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COMPPELLING COLLECTIVE BARGAINING UNDER SECTION 10(j) OF THE NATIONAL LABOR RELATIONS ACT

The National Labor Relations Act (NLRA) grants employees the right to form or participate in collective labor organizations. A common organizational process by which a union can become the certified bargaining representative for the employees of a nonunion shop initially involves the signing of authorization cards by the employees. Once a majority of employees in an appropriate bargaining unit has signed union authorization cards, the union may demand that the employer bargain with the union as the legitimate representative of the employees. If the employer refuses to bargain with the union after a majority of signed authorization cards has been obtained, the organizing union generally will petition the National...
Labor Relations Board (NLRB or Board)\textsuperscript{5} for a certification election\textsuperscript{6} to verify the union’s majority support. If the certification election verifies the union’s majority, an employer’s continued refusal to bargain will constitute a violation of section 8(a)(5) of the NLRA.\textsuperscript{7} The NLRB may then issue an order under section 10(c) of the NLRA\textsuperscript{8} directing the employer to bargain with the union.

Complications arise in the unionization process when in opposition to the union’s organizational attempts, the employer uses coercive practices to undermine and dissipate union support.\textsuperscript{9} Section 8 of the NLRA explicitly proscribes these practices\textsuperscript{10} and section 10 empowers the NLRB to remedy these unfair labor practices.\textsuperscript{11} Unfair labor practices may tend to weaken union support and may preclude the possibility of holding a fair representation election.\textsuperscript{12} In such circumstances, the union, rather than

\textsuperscript{5} The NLRB consists of five members appointed by the President with the advice and consent of the Senate. 29 U.S.C. § 153 (1976). The NLRB is responsible for the enforcement of the NLRA and for remedying unfair labor practices. The Board delegates this authority to regional directors throughout the country with whom unfair labor practice charges are initially filed. See 29 U.S.C. § 153(b) (1976).


\textsuperscript{7} See note 10 infra.

\textsuperscript{8} The issuance of bargaining orders is authorized under § 10(c) of the NLRA, 29 U.S.C. § 160(c) (1976). Section 10(c) states that the Board shall issue and cause to be served an order requiring such persons who have committed unfair labor practices to cease and desist from such unfair labor practice, and to take such action as will effectuate the policies of this Act. A bargaining order under § 10(c) requires that upon the union’s request, an employer must bargain collectively in good faith with the union as the exclusive representative of the employees concerning pay, wages and hours of employment; and if an understanding is reached, to embody it in a signed agreement. For a discussion of the circumstances which justify a 10(c) bargaining order see NLRB v. Gissel Packing Co., 395 U.S. 575, 613-15 (1969); Walgreen Co. v. NLRB, 509 F.2d 1014, 1017-19 (7th Cir. 1975).


\textsuperscript{10} The NLRB is able to remedy unfair labor practices through cease and desist orders, restraining orders, rerun elections, and injunctions. See 29 U.S.C. § 160 (1976).

\textsuperscript{11} The unions contend that an employee confronted with antiunion tactics inevitably may be compelled to vote against the union for fear of job loss or other reprisals, thus impairing the election’s fairness. However, since certification elections are conducted by secret ballot, see 29 U.S.C. § 159(e) (1976), employees have no reason to fear reprisals unless
petition the NLRB to hold a certification election, may file an unfair labor practice charge against the employer that alleges the commission of at least one unfair labor practice. Filing such a complaint initiates the Board’s administrative proceedings which include investigations and hearings to determine the legitimacy of the alleged charges.

When the Board ultimately finds that unfair labor practices have undermined a union’s majority and thus have made the holding of a fair election unlikely, or where such practices have caused a previously held election to be set aside as invalid, the NLRB may properly issue a bargaining order under section 10(c) of the NLRA despite the fact that the union has never been certified as the legitimate representative of the employees. In NLRB v. Gissel Packing Co., the seminal case regarding bargaining orders, the Supreme Court held that a bargaining order is an appropriate remedy for an employer’s refusal to bargain where unfair labor practices have undermined and dissipated a union’s majority, thus render-

the employer has threatened to cease operations completely if the union prevails. While an employer’s antiunion activity inherently amounts to tampering with the electoral certification process, it may or may not be an infringement upon the employees’ rights to freedom of choice as guaranteed by § 7 of the NLRA. Only if there is a causal relationship between the employer’s misconduct and election results which are unfavorable to the union will the election process have been damaged.

If the union decides to petition the NLRB for a certification election, and subsequently loses the election, the union is not without recourse. The NLRB may set aside the results of a certification election in which employer or union misconduct has destroyed the election’s fairness. An unfair labor practice charge must be filed with the regional director for the region in which the alleged violations have occurred. See also Bernel Foam Prod. Co., 146 N.L.R.B. 1277, 1281 (1964); 29 C.F.R. § 101.21 (1978). The corrective functions of the Board are based on the premise that certification elections should be held in laboratory conditions to ensure the employees a fair and free choice in determining whether they desire representation and in choosing their representatives. See NLRB v. Houston Chronicle Pub. Co., 300 F.2d 273, 278 (5th Cir. 1962). Upon determining that a previous election was unfair, the NLRB may invalidate the election results and order a new election to be held, or may order the parties to bargain without the union ever having been certified as the legitimate representative of the employees. See text accompanying notes 19-22 infra.

