunction and constitute an interlocutory order which would be appealable. See United States v. Wood, 295 F.2d 772, 776-78 (C.A. 5,1961)

Irreparable Injury

Section 10(1) expressly provides that irreparable injury to the charging party be shown before issuance of an ex parte TRO. 5/ However, once the statutory requirement is met, additional injury to others, e.g., the

5/ Section 10(j) contains no such requirement, but would appear to be subject to the requirement of Rule 65(b), F.R.C.P., that a showing be made "that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or his attorney can be heard in opposition". Therefore, as the Board is the applicant, the application may be based in whole or part upon a showing of irreparable injury to the policies of the Act.

community or national defense, can and should be demonstrated in the application. 6/ Moreover, while a showing of irreparable harm to the charging party might not, standing alone, warrant issuance of a TRO, such a showing in conjunction with irreparable injury to others (e.g., the community), might satisfy the statutory requirement. In such circumstances, the totality of irreparable injury that would occur may warrant application for a TRO. 7/ Where irreparable injury to the community or to the national defense is involved, the statutory requirement is met if the charging party is the governmental body or agency affected by the charged unlawful conduct.

In considering what is irreparable injury, it is to be remembered that the TRO is intended only to prevent such damage during the pendency of the injunction proceeding (typically, between the filing of the petition for an injunction and the injunction hearing itself). Accordingly, allegations of irreparable injury based on alleged damage continuing thereafter would ordinarily not be relevant.

What is irreparable injury to a charging party depends, of course, on the circumstances. The following is illustrative of situations where applications for a TRO might be warranted:

1. Substantial financial loss. This is, of course, relative since a substantial daily financial loss by a major industrial enterprise may not be sufficient injury to warrant a TRO, while the same amount may constitute irreparable injury to a small company. For TRO purposes, irreparable injury does not generally include normal, fixed, expenses such as salaries of personnel and overhead. While such financial losses to the charging party, standing alone, might not warrant application for a five-day TRO, those losses, if coupled with the threat of more serious harm to other persons or to the public might warrant a TRO. Further, where those losses may be so great as to be uncollectable from the respondent (insufficient assets, etc.) a TRO may well be warranted.

6/ District courts, in unreported decisions, have issued TRO's which were based in whole or in part upon a showing of irreparable injury to the public generally, or to persons other than the charging party.

7/ See, Danielson v. Laborers, Local 275, 479 F. 2d 1033, 1037 (C.A. 2, 1973), in which the court held that picketing which failed to shut down a construction project, but delayed work, thereby causing the incurring of expenses and prevention of profits, was conduct which resulted in "substantial and irreparable harm" to the employer within the traditional equitable meaning of that term.

2. Substantial impact on the national defense, e.g., interruption to construction or maintenance work on a military installation. See, Boire v. Local 295, Plumbers, 59 LRRM 2694 (M.D., Fla., 1956).

3. Picketing or strike conduct which presents an imminent threat of bankruptcy or insolvency, loss of a business relationship, substantial unemployment, or a substantial loss of business or customer good will. See, Kaynard v. Independent Routemen's Ass'n., 479 F. 2d 1070, 1073 (C.A. 2, 1973).

4. Violence or mass picketing. See, In re Puerto Rico Newspaper Guild, 476 F. 2d 856, 857 (C.A. 1, 1973).

5. Dangerous consequence of a work stoppage, e.g., dangers of a partially completed structure collapsing or of tunnel areas flooding.

6. Threatened spoilage of perishable goods. See, Samoff v. Int'l. Longshoremen's Ass'n., 188 F. Supp. 308, 311 (D. Del., 1960); Schauffler v. Local 1291, ILA, 46 LRRM 2047, 2049 (E.D. Pa., 1960).

7. Serious adverse impact upon the community, e.g., disruption of a public utility or business deemed vital to the public health, safety or general welfare, or delay in opening a school or hospital. See, Hoffman v. ILWU Local 10, et al., 85 LRRM 2353, 2354 (C.A. 9, 1974); see also, G. C. Memorandum 74-49 (Health Care Institutions) at p. 29.

8. Time of the essence, e.g., threatened disruption of a scheduled event or seasonal business, or unfair labor practices which threaten to interfere with a pending Board-conducted election. See, Hoffman v. ILWU, Local 10, supra.

9. Situations posing serious remedial problems in Board litigation, e.g., imminent discriminatory shutdown of a plant, or imminent threat of dissipation of assets in a pending Section 8(a)(3) case. See, Douds v. Anheuser-Busch Inc., 28 LRRM 2377 (D.N.J., 1951).

As with any unfair labor practice issues, the Region may submit to the Division of Advice TRO issues that are novel, not clearly governed by controlling precedents, or otherwise deemed appropriate for submission by the Regional Director.

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