A CALL FOR A SIMPLER APPROACH: EXAMINING THE NLRA'S SECTION 10(j) STANDARD

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I. INTRODUCTION

In 1947, Congress, in an attempt to curtail the growing power of organized labor, passed the Taft-Hartley Act (the "Act").¹ Included in the many significant provisions of the Act was Congress' explicit approval of the labor injunction. Through sections 10(j) and 10(l) of the Act, Congress had, after fifteen years, returned limited power to the federal courts to adjudicate and enjoin labor controversies.

However, despite over fifty years experience, no clear, consistent standard has emerged to guide the courts, much less litigants, as to when injunctive relief is warranted. Instead, there is a patchwork of varying, inconsistent standards and decisions, increased costs and, possibly worst of all, injunctions issued without regard to the historical purposes of equitable relief. The National Labor Relations Board ("NLRB" or "Board") has exploited this unsettled situation, militating for a standard in section 10(j) cases which provides the Board unwarranted and undue deference in deciding such cases.

By creating sections 10(j) and 10(l), Congress never intended to supplant the lengthy history of equitable relief or rewrite the consistently applied and well-established standards governing the appropriateness of injunctive relief. Rather, Congress had a more limited but nonetheless ambitious goal: allowing, on a limited basis, the use of injunctions to

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remedy particularly egregious and harmful employer and union unfair labor practices. As illustrated recently by *Hirsch v. Dorsey Trailers, Inc.*, the judiciary has struggled for over fifty years with the basic essence and meaning of sections 10(j) and 10(l). Most significantly, this struggle has centered on finding the proper balance between the power of the federal courts to issue interim relief and the authority and expertise of the National Labor Relations Board in shaping and interpreting the National Labor Relations Act ("NLRA").

In *Hirsch*, Dorsey Trailers, Inc., a manufacturer of dump and flatbed trailers, employed nearly 200 unionized workers at its Northumberland, Pennsylvania, plant. In June of 1995, during negotiations for a new collective bargaining agreement, the union struck, alleging unfair labor practices were being committed by the company. In November of 1995, the company notified the union of its decision to shut down the plant and resume operations in Georgia. In late December of 1995, the Northumberland plant shut down and the company resumed operations in Georgia and later in South Carolina. Over a year later, in January of 1997, the NLRB petitioned the district court for a section 10(j) injunction to stop the company from selling the Northumberland plant before the Board ruled on the merits of the unfair labor practice charges. The Board sought to maintain the status quo and thus preserve the remedy of restoration should it ultimately decide against the company.

In July of 1997 the district court denied the Board's request, primarily because maintaining the vacant plant would have been extremely costly (maintenance costs exceeded $130,000 in six months) and workers in Georgia and South Carolina could lose their jobs. The Third Circuit, however, overruled the district court and held that the critical determination "is whether, absent an injunction, the Board's ability to facilitate peaceful management-labor negotiations will be impaired." Since the company could sell the plant before the Board ruled on unfair labor practice charges, the court of appeals reasoned, the Board's remedy of restoration would become "toothless." Emphasizing deference to the Board and reiterating that irreparable harm to the respondent need not be considered, the court issued the section 10(j) injunction.

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2. 147 F.3d 243 (3d Cir. 1998).
3. Id. at 245.
4. Id.
5. Id.
6. Id.
7. Id.
8. Id. at 247.
9. Id. (quoting Pascarell v. Vibra Screw Inc., 904 F.2d 874, 879 (3d Cir. 1990)).
10. Id. at 248.
11. Id. at 249.
The battle between the district court and the court of appeals as to how to analyze and interpret section 10(j) in *Hirsch* is representative of an ongoing conflict among the courts, and continues to unnecessarily plague section 10(j) litigation. This article advocates a simple, straightforward approach to section 10(j) injunctions, one which uses traditionally applied standards governing when equitable relief is necessary. Such an approach would eliminate confusion, give litigants a clear understanding of the governing standards and level the playing field between the Board and respondents.

II. HISTORY OF LABOR INJUNCTIONS

To fully understand the policy and reasoning behind the legislative creation of sections 10(j) and 10(l) of the Act, and to place these enactments in proper perspective, one must first briefly review and understand the labor injunction's history of use and abuse. The unrestricted utilization of labor injunctions in American jurisprudence had a short, but troubled, history. Yet it is this history that forms the judicial rationale that permeates the analysis of modern day labor injunctions.

The earliest reported labor injunction case was tried in 1806 when Philadelphia shoemakers were criminally indicted for striking for higher wages. The jury was charged that "a combination of workmen to raise their wages may be considered from a two-fold point of view; one is to benefit themselves, the other to injure those who do not join their society. The rule of law condemns both." The trouble with the labor injunction had begun.