An unfair labor practice charge must be filed with the regional director for the region in which the alleged violations have occurred. 29 C.F.R. § 101.2 (1978).

At the conclusion of the investigations and the hearings before an administrative law judge, the judge will prepare a decision stating findings of the fact, conclusions, and reasons for his determinations on all material issues. The parties may accept and comply with these findings or may file exceptions to the decision with the NLRB. See generally NLRB Statement of Procedure, 29 C.F.R. §§ 101.2-.16 (1978) (describing unfair labor practices proceedings).

See note 13 supra.

See note 8 supra.


Id. Gissel was a consolidation of four separate cases in which unfair labor practices were alleged. Each of the cases involved charges of § 8(a)(1) and § 8(a)(5) violations and two of the cases involved an additional § 8(a)(3) violation. See note 10 supra. In two of the cases the union lost certification elections which were subsequently invalidated because of the employer’s unfair labor practices. In the other two cases, no certification elections were held as a result of employer misconduct. 395 U.S. at 579-83. See generally Lewis, Gissel Packing: Was the Supreme Court Right?, 56 A.B.A. L.J. 877 (1970); 50 B.U.L. Rev. 111 (1970); 21 Case W. L. Rev. 305 (1970).
ing the holding of a fair election highly unlikely.\textsuperscript{20}

The \textit{Gissel} decision states that an employer who has engaged in unfair labor practices may under certain circumstances be required to bargain with an uncertified union.\textsuperscript{21} In many cases the final bargaining order will not issue, however, until as many as two years after the filing of the original complaint,\textsuperscript{22} and employers may often take advantage of this delay to further undermine the union's majority strength.

In addition, further procedural delays are possible once the Board has issued a bargaining order insofar as a bargaining order issued by the NLRB is not self-enforcing. If an employer does not comply voluntarily with a bargaining order,\textsuperscript{23} the Board must petition a court of appeals to enforce its directives.\textsuperscript{24} The court of appeals will review the situation and may or may not enforce the Board's order.\textsuperscript{25} Enforcement proceedings in a court

\textsuperscript{20} 395 U.S. at 575. In \textit{Gissel}, the Supreme Court held that a union may establish its majority status through obtaining signed authorization cards from a majority of employees. \textit{Id.} at 601-10. While acknowledging that certification elections are the preferred means of establishing a union's majority status, the Court recognized the practical unworkability of the election method when an employer's misconduct would seriously impede the election's fairness. \textit{Id.} at 610-12. Thus, bargaining orders were found to be a proper remedial procedure. The \textit{Gissel} Court justified this finding on the grounds that alternative remedies such as cease and desist orders would not protect the employees' right to determine if they desire representation and would allow the employer to benefit from his unlawful refusal to bargain. \textit{Id.} at 610-16. The Supreme Court reasoned that once an employer has succeeded in undermining a union's strength, he would probably obey a cease and desist order since the damage to union strength already would have been done. \textit{Id.} at 612.

\textsuperscript{21} \textit{Id.} at 610-12. Recognizing the wide spectrum of unfair labor practices and the diverse effects that such practices might have on the certification election process, the \textit{Gissel} Court delineated three categories of unfair labor practices, two of which would justify a bargaining order. \textit{Id.} at 613-15. The first category involves clearly extraordinary cases of outrageous and pervasive unfair labor practices whose coercive effects cannot be eliminated by the application of traditional remedies. In such cases a bargaining order may issue even in the absence of specific \textsection 8(a)(5) violations or a bargaining demand from the union. \textit{Id.} at 614. See J.C. Penney Co., Inc., 384 F.2d 479, 485 (10th Cir. 1967). In \textit{J.C. Penney}, the granting of pervasive unilateral wage increases designed to destroy the union's majority was found to be so hostile to the union's interest and so outrageous that a bargaining order was justified. \textit{Id.} at 482-86. More commonplace are cases which fit into the second \textit{Gissel} categorization. In such cases, the employer is guilty of less pervasive and less outrageous practices, which nevertheless tend to undermine the union's strength and impede the election process. Under these circumstances, a bargaining order may be an appropriate remedy upon showing that the union once enjoyed majority support. 395 U.S. at 614-15. See Walgreen Co. v. NLRB, 509 F.2d 1014, 1017 (7th Cir. 1975). The third \textit{Gissel} categorization involves minor violations which because of their minimal impact on the election process will not sustain a bargaining order. 395 U.S. at 615. See Meatcutters Local 576 v. NLRB, 516 F.2d 1244, 1247 (D.C. Cir. 1975).

\textsuperscript{22} The relative slowness of the NLRB's hearing procedures often causes lengthy delays in the issuance of a final bargaining order. See, e.g., Seeler v. Trading Port, Inc., 517 F.2d 33, 38 (2d Cir. 1975), which exemplifies the possible delays.

\textsuperscript{23} Even if the employer clearly has committed unfair labor practices, the employer may not comply voluntarily with the bargaining order. It is reasonable to assume that there may be a strong economic incentive for the employer to delay union recognition and collective bargaining since an agreement inevitably could reflect an increase in salaries or benefits.

\textsuperscript{24} 29 U.S.C. \textsection 160(e) (1976).

\textsuperscript{25} The court of appeals may remand the case to the Board to consider additional material evidence or changed circumstances, to make further findings on evidence already received,
of appeals result in even longer delays. Thus, a *Gissel* bargaining order, though designed to protect an employee's unionization rights, often may be an inadequate remedy because of the procedural delays inherent in the administrative process. Recognizing this fact, the NLRB occasionally has utilized section 10(j) of the NLRA to maintain a union's viability and to protect the rights of employees.

