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THE 10(j) LABOR INJUNCTION: AN EXERCISE IN STATUTORY CONSTRUCTION

Section 10(j) of the National Labor Relations Act authorizes the National Labor Relations Board in certain unfair labor practice cases to seek in a federal district court "appropriate temporary relief or restraining order," and empowers the court "to grant to the Board such temporary relief or restraining order as it deems just and proper."[1] Although this section has been the law since 1947, only recently has it been used enough to merit serious consideration in most unfair labor practice litigation. The standards which guide issuance of injunctions under section 10(j) have never been clear, and the Board's policy of increased use of that section since 1961[2] has highlighted difficulties in its administration. *McLeod v. General Electric Co.*, 257 F. Supp. 690 (S.D.N.Y.), *rev'd*, 366 F.2d 847 (2d Cir.), *temp. stay pend. cert.*, 87 Sup. Ct. 5 (Harlan, Circuit Justice, 1966), *cert. granted on principal issue but remanded on other grounds*, 385 U.S. 533 (1967), articulated a principle implicit in most of the cases construing this section. Because this principle may be authoritatively sanctioned by the Supreme Court in the near future,[3] it is worthwhile to examine its validity.

General Electric Co. refused to bargain with an IUE negotiating team including members of seven other unions representing G.E. employees. Regional Director McLeod, acting for General Counsel of the Board, issued a complaint charging G.E. with refusal to bargain in

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[1] Labor Management Relations Act (Taft-Hartley Act) § 101(10)(j), 29 U.S.C. § 160(j) (1964). The section in its entirety reads:

> The board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in any unfair labor practice, to petition any United States district court within any district wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

[2] As of June 30, 1965, the Board had made a total of 112 petitions for injunctions under section 10(j). Of this number, 46 were sought prior to June 30, 1961, and 66 were sought since that date. That is an average of 3 per year prior to 1961, and 16 per year since then. Extracted from NLRB ANN. REPS., (1948-1965). Tables are reproduced in the appendices (table 18) since 1952, and in the text of discussion on section 10(j) prior to that date.

[3] Certiorari was granted by the Supreme Court. If the language of the Supreme Court's opinion interpreting the holding of the district court is any index, the Court failed to see the crucial issue of whether Section 10(j) requires judicial deference. If there was such a misinterpretation it is possibly because the Court did not consider fully the merits at this time but simply remanded for further consideration of the mootness issue.

violation of section 8(a)(5) of the National Labor Relations Act.[4] Pursuant to section 10(j) of the Act, the Regional Director sought to enjoin G.E.'s refusal to bargain. In a federal district court it was *held:* injunction granted. Section 10(j) of the National Labor Relations Act permitting the NLRB to seek "appropriate relief," and empowering the courts to grant such relief as is "just and proper," requires judicial deference to the Board's judgment in deciding when such relief will issue.

The district court, in the principal case, saw the problem as involving two questions: when should the Board seek an injunction, and when, if one is sought, should it be granted.[5] Rejecting G.E.'s attempt to hold the Board to public statements stating that the injunction would be limited to flagrant violations, the court pointed out that the Board cannot be legally bound by public statements of its members.[6] The court argued that Congress entrusted the Board with "essential judgment" as to when the public interest required an injunction,[7] and left to the courts power to deny relief only in "routine cases" where there is "no good reason to short-circuit the normal processes of administrative hearing and judicial review."[8] Particular implementations of the 10(j) injunction were left "mainly for the Board's administrative judgment."[9] Given a proper exercise of discretion, the court would deny relief only if there was no reasonable cause to believe the charged party had committed an unfair labor practice.[10]

The Second Circuit, in reversing the district court, emphasized the extraordinary nature of the remedy,[11] and concluded that the Board had "not demonstrated that an injunction is necessary to preserve the status quo or to prevent any irreparable harm."[12] Although it emphasized the importance of G.E. to national defense,[13] the court indicated its preference that the usual avenues of Board adjudication and judicial review be exercised with dispatch.[14] The circuit court