In 1896, the Supreme Judicial Court of Massachusetts issued an injunction against picketing because such conduct had the effect of interfering with an employer's freedom of contract and the right to employ individuals at an agreeable wage. The Court viewed the workers' picketing as a private nuisance and therefore declared it to be unlawful. In dissent, then-Judge Oliver Wendell Holmes called for instruction from the legislature, explaining:

The true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and general propositions of law which nobody disputes. Propositions as to public policy rarely are

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13. *Id.* (quoting The Philadelphia Cordwainers' Case, 3 Commons & Gilmore, Doc. Hist. Am. Ind. Soc. 59-248 (1910-11)).
15. *Id.* at 1078.
unanimously accepted, and still more rarely, if ever, are capable of unanswerable proof . . . . One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way . . . . If it be true that workingmen may combine with a view, among other things, to getting as much as they can for their labor, just as capital may combine with a view to getting the greatest possible return, it must be true that, when combined, they have the same liberty that combined capital has, to support their interests by argument, persuasion, and the bestowal or refusal of those advantages which they otherwise lawfully control.\(^\text{16}\)

Because of the basic public policy issues that were presented by labor disputes, judges, with no statutory guidance, were forced to make value judgments about economic conflicts. As Professor Archibald Cox and others observed about the post-Civil War period:

"It seems fair to say that when the labor disputes engendered by the conflict over union organization were taken to the courts, the judges were substantially free, despite the scattered precedents, to create new law appropriate to the new occasion, guided only by the vague "principles" which emerged from rulings upon more familiar situations."\(^\text{17}\)

Not guided by statutes or common law dealing with labor issues, the courts relied on existing rules of equity and tort law to guide their decisionmaking.\(^\text{18}\) The inherent question seemed to be whether the self-interest of the worker was a legitimate purpose, or whether a judicial balancing of the economic interests of workers, employers, and the public was to prevail.\(^\text{19}\)

\(^{16}\) Id. at 1080-81.

\(^{17}\) Cox et al., supra note 12, at 14.


\(^{19}\) In Equity Jurisprudence, Pomeroy states:

The courts have thus been required to face such questions as the nature and extent of the capitalist's right in the management of his business and of the workingman's property in his labor; to decide how far the employer shall be protected in his right to have labor and custom flow to him free from the interference of third parties . . . to determine what limits shall be placed upon the individuals and combinations of individuals in seeking their economic advancement at the expense of their fellows. All these and other problems have come before the courts in rapid succession.
By the beginning of the twentieth century, trade unions, led by the American Federation of Labor, had established a secure foothold in the American labor landscape. With the growth of unions came an increase in the volume of labor litigation. Injunctions became a commonly used instrument in labor-management disputes. Throughout the 1920s, encouraged by the sympathetic response of the judiciary, employers used the injunction tool with increasing frequency to squelch labor unrest. Before 1931, federal and state judges issued over 1,800 labor-related injunctions. For labor, there were several problems with the treatment of the labor injunction. The basis for obtaining relief was through affidavits supplied by the employer, many times on an ex parte basis. Orders by the courts prohibited striking and picketing on the ground that irreparable harm would be caused to the employer. Labor unions began to complain that courts sought to deal with violence by injunction and citation for contempt instead of leaving the protection of persons and property to the normal processes of criminal law. Unions also complained of the doctrines under which the misconduct of a few individuals was attributed to the labor organizations that sponsored a strike or picket line. To make matters worse, union agitators were sometimes tried for contempt by the same judge who issued the injunction. The final blow for labor was the Supreme Court's limiting

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20. COX ET AL., supra note 12, at 36.
21. As two commentators wrote:
   In the administration of justice between employer and employee, [the injunction] has become the central lever. Organized labor views all law with resentment because of the injunction, and the hostility which it has engendered has created a political problem of proportions. The injunction is America's distinctive contribution in the application of law to industrial strife.
23. As articulated by Frankfurter and Greene:
   The injunction cannot preserve the so-called status quo; the situation does not remain in equilibrium awaiting judgment upon full knowledge. The suspension of activities affects only the strikers; the employer resumes his efforts to defeat the strike, and resumes them free from interdicted interferences. Moreover, the suspension of strike activities, even temporarily, may defeat the strike for practical purposes and foredoom its resumption, even if the injunction is later lifted.
25. Id.
26. Id. at 25.
interpretation of the Clayton Act.\textsuperscript{27} The Clayton Act had been hailed by labor as a "charter of freedom," partly because it seemingly curtailed judicial involvement in labor disputes.\textsuperscript{28}

Thus, management would look to and rely on the federal court injunction to help prevent unions and employees from organizing effectively.\textsuperscript{29} The use of labor's most powerful weapon, the strike, was many times rendered meaningless because court-ordered injunctions could effectively thwart them. Since judicial decisions favored employers and were regarded as highly unfair by labor sympathizers, workers acquired a distrust of the courts. These court decisions shook labor's confidence in the law and only further undermined labor relations between organized labor and employers.\textsuperscript{30}

As Justice Holmes predicted, it became readily apparent that labor injunctions turned on questions of social and economic policy which were more suitable for a legislative solution than a judicial determination. Heeding the call, Congress attempted in 1932 to remove the federal courts from most labor disputes with the passage of the Norris-LaGuardia Act.\textsuperscript{31} In essence, the Norris-LaGuardia Act establishes that peaceful, concerted activities such as strikes, boycotts, and picketing are not enjoinable.\textsuperscript{32} Under the Norris-LaGuardia Act, federal courts are precluded from issuing injunctions except where violence or fraud is involved. In addition, even where violence or fraud is involved, an order restraining such stoppage is available only after a hearing involving an examination and a cross

\textsuperscript{27} See Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921).

\textsuperscript{28} Cox et al., supra note 12, at 37; see also Duplex Printing Press Co. 254 U.S. at 443 (interpreting the Clayton Act narrowly).