Section 10(j) of the NLRA permits the Board to petition in federal district court for appropriate temporary injunctive relief to restrain an employer from engaging in unfair labor practices. Section 10(j) provides the district court with broad discretionary injunctive authority to prevent labor related misconduct or to compel labor related action. Under section to clarify the record, or to take further action in accordance with the applicable law. See *Ford Motor Co. v. NLRB*, 305 U.S. 364, 368-76 (1939). The court may remand the case in its entirety or issue a partial remand only involving certain portions of the order. See *NLRB v. Somerset Shoe Co.*, 111 F.2d 681, 689-90 (1st Cir. 1940). See generally 29 U.S.C. §§ 160(d)-f (1976).

As the processing of a *Gissel*-type complaint is relatively slow, see note 27 infra, an employer's noncompliance with the NLRB's bargaining order will often result in a protracted continuation of § 8 violations. 29 U.S.C. § 158 (1976). While it may be argued that a traditional cease and desist order will prevent continued § 8 violations during the processing of an unfair labor practice complaint, the long delays inherent in the Board's administrative procedures and in the subsequent judicial appeals may cause the dissipation of union support through normal turnover in the work force. However, normal work force turnover is to be expected and there is no reason to assume that the incoming workers would be any less amenable to the prospect of unionization than the workers whom they replace.

In fiscal 1975, the average processing time in unfair labor practice cases from the filing of the charge to the final Board decision was 344 days. From a final Board decision to a decision in the court of appeals averaged another 380 days. H.R. Rep. No. 9069, 94th Cong., 1st Sess., at 3282-3296, 3332 (1975).

29 U.S.C. § 160(j) (1976) states in relevant part:

> The Board shall have power . . . to petition any United States district court, . . . wherein the unfair labor practice in question is alleged to have occurred . . . for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served . . . and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper. (Emphasis added.)


See note 29 supra. Section 10(j) injunctions must be distinguished from injunctions issued under § 10(i). 29 U.S.C. § 160(j) (1976). Under § 10(i), whenever the NLRB has reasonable cause to believe that certain enumerated unfair labor practices have occurred, the Board must petition for injunctive relief. 29 U.S.C. § 160(i) (1976). The mandatory petitioning for injunctive relief under § 10(i) applies only to unfair labor practices committed by labor organizations or their agents and does not encompass the violations which would lead to the Board's petitioning for a 10(j) injunction.
8 of the NLRA, an employer's refusal or failure to bargain with the legitimate representatives of his employees constitutes an unfair labor practice subject to the normal remedial processes of the NLRB.\textsuperscript{31} However, the use of section 10(j) injunctions to compel an employer to bargain with an uncertified union in \textit{Gissel}-type situations pending adjudication of unfair labor practice allegations before the Board is highly controversial.\textsuperscript{32} The Board has petitioned for 10(j) injunctive relief sparingly in \textit{Gissel} situations, and the courts are divided on the propriety of such action.\textsuperscript{33}

In enacting section 10(j) in 1947,\textsuperscript{34} Congress sought to provide a means whereby the NLRB could ensure that the remedial objectives of the NLRA would not be frustrated by the delays inherent in the administrative process.\textsuperscript{35} Despite the clear legislative intent, considerable disagreement exists concerning what constitutes frustration of the NLRA and the proper scope of injunctive relief. While courts generally agree that a labor injunction is an extraordinary remedy,\textsuperscript{36} the courts are divided with regard to what constitutes the extraordinary circumstances necessary to warrant the judicial intervention of granting an NLRB petition for a section 10(j) injunction.\textsuperscript{37}

\textsuperscript{31} See note 10 supra.

\textsuperscript{32} Somewhat less controversial is the propriety of § 10(j) injunctions which compel bargaining involving a formerly existing union as opposed to an uncertified union in \textit{Gissel} situations. Whereas authorization cards are the only evidence of majority support that an organizing union may claim, a preexisting union has the benefit of once having been certified as the legitimate representative of the employees. Thus, courts generally have been more likely to grant injunctive relief in cases involving a preexisting union than in cases involving an organizing union. \textit{See generally} Levine v. White-Westinghouse Corp., 92 L.R.R.M. 3499, 3501 (N.D. Ohio 1976) (bargaining order injunction granted). \textit{Contra}, Hirsch v. Pick-Mt. Laurel Corp., 436 F. Supp. 1342, 1350-53 (D.N.J. 1977) (bargaining order injunction denied).


\textsuperscript{34} Prior to enactment of § 10(j), federal courts were deprived of jurisdiction to issue injunctions in labor disputes by the Norris-LaGuardia Act, 29 U.S.C. § 101-15 (1976).

\textsuperscript{35} The congressional intent in enacting § 10(j) is indicated in \textit{S. Rep.}, No. 105, 80th Cong., 1st Sess. 8, 27 (1947). This report emphasizes that, since time is of the essence in unfair labor practice proceedings, the slow procedures of the NLRB followed by lengthy appeals in the circuit courts fall short of achieving the desired objective of the NLRA. This objective is the prompt elimination of the obstructions to the free flow of commerce and the encouragement of collective bargaining. Thus, Congress provided that the Board may seek injunctive relief to preclude persons violating the Act from accomplishing their unlawful objectives prior to being placed under any legal restraint. \textit{Id.}

\textsuperscript{36} See Minnesota Mining & Mfg. Co. v. Meter, 385 F.2d 265, 270 (8th Cir. 1967) (§ 10(j) is reserved for serious and extraordinary set of circumstances); Fuchs v. Steel-Fab, Inc., 356 F. Supp. 385, 387 (D. Mass. 1973) (reasonable cause to believe that the NLRA has been violated is not sufficient to issue a § 10(j) injunction).