[4] Labor Management Relations Act (Taft-Hartley Act) § 101(8)(a)(5), 29 U.S.C. §158(a)(5)(1964).
[5] 257 F. Supp. at 707.
[6] *Id.* at 702, 708 and n.14.
[7] *Id.* at 708.
[8] *Id.*
[9] *Id.* at 709 n.15.
[10] *Id.* at 709. Judge Frankel indicated that "the points of controversy are essentially legal rather than factual," and that were it a matter of independent judgment, the decision would have gone for the Board. *Id.* at 710.
[11] 366 F.2d at 849.
[12] *Id.* at 850.
[13] *Id.*
[14] *Id.*

assumed that primary discretion over issuance of injunctions was in the hands of the Board,[15] and reversed largely on the ground that by its action in seeking an injunction, the Board deprived the courts of the benefit of its expertise on the underlying unfair labor practice which would have been available had normal procedures been used.[16]

Mr. Justice Harlan, acting as circuit justice, entered a temporary stay of the circuit court's decision pending application for certiorari. The Supreme Court granted certiorari on the issue of standards, but remanded the case to determine the effect of a subsequent contract between the parties on the mootness of that issue.[17]

Under the normal procedures in injunction cases, the Regional Director first issues a complaint and notice of hearing on the underlying unfair labor practice. Then, the regional office conducts an independent investigation and on the basis of that investigation the Regional Director determines whether injunctive relief is required. If such relief is deemed necessary, petition is filed in a district court requesting an injunction under the Act. It is in answer to an order to show cause in the district court that the respondent has his first opportunity to challenge the propriety of such relief.

This note presents an alternative to the district court's interpretation in the principal case requiring deference to the judgment of the administrator. This alternative is desirable because on the one hand, there is no compelling reason to adopt the district court's position, and on the other, desirable policy dictates another result. The material is discussed under four subject-headings: (a) the language of section 10(j) is vague; (b) prior judicial interpretations of this language have not resolved its ambiguity; (c) the context and legislative history of section 10(j) are not conclusive on the issue of deference; and (d) fairness dictates that the current interpretation be changed.

I. The Language of Section 10(j) is Vague

The text of section 10(j) suffers from lack of clarity in two important respects. First, it does not indicate whether issuance of injunctions is to be a matter for the discretion of the Board, with the court deferring to administrative judgment, or whether the court is to define its own set of independent standards within which the Board is to be required to act. Second, it provides little guidance in determining what those standards will be.

[15] *Id.* at 849-50.
[16] *Id.* at 850.
[17] 385 U.S. at 535.

The language of section 10(j) empowers the Board, upon issuance of an unfair labor practice complaint, to petition a federal district court for "appropriate temporary relief or restraining order." The court is given jurisdiction to "grant to the Board such temporary relief or restraining order as it deems just and proper." The phrase "temporary relief or restraining order" is modified twice in this section; once in reference to the Board's power to seek, and once in reference to the court's power to grant. In either instance the modifying term ("appropriate" or "just and proper") may be taken as descriptive of the nature of the "relief or order" to be sought or granted, or it may be taken as descriptive of the nature of the "case" or "fact situation" in which such relief is to be sought or granted.

Further ambiguity is present in the use of the pronoun "it" in the clause granting the courts jurisdiction to "grant to the Board such temporary relief or restraining order as *it* deems just and proper." (Emphasis added). If the "it" refers to the Board, there is no discretion granted to the court. If the "it" refers to the court, there is at least discretion sufficient to decide in which cases relief would be "just and proper."

As a result of these difficulties, the language of the section is inconclusive in regard to the allocation of responsibility between court and Board. In any event the Board preliminarily decides whether the public interest demands an action for such injunction. Given the decision to seek an injunction, the question is whether the court must therefore presume that an injunction is needed, defer to administrative judgment, and place a burden on the respondent to show that the injunction is not necessary. According to the courts' interpretation of this section, the Board exercises primary decision-making power over issuance of injunctions. As a practical matter, issuance is nearly certain once the Board has made its decision to petition. According to the interpretation urged by this note, the court would define its own standards within which the Board must operate.

