

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 06-02

January 6, 2006

TO: The Board

FROM: Arthur F. Rosenfeld, Acting General Counsel

SUBJECT: End-of-Term Report on Utilization of Section 10(j)
Injunction Proceedings
June 1, 2001 through December 31, 2005

Attached hereto is a report that I recently sent to the Board concerning Section 10(j) authorizations and litigation during my term as General Counsel. I believe that you will find it informative as well as helpful in the management of your Section 10(j) program.

The accomplishments outlined in this report are the result of hard work and dedication by you and your staffs. You can take pride that these efforts have contributed to a more effective enforcement of the Act.

/s/

Arthur F. Rosenfeld
Acting General Counsel

Attachments

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UNITED STATES GOVERNMENT
memorandum

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL

DATE: January 6, 2006

TO: The Board

FROM: Arthur F. Rosenfeld
Acting General Counsel

SUBJECT: End-of-Term Report on Utilization of
Section 10(j) Injunction Proceedings
June 1, 2001 through December 31, 2005

Attached is my report on the use of Section 10(j) proceedings during my term as General Counsel. I intend to release this report to the public consistent with the practice of former General Counsels.

/s/
Arthur F. Rosenfeld
Acting General Counsel

Attachments

cc: Executive Secretary
Acting Solicitor

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

DATE: January 6, 2006
TO: The Board
FROM: Arthur F. Rosenfeld
General Counsel
SUBJECT: End-of-Term Report on Utilization of Section 10(j) Injunction Proceedings
June 1, 2001 through December 31, 2005

I. 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 June 1, 2001 and December 31, 2005.

During my tenure as General Counsel, I have continued to support the use of Section 10(j), when appropriate, 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 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) appropriately.

First, I directed the Regional Offices to evaluate two factors in considering Section 10(j) proceedings in their cases: (1) the likelihood that any final remedial order of the Board would be ineffective to remedy the alleged unfair labor practices and protect statutory rights; and (2) the strength of the alleged violations. With regard to the first criteria, "threat of remedial failure," I was particularly sensitive to the use of Section 10(j) proceedings to protect the right of

employees freely to choose whether or not to be represented by a union. For example, in union organizing cases and cases where an employer assists a union or recognizes one union over another, an interim injunction can restore the status quo to permit the holding of a NLRB-sponsored election. Concerning the second, “success on the merits” factor, I sought Board authorization for Section 10(j) proceedings where the allegations of the complaint were sufficiently strong that the Board likely would grant, as its remedial order, the same relief that would be sought on an interim basis through the Section 10(j) proceeding. I believe that this approach assured that interim relief would be imposed only when it was likely that the Board would order such relief permanently.¹

Consistent with these views, during my tenure I maintained the approaches to Section 10(j) of prior General Counsels, particularly in the areas of staff training and monitoring of Regional Office 10(j) programs. I continued to support the training of Regional Office staff in the use of Section 10(j) law and procedures to assure 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. We also developed an electronic version of the Agency’s Section 10(j) Manual for use by the Agency and the public. In 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.

During my tenure, we began the practice in selected cases of requesting Board authorization to initiate 10(j) court filings after the issuance of the administrative law judge decisions. In such cases, the allegation in a Section 10(j) request that there is a “reasonable cause to believe” that the Act was violated, is supported by a favorable decision of a neutral fact-

¹ See Memorandum GC 02-07, “Utilization of Section 10(j) Proceedings,” dated August 9, 2002.

finder, based on record evidence. Thus, in a variety of cases during the reporting period, the Board authorized Section 10(j) proceedings, and courts granted interim injunctions, after ALJDs had issued.

The Board's Section 10(j) activity from June 1, 2001 through December 31, 2005 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. Part II 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 requested and the Board granted authorization to seek such relief. In Part II, we also analyze the types of situations in which we resorted to Section 10(j) proceedings during this period. Part III 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 IV deals with other developments in Section 10(j) litigation that occurred during the report period.