\textsuperscript{37} Courts have looked to varying criteria to determine whether injunctive relief is proper. \textit{Cf.} Angel v. Sacks, 382 F.2d 655, 660-61 (10th Cir. 1967) (frustration of the purposes of the
Before filing a petition for section 10(j) relief, the NLRB makes a preliminary determination as to the seriousness of the alleged violations. The Board initially must take into account the likely effect of the alleged violations absent injunctive relief. Once the NLRB has decided that the circumstances warrant the institution of a 10(j) proceeding, the district court must determine the propriety of issuing the injunction. In general, courts will apply a two-part test to ascertain the validity of the Board’s petition. First, a court must find reasonable cause to believe that an unfair labor practice has been committed. To make this determination the district court only need decide that the Board’s theories of law and fact are not insubstantial or frivolous. Given the serious nature of the alleged violations necessary to precipitate an NLRB petition seeking 10(j) injunctive relief, a finding of reasonable cause is virtually assured. In addition to a finding of reasonable cause to believe that unfair labor practices have been committed, there also must be a finding that the relief sought is “just and proper” as required by the statute. This second requirement has led to significant differences in the analysis and ultimate decisions of courts reviewing NLRB petitions seeking 10(j) injunctions.

Courts have relied on one or more of three primary bases of inquiry to determine whether section 10(j) relief is just and proper. Each basis of

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28 The NLRB has set forth its standards for determining whether to petition for § 10(j) relief. 29 U.S.C. § 160(j) (1976). See General Council Report of August 14, 1975, quoted in Solien v. Merchants Home Delivery Service, Inc., 557 F.2d 622, 625-26 (8th Cir. 1977). The major consideration is whether the unlawful conduct is likely to frustrate the Board’s remedial processes in the absence of injunctive relief. Such a determination may depend on whether the unfair labor practices involved can be remedied and the status quo restored by a Board order and its subsequent enforcement by a court of appeals. Other considerations include the repetitious nature of the alleged violations, the impact of these violations on the charging party, and the impact on the public interest. Id. See text accompanying notes 38-58 infra.


31 If reasonable cause to believe that unfair labor practices have been committed were the only criteria used to determine the propriety of petitions requesting 10(j) injunctions, injunctions would routinely be issued. 29 U.S.C. § 160(j) (1976). Virtually every court, however, recognizes the labor injunction as an extraordinary remedy and looks to criteria other than reasonable cause. See note 37 supra.


33 The three most commonly used standards employed in granting or denying 10(j) petitions are whether absent injunctive relief: (1) the purposes of the NLRA will be frustrated, see text accompanying notes 46-51 infra; (2) irreparable harm will accrue to the complainant, see text accompanying notes 52-54 infra; and (3) the status quo ultimately will be preserved for administrative resolution of the unfair labor practice allegations. See text accompanying
inquiry is intended to ensure the ultimate efficacy of Board remedies and each utilizes many of the same analytical criteria used by the Board.\textsuperscript{41} Courts seldom have applied these bases of inquiry uniformly, however, and often have reached contradictory results using similar criteria.\textsuperscript{45}

The first basis of inquiry used by the courts is whether the circumstances of the case demonstrate that the purposes of the NLRA will be frustrated absent injunctive relief.\textsuperscript{44} Determining what constitutes frustration of the Act is difficult.\textsuperscript{47} In \textit{Angel v. Sacks},\textsuperscript{48} the Tenth Circuit held that if the circumstances of the case create a reasonable fear that the efficacy of a final Board order may be nullified or the administrative procedure rendered meaningless, the purposes of the Act would be frustrated and 10(j) injunctive relief would be appropriate. Other courts have looked to the ineffectiveness of alternative remedies as a primary factor in determining that the purposes of the Act will be frustrated.\textsuperscript{50} While this inquiry seems to be in accord with the legislative intent underlying section 10(j) relief,\textsuperscript{59} the lack of uniform application leads to inconsistent findings and illustrates the need for a more definitive set of standards.\textsuperscript{61}

The second basis of inquiry is whether irreparable harm will accrue to the complainant absent injunctive relief.\textsuperscript{52} This test is merely an extension of the frustration of the Act standard.\textsuperscript{63} Allowing the rights of an aggrieved party to be affected irreparably by unfair labor practices also frustrates the purposes of the Act. Courts tend to treat irreparable harm, however, as a separate standard. In a \textit{Gissel} situation, the primary consideration under the irreparable harm standard is whether the union's support will be dissipated to such an extent that the Board's normal remedial procedures would be inadequate to protect the employees' interests.\textsuperscript{64} The difficulty