II. PRIOR JUDICIAL INTERPRETATION OF THE LANGUAGE OF SECTION 10(j) HAS NOT RESOLVED ITS AMBIGUITY

As a result of this lack of clarity in the language, the standards for issuance of 10(j) injunctions have been difficult to settle. The few times courts have been faced with the question,[18] the tendency has

[18] Up to June 30, 1965, the 10(j) injunction had only been litigated in the courts 71 times. NLRB ANN. REPS., *supra* note 2. Information not found in the tables was extracted from the text.

been to assume that the Board knows what it is doing, and to grant the injunction without careful investigation into the facts. A comparison with section 10(*l*) suggests little more by direct inference than that the injunction under 10(j) was not thought to be needed in every case.[19] Statements in the legislative history (which is far from extensive) indicate that the section was included to prevent irreparable harm and to protect the public interest,[20] but the meaning of these abstractions can only be supplied by careful discussion of fact situations in light of the relevant issue. Such discussion is hard to find. As a result of these difficulties, the injunction, when sought, has almost always been granted.[21]

Many of the courts granting injunctions have never confronted the issue of need for relief. Some courts have apparently assumed that given reasonable cause to believe a violation has been committed the issue is not open to judicial question.[22] Others have explicitly stated that the court must defer to administrative judgment.[23] Most of the cases which pass beyond the previous two situations nevertheless mechanically apply the statute to the facts.[24] In many of the cases in which the issue of proper standards has been raised, and discussed, the need

[19] Labor Management Relations Act (Taft-Hartley Act) § 101(10)(*l*), 29 U.S.C. § 160(1) (1964), provides that in every case in which a complaint is issued under section 8(b)(4) (secondary boycotts) the Board *must* seek a temporary injunction in a federal court and the court may grant such injunction as it deems "just and proper." Because no discretion is vested in the Board under section 10(*l*) it has been held that issuance of these injunctions is wholly for the courts to decide. Retail Clerks Union v. Food Employer's Council, Inc., 351 F.2d 525, 530-31 (9th Cir. 1965).

[20] S. REP. No. 105, 80th Cong. 1st Sess. 27 (1947). See LeBus v. Manning, Maxwell & Moore, Inc., 218 F. Supp. 702 (W.D. La. 1963).

[21] Of the 71 times the courts had passed on the 10(j) question as of June 30, 1965, injunctions were granted 59 times, and denied 12 times. NLRB ANN. REPS. *supra* note 2. Information not found in the tables was extracted from the text.

[22] McLeod v. Compressed Air Workers, 194 F. Supp. 479 (E.D.N.Y. 1961), *aff'd*, 292 F.2d 358 (2d Cir. 1961) (both opinions); Douds v. I.L.A., 241 F.2d 278 (2d Cir. 1957); Brown v. Pacific Tel. & Tel., 218 F.2d 542 (9th Cir. 1955) (concurring opinion of Pope, J.); Elliot v. Dubois Chemicals, Inc., 201 F. Supp. 1 (N.D. Tex. 1962); Kennedy v. Telecomputing Corp., 49 L.R.R.M. 2188 (S.D. Cal 1961); Johnston v. Wellington Mfg. Div., 49 L.R.R.M. 2536 (W.D.S.C. 1961); Hull v. Sheet Metal Workers' Int'l Ass'n, 161 F. Supp. 161 (N.D. Ohio 1958).

[23] McLeod v. General Elec. Co., 257 F. Supp. 690 (S.D.N.Y. 1966); LeBus v. Manning, Maxwell & Moore, Inc., 218 F. Supp. 702 (W.D. La. 1963); Fusco v. Richard W. Kaase Baking Co., 205 F. Supp. 465 (N.D. Ohio 1962).

[24] Reynolds v. Herron Yarn Mills, Inc., 53 CCH Lab. Cas. 17,147, ¶11,347 (W.D. Tenn. 1966); Potter v. United Foods, Inc., 58 L.R.R.M. 2469 (S.D. Tex. 1965); Alpert v. Trailways of New England, 58 L.R.R.M. 2152 (D.C. Mass. 1965); Rains v. East Tenn. Pkg. Co., 240 F. Supp. 770 (E.D. Tenn. 1965); Brooks v. Square Tube Corp., 56 L.R.R.M. 2881 (E.D. Mich. 1964); Davis v. Ferrantello, 56 L.R.R.M. 2316 (N.D. Tex. 1964); Johnston v. Evans, 223 F. Supp. 766 (E.D.N.C. 1963); Madden v. Alberto Culver Co., 49 L.R.R.M. 2516 (N.D. Ill. 1961); Elliott v. Sheet Metal Workers, 42 L.R.R.M. 2100 (D.C.N.M. 1958); Schnied v. District 50 U.M.W., 40 L.R.R.M. 2529 (N.D. Ill. 1957); Douds v. I.L.A., 33 L.R.R.M. 2004 (S.D.N.Y. 1953); Madden v. Cargill, Inc., 30 L.R.R.M. 2459 (N.D. Ill. 1952).