\textsuperscript{29} For an example of the powerful, far-reaching impact of an easily-issued injunction, see U.S. Gypsum Co. v. Heslop, 39 F.2d 228 (N.D. Iowa 1930). In Heslop, the court's injunction enjoined workers from printing, publishing, issuing, circulating, and distributing, or otherwise communicating, directly or indirectly, in writing or verbally, to any person, association of persons, or corporation, any statement or notice of any kind or character whatsoever, stating or representing: that there was a strike at the mill or plant of complainant; or that the strike was still in existence; or that there was a controversy over wages or conditions of employment between complainant and its employees; or any false statement with reference to conditions of employment at complainant's plant. Id. at 228. The result of this order was that workers were not allowed to tell anyone, no matter how true, about even the existence of a strike. Congress, aware of this type of far-reaching injunction, quickly moved to limit its future use in what would become known as the Norris-LaGuardia Act. See The Norris-La Guardia Anti-Adjudication Act, in Labor Organization 219 (Robert F. Koretz ed., 1970).

\textsuperscript{30} Cox et al., supra note 12, at 51.


\textsuperscript{32} Section 1 of the Norris-LaGuardia Act states that no federal court shall have "jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of this chapter." 29 U.S.C. § 101 (1998).
examination, as opposed to the kind of affidavits and ex parte procedures federal courts used prior to the Norris-LaGuardia Act.

Significantly, traditional equitable approaches to injunctions were also advocated in the Norris-LaGuardia Act. Section 7 of the Act, for example, provides that a balance of harms must be undertaken by the court and requires other procedural protections before a court may issue an injunction. Section 8 of the Act, likewise, creates an equitable approach to injunctions by providing that a complainant should not be entitled to an injunction if he has not complied with any contract or obligation on his part, or if he has not made every reasonable effort to settle the dispute by the available methods of arbitration or mediation. As stated in the debates leading to the Act's passage, "surely this fundamental principle of equity that he who seeks justice must do justice should apply in labor disputes as well as in judicial controversies."

Congressional action continued in 1935, when Congress enacted the Wagner Act. Concerned primarily with the organizational phase of labor relations, the Wagner Act's goal was to encourage unionization and the development of collective bargaining.

With the aid of these two pro-labor legislative mandates, the size and strength of unions grew in the late 1930s and 1940s. In 1940, for example, only five million workers belonged to labor unions; by 1945 there were nearly fifteen million union members. While other social and economic factors certainly influenced union growth, the legal protections provided by the Wagner Act, combined with Norris-LaGuardia's anti-injunction stance, played a significant role in advancing the labor movement.

By the late 1940s, unions had achieved much economic power; with that power came abuse. Numerous work stoppages in post-World War II...
America provided a scare and an illustration of the danger that strikes could have on the American economic and social system. Against this backdrop, Congress enacted the Taft-Hartley Act. As Archibald Cox explained:

The Taft-Hartley Act was the product of diverse forces—the offspring, a critic might say, of an unhappy union between the opponents of all collective bargaining and the critics of the unions' abuses of power. The former group was probably the most influential of the two in writing the Taft-Hartley amendments, for organized labor's unfortunate decision to oppose all legislation left its sympathetic critics in a dilemma.

The reported goal of the Taft-Hartley Act was to put labor and management on a level playing field. Representative Fred Hartley, in his report to the House of Representatives, explained that the necessity for legislation was due to the industrial strife that had pushed the country to the brink of economic paralysis. It was Representative Hartley's goal to make a fair bill that would protect not only employees, but the employers and the public. Senator Taft opined that the administration of the NLRA had begun to destroy the equality of bargaining power, which is necessary to maintain industrial peace. In its declaration of policy, Congress stated:

It is the purpose and policy of this Act... to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations,... to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

In this environment, Congress again decided it was necessary to address the issue of the labor injunction.
III. ENACTMENT OF SECTIONS 10(J) AND 10(L)

A. Legislative History

It had been a generation since the pro-labor enactment of the Norris-LaGuardia Act, and for twelve years, the adjudication procedure of the NLRA operated without any form of interim relief. It can be argued that the absence of such relief reflected a deep congressional distrust of the labor injunction, a distrust which likely stemmed from the judiciary's abusive application of the injunction remedy before the passage of the Norris-LaGuardia Act. Congress' enactment of sections 10(j) and 10(l) must be viewed from the backdrop of considerable anti-injunction sentiment.48

But in 1947, union abuses such as secondary boycotts and violent strikes created an environment that tempered fear of rashly issued injunctions, especially since the use of an injunction was often necessary to stop such abuses. Yet resuscitation of the labor injunction brought with it a fear of the judiciary taking control once again and "abusing" its powers. "The majority report concluded that section 10(j) would serve the dual purposes of preserving the integrity of the Board's processes and prohibiting a wrongdoer from benefiting from his own unfair labor practices."49 The Democrats, of course, feared the judicial abuses of pre-Norris-LaGuardia, the result was the compromise of § 10 (j) and (l).50 Thus, the latent fear of injunctions combined with the need to stop union abuses created a compromise strategy. Congress reasoned that only the neutral Board could permit a court to exercise jurisdiction over labor injunctions. To combat union abuses, Congress mandated that the Board petition for injunctive relief in cases involving such practices as secondary boycotts and jurisdictional disputes. For all other cases, the Board would provide a buffer from an over-reaching judiciary by picking and choosing the cases a district court could adjudicate. This, of course, led to the

to commit unfair labor practices, and jurisdictional strikes over work assignments. The Act also represented an abandonment of the policy of affirmatively encouraging unionization as illustrated by section 7 which, under Taft-Hartley, places the right to refrain from organizing activities on equal footing with the organizing rights originally guaranteed in the NLRA. COX ET AL., supra note 12, at 86-87.