\textsuperscript{notes 55-58 infra. See generally Boire v. Pilot Freight Carriers, Inc., 515 F.2d 1185, 1188-89 (5th Cir. 1975); Seeler v. Trading Port, Inc., 517 F.2d 33, 36-37 (2d Cir. 1975).
\textsuperscript{\textsuperscript{44}} See note 38 supra.
\textsuperscript{\textsuperscript{46}} E.g., Seeler v. Trading Port, Inc., 517 F.2d 33 (2d Cir. 1975); Angel v. Sacks, 382 F.2d 655, 660 (10th Cir. 1967).
\textsuperscript{\textsuperscript{47}} Placed in a \textit{Gissel} context and carried to its logical extreme, the purposes of the Act would always be frustrated whenever an employer refused to bargain because such a refusal would inherently impede the collective bargaining process which the NLRA seeks to promote.
\textsuperscript{\textsuperscript{48}} 382 F.2d 655, 660 (10th Cir. 1967). The employer in \textit{Angel} had discharged nearly one-third of his work force and subsequently had doubled the size of his staff in order to preclude unionization. The Tenth Circuit concluded that absent injunctive relief, this conduct would constitute frustration of the purposes of the NLRA. \textit{Id}.
\textsuperscript{\textsuperscript{49}} E.g., Seeler v. Trading Port, Inc., 517 F.2d 33, 39 (2d Cir. 1975); see text accompanying notes 71-79 infra.
\textsuperscript{\textsuperscript{50}} See note 33 supra.
\textsuperscript{\textsuperscript{51}} See note 45 supra and text accompanying notes 59-80 infra.
\textsuperscript{\textsuperscript{53}} See Refusal-To-Bargain Cases, supra note 2, at 848-85.
\textsuperscript{\textsuperscript{54}} See note 26 supra.
of such a determination is that the courts must judge in advance the ultimate effect than an employer's refusal to bargain will have on the union. The lack of a clearly delineated standard that determines the circumstances under which a refusal to bargain would cause irreparable harm contributes to inconsistent decisions.55

The third basis of inquiry is whether the status quo can be preserved for administrative resolution absent injunctive relief.64 This criterion must be considered in relation to the other standards. If irreparable harm will occur absent injunctive relief, the status quo probably cannot be preserved and the objectives of the NLRA will be frustrated. Courts generally use a combination of these standards to make the determination of whether section 10(j) injunctive relief is appropriate.65 While each standard is subject to varying interpretations, the preservation of the status quo standard has proven to be particularly prone to conflicting interpretations and applications especially when applied to a Gissel-type situation.66

Two 1975 circuit court decisions illustrate the conflicting interpretations which can arise when applying the standards of inquiry in Gissel situations. In Boire v. Pilot Freight Carriers, Inc.,67 the Fifth Circuit refused to compel bargaining under section 10(j). The case exemplifies the Gissel fact situation.68 Petitioned for a 10(j) injunction, the district court determined on the basis of the evidence that there was reasonable cause to believe that unfair labor practices had occured,69 and on appeal the Fifth Circuit concurred.70 The district court issued an injunction against the commission of future unfair labor practices but refused to order the reinstatement of discharged employees or to compel collective bargaining under section 10(j). In affirming the district court's action, the Fifth Circuit emphasized that measures to circumvent the NLRB's processes

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65 E.g., 515 F.2d at 1185 (irreparable harm and status quo); 517 F.2d at 33 (frustration of the purposes of the Act, irreparable harm and status quo).

66 See text accompanying notes 59-80 infra. The conflicting interpretations of the status quo standard indicate basic policy differences between the courts. The differences focus primarily on the courts' view of the unionization process and on the courts' view of their role in the labor dispute resolution process. See text accompanying notes 67-70 & 77-80 infra.

67 515 F.2d at 1185 (5th Cir. 1975).

68 Id. In Trading Port, the Teamsters attempted organization of a newly extended freight operation of Pilot Freight. Pilot Freight subsequently engaged in violations of §§ 8(a)(1), (3) and (5) of the NLRA which included coercive threats, firings and wage increases to deter unionization. 29 U.S.C. §§ 158(a)(1), (3) & (5) (1976). 515 F.2d at 1190. The union filed unfair labor practice charges against the company and a certification election was never held. Subsequently, the NLRB petitioned the district court for a 10(j) injunction to enjoin the commission of unfair labor practices, to reinstate discharged employees and to compel collective bargaining. 515 F.2d at 1189.


70 515 F.2d at 1185, 1191.
should be employed sparingly. The court stated that the injunction issued by the district court would prohibit the commission of unfair labor practices in the future and thus adequately would protect the employees' interests because the employers could be held in contempt if they attempted to dissipate union strength in any unlawful manner.

The Fifth Circuit justified this position on several grounds. The court reasoned that the union, although claiming a card majority, had never enjoyed a bargaining relationship with the employer. Since the signing of union authorization cards precipitated the controversy, the *Pilot Freight* court defined the status quo to be preserved as that period prior to any union activity. The Fifth Circuit reasoned that an interim bargaining order materially would alter the status quo by creating judicially a relationship that had not existed previously. The court suggested that the issuance of an injunction compelling an employer who allegedly has committed unfair labor practices to bargain collectively with an uncertified union would be a judicial usurpation of the NLRB's authority as fact finder and enforcer of the statutory scheme. In addition, the Fifth Circuit concluded that a continuation of the non-bargaining relationship would not affect the union so deleteriously that it could not recover. The *Pilot Freight* court did not attempt, however, to set forth the continuing effects non-bargaining would have on an ultimate certification election or on the union's viability.