for an injunction was so clear by any standard that no incisive analysis was needed for the holding; and the cases are easily restricted to their facts.[25]

In the few cases in which the requested injunction has been denied, the grounds for denial were almost always that the Board failed to show reasonable cause to believe a violation had been committed.[26] The question of standards was never approached. In the very few instances in which an injunction has been denied for lack of need for that injunction, the court has failed to handle the problem in a clear and helpful fashion.[27]

This is not to suggest that the judicial history of section 10(j) is devoid of any well-considered discussion of the problem.[28] It is only to demonstrate that such discussion has not carried the day.

III. THE CONTEXT AND LEGISLATIVE HISTORY OF SECTION 10(j) ARE INCONCLUSIVE ON THE ISSUE OF DEFERENCE

The language of section 10(j) is not conclusive as to whether the courts are required to defer to administrative judgment on standards for issuance. There are, however, inferences which may be drawn from

[25] Henderson v. Gibbons & Reed Co., 53 CCH Lab. Cas. 16,360, ¶ 11,081 (D.C.N.M. 1966); LeBus v. Local 1800 I.L.A., 52 L.R.R.M. 2500 (E.D. La. 1963); Compton v. Sea-Land Serv., Inc. 53 L.R.R.M. 2016 (D.C.P.R. 1963); Potter v. Cement Workers Union, 48 L.R.R.M. 2965 (E.D. Tex. 1961); Madden v. Alberto Culver Co., 49 L.R.R.M. 2516 (N.D. Ill. 1961); Douds v. I.L.A., 147 F. Supp. 103 (S.D.N.Y. 1956), *aff'd* 241 F.2d 278 (2d Cir. 1957); Douds v. American Coal Shipping, Inc., 39 L.R.R.M. 2767 (S.D.N.Y. 1957); Brown v. National Union of Marine Cooks & Stewards, 104 F. Supp. 685 (N.D. Cal. 1951); Jaffee v. Newspaper & Mail Deliverer's Union, 97 F. Supp. 443 (S.D.N.Y. 1951); Penello v. United Mine Workers, 88 F. Supp. 935 (D.D.C. 1950); Curry v. Union De Trabajadores De La Industria Del Cemento Ponce, 86 F. Supp. 707 (D.C.P.R. 1949); Madden v. United Mine Workers, 79 F. Supp. 616 (D.D.C. 1948).

[26] Johnston v. J. P. Stevens & Co., 234 F. Supp. 244 (E.D.N.C. 1964), *aff'd.* 341 F.2d 891 (4th Cir. 1965); Getreu v. Armco Steel Corp., 241 F. Supp. 376 (S.D. Ohio 1964); Davis v. Ferrantello, 56 L.R.R.M. 2316 (N.D. Tex. 1964); Penello v. Burlington Industries, 54 L.R.R.M. 2165 (W.D. Va. 1963); Phillips v. Burlington Industries, 49 L.R.R.M. 2144 (N.D. Ga. 1961); Graham v. Boeing Airplane Co., 22 L.R.R.M. 2243 (W.D. Wash. 1948).

[27] McLeod v. General Elec. Co., 366 F.2d 847 (2d Cir. 1966), *cert. granted* 385 U.S. 533 (1967); Johnston v. J.P. Stevens & Co., 341 F.2d 891 (4th Cir. 1965); Penello v. Burlington Indus., 54 L.R.R.M. 2165 (W.D. Va. 1963).