48. Section 10(j) was added to the NLRA by amendment on June 23, 1947, ch. 120, Title I § 101, 61 Stat. 146 (1947).


50. Id.
necessity of having two separate and distinct provisions—sections 10(j) and 10(l). In fact, the reasoning behind Congress' enactment of sections 10(j) and 10(l) differs. Section 10(l) was primarily concerned with preventing the continuation of union abuses, while section 10(j) was seemingly proposed because of the concern that parties were irreparably injured due to lengthy Board procedures. In its most lengthy discussion on the subject of irreparable injury, Congress explained:

Time is usually of the essence in these matters, and consequently the relatively slow procedure of Board hearing and order, followed many months later by an enforcing decree of the circuit court of appeals, falls short of achieving the desired objectives—the prompt elimination of the obstructions to the free flow of commerce and encouragement of the practice and procedure of free and private collective bargaining. Hence we have provided that the Board, acting in the public interest and not in vindication of purely private rights, may seek injunctive relief in the case of all types of unfair labor practices and that it shall also seek such relief in the case of strikes and boycotts defined as unfair labor practices.\(^{51}\)

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Experience under the National Labor Relations Act has demonstrated that by reason of lengthy hearings and litigation enforcing its orders, the Board has not been able in some instances to correct unfair labor practices until after substantial injury has been done. Since the Board's orders are not self-enforcing, it has sometimes been possible for persons violating the act to accomplish their unlawful objective before being placed under any legal restraint and thereby to make it impossible or not feasible to restore or preserve the status quo pending litigation.\(^{52}\)

With respect to section 10(l), Congress stated:

After a careful consideration of the evidence and proposals before us, the committee has concluded that five specific practices by labor organizations and their agents, affecting commerce, should be defined as unfair labor practices. Because of the nature of certain of these practices, especially jurisdictional disputes, and secondary boycotts and strikes for specifically defined objectives, the committee is convinced that additional procedures must be made available under the National Labor Relations Act in order adequately to protect the public welfare

\(^{51}\) LMRA, supra note 44, at 414.

\(^{52}\) Id. at 433.
which is inextricably involved in labor disputes.\textsuperscript{53}

In fact, some senators felt that, at least with respect to unfair labor practices under section 10(1), the Act did not go far enough and that private litigants should be able to bring an action.\textsuperscript{54} There was also a fear in the Senate that the courts would garner back the power that Congress had previously stripped from it. For example, Senator Murray stated:

It may be anticipated that, if this section became law, the Board would be harassed by demands that it seek immediate injunctive relief if unfair labor practices were alleged by either employees or employers. If such applications were made the clear result would be to throw decision of the merits of such cases into the Federal district courts and thus to oust the Board of jurisdiction, since it is not to be supposed that district courts could act without some inquiry into the merits of the dispute, or that the Board could, at a later date, take a view of the case inconsistent with that of the court. Mere existence of such power might prove a handicap.\textsuperscript{55}

Significantly, nowhere in the sparse legislative history of the Taft-Hartley Act is there any discussion as to whether a court's authority should be curtailed or reshaped in any way when determining equitable relief.\textsuperscript{56} Instead, the legislative debates centered on what type of actions the courts should have jurisdiction over and whether private litigants should be able to bring injunctions against unions. Congress was more concerned about what type of case the judiciary should hear, rather than how the court

\textsuperscript{53} Id. at 414. Section 10(I)'s prohibited practices include hot cargo clauses, secondary boycotts, coercive union organizing techniques, and coercive methods of gaining union recognition. See 29 U.S.C. § 158(e), (b)(4)(A), (b)(4)(B), (b)(4)(C), (b)(7) (1998).

\textsuperscript{54} The Senate Report Stated:

The Board may obtain a temporary injunction from a court while it is conducting a hearing on the question whether the strike is an unfair labor practice or not. If it finds that it is, it then may issue a cease and desist order against such a strike and later ask to have this enforced by the court. In our opinion, this is a weak and uncertain remedy for those injured by clearly illegal strikes. It depends upon the decision of the National Labor Relations Board as to whether any action shall be taken, and the conduct of the proceedings will be entirely in the hands of the NLRB attorneys instead of attorneys of the injured party. The facts in such cases are easily ascertainable by any court and do not require the expertness supposed to be one of the virtues of the administrative law procedure.

LMRA, supra note 44, at 460.

\textsuperscript{55} Id. at 1046 (emphasis added).

\textsuperscript{56} The closest reference to a court's authority is Senator Murray's statement that "it is not to be supposed that district courts could act without some inquiry into the merits of the dispute, or that the Board could, at a later date, take a view of the case inconsistent with that of the court. Mere existence of such power might prove a handicap." Id.
should adjudicate the matter. It would appear, then, that Congress knowing full-well the existing standards governing the issuance of equitable relief, chose simply to direct (in the case of section 10(l)) or to permit (in the case of section 10(j)) the Board to petition the federal courts for injunctive relief. Congress left untouched, one may presume intentionally, the traditional standards for equitable relief, leaving it to the federal courts to apply such standards in the context of the disputes brought before them by the Board as the courts deemed "just and proper."

B. Statutory Language

Two different rationales drove the revival of the labor injunction: preventing union abuses and preventing inequitable results from delay in the Board processes. As a result, two distinct statutory schemes emerged—sections 10(j) and 10(l). For all of their differences, the two sections are also strikingly similar. The difference lies in the language that deals with

57. See discussion, infra pp. 23-28.
58. Section 10(j) provides:

The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or 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.