In *Seeler v. Trading Port, Inc.*, the Second Circuit adopted a far differ-

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5 Id. at 1192.
6 Id. at 1193.
7 See text accompanying note 2 supra.
8 515 F.2d at 1193.
9 Id. at 1194.
10 Id. The court stated that a bargaining order would have to rest on the assumption that unfair labor practices occurred, despite the fact that the Board had yet to make such findings. *Id.*
11 Id.
12 Two other cases had been decided previously in accordance with the Fifth Circuit's rationale in *Trading Port*. In *Fuchs v. Steel-Fab, Inc.*, 356 F. Supp. 385 (D. Mass. 1973), the organizing union lost a certification election and subsequently alleged that Steel-Fab had committed §§ 8(a)(1), (3) and (5) violations of the NLRA, 29 U.S.C. §§ 158(a)(1), (3) & (5) (1976). *See note 10 supra*. The NLRB petitioned the district court for a temporary injunction pursuant to § 10(j) of the NLRA to compel Steel-Fab to bargain with the union and to enjoin the commission of unfair labor practices in the future. The district court found that there was substantial evidence that Steel-Fab had violated the NLRA. 356 F. Supp. at 387. The court refused to grant the petition for injunctive relief, however, stating that 10(j) was an extraordinary remedy to be used only when necessary to preserve the status quo while an action is pending before the NLRB. *Id.* In denying relief, the district court in *Steel-Fab* took the same view of the status quo to be protected as the Fifth Circuit later took in *Trading Port*. *See text accompanying notes 71-80 infra*. In its decision, the *Steel-Fab* court cited and relied upon *Kaynard v. Lawrence Rigging, Inc.*, 80 L.R.R.M. 2600 (E.D.N.Y. 1972). 356 F. Supp. at 387. In *Lawrence Rigging*, the district court, faced with a typical *Gissel* situation, refused to compel interim bargaining on the grounds that such relief would not be timely, would not preserve the status quo, and would infringe upon the statutorily mandated powers of the NLRB. 80 L.R.R.M. at 2604-05.
13 517 F.2d 33 (2d Cir. 1975).
ent approach in its resolution of an analogous dispute. Faced with a typical Gissel situation, the Second Circuit reversed the district court and compelled collective bargaining by means of a 10(j) injunction. After determining, as did the district court, that reasonable cause existed to find that unfair labor practices had been committed, the Second Circuit concluded that the specific injunctive relief requested by the NLRB was just and proper. In making its determination, the Second Circuit used basically the same analytical criteria as did the Fifth Circuit in Pilot Freight but reached a far different conclusion.

The court reasoned that interim bargaining order relief was necessary to effectuate employee rights. The court determined that absent injunctive relief, irreparable harm might be done to the union. The court found that only through the issuance of an interim bargaining order could the union’s viability be maintained to the degree necessary to make final Board adjudication in the form of an election or a bargaining order meaningful.

The Trading Port court also considered preservation of the status quo as an important determining factor, although the Second Circuit defined the status quo much differently than did the Fifth Circuit. The Second Circuit stated that the status quo to be protected by section 10(j) is not the status quo which has emerged as a result of the unfair labor practices being litigated. Rather, section 10(j) should preserve or restore the status quo as it existed before the onset of the unfair labor practices. The Trading Port court sought to re-establish the union’s alleged majority and
to validate that status by requiring the employer to bargain with the union. The Trading Port decision clearly represents a different orientation than does the Pilot Freight decision. The Fifth Circuit, in Pilot Freight, chose to give controlling weight to the fact that in Gissel situations, the union’s majority status has never been certified and the unfair labor practice allegations against the employer have never been proven. The Second Circuit, in Trading Port, chose to give controlling weight to the possibility that in Gissel situations the employer may have engaged in such egregious unfair labor practices that the statutory rights of the employees to organize freely may not be protected by the normal administrative procedures. The Second Circuit thus did not hesitate to legitimize a bargaining relationship that never previously existed.

The divergent opinions expressed in Pilot Freight and Trading Port raise legitimate questions as to the effectiveness of compelled bargaining under section 10(j) in Gissel situations. Since a 10(j) injunction can only provide a temporary bargaining order, the normal administrative proceedings of the NLRB must continue. While the employer is forced to bargain with the union, the unfair labor practice allegations will be litigated.

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8 In Smith v. Old Angus, Inc., 82 L.R.R.M. 2931 (D. Md. 1973), the district court reached a result similar to the Trading Port decision. After the organizing union had obtained signed authorization cards from 27 of 50 employees, the employer Old Angus, had allegedly engaged in violations of §§ 8(a)(1), (3) and (5) of the NLRA. See note 10 supra. These alleged violations included the coercive interrogation of employees concerning suspected union activity, the discharge of union sympathizers, and the distribution of a document discouraging unionization. 82 L.R.R.M. at 2932, 2934. The NLRB, pursuant to § 10(j) of the NLRA, 29 U.S.C. § 160(j) (1976), petitioned for an injunction to enjoin the commission of future unfair labor practices, to reinstate discharged employees, and to require Old Angus to bargain in good faith with the organizing union. Id. at 2931. No certification election was held. The district court granted the NLRB’s petition on the following grounds: (1) the signed authorization cards were a valid indication that the union had once enjoyed majority status; (2) there was reasonable cause to believe that Old Angus had violated the NLRA; (3) an injunction was just and proper to prevent frustration of the NLRA; and (4) an injunction was necessary to preserve the status quo which existed at the time the unfair labor practices had begun. Id. at 2935-38.