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

II. Cases Submitted and Authorized in General

During the period covered by this report, the Regional Offices submitted 355 cases to the Injunction Litigation Branch of the Division of Advice with a recommendation concerning

Section 10(j) relief. I sought authorization from the Board to institute Section 10(j) proceedings in 103 of those cases. The Board authorized Section 10(j) proceedings in 70 of the cases.²

During this reporting period, the Agency has seen some decline in its caseload. For example, the case intake (combined C and R) for Fiscal Year 2000, the last full year before my appointment, was 35,249. In FY 2005 that same figure was 29,602.

This reporting period also saw continued strength in our settlement rate from 94.7% in FY 2000, to 96.5% in FY 2001, 93.6% in FY 2002, 92.8% in FY 2003, 96.1% in FY 2004 and 97.2% in FY 2005. The reduced intake and the increased settlement rate, together with my concern that this important remedial weapon be used only when clearly warranted, explains much about the decline in the actual numbers of Section 10(j) cases over the past four years. By careful selection of our cases, we have been able to achieve positive remedial results. Those results, together with our efforts to achieve voluntary compliance with the Act, have fostered an atmosphere of increased settlement of merit cases. In the final analysis, voluntary settlement is the quickest and most effective remedy for meritorious unfair labor practice cases and the increased settlement rate reflects the success of the Regions' efforts.

Appendices A and B attached to this report summarize the results of the cases authorized by the Board. 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

² 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.

and denied, the number of cases in which changed circumstances caused us not to proceed with the litigation, and the number of cases which are still pending. 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 Board's 10(j) authorization.

As Appendix A shows, of the 70 cases authorized by the Board, 57 have been pursued to conclusion at this time.³ Of these cases, 21 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, 37%, is lower than prior 10(j) reporting periods, including the settlement/adjustment of 52% during the last reporting period. However, of the remaining 33 cases resolved by court decision, injunctions were granted in whole or in substantial part in 29 cases. Thus, in litigated cases, we were successful in 88% of the cases. This compares favorably with the 72% litigation success in the reporting period ending in January 2001. All together, we obtained a successful settlement or favorable court decision in 50 of 54 cases, a "success" rate of 93% of the cases pursued to a conclusion. This success rate was higher than 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, 16%; Category 2, 13%). This was below the 43% proportion in the 2001 Section 10(j) report.⁴ Category 1 cases declined from 25% of the total

³ We have excluded three cases that are still pending and ten cases in which we decided not to pursue further proceedings.

⁴ 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

10(j) cases authorized in the 2001 reporting period to the current 16%. Similarly, Category 2 cases declined from 18% in the 2001 reporting period to 13% during my tenure. The largest single category during this period (Category 4) involved cases in which an employer unlawfully withdrew recognition from an incumbent union: 14 cases representing 20% of all cases authorized by the Board, a rise from the comparable figure of 16% in the last report period. This rise in percentage in Category 4 cases is an upward trend that has continued for several reporting periods since the late 1980's. Another category that experienced significant growth in authorized 10(j) cases was Category 6, which involve 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 present report this category constituted 14% of the total cases authorized.

III. Types of Cases

1. Interference with organizational campaign (no majority)⁵

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

Co., 395 U.S. 575 (1969), in addition to other relief. See the discussion *infra*, Part III, Sections 1 and 2.

⁵ Category 1 cases exclude those involving a campaign in which the union has obtained a card majority in an appropriate unit and the 10(j) petition seeks a remedial bargaining order on behalf of the union under the principles of the Supreme Court's decision in Gissel Packing Co. That group is covered in Category 2.

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).

