

NATIONAL LABOR RELATIONS BOARD

SECTION 10(J) MANUAL

Office of the General Counsel

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PREFACE

This manual has been prepared by the General Counsel of the National Labor Relations Board pursuant to his authority under Section 3(d) of the Act. It is designed only to provide operational and procedural guidance for the Agency's staff in administering the National Labor Relations Act. It is not intended to be a compendium of substantive or procedural law, nor a substitute for a knowledge of the law, evidence, or procedure. The matters contained herein are not General Counsel or Board rulings or directives and are not a form of authority binding on the General Counsel or the Board.

SECTION 10(J) MANUAL

Users' Guide

I. Introduction

This manual is intended to be a general guideline for the processing of Section 10(j) cases, from initial investigation through litigation in federal district court. It contains materials to help Board agents become more familiar with the situations in which interim injunctive relief under Section 10(j) may be necessary. Also contained in this manual is a checklist of questions to help elicit evidence relevant to determining whether Section 10(j) relief is "just and proper" in a particular case, as well as sample documents to assist attorneys in preparing Section 10(j) memoranda to the General Counsel and court papers in their respective district courts.

The use of Section 10(j) is an effective adjunct to unfair labor practice litigation in those cases where respondents stand to achieve an unlawful objective as a result of the delay inherent in formal litigation before the Board. All Board agents should be familiar with situations in which Section 10(j) relief may be appropriate, and be prepared to effectively investigate and recommend Section 10(j) proceedings whenever warranted. Similarly, greater familiarity with Section 10(j) will aid trial attorneys who must litigate Section 10(j) cases in federal district courts.

II. Identifying Potential Section 10(j) Cases

A. Section 10(j) Principles

Section 10(j) relief is an interim remedial tool to preserve or restore the status quo ante so that a final order of the Board is not rendered meaningless by the passage of time. Congress recognized that permitting a respondent's unlawful acts to remain in effect during the Board's administrative proceedings could permanently alter the situation and prevent the Board from effectively remedying the violations. Thus, to justify Section 10(j) relief, the Board must show a district court that the unfair labor practices, left unremedied, will irreparably harm statutory rights while the parties await a final Board order.

This involves two elements of proof:

1. a sufficient showing that an unfair labor practice has occurred; and
2. a sufficient showing that there is a threat that the Board's ultimate remedial order will be a nullity.

The latter element is often referred to as a threat of "remedial failure." In most circuits these elements are tested under the two prong analysis of whether there is "reasonable cause to believe" that the Act has been violated as alleged in the unfair labor practice complaint; and whether interim injunctive relief, pending a final Board order, is "just and proper." the First, Seventh and Ninth

Circuits have abandoned the "reasonable cause" inquiry as the limit of a district court's inquiry into the merits of the unfair labor practice case and held that requests for Section 10(j) injunctions should be evaluated under traditional equitable principles.¹ A more precise definition of the standards for each circuit is set out in the Model 10(j) standards for each circuit contained in Appendix E.

The "merits" analysis of a 10(j) case is the same as the merits determination of any unfair labor practice charge. What distinguishes a 10(j) case from other unfair labor practice cases is the threat of remedial failure. This threat may be demonstrated by the nature and extent of the alleged violations, the circumstances surrounding the violations, and the anticipated and actual impact of the unremedied violations or "chill" upon statutory rights that is expected to continue until a Board order issues.

B. Categories of Section 10(j) Cases

Section 10(j) injunctions may be sought by the Board for any alleged violation of the Act, other than those enumerated in Section 10(l). Over the years, certain categories of cases have been shown to be particularly likely to threaten the efficacy of the Board's order. We have identified 15 of these categories:

¹ See Maram v. Universidad Interamericana de Puerto Rico, 722 F.2d 953 (1983); Kinney v. Pioneer Press, 881 F.2d 485 (7th Cir. 1989) and Miller v. California Pacific Medical Center, ___F.2d ___, 145 LRRM 2769 (9th Cir. 1994).