[28] In Henderson v. Gibbons & Reed Co., 53 CCH Lab. Cas. 16,360, 16,361, ¶ 11,081 (D.C.N.M. 1966), the court said:

> An injunction should not be granted just because petitioner requests it. The court should exercise its sound discretion in granting the temporary injunction or in denying such an injunction, and such is to be determined by the court. It is not whether or not the Board has reasonable grounds to believe that an injunction should issue but whether or not the Court has reasonable grounds that it should issue.

It appears that *Henderson* is an exception among the recent cases. Some earlier opinions, however, concur in this approach: Brown v. National Union of Marine Cooks & Stewards, 104 F. Supp. 685 (N.D. Cal. 1951); Douds v. Anheuser-Busch, Inc.,

the statute's context and legislative history which suggest that no deference was intended.

It has been argued that one of the chief reasons for placing power over labor matters in the hands of the National Labor Relations Board in 1935 was to effect an institutional change and thereby reduce the influence of federal courts whose anti-labor tendencies had long been known.[29] It was feared that the NLRA would be destroyed as an effective weapon of social reform if it were given to the courts to apply.

By 1947, Congressional attitudes had significantly changed and the power of unions had grown far out of proportion to what it was in the early 1930's.[30] It would not have been inconsistent with the purposes of a statute so obviously designed to curtail union power as was the Taft-Hartley Act that it should have vested certain limited discretion over labor matters in the federal courts.

Furthermore, other sections of the Act provide for judicial remedies not previously included in the labor law. Section 303(b) provides that unions may be sued in federal courts for damages occasioned by certain unfair labor practices defined in section 8(b)(4) of the Act.[31] Section 208(a) gives the courts power, upon petition by the Attorney General in national emergency disputes, to issue an injunction.[32] Section 10(l) vests power in the courts to enjoin certain unfair labor practices where they deem it just and proper.[33] In none of these instances is there any question about deference to an administrator. Again, it is not inconsistent to conclude that Congress intended to vest similar power in courts under section 10(j).[34]

There is no reason to conclude that the courts must defer under 10(j) from comparison with section 10(*l*). Althtough it is true that section 10(j) does not require Board initiation, while 10(*l*) does, that

99 F. Supp. 474 (D.C.N.J. 1951); Penello v. United Mine Workers, 88 F. Supp. 935 (D.D.C. 1950); Evans v. International Typographical Union, 76 F. Supp. 881 (S.D. Ind. 1948).

[29] *See* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1.03 (1958). *See, e.g.,* Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921).

[30] Union membership had grown from under 3.5 million in 1935 to over 14.5 million in 1947. U.S. Dept. of Labor, Directory of National and International Labor Unions, (1963) cited in S. COHEN, LABOR IN THE UNITED STATES 139 (2d ed. 1960). The Congressional attitude toward unionism in 1947 was reflected in H.R. REP. No. 245, 80th Cong. 1st Sess. 4 (1947), and in comments by Congressmen on the floor of Congress. *See, e.g.,* 93 CONG. REC. 1069-70 (1947) (remarks of Congressman Case); 93 CONG. REC. A 1295 et. *seq.* (1947) (remarks of Congressman Landis).

[31] 29 U.S.C. § 187(b) (1964).

[32] 29 U.S.C. § 178(a) (1964).

[33] Labor Management Relations Act (Taft-Hartley Act) § 101(10)(*l*), 29 U.S.C. § 160(l) (1964).

[34] *Cf.* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

difference is best explained by comparison of the conduct each section was designed to prevent. Violations of the secondary boycott provision at which the 10(*l*) injunction is aimed, are more likely to cause unjustified harm than are violations of other provisions of sections 8(a) and 8(b). The discretion vested in the Board under section 10(j) resembles that of a public prosecutor.[35] Although a prosecutor may not normally be compelled to bring an action, that he does is no reason to presume the guilt of the charged party.