Of the ten cases resolved during this period under this category, we were successful in nine cases. See Appendix A. Five cases were settled or adjusted, and in four cases the district courts granted injunctions. One of the litigated cases involved the interim reinstatement of several discharged employees as well as the recall of some 80-100 alleged unfair labor practice strikers. See Kentov v. Point Blank Body Armor, Inc., 2003 WL 253063 (S.D. Fla. January 30, 2003). In a second case, the court ordered the interim reinstatement of discharged employees who were laid off, then hired by a labor broker, and referred back for hire with the employer. See Chavarry v. E.L.C. Electric, Inc., 2004 WL 2137644 (S.D. Ind. Indianapolis Div. June 29, 2004).

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).

Of the nine cases pursued to a conclusion, we were successful in all the cases, including five cases in which injunctions were granted.⁶ In one significant case, Tremain v. H H 3 Trucking, Inc., No. 03 C 50494 (N.D. Ill. Western Div. December 9, 2003). the employer discharged the unit employees and then subcontracted their work. The district court ordered the employer to recognize and bargain with the union, to offer recall to the discharged employees as soon as work became available, and to provide the Regional Office with billing records, payroll records and other information on a bi-weekly basis if work was not available for any of the discharged employees. In a second case, Sharp v. Ashland Construction Co., Inc., 190 F. Supp.2d 1164 (W.D. Wis. 2002), the court issued an interim Gissel bargaining order, concluding

⁶ In one of the cases where we obtained a consent injunction, we did not seek an interim bargaining order remedy.

that the public interest under Section 10(j) is the protection of the integrity of the parties' collective-bargaining process.

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

⁷ See, e.g., NLRB v. Joy Recovery Technology Corp., 134 F.3d 1307, 1314-1315 (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., Lear Siegler, Inc., No-Sag Products Division, 295 NLRB 857, 861 (1989).

alienation of the old facility or equipment.¹⁰ Based upon 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. Ca. 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. 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 single case authorized by the Board in this category during the reporting period involved the discriminatory relocation of unit work. The case was successfully resolved with a Board settlement.

4. Withdrawal of recognition from incumbent

These cases generally 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 union representation for the entire period of

¹⁰ See, e.g., Teamsters Local Union No. 171 v. NLRB, 863 F.2d 946, 957-958 (D.C. Cir. 1988), cert. denied sub nom., A.G. Boone Co. v. NLRB, 490 U.S. 1065 (1989) and the cases discussed therein.

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).

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 final Board order. See, e.g., Brown v. Pacific Telephone and Telegraph Co., 218 F.2d 542 (9th Cir. 1955)(as amended); 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); D'Amico v. Townsend Culinary, Inc., 22 F. Supp. 2d 480 (D. Md. 1998); Overstreet v. Tucson Ready Mix, Inc., 11 F. Supp. 2d 1139 (D. Ariz. 1998).

We were successful in nine of the 11 resolved cases. Injunctions were granted in a series of cases involving situations where employers had committed independent violations to "taint" subsequent showing of employee disaffection from an incumbent union.

In one case, Miller v. H & N Foods International d/b/a H & N Fish Co., No. C-03-4002 (N.D. Ca. October 17, 2003), the court granted an injunction, including an interim bargaining order, after the favorable ALJ decision had issued, where the employer's withdrawal of recognition from the recently-certified union was tainted by its allegedly unlawful unilateral discontinuation of annual performance reviews and merit wage increases, anti-union statements, and delay in providing relevant requested information during bargaining.

Another court granted an interim bargaining order where an employer had withdrawn recognition from a long-standing collective-bargaining representative based on anti-union petitions that the employer required former strikers to sign before allowing them to return to work. See Moore-Duncan v. Laneko Engineering Co., 174 LRRM 2395 (E.D. Pa. 2003). The court also ordered the employer to withhold recognition from, and cease dealing with, an employee committee it established after withdrawing recognition from the union.