Section 10(l) provides in pertinent part:

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph 4(A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b)(7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: Provided further, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be
the Board's obligations. Designed to quickly combat union unfair labor practice charges including hot cargo clauses, secondary boycotts, coercive union organizing, and recognition techniques, section 10(l) is mandatory for the Board, illustrating Congress' concerns with unions' abuse of economic power. Section 10(l) provides that if the Board's General Counsel has "reasonable cause to believe" that an unfair labor practice is being committed, the General Counsel shall petition a federal district court for interim relief. The term "reasonable cause" is found only in section 10(l) and deals only with the Board's obligation to petition a district court for injunctive relief. In other words, if the Board has reasonable cause to believe an unfair labor practice is occurring within the scope of section 10(l), it must seek an injunction and has no discretion in the decision to petition for equitable relief.

In sharp distinction, section 10(j) gives the Board broad discretion to decide in which cases it will seek injunctive relief. Thus, while broader in scope than section 10(l) because it provides temporary judicial relief for any other type of unfair labor practice charge, section 10(j) is discretionary for the Board. Beyond the initial requirement that a complaint must have been issued, there is no statutory limit or guidance as to which unfair labor practices warrant petitioning a district court for potential injunctive relief. Under section 10(j), it is within the sole discretion of the Board to determine which cases should be brought forth to the district court for injunctive relief.

Although the sections are entirely different with respect to the Board's obligations, they are identical with respect to the district court's obligation. Both sections provide that the district court shall have jurisdiction to grant such injunctive relief as the court deems "just and proper." There is no language in either section that discusses the scope of judicial review or power; rather, it is simply the unadorned standard that injunctive relief will issue when it is found to be "just and proper." Courts are offered no other guidance from the statutory sections and are left to glean a standard for injunctive relief from the phrase "just and proper."

It is telling that Congress either spent little or no time wondering how courts would or should decide these cases. Perhaps Congress thought that

unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period.

60. One minor difference between sections 10(j) and 10(l) dealing with the district court's obligation is the phrase "notwithstanding any other provision of law" found in section 10(l). This phrase appears to reference the Norris-LaGuardia Act's provisions and is most likely aimed at obviating any possible conflict between Norris-LaGuardia and section 10(l). Section 10(l) also provides criteria for the issuance of a temporary restraining order. 29 U.S.C. § 160 (1998).
procedures implemented under the Norris-LaGuardia Act were a sufficient guide to the courts when determining whether to issue injunctive relief. Most likely, Congress assumed that labor injunction cases should be decided like any preliminary injunction case—using traditional equitable notions to come to a conclusion that is just and proper. Regardless, Congress addressed the historical fear and apprehension of labor injunctions not in the standards used to decide injunctions, but in the court's limited jurisdiction.

IV. INTERPRETING SECTION 10(j)

From 1948-1961, the Board authorized an average of just three section 10(j) injunctions per year.\(^{61}\) It is significant to note that the vast majority of section 10(j) injunctions during that period were sought against unions.\(^{62}\)

Speaking before the American Bar Association in 1947, the NLRB's General Counsel Robert Denham offered insight into the Board's initial approach:

> The history of labor injunctions is too long and reveals too much the national desire to reduce government by injunction to a minimum to justify a theory other than that this provision is placed in the Act for emergency purposes and only where loss or damage or jeopardy to safety and welfare of a large segment of the public would result if injunctive action were not taken.\(^ {63}\)

In 1962, however, Congress concluded that the Board's failure to utilize section 10(j) discretionary injunctions often resulted in irreparable injury. But while NLRB Chairman McCulloch announced that the Board would seek more section 10(j) injunctions, he nevertheless reemphasized a fear of labor injunctions when he observed that "the extraordinary remedy of injunction should not and cannot become the ordinary remedy in unfair labor practice cases."\(^ {64}\)

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62. Id. Perhaps the Board, heeding congressional concern about union abuses, focused its early efforts on union activity. This emphasis has been completely reversed, where today nearly every section 10(j) injunction is filed against an employer. For example, in 1997, the Board filed a total of 35 petitions for temporary relief under section 10(j). All the petitions filed were against employers. 62 NLRB ANN. REP. 73 (1997).
63. Fahrenkopf, supra note 49, at 1168 (citing I. HERBERT ROTHENBERG, ROTHENBERG ON LABOR RELATIONS 632 n.4 (1949)).

Chairman McCulloch's concern seemingly stemmed from the fact that the more detailed analysis a court undertakes, the more power potentially is taken away from the
With the imminent expansion of section 10(j) injunctions, it was imperative that the courts develop consistent standards to be used in adjudicating this extraordinary remedy. Unfortunately, this proved not to be the case.

A. Early Case Law

Courts were slow to develop standards with regard to section 10(j) and section 10(l) injunctions. This, coupled with the lack of opportunity to develop a clear set of standards, led to confusion and uncertainty. One commentator described the attitude of the courts in the 1940s, 1950s, and 1960s as follows:

Some courts have apparently assumed that given reasonable cause to believe a violation has been committed the issue is not open to judicial question. Others have explicitly stated that the court must defer to administrative judgment. Most of the cases which pass beyond the previous two situations nevertheless mechanically apply the statute to the facts. In many of the cases in which the issue of proper standards has been raised, and discussed, the need 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.