9 The Pilot Freight decision is indicative of judicial hesitancy to interfere seriously with the normal administrative procedures of the NLRB. By refusing to adopt § 10(j) injunctions as a proper means of compelling interim bargaining when reasonable cause exists to believe that an employer has engaged in unfair labor practices and the union claims to have a majority, the Fifth Circuit attached very little significance to the union’s claimed majority status. By defining the status quo to be preserved as that period prior to any union activity, the Pilot Freight court clearly indicated that the primary responsibility for the resolution of labor disputes lies in the hands of the NLRB and not with the courts.

The Trading Port decision indicates judicial concern for protecting the § 7 rights of employees. See note 1 supra. By adopting § 10(j) as a proper mechanism for compelling interim bargaining in a Gissel-type situation, the Second Circuit placed primary emphasis on the possible effects that the commission of serious unfair labor practices might have on the employees’ right to freely select their representatives.

The normal NLRB proceedings include hearings, administrative law judge decisions, approval or disapproval of an NLRB bargaining order, and possible enforcement proceedings in a court of appeals. 29 C.F.R. §§ 101.10-.15 (1978).
through normal Board procedures. This resolution mechanism raises doubts as to whether the parties will bargain seriously knowing that ultimately the NLRB may determine that bargaining is not warranted. This concern is especially relevant since the employer already may have demonstrated his unwillingness to accept the union as the representative of his employees by resorting to unfair practices. In addition, at the time the 10(j) injunction is issued, there have been no actual determinations of the validity or accuracy of the alleged violations. Thus, an employer might feel that he is being forced to bargain prior to a hearing of the case. Insofar as a section 10(j) injunction is designed to remedy the problems created by the delays inherent in the Board's administrative procedures, its effectiveness will be severely impaired, if not completely frustrated, by insincerity at the bargaining table. That this insincerity may be caused by lack of finality in the court's decision further emphasizes the inadequacy of compelled interim bargaining under section 10(j). A determined employer possibly could avoid the sanctions of a section 10(j) injunction compelling bargaining, thus rendering the bargaining order ineffective.

A more serious problem would arise should the Board ultimately conclude that a bargaining order is not appropriate. Once compelled by section 10(j) to bargain with an uncertified union, an employer's relationship with his employees would be altered in such a way as to preclude a return to a pre-bargaining situation. If the Board subsequently concludes that bargaining is not warranted, a return to the status quo would be impossible, even if one accepts the Second Circuit's definition of the status quo

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81 See note 15 supra; see also text accompanying note 24 supra.
82 The NLRB is not bound by a district court's finding as to the propriety of compelled bargaining.
83 If, in addition to committing §§ 8(a)(1) and (3) violations, see note 10 supra, the employer has committed § 8(a)(5) violations by illegally refusing to bargain with the union, the concern that the employer will not bargain seriously pursuant to a bargaining order is given further support. 29 U.S.C. §§ 158(a)(1) & (3) (1976).
85 While an employer may be held in contempt for violations of an injunction compelling bargaining, the union must prove failure to bargain in good faith. This proof may be difficult if the employer has tactfully avoided his bargaining responsibilities through insincere bargaining. In any case, the protracted litigation involved will only delay the processes the injunction was supposed to expedite.
86 It has been suggested that an employer might be able to avoid the sanctions of a § 10(j) injunction compelling bargaining by allowing a certification election and then refusing to bargain with the newly certified union. See Refusal-To-Bargain Cases, supra note 3, at 861. Should the union file an unfair labor practice complaint, the employer would merely raise unsubstantial defenses, thus further delaying the bargaining responsibility. Id.
87 Arguably, the issuance of a § 10(j) injunction which compels an employer to bargain with an uncertified union could generate the support necessary to obtain majority status. See Refusal-To-Bargain Cases, supra note 3, at 859. Aided by the judicially imposed bargaining relationship, the union could conceivably prevail despite never actually having received majority support prior to the issuance of the bargaining order. This concern is especially relevant given that union authorization cards may not be valid indicators of employee sentiment. See note 2 supra.
to be protected.\textsuperscript{31} Employee regard for the union as a representative of employee interests would be enhanced through the image conveyed by the bargaining relationship. While arguably a proper objective of section 10(j),\textsuperscript{32} such enhancement only can be proper if the Board subsequently determines that the bargaining relationship itself is proper. Absent such a finding by the NLRB, a section 10(j) injunction which compels bargaining unduly would disadvantage the employer,\textsuperscript{33} and effectively would result in an alteration of the status quo which 10(j) injunctions are purported to protect.\textsuperscript{34} Compelled bargaining under section 10(j) indeed may create by judicial fiat a relationship that never existed.