Further, a district court granted an interim bargaining order injunction in a withdrawal-of-recognition case where the incumbent union's alleged loss of employee support followed the employer's premature declaration of a bargaining impasse and the unilateral imposition of changes to many terms and conditions of employment of unit employees. See Pye v. EAD Motors Eastern Air Devices, Inc., 175 LRRM 2441 (D. N.H. 2004).

Finally, in a case where the withdrawal of recognition was not preceded by other employer unfair labor practices, but rather occurred during the term of a collective-bargaining agreement,¹² a district court ordered an employer to recognize the incumbent union and to abide by the parties' labor contract. See Glasser v. Heartland Health Care Center d/b/a Plymouth Court, 174 LRRM 2397 (E.D. Mich. 2003).

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., Arlook v. S. Lichtenberg & Co., Inc., 952 F.2d 367 (11th Cir. 1992); Pascarell v. Vibra Screw Inc., 904 F.2d 874 (3d Cir. 1990); Dunbar v.

¹² Absent unusual circumstances, an employer cannot question an incumbent union's majority status during the term of a labor agreement when a question concerning representation cannot be raised. See, e.g., Hexton Furniture Co., 111 NLRB 342, 344 (1955); Osteopathic Hospital Founders Association v. NLRB, 618 F.2d 633, 638 (10th Cir. 1980).

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); Aguayo v. South Coast Refuse Corp., 161 LRRM 2867 (C.D. Ca. 1999).

In the five cases that reached a conclusion under this category, we were successful in all cases, with three settlements reached. In the one litigated case, the district court granted an injunction that ordered the employer to recognize the incumbent union, to comply with the terms of an area labor agreement by which the employer had agreed to be bound, to supply relevant information to the union, and to reinstate unlawfully discharged employees. See Mattina v. Chinatown Carting Corp., 290 F. Supp.2d 386 (S.D.N.Y. 2003).

In Ahearn v. Jackson Hospital Corp., d/b/a Kentucky River Medical Center, Inc., 351 F.3d 226 (6th Cir. 2003), the Sixth Circuit affirmed a 10(j) injunction involving alleged violations taking place at the time the union won a decertification election. The circuit court continued to adhere to its “reasonable cause” and “just and proper” two-part test to evaluate Section 10(j) cases. The court also held that the district court had properly concluded that there was reasonable cause to believe that the respondent had unlawfully discharged several employees and had made unlawful unilateral changes to the working conditions of the unit employees. The Sixth Circuit also affirmed the interim relief granted by the district court, based upon affidavit testimony that the discharges had a “chilling” impact on union activity at the facility.

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.¹³ 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); 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).

We were very successful in this category during this reporting period. Of the eight resolved cases, settlements were reached in five cases and injunctions were granted in the remaining three cases. For example, the district court in Moran v. LaFarge North America, Inc., 286 F. Supp. 2d 1002 (N.D. Ind. 2003), ordered the employer to cease and desist from continuing to recognize, or give effect to a collective-bargaining agreement with, a union that never had enjoyed uncoerced majority support from the unit employees. That injunction restored the conditions necessary for holding a fair Board representation election. In this regard, a bona fide rival union that had filed a representation petition with the Board in this unit was prepared to proceed to an election under the protection of a court order. Thus, the rival union was willing to

¹³ See Garment Workers (Bernhardt-Altman Texas Corp.) v. NLRB, 366 U.S. 731, 738-739 (1961).

file a request to proceed to an election and a waiver of potential election objections based on the employer's alleged violations of Section 8(a)(2) and would not oppose placing the illegally assisted union on the ballot. See generally Carlson Furniture Industries, Inc., 157 NLRB 851 (1966). Similarly, in McDermott v. Dura Art Stone, Inc., 298 F. Supp. 2d 905 (C.D. Ca. 2003), the employer and the incumbent union allegedly violated Section 8(a)(1), (2), and (3), and 8(b)(1)(A) and (2), by entering into a successor agreement with a union-security clause after learning that the incumbent no longer enjoyed majority support. The court's order established the conditions necessary for the Board to conduct an election pursuant to a rival union's representation petition and the equivalent of the waivers set forth in Carlson Furniture.