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. 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.65

Interestingly, two early district court cases from New York, decided just one month apart, seem to have set the trend for the divergence of opinions as to the section 10(j) standard that continues to plague the courts to this day. In Douds v. Local 294 International Brotherhood of

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Teamsters, the Board brought both section 10(j) and section 10(l) actions against the union for a litany of alleged unfair labor practices. While the court focused on the "just and proper" language of both statutes and held that both statutes should be treated identically when determining the propriety of relief, the court rejected the notion that irreparable injury and/or no adequate remedy at law must be shown before the petitioner could be granted relief. The court reasoned that since section 10(j) relief is entirely statutory, common law requirements should not apply. Instead, the court concluded that interlocutory relief under section 10(j) may be granted upon a showing of "reasonable probability" that the moving party is entitled to final relief. Explaining what it meant by a "reasonable probability," the court observed, "[t]he requirements... are met when the factual jurisdictional requirements are shown, and credible evidence is presented which, if uncontradicted, would warrant the granting of the requested relief, having in mind the purpose of the statute and interests involved in its enforcement."

In Douds v. Wine Liquor & Distillery Workers Local 1, the district court, deciding a section 10(l) petition, emphasized the need for judicial discretion in determining what is just and proper relief, citing the long history of courts' experience with equity practice. The court denied the injunction, in part, because there was no likelihood of irreparable injury to the flow of interstate commerce, to the general welfare, to the charging parties, or to anyone else. The court held that traditional equitable criteria must be satisfied and further stated that "unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable, [equitable criteria] should serve as a guide and norm to the court when interpreting and applying what it deems just and proper."

These decisions illustrate the basic split in standards governing section 10(j) injunctions: one, more deferential to the Board, disregarding the traditional equitable standards; the other, in sharp contrast, embracing the experience and approach of the courts' long-established equity practice.

Apart from the incipient split in approaches, the most troubling matter

67. Id. at 418.
68. Id.
69. Id. Although apparently intended to be deferential to the Board, the court's "reasonable probability" standard at least sounds like the traditional equitable factor of "likelihood of success on the merits." Any similarity is dispelled entirely, though, by the court's explanation of that phrase.
70. 75 F. Supp. 184 (S.D.N.Y. 1948).
71. Id. at 186; see also Lebaron v. Kern County Farm Labor Union, 80 F. Supp. 151 (S.D. Cal. 1948) (holding that in a section 10(l) action, the general equity powers of the court are not abrogated).
72. Douds, 75 F. Supp. at 188.
73. Id.
surrounding early interpretations of section 10(j) was the courts' unexplained grafting of the "reasonable cause" language found in section 10(l) into section 10(j) cases. Nowhere in section 10(j) does the term "reasonable cause" appear. In *Douds v. International Longshoremen Ass'n*, 74 the Second Circuit brought the blurring of the statutes a step further by holding that "[s]ection 10(j) *specifically* provided for a temporary injunction on petition by the Board when there is reasonable cause to believe the unfair labor practice complained of was committed." 75 As use of the section 10(j) injunction increased in the late 1960s and early 1970s, the "reasonable cause" criteria established a foothold in the section 10(j) analysis. 76

Through this unexplained merging of section 10(j) and section 10(l), a loose standard began to develop for section 10(j) injunctions, along with an extreme deference to the Board in the proceedings. As one commentator stated, "[i]njunctive were almost always issued upon request, either because the judiciary deferred to the Board's judgment or because the need for relief 'was so clear by any standard' that no incisive analysis was needed for the holding." 77 With this deference came the implicit rejection of a traditional equitable component to the injunctive relief analysis. The result was a two-prong approach from the courts to determine the appropriateness of injunctive relief under section 10(j). 78

**B. Modern Approaches**

Generally, until the late 1980s, the courts agreed on the use of a two-

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74. 241 F.2d 278 (2d Cir. 1957).
75. *Id.* at 285 (emphasis added); *see also* *Johnston v. J.P. Stevens & Co.*, 341 F.2d 891, 892 (4th Cir. 1965) (stating that 10(j) injunctions should be based on a finding by the district court that there is "reasonable cause to believe that unfair labor practices have been committed and that [under the existing circumstances] injunctive relief is just and proper").
76. *See* *Boire v. Pilot Freight Carriers, Inc.*, 479 F.2d 778, 787 (5th Cir. 1973) (showing of reasonable cause is necessary for the issuance of a temporary injunction); *Angle v. Sacks*, 382 F.2d 655 (10th Cir. 1967) (finding of reasonable cause is a prerequisite to the granting of injunctive relief); *Johnston*, 341 F.2d at 892; *McLeod v. Compressed Air Workers*, 292 F.2d 358, 361 (2d Cir. 1961) (finding of reasonable cause is a prerequisite to the granting of injunctive relief).
78. *See* *Minnesota Mining & Mfg. Co. v. Meter*, 385 F.2d 265 (8th Cir. 1967); *McLeod v. General Elec. Co.*, 366 F.2d 847 (2d Cir. 1966), *vacated*, 385 U.S. 533 (1967) (memorandum of Justice Harlan). Justice Harlan granted the Board's application for a stay, pending certiorari proceedings, of a judgment of the Second Circuit setting aside a temporary injunction issued by a district court. In granting the stay, Justice Harlan pointed out that the standards governing the application of section 10(j) had never been decided by the Supreme Court, despite the section's continuing importance in the proper administration of the NLRA. *See also* *Kobell v. Beverly Health & Rehab. Servs. Inc.*, 142 F.3d 428 (3d Cir. 1998), *cert. denied*, 525 U.S. 1121 (1999).
prong approach to determine the appropriateness of injunctive relief, regardless of whether the injunction was sought under section 10(j) or section 10(l). That approach consists of two separate inquiries. The first inquiry is whether the Board has established reasonable cause to believe that an unfair labor practice has occurred. The second inquiry is whether the requested relief is "just and proper".