The legislative history of the statute reveals nothing which rebuts the conclusion that increased powers were to be vested in the federal judiciary. That Congress was displeased with the present means of administration of the labor law is attested to by references in the committee reports to "onesidedness" of the present state of the law,[36] and to the "discredited" National Labor Board.[37] The House report on the original House bill refers to increased powers of review over administrative action given to federal courts.[38] At one point, the Senate report indicates that one reason for the difference between sections 10(*l*) and 10(j) is that for some 10(j) unfair labor practices injunction is not a necessary remedy.[39] There is no clear indication anywhere in the legislative history that this difference was designed to require courts to defer to the judgment of the new NLRB.[40]

In the original Senate bill, the word "exclusive" appeared before "jurisdiction" in the clause granting power to the courts.[41] In the final version of the bill, as reported out of conference committee, this word had been omitted.[42] Although the presence of this word would have increased the certainty that courts were not to defer to the Board, its removal may be as well explained by its seeming needlessness, as by any attempt to change the meaning of the language. When the bill

[35] L. MAYERS, THE AMERICAN LEGAL SYSTEM 44-45 (rev. ed. 1964). In at least some states, removal for cause is possible. *Id.* at 45. Compare the unreviewable discretion of the Board over issuance of complaints. Balanyi v. Local 1031, IBEW, 374 F.2d 723 (7th Cir. 1967). It may be well argued that even the reasoned decision not to prosecute ought to be reviewable.

[36] S. REP. No. 105, 80th Cong., 1st Sess. 2 (1947).

[37] H.R. REP. No. 245, 80th Cong., 1st Sess. 5 (1947).

[38] *Id.*

[39] S. REP. No. 105, 80th Cong., 1st Sess. 27 (1947).

[40] A helpful collection of the legislative history of the Taft-Hartley Act may be found in NATIONAL LABOR RELATIONS BOARD, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT OF 1947 (1948).

[41] S. 1126, 80th Cong., 1st Sess. (1947). Prior to the change which took place in conference, the bill read: "[T]he court... shall have *exclusive* jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper." (Emphasis added).

[42] *See* H.R. REP. No. 510, 80th Cong., 1st Sess. (1947) (as reproduced therein), and final version of the Act.

was reported in final form out of conference committee, Senator Taft stated on the floor of Congress that "the provisions regarding injunctions are exactly those which were in the Senate bill. . . ."[43] While he may have been politicking, it seems more likely that he did not consider the change significant.

IV. Fairness Dictates that the Current Interpretation Be Changed

In the absence of clear legislative intent, reasonable intent should be assumed.[44] Strong policy grounds suggest that the most reasonable position in the principal case is in opposition to that taken by the district court.

If courts defer to administrative judgment, power to determine when injunctions will issue is vested in the Board which is beyond that required for effective performance of its role as public prosecutor. To that extent, it is important to consider what procedures are used by the Board in determining when to seek injunctions. If those procedures do not include proper safeguards against arbitrary action, private parties may be denied rights guaranteed by due process[45] and the Administrative Procedure Act[46] and forced unjustifiably to submit to methods at odds with the aims of good government.

Under the procedures used in the 10(j) situation, when a decision to petition for an injunction is made, the Regional Director does not hold a hearing or provide an opportunity to rebut the necessity of the relief.[47] Discovery of internal memoranda relating to that decision is not permitted.[48] As a result, the evidence, documentary and testimonial, is not available for examination.[49] In consequence, the reasonableness of the decision cannot be questioned. Because there are no published

[43] 93 Cong. Rec. 6603 (1947) (remarks of Senator Taft).
[44] 2 J. Sutherland, Statutory Construction 326, § 4508 (3d ed. 1943).
[45] *Infra* note 47 and text accompanying.
[46] 5 U.S.C. §§ 1001-11 (1964).
[47] As of January 1, 1966, there were no procedures for hearing on 10(j) cases reported in 29 C.F.R. §§ 101, 102. The Administrative Procedure Act, § 5, 5 U.S.C. § 1004 (1964), requires a hearing in cases of adjudication. Due process of law under the fifth amendment to the United States Constitution also requires some form of notice and hearing. Morgan v. United States, 304 U.S. 1 (1938) (construing statutory provision within the Constitution). *See also* Opp. Cotton Mills, Inc. v. Administrator, 312 U.S. 126, 152-53 (1941).
[48] United States v. Morgan, 313 U.S. 409 (1941). The Administrative Procedure Act § 7(c), 5 U.S.C. § 1006(c) (1964), would seem to require at least some opportunity for the charged party to hear the evidence against him. Such procedures would also seem to violate due process. *See* note 47, *supra*.
[49] 257 F. Supp. at 702. The Administrative Procedure Act § 7(c), 5 U.S.C. § 1006(c) (1964), would seem to condemn such procedures.