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.¹⁴ 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.¹⁵ The danger of irreparable injury to statutory rights is that, as in the withdrawal of recognition situation, the employees will

¹⁴ 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).

¹⁵ 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).

be denied the benefits of union representation for the entire duration of the Board proceeding and during that time employees likely will sever irrevocably their ties and loyalties to the incumbent union. See, e.g., 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); Dunbar v. Onyx Precision Services, Inc., 129 F. Supp.2d 230 (W.D.N.Y. 2000); Donner v. NRNH, Inc., 163 LRRM 2033 (W.D.N.Y. 1999).

We were successful in all five cases in this category, with one settlement and four injunctions granted. In two of the litigated cases, the courts ordered the respondents to recognize and bargain with the incumbent unions that had represented the predecessor employer's employees and also enjoined the successor employers' improper recognition of minority unions. See Kendellen v. Interregional Disposal & Recycling, Inc., No. 03-1442 (WHW) (D. N. J. April 23, 2003); Lightner v. North Hills Office Services, No. 03-CV-2320 (JAG) (D. N. J. July 22, 2003).

In two circuit court decisions, appellate panels decided that 10(j) injunctions were warranted involving successor employers. In Hoffman v. Inn Credible Caterers, Ltd., 247 F.3d 360 (2d Cir. 2001), the Second Circuit concluded that an interim bargaining order under 10(j) was just and proper to protect an incumbent union where there was reasonable cause to believe that the respondent was a Burns successor that had failed and refused to recognize and bargain with the union. The court stated that there was a "pressing need" to preserve the status quo to compel a successor employer to recognize and bargain with the incumbent union. The Second Circuit thus reversed the district court's denial of an interim bargaining order remedy.

In Bloedorn v. Francisco Foods, Inc., d/b/a Piggly Wiggly, 276 F.3d 270 (7th Cir. 2001), the Seventh Circuit reversed the denial of an interim bargaining order and hiring order involving

a successor employer that allegedly had refused to hire the predecessor's workforce in an effort to avoid a union bargaining obligation. The district court had concluded, based upon the written record made before a Board ALJ, that the Regional Director had no better than a negligible chance of prevailing on the merits of the case. The lower court also concluded that the incumbent union did not face irreparable harm in the absence of an injunction. The Seventh Circuit reversed both findings. The circuit court noted that the ALJ's intermediate decision was a useful "benchmark" against which the Regional Director's chance of success on the merits must be measured. Regarding the issue of irreparable harm, the court concluded that the longer the incumbent union was kept out of the facility, the less likely it could successfully organize and represent the workers when the Board order finally issues. The Seventh Circuit thus concluded that interim relief under Section 10(j) would serve the public interest.

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 the four resolved cases in this category. In one of the three litigated cases, the district court issued an interim bargaining order and a reinstatement order where the Region had demonstrated a likelihood of success on the merits that the respondent had failed to bargain in good faith by engaging in “surface” bargaining, had refused to furnish the union with requested relevant information, and had unlawfully discharged several employees. See Miller v. Renzenberger, Inc., CIV. S-04-1518 WBS PAN (E.D. Ca. September 16, 2004).

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.¹⁶ 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

¹⁶ See generally Lechmere v. NLRB, 502 U.S. 527 (1992); Four B Corp. d/b/a Price Choppers, 325 NLRB 186 (1997), *enfd.* 163 F.3d 1177 (10th Cir. 1998).

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 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., Hirsch v. Pilgrim Life Insurance Co., 112 LRRM 3147 (E.D. Pa. 1982).