It is not an exaggeration to assert that the "reasonable cause" test is generally a non-factor for all the circuits. The test of "reasonable cause" has developed into an extremely low threshold for the Board to meet. "Reasonable cause" is generally satisfied by a simple showing that the Board's legal theories are not insubstantial or frivolous. The extreme deference given to the Board is at the core of this test. For example, courts have recognized that they are not to weigh all the evidence presented, but rather should give the Board's version of the facts "the benefit of the doubt." As noted by the Sixth Circuit, the question as to whether the NLRA has been violated ultimately "is a function reserved exclusively to the NLRB."

This test makes it highly unlikely that a party could argue that reasonable cause is not established. In fact, due to Board processes for

79. For example, the Third Circuit had divided the reasonable prong analysis into a two step inquiry. This analysis requires a district court to first determine whether the legal theory that underlies the Board's unfair labor practice allegation is substantial and not frivolous. Then the district court must determine whether the Board has demonstrated sufficient facts which, if true, would support an unfair labor practice finding under the legal theory presented, viewing the facts in the light most favorable to the Board, without resolving credibility issues that may be raised by the evidence. Kobell v. Suburban Lines, 731 F.2d 1076 (3d Cir. 1984); see also Calatrello v. "Automatic" Sprinkler Corp. of Am., 55 F.3d 208, 212 (6th Cir. 1995) (discussing the idea that the director only has to come up with some evidence to support his position and that he does not have to convince the court of the validity of the Board's theory as long as the theory is not frivolous); Arlook v. S. Lichtenberg & Co., 952 F.2d 367, 371 (11th Cir. 1992) ("Board must present enough evidence in support of its coherent theory to permit a rational factfinder... to rule in favor of the Board."); Boire v. Pilot Freight Carriers, Inc., 515 F.2d 1185, 1189 (5th Cir. 1975) (determining that all that is necessary for reasonable cause is that the "Board's theories of law and fact are not insubstantial or frivolous"); Hirsch v. Corban Corps., 949 F. Supp. 296, 299 (E.D. Pa. 1996) (stating that the court must find that the theory of the Board is substantial).

80. Danielson v. Joint Bd. of Coat Garment Workers' Union, 494 F.2d 1230, 1244 (2d Cir. 1974) (finding that although the district court's "duty of scrutiny" is not limited to determining whether the regional director's claim is "insubstantial and frivolous," nonetheless, "on an issue of law, the district court should be hospitable to the views of the General Counsel, however novel"); see also Silverman v. Major League Baseball, 880 F. Supp. 246 (S.D.N.Y.), aff'd, 67 F.3d 1054 (2d Cir. 1995).

81. Calatrello, 55 F.3d at 212-13; see also Asseo v. Centro Medico Del Turabo, Inc., 900 F.2d 445, 450 (1st Cir. 1990) (stating that "the district court is not empowered to decide the merits of the case, that is, whether an unfair labor practice occurred"); Kaynard v. Mego Corp., 633 F.2d 1026, 1033 (2d Cir. 1980) (finding of reasonable cause must ensue unless the district court is convinced that the legal position of the Board is wrong).
bringing section 10(j) injunctions—a prerequisite for a section 10(j) injunction—it is almost incomprehensible that the "neutral" Board would petition for an injunction in a case where it could not establish that there was reasonable cause to believe unfair labor practices were being committed, or, for that matter, that the Board could not establish a legal theory that was not frivolous. While the terms used to describe "reasonable cause" differ among the courts, the bottom line remains the same—the first prong of the test is simply a mere rubber stamp for the Board. As such, it is useless as a measure to decide the question of whether injunctive relief is warranted.

A more significant lack of consensus has developed among the courts with respect to the second prong—the meaning and definition of what is "just and proper". Relying on the sparse legislative history, courts have emphasized the need for the parties to be restored to the status quo. Generally, injunctive relief has been deemed just and proper where it results in the preservation of the status quo pending the issuance of a final Board order or the completion of litigation in the courts. While the objective of the "status quo" may be somewhat clear, determining which cases warrant preservation of the status quo has proven difficult.

82. A complaint must first be filed, then the regional director makes a recommendation to the General Counsel's Office, through the Division of Advice, which, in turn, makes a recommendation to the Board. No section 10(j) proceedings may be instituted unless authorized by the Board. Office of the General Counsel, National Labor Relations Board Section 10(J) Manual, App. A at 16 (May 1994).

83. See National Labor Relations Board Case Handling Manual, Part I, §§ 10252-58 (pre-complaint action) and § 10108 (written or oral report regarding issuance of complaint). Section 10108 provides that a written or oral report recommending issuance of a complaint should be prepared by the Board agent responsible for the case. The report should include such things as a factual chronology, which may also include credibility considerations, conclusions, recommendations, discussion of an appropriate remedy, and legal analysis if necessary. Given this substantial pre-complaint investigation, analysis, and report, it is very unlikely a Board's complaint could not satisfy the current reasonable cause prong.

84. See, e.g., Fleischut v. Nixon Detroit Diesel Inc., 859 F.2d 26, 29 (6th Cir. 1988) (finding that the Board needs only some evidence and that the district court should not resolve conflicts if facts could support the legal theory); Eisenberg v. Lenape Prods. Inc., 781 F.2d 999, 1003 (3d Cir. 1986) (viewing facts in light most favorable to the Board); Kaynard v. Palby Lingerie Inc., 625 F.2d 1047, 1051 (2d Cir. 1980) (giving the benefit of the doubt to the Board on factual disputes); Kaynard, 633 F.2d at 1031 (sustaining Board's version of the facts if rational and drawing inferences in favor of Board).