opinions, the standards which are derived are not available to the public for use in predicting future action. The absence of a written opinion makes it impossible to show that a decision is unreasonable or arbitrary.[50] If the members of the Board should publicize informally the standards they use,[51] the courts will not bind them to those standards.[52] Because the same body decides whether to prosecute as has an important part in deciding whether the injunction will issue, the separation of functions guaranteed in the Administrative Procedure Act is violated.[53] Finally, assuming that this is an area in which rulemaking is appropriate, the NLRB has shown great reluctance to use its rulemaking power,[54] and there are no current indications of a change in attitude.[55] Even if the Board did decide to begin using its rulemaking power, courts would have to exercise independent judgment as to whether the Board's standards were followed in the individual case. Otherwise, those standards would be as meaningless as the public statements held inapplicable in the principal case.

The principal case is an excellent example of how the absence of procedural safeguards can affect a private litigant. G.E. sought to bind the Board to certain public statements of Board members that 10(j) injunctions would be limited to cases of "flagrant" violations.[56] Because there was no hearing, and no written opinion, the company sought to discover internal memoranda of the Board to show that its decision to petition was not unanimous.[57] That information would have tended to prove that G.E.'s behavior could not have been considered "flagrant." The district court denied the request for discovery,[58] and said that at any rate, the evidence would not have been

[50] *See* K. DAVIS, ADMINISTRATIVE LAW, CASES-TEXT-PROBLEMS 82-84 (1965). The Administrative Procedure Act § 8(b), 5 U.S.C. § 1007(b) (1964), requires written findings and conclusions and bases for conclusions in cases of adjudication and hearing.

[51] In this particular situation, the Board has made its standards public. *See* press releases by Board chairman Frank W. McCulloch in 49 L.R.R. 103 (Nov. 1961), 48 L.R.R. 657 (Sept. 1961). Address by Frank W. McCulloch before a Joint Industrial Relations Conference at Michigan State University, 49 L.R.R.M. 74, 81-84 (April 1962). *See also* Statement by General Counsel of N.L.R.B., reproduced *infra* note 63.

[52] 257 F. Supp. at 702, 708, and n.14.

[53] § 5 (c), 5 U.S.C. § 1004(c) (1964). It seems unlikely that Congress would have intended to so drastically alter the procedures it so carefully assured only a year before. *But cf.* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

[54] Peck, *The Atrophied Rule-Making Power of the NLRB*, 70 YALE L.J. 729 (1961).

[55] 29 C.F.R. §§ 101, 102 revised as of Jan. 1, 1966, included no new substantive rules of the Board.

[56] 257 F. Supp. at 708. It is likely that counsel for respondant were misled by the public statements made by McCulloch in late 1961 and early 1962. See note 51 *supra*.

[57] 257 F. Supp. at 702. Apparently the decision to prosecute in the principal case was made by the Board itself.

[58] The court relied on United States v. Morgan, 313 U.S. 409 (1941).

helpful because the Board cannot be bound by public statements of its members.[59] Whatever the merits of G.E.'s claim, the procedures to which it was subjected are disturbing.

It may be convincingly argued that the question of harm from unfair labor practices for which injunction is an appropriate remedy is one requiring special expertise which the Board is best able to provide.[60] If that is the case, then the statute ought to be changed to provide acceptable procedural safeguards. Only a refusal by the courts to defer to administrative judgment, or an amendment of the statute itself, will ever make clarification of standards for issuance possible.

Such clarification is necessary because the current situation is detrimental to the just and orderly administration of the law. Owing to the extraordinary and oppressive nature of injunctive relief, assurance is needed that it will not be used unless absolutely necessary.[61] On the other hand, the importance of the goals of the labor law dictate that it be certain that injunctions will issue when they are needed.[62] Clear standards provide the trial courts with a means to know what facts are relevant, so those facts can be ascertained. They allow all courts to know what law is relevant so as to avoid the appearance of arbitrariness. Finally, they allow for the rational guidance of parties by counsel at the level of primary private activity.

A good start toward meaningful standards was set out in a public statement by General Counsel of the NLRB in 1961.[63] These standards are clear and they comport with the policy suggested by the context and legislative history of section 10(j).