No cases were authorized during the period under this category. However, in Sharp v. Webco Industries, Inc., 265 F.3d 1085 (10th Cir. 2001), the Tenth Circuit affirmed a Section 10(j) injunction against an employer's unlawful prosecution of state court lawsuits against two employees for, inter alia, breach of contract and unjust enrichment, based upon the employees' participation in a related Board ULP proceeding. The employer contended that the laid off employees had been alleged as 8(a)(3) discriminatees by the General Counsel and that such allegations constituted breaches of private settlement/severance agreements already reached and complied with between the employer and the affected employees. For money paid to the employees, they had agreed to relinquished all NLRA claims against the employer. The employer's lawsuits were alleged by the Board as unlawful discrimination under Section 8(a)(4). The circuit court affirmed the lower court's injunction against the employer's prosecution of the state court lawsuits, agreeing with the district court that the state actions had been preempted by the ongoing NLRB administrative proceeding and was not controlled by Bill Johnson's Restaurants, Inc. v. NLRB,¹⁷ which did not deal with preempted state court lawsuits. Rather, the circuit court concluded that NLRB v. Nash-Finch Co.¹⁸ controlled, as the validity of the severance agreements signed by the employer and the employees had been presented to the

¹⁷ 461 U.S. 731, 745-46 (1983)(Board has no authority to enjoin state court lawsuits unless they are in retaliation for protected activities and are baseless in law or fact).

¹⁸ 404 U.S. 138, 144 (1971)(Board has authority to enjoin state court injunction where matter was subject to Board preemption).

Board. The Tenth Circuit agreed with the lower court that a temporary injunction against the employer's prosecution of its state court actions was just and proper.

14. Segregating assets

In these cases an unfair labor practice complaint or a backpay proceeding is 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).

We were successful in two of the three cases authorized under this category. In one case an appropriate settlement was reached after the petition was filed. The other successful case, Aguayo v. South Coast Refuse Corp., et al., No. CV 02-6258 AHM(JTLx) (C.D. Ca. October 10, 2002), involved a recidivist respondent against which the Board was litigating a large backpay proceeding under two prior court-enforced Board orders.¹⁹ During the course of the backpay proceeding, the Region concluded that the corporate respondent had alienated most, if not all, of

¹⁹ The Board had also successfully obtained a prior Section 10(j) decree and civil contempt adjudication against this respondent. See Aguayo v. South Coast Refuse Corp., 161 LRRM 2867 (C.D. Ca. 1999); Aguayo v. South Coast Refuse Corp., 2000 WL 1280915 (C.D. Ca. 2000)(civil contempt).

its assets to its individual owners and certain alter ego entities. The Region amended its backpay specification to name these new parties as derivative respondents, thereby creating the predicate “complaint” upon which Section 10(j) proceedings could be initiated. The Board sought a Section 10(j) protective order against the original corporate respondent and the new derivative respondents to safeguard the estimated \$1.1 million in Board backpay. The district court granted the requested injunction and ordered the respondents, jointly and severally, to deposit into the registry of the U.S. district court, or obtain an equivalent bond, the amount of \$1.1 million.

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)).

No cases were authorized during the period under this category.

IV. Other Major Section 10(j) Issues

A. Temporary Delegation of Section 10(j) Authority from Board to General Counsel

In December 2001, the Board issued an Order Delegating Authority to the General Counsel, providing 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. 66 Fed. Reg. 65,998 (2001). During a brief period in

November and December 2002 when the Board lacked a quorum, the General Counsel, pursuant to this delegation, authorized four Section 10(j) cases. In one of those cases, Kentov v. Point Blank Body Armor, Inc., 258 F. Supp. 2d 1325 (S.D. Fla. 2002), the district court denied a respondent motion to dismiss a Section 10(j) petition claiming that the General Counsel lacked authority. Consistent with the sole court decision directly on this point, the district court held that the Board's delegation order was permissible pursuant to the Act's grant to the General Counsel of, "such other duties as the Board may prescribe...." Section 3(d) of the Act, 29 U.S.C. § 153(d).