1. Interference with organizational campaign (no majority)
2. Interference with organizational campaign (majority)
3. Subcontracting or other change to avoid bargaining obligation
4. Withdrawal of recognition from incumbent
5. Undermining of bargaining representative
6. Minority union recognition
7. Successor refusal to recognize and bargain
8. Conduct during bargaining
9. Mass picketing and violence
10. Notice requirements for strikes or picketing under Section 8(d) and 8(g)
11. Refusal to permit protected activity on property
12. Union coercion to achieve unlawful objective
13. Interference with access to Board processes
14. Segregating assets
15. Miscellaneous (includes injunction against certain lawsuits, employer violence, interference with employee activities for mutual aid and protection)

Many of the materials in this manual, as well as other material on 10(j) litigation published by the Board, are organized according to these categories. A brief description of the nature of the violations, relief and case law associated with each category is contained in Training

Monograph No. 7: Injunctive Relief under Section 10(j) of the NLRA, pp. 4-16, included here as Appendix A.²

The foregoing categories are not exclusive. Cases may arise in various contexts that are not encompassed by these categories but that still warrant extraordinary injunctive relief. The common denominator for all Section 10(j) cases is that the Board's ultimate remedial order will be unable to restore completely the status quo, and thereby, neutralize the damage caused by the violations.

III. Processing Section 10(j) Cases

A. Notice and Expedition

Consideration of the need for 10(j) relief may be triggered by a charging party's request for Section 10(j) relief. Even if no request is made, at the initial processing of any case, Board agents should consider whether the case falls within one of the 15 categories or whether the circumstances otherwise suggest that the effectiveness of a final Board order is threatened by the passage of time. If so, the Region should consider "sua sponte" whether Section 10(j) relief should be sought.

² Additional citations of cases where injunctive relief was sought, organized by the categories, are found in Appendix c. Discussion of cases according to these categories is also found in the Board's Annual Reports, the General Counsel's Quarterly Reports and the Reports of General Counsels regarding Section 10(j) Litigation during their term.

As soon as it appears that 10(j) will be considered, the Region immediately should notify the charged party of this fact and solicit the parties' positions regarding the propriety of Section 10(j) relief.

Although Section 10(j) cases do not have statutory priority, the Agency has determined that, based upon policy considerations, any cases involving Section 10(j) relief should have priority over all other non-statutory priority cases in the Region (see Casehandling Manual 11740). This expedition is necessary because inordinate delay in processing a Section 10(j) case diminishes the effectiveness of any relief obtained, and may entirely preclude relief where the situation has so changed that restoration of the status quo is impossible or would be no more effective than the Board's order in due course.

B. Investigating Need for Injunctive Relief

As noted above, what distinguishes a 10(j) case from other unfair labor practice cases is that the circumstances of the case make it likely that the Board's ultimate order will be ineffective to restore the status quo. Accordingly, in investigating an unfair labor practice charge that includes 10(j) consideration, the Board Agent must not only determine whether there is evidence establishing a violation of the Act but also conduct additional investigation and analysis to determine whether a Board order in due course will be inadequate to protect statutory rights.

The quantum of evidence required to establish the need for Section 10(j) relief will vary depending upon the type of cases involved, the applicable case law, and the judicial circuit in which injunctive relief is sought. Some courts will presume that certain violations, if left unremedied until a final Board order, threaten irreparable harm to statutory policies such as "chilling" unit employees' support for a union or their willingness to engage in protected union activities. Other courts or other types of violations require actual evidence of such irreparable injury. Thus, the existence or absence of direct evidence of impact in a particular case is always relevant to the evaluation of the need for 10(j) relief. Its absence does not necessarily mean that Section 10(j) proceedings are inappropriate. But the ability of the Regions to adduce demonstrable evidence of irreparable harm or undermining effects of the unfair labor practices, increases the Board's chances for success in litigating "just and proper" issues in Section 10(j) proceedings.