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[59] 257 F. Supp. at 702, 708, and n.14. *See also* NLRB v. Express Publishing Co., 312 U.S. 426, 439 (1941) (Douglas J. dissenting).

[60] Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

[61] It may be that in the individual case complete justice cannot be certain either with or without an injunction. In the principal case, the injunction compelled G.E. to submit to bargaining which might later have been found unfair. If no injunction had issued, the union would have been compelled to submit to demands by G.E. which might also have later been found unfair. Where such a situation exists the balance ought to be struck in favor of denying relief because of the nature of the remedy. *See* W. DEFUNIAK, MODERN EQUITY 16, § 8 (1956).

[62] It may be argued that temporary injunctions are a needed supplement to the limited powers of the board to compel compliance with its orders. The suggestions of this note would not significantly restrict use of injunctions as a remedy. They would rather assure that the use made of the remedy was not arbitrary or unreasonable.

[63] Statement of General Counsel for the National Labor Relations Board reported in *Hearings Before the Subcommittee on National Labor Relations Board of the Committee on Education and Labor, House of Representatives,* 87th Cong., 1st Sess., pt. 2 (June 29, 1961):

> No rigid criteria for the authorization of Section 10(j) action has been adopted by the Board; rather, each case has been considered on its individual merits. An analysis of past cases, however, indicates that consideration has been given to such factors as: (1) the clarity of the alleged violation; (2) whether the case

Even if the courts apply a discriminating set of standards in 10(j) injunction cases, there is no assurance that the Board will seek those injunctions.[64] Though more have been granted than have been denied, it is difficult to argue on such evidence alone that too many have issued because compared with the total number of eligible violations so few have been sought. The infrequency of use of section 10(j) is no reason to sanction the existence of arbitrary power whether or not it is exercised, nor is it an adequate excuse for the lack of predictability which plagues this section of the Act. Although the Board is held only to a loose standard of prosecutorial discretion in whether to take any action, that standard excludes the unreasonable and the arbitrary.[65] It is the office of a legal system to make it ostensibly, as well as factually certain that governmental power is properly exercised.

PHYSICAL INJURY AND THE MISREPRESENTATION EXCEPTION OF THE FEDERAL TORT CLAIMS ACT, § 2680(h)

Plaintiff, operating a dragline[1] while improving the channel of a small creek, struck and detonated a natural gas pipeline which was shown on Government site plans[2] to be located outside the work area.

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involves the shutdown of important business operations which, because of their special nature, would have an extraordinary impact on the public interest; (3) whether the alleged unfair labor practices involve an unusually wide geographic area, thus creating special problems of public concern; (4) whether the unfair labor practices create special remedy problems so that it would probably be impossible either to restore the *status quo* or effectively to dissipate the consequences of the unfair labor practices through resort solely to the regular procedures provided in the Act for Board order and subsequent enforcement proceedings; (5) whether the unfair labor practices involve interference with the conduct of an election or constitute a flagrant disregard of a Board certification of a bargaining representative or other Board procedures; (6) whether the continuation of the alleged unfair labor practice will result in exceptional hardship to the charging party; (7) whether the current unfair labor practice is of a continuing or repetitious pattern; (8) whether, if violence is involved, the violence is of such a nature as to be out of control of local authorities or otherwise widespread and susceptible of control by 10(j) relief.

There is no reason why standards used in 10(*l*) cases to date could not be applied to the 10(j) situation if the relationship is kept clear.

[64] *See, e.g.*, Bandlow v. Rothman, 278 F.2d 866 (D.D.C. 1960); Hourihan v. NLRB, 201 F.2d 187 (D.D.C.), *cert. denied* 345 U.S. 930 (1953).

[65] Office Employee's International Union v. Labor Board, 353 U.S. 313 (1957); Joliet Contractors Ass'n v. NLRB, 193 F.2d 833 (7th Cir. 1952).

[1] "An excavating machine in which the bucket is attached only by cables and is drawn toward the machine during the filling operation...." WEBSTER, THIRD NEW INT'L DICTIONARY (1961).

[2] Plans were furnished by the United States Department of Agriculture, Soil Conservation Service.