The problems which may arise as a result of an improperly created bargaining relationship are magnified if the union and the employer reach a settlement during the period that the 10(j) injunction compelling bargaining is in force but prior to an NLRB determination that bargaining is not warranted. The embodiment of such a settlement in a signed agreement and implementation of the agreement irreparably would harm the interests of the employer. Even if the agreement is made contingent on the Board's ultimate findings,\textsuperscript{35} that such an agreement once existed inevitably would work to the union's benefit, either in a certification election or in future unionization attempts.\textsuperscript{36} A 10(j) injunction compelling bargaining with an uncertified union neither preserves the status quo nor adequately protects the legitimate rights of the employer.\textsuperscript{37}

In addition, the issuance of a 10(j) injunction which compels bargaining essentially causes judicial displacement of NLRB determinations. A 10(j)
injunction issued in a *Gissel* situation, in effect, transfers to the courts the NLRB's authority over certain unfair labor practice complaints. Unlike an injunction which merely enjoins the commission of unfair labor practices in the future, a court issued injunction which compels bargaining with an uncertified union inherently must reflect many determinations which should be reserved for the NLRB. To issue a 10(j) injunction compelling bargaining, the district court first must conclude that the authorization cards upon which the union bases its claim of support are reliable and are a valid indication that a majority of employees within a proper bargaining unit favor unionization. If the union has no valid claim to prior majority support, a bargaining order could not be warranted. The district court also must decide on the basis of the authorization cards to accept the union as the exclusive representative of the employees. The resolution of these factual determinations should be left to the administrative expertise of the NLRB.

An even greater encroachment on the Board's authority occurs in the district court's finding that a 10(j) injunction granting bargaining order relief is just and proper. While no clear or uniform standards exist to guide the courts in determining that the relief requested is just and proper, the courts must essentially make a *Gissel* determination as to the ultimate effects of the alleged unfair labor practices. Prior to the issuance of a 10(j) injunction, the district court will look to the alleged section 8(a)(1) and (3) violations to determine if the union's viability can be protected adequately absent bargaining order relief. The NLRB must make this same determination in its later administrative proceedings. In addition, the allegations which precipitate the controversy have never been proven and are not proven before the district court. Rather, the district court only must determine if there is reasonable cause to believe that unfair labor practices have occurred, and then attempt to judge the effects that the alleged practices might have in the future. Such court determinations circumvent the administrative procedures of the NLRB. As the Fifth Circuit asserted in *Pilot Freight*, the scope of section 10(j) should not overpower the orderly procedures of the Board.

While the NLRB is not bound by the district court's findings, the
Board may be predisposed to issue a 10(c) bargaining order in its later adjudicative proceedings. Such a predisposition is likely given that the Board instituted the 10(j) proceedings on the belief that injunctive relief was necessary. In addition, the district court’s initial issuance of a 10(j) injunction compelling bargaining may have a similar predisposing effect in the subsequent enforcement proceedings which would inevitably follow a final Board order. Essentially, the issuance of a 10(j) injunction compelling bargaining in Gissel situations would result in the courts having assumed the role of primary arbiter in certain NLRA enforcement proceedings.

The NLRB has been hesitant to seek section 10(j) injunctions to compel bargaining where an employer allegedly has committed unfair labor practices against an uncertified union claiming to have had signed authorization cards from a majority of employees. Gissel situations present serious problems, however, in protecting the legitimate rights of the parties involved, and the present administrative procedures and remedies do not appear capable of providing workable solutions. Nevertheless, the answer does not lie in extensive use of section 10(j) to compel bargaining. The inequities of the injunctive remedy when used to mandate bargaining ultimately would result in the courts becoming the arbiters of NLRA claims in Gissel situations. Such displacement of the Board’s authority is not in line with the legislative intent behind section 10(j) nor is it wise given the abilities and expertise of the NLRB in labor related matters. A substantive revision of the administrative processes is a preferable solution. Since time delays presently inherent in the NLRB’s procedures are at the heart of the Gissel dilemma, revision of these procedures to expedite the handling of Gissel-type complaints would eliminate the need for section 10(j) bargaining orders. Increasing the number of administrative law judges, giving the utmost priority to cases involving alleged serious Gissel

precluded from reaching conclusions contrary to those reached by the district court. The district court’s findings are not dispositive on the merits, but are significant only insofar as they grant or deny interim relief.

See note 8 supra.
See 515 F.2d at 1185. In Trading Port, the Board subsequently issued a § 10(c) bargaining order as part of its final decision and order. Id.
See text accompanying notes 38-40 supra.
See text accompanying notes 23-25 supra.
See Refusal-To-Bargain Cases, supra note 2, at 862.
See note 33 supra. The NLRB currently only petitions for § 10(j) injunctions to compel bargaining in a very limited number of cases each year. Yet, the NLRB considers the § 10(j) injunction to compel bargaining as a viable alternative in attempting to provide the most effective remedy possible in labor disputes. Thus, the NLRB will not hesitate to seek 10(j) injunctions to compel bargaining, especially in light of the Second Circuit’s decision in Seeler v. Trading Port, Inc., 517 F.2d 33 (2d Cir. 1975). The Board, of course, does not agree with the view of the Fifth Circuit in Boire v. Pilot Freight Carriers, Inc., 515 F.2d 1185 (5th Cir. 1975). Letter from John H. Fanning, Chairman, National Labor Relations Board, to James P. O’Sick (Jan. 31, 1979).
See note 35 supra.
See note 98 supra.
violations, requiring reasonable yet expeditious time limits within the administrative process, and petitioning promptly for section 10(j) injunctions to prohibit the continuation of unfair labor practices markedly would reduce the time delays involved. A solution which attacks the very cause of the time delay problem is more reasonable than a remedy which requires judicial interference with the administrative agency explicitly created to deal with labor related matters. Expediting the administrative procedures would preserve the jurisdiction of the NLRB over unfair labor practices, eliminate the inequities of compelled bargaining under section 10(j), and thus more adequately protect the legitimate rights of all the parties involved.

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