In any case being considered for 10(j) relief, the Board Agent should routinely question witnesses about the impact of the alleged violations on statutory rights, including possible "chill" on Section 7 rights, and include witnesses responses in their initial affidavits. In developing the appropriate questions, Board Agents should determine whether the case falls within one of the 15 categories of Section 10(j) cases listed above and consult

institution of Section 10(j) proceedings, a copy of the General Counsel's memorandum is forwarded to the Regional Office by facsimile transmission for use in preparing the district court papers. If the Board authorizes Section 10(j) proceedings, complaint must issue before any court action is undertaken. The Region must file the Section

10(j) petition within 48 hours after notice by the ILB that the Board has authorized the use of Section 10(j). If a settlement is imminent, the Regional Office may seek authorization from the appropriate Assistant General counsel to file the petition outside the 48-hour deadline.

During the 48 hours from the authorization of Section 10(j) proceedings until the filing of the Section 10(j) court papers, settlement efforts should be vigorously pursued. Experience demonstrates that the authorization of Section 10(j) proceedings is a strong catalyst for settlement of the underlying case.

B. Preparing Court Papers

The documents to be filed in U.S. District Court include:

- Petition for Injunctive Relief (attach charge, complaint and Regional Director's affidavit)
- Proposed Order to Show Cause
- Memorandum of Points and Authorities
- Proposed Findings of Fact and Conclusions of Law
- Proposed Temporary Injunction Order

Examples of these papers, as well as a sample motion for a Temporary Restraining Order, are included in Appendix F.

In preparing for district court litigation, the Region should keep in mind that the district court judge or magistrate is unlikely to be as familiar with labor law principles as an administrative law judge. Thus, the

Board's Memorandum in support of the Petition for Injunctive Relief should lay out a theory of violation in greater detail than the Region is likely to do in administrative litigation. The Region's memorandum regarding Section 10(j) relief and the General Counsel's memorandum to the Board, serve as a blueprint for the district court petition and brief and a repository of solutions for anticipated litigation problems in the particular case. The Region is not expected to perform additional research to prepare its court papers. Rather, the Region should rely upon these two documents, together with other resources, such as the Model 10(j) standards included in Appendix E and sample 10(j) pleadings in Appendix F, to draft papers in appropriate format for the district court.

For cases in district courts which permit the board to litigate 10(j) cases on affidavits, the Region should also prepare for filing with the court a volume of the affidavits and exhibits it intends to rely on. In some cases, a record already compiled in the administrative proceeding before an administrative law judge (or relevant portions thereof) can be used in place of, or in conjunction with, affidavits. Unless the district court has approved as a general rule the use of affidavits or administrative transcripts in 10(j) proceedings,⁵ the Region should file a motion to hear the

⁵ For example, district courts in the Ninth Circuit allow preliminary injunction cases to be tried on affidavits as a matter of course.

case on affidavits or the administrative record. A model memorandum to support such a motion is also contained in Appendix G.

The respondent is afforded the opportunity to file answering papers and, where relevant, counter-affidavits and exhibits. The Board then may file a reply brief and rebuttal affidavits and exhibits. Local rules in some jurisdictions require that live testimony be presented in support of the petition, but often the district court hears only oral arguments by counsel and does not hold an evidentiary hearing.

C. Litigation Resources

Once the Region has filed the court papers and the court has set a hearing date for the Section 10(j) proceedings, various litigation issues may arise, for example, questions concerning discover. The ILB has prepared and regularly updates model motions and other court papers on recurring legal issues, many of which are included in Appendix G. Other sample court papers including sample memoranda of points and authorities, for different circuits, are available for most of the 15 categories of Section 10(j) cases. These can be transmitted by data-fax or modem to any Region when a need arises (see Appendix G for list of available sample motions and other court papers).

The ILB also is available to discuss any litigation strategies or problems than may arise during the course of a Section 10(j) litigation. Since the number of Section 10(j) cases actually litigated is quite small, many attorneys have never presented a Section 10(j) case in district court. To help them prepare, the ILB will conduct telephone conferences to help attorneys practice their presentations to the district court.