B. 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.²⁰ In civil contempt cases, the Board must show a respondent's noncompliance with the order by "clear and convincing" evidence.²¹ 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.²²

One case during the reporting period involved a complex civil contempt proceeding arising under a Section 10(j) "protective order" to sequester assets during a Board backpay proceeding. As discussed supra, Part III. Category 14, the district court had granted a Section 10(j) decree requiring several related corporate and individual respondents, jointly and severally, to deposit into the registry of the district court, or obtain an equivalent bond, in the amount of \$1.1 million, to protect the potential Board backpay.²³ The respondents failed to timely comply

²⁰ 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).

²¹ See, e.g., Squillacote v. Local 248, Meat & Allied Food Workers, 534 F.2d 735, 746-747 (7th Cir. 1976).

²² See, e.g., Local 28, Sheet Metal Workers' Int'l v. EEOC, 478 U.S. 421, 443 (1986).

²³ See Aguayo v. South Coast Refuse Corp., et al., No. CV 02-6258 AHM(JTLx) (C.D. Ca. October 10, 2002).

with their obligations either to fund the required escrow account or to obtain the bond. Based upon such failure to comply with the court's 10(j) decree, the Board sought civil contempt sanctions, including the imposition of prospective compliance fines. On January 28, 2003, the district court issued an order holding the respondents in civil contempt, including the imposition of a prospective compliance fine of \$25,000 and a daily fine of \$500 per day until full compliance was achieved. Thereafter, based upon the respondents' failure to completely purge themselves of their contumacious conduct, further proceedings were initiated in the district court to assess civil contempt fines and to seek writs of body attachment of the individual owner-respondents.²⁴ On March 17, 2003, the court imposed civil contempt fines of \$40,250 and issued provisional writs of body attachment for the individual respondents. On about March 20, 2003, a global settlement was reached in this labor dispute, which provided for the payment to the district court of the \$40,250 in civil contempt fines and a total of \$850,000 in backpay to the affected employees, union dues to be paid to the affected union, and employer contributions to be tendered to the union's trust fund. An alleged alter ego company also agreed to offer recall to discriminatees and agreed to a formal Board settlement which provided for union recognition and compliance with an extant labor agreement with the union.

C. 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 Ahearn v. Rescare West Virginia, 208 F.R.D. 565, 171 LRRM 3247 (S.D. W. Va. 2002), the district court

²⁴ Regarding the use of writs of body attachment in civil contempt proceedings, see, e.g., NLRB v. Interurban Gas Co., 401 F.2d 745, 746 (6th Cir. 1968); NLRB v. James Troutman & Associates, 146 LRRM 2941, 2949, 1994 WL 397338 (9th Cir. 1994).

ruled that the respondent could not depose the Regional Director as part of its discovery request. The court agreed with our argument that the information and analyses presented to the Regional Director by the Regional Office staff was protected by the attorney work product doctrine.²⁵ While the court did not specifically rule on the Board's alternative argument that a deposition of the Regional Director would violate the deliberative process privilege,²⁶ the court concluded that the respondent was not entitled to discovery of the mental impressions and opinions that the Regional Director formed when weighing the evidence produced during the investigation. The court also noted that the Regional Director had no first hand knowledge of all of the evidence relevant to determining "reasonable cause" in the injunction proceeding, all of which was contained in the unfair labor practice record that was then pending before the administrative law judge. Finally, the court concluded that the respondent had failed to overcome the attorney work product doctrine's protection by showing substantial need or an inability to obtain the information by other means. Id., 208 F.R.D. at 568.

Arthur F. Rosenfeld
General Counsel

Attachments (2)

²⁵ See generally Hickman v. Taylor, 329 U.S. 495 (1947).

²⁶ See, e.g., U.S. v. Farley, 11 F.3d 1385 (7th Cir. 1993); Bordone v. Electro-Voice, Inc., 879 F. Supp. 919 (N.D. Ind. 1995).