85. See Fahrenkopf, supra note 49, at 1159.

86. See Johnston v. J.P. Stevens & Co., 341 F.2d 891, 892 (4th Cir. 1965). Courts tend not to agree on the definition of the "status quo" in this context. See Seeler v. Trading Port, Inc., 517 F.2d 33 (2d Cir. 1975) (finding that status quo is the situation that existed before the onset of unfair labor practices); Boire v. Pilot Freight Carriers, Inc., 479 F.2d 778, 788 (5th Cir. 1973) (finding that status quo is the last uncontested status which preceded the pending controversy); see also Burns, supra note 64, at 1043-44.
While a variety of approaches have been articulated, two general approaches have emerged to interpret section 10(j)'s "just and proper" language. One approach emphasizes that an injunction is just and proper if it will prevent frustration of the remedial purposes of the Act. The other approach contemplates the use of the traditional equitable criteria used in determining the propriety of injunctive relief in other forums: namely, balancing of the hardships, likelihood of success on the merits, irreparable harm, and the public interest. The "frustration of the Act," standard is by far the more lenient of the two "theories," and historically the more commonly used. It requires only that the NLRB show a need for interim relief "to prevent frustration of the remedial purposes of the Act," and to preserve the Board's ultimate remedial powers. In sum, this standard looks only to whether the injunction is necessary for the Board to complete its job. Significantly, the equitable bedrock factor of a showing of irreparable harm is generally not a factor to be considered under this approach. As one commentator notes, there is little guidance behind the words "just and proper." For, under a broad interpretation of this standard, every unfair labor practice case that is not immediately settled frustrates the purpose of the NLRA.

87. For example, the extraordinary circumstances standard was meant to be reserved for serious and extraordinary situations where the unfair labor practices, unless contained, would have an adverse and deleterious effect on the rights of the aggrieved party. Minnesota Mining & Mfg. Co. v. Meter, 385 F.2d 265, 270 (8th Cir. 1967). The public interest standard requires that the labor dispute impact the public interest. Courts applying this standard generally grant relief only if the denial would have a widespread, substantial, and damaging effect on the public interest or would cause widespread economic dislocation. Squillacote v. UAW Local 578, 384 F. Supp. 1171 (E.D. Wis. 1974); McCleod v. Compressed Air Workers Local 147, 194 F. Supp. 479 (E.D.N.Y. 1961), aff'd, 292 F.2d 358 (2d Cir. 1961); see also Fahrenkopf, supra note 49, at 1172-73.


91. Fahrenkopf, supra note 49, at 1177.


93. Burns, supra note 64, at 1044.

94. Id. at 1048.
allows for broader judicial discretion, the "frustration" standard seems to encourage deference to administrative findings, establishing a presumption in favor of granting injunctive relief.\textsuperscript{95}

Under the two-prong approach, courts created a myriad of standards and tests designed to provide the Board deference and to determine whether to grant injunctive relief. It wasn't until 1989 that a federal court of appeals thoroughly and critically analyzed the statutory language and legislative history behind section 10(j) and attempted to articulate an approach that would sensibly clarify the standards courts should consider when determining the propriety of relief under section 10(j).

C. \textit{Kinney v. Pioneer Press}\textsuperscript{96}

In 1989, the Seventh Circuit Court of Appeals, in an opinion authored by Judge Easterbrook, undertook a detailed analysis of the section 10(j) injunction process and concluded that the favored two-prong approach was not the appropriate standard for courts to use when determining the propriety of injunctive relief.

Pioneer Press, a publisher of suburban Chicago newspapers, withdrew recognition from the union representing its production workers, contending it had a good faith doubt as to whether a majority of the workers still supported the union. The withdrawal of recognition occurred during negotiations for a new collective bargaining agreement. Once it withdrew recognition, the company refused to bargain with the union, unilaterally implemented a wage increase, removed union literature from bulletin boards, and warned all employees against distributing union literature. The Board's General Counsel issued a complaint against Pioneer Press, alleging violations of section 8(a)(1), (3), and (5).\textsuperscript{97} Concerned that the union might

\textsuperscript{95} See Arlook, 952 F.2d at 372 (finding injunctive relief under section 10(j) just and proper whenever the facts demonstrate that without such relief, "any final order of the Board will be meaningless or so devoid of force that the remedial purposes of the Act will be frustrated"); Angle v. Sacks, 382 F.2d 655, 660 (stating that when the circumstances of a case create a reasonable apprehension that the efficacy of the Board's final order may be nullified, or the administrative procedures will be rendered meaningless, injunctive relief should be issued); see also Pascarell v. Vibra Screw Inc., 904 F.2d 874, 879 (3d Cir. 1990) (determining whether the failure to grant injunctive relief would be likely to prevent the Board from effectively exercising its remedial powers); Fleischut, 859 F.2d at 30 (finding that the district court must inquire whether the relief is necessary to preserve the remedial power of the Board).

\textsuperscript{96} 881 F.2d 485 (7th Cir. 1989).

\textsuperscript{97} Section 8(a)(1) provides that "it shall be an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of their rights" under the chapter. Section 8(a)(3) provides, in part, that "it shall be an unfair labor practice for an employer . . . [to discriminate] in any term or condition of employment or discourage membership in any labor organization". Section 8(a)(5) provides that "it shall be an unfair labor practice for an
wither during the pendency of the Board's proceedings, the Board petitioned the district court under section 10(j) for injunctive relief. Applying the two-prong approach, the district court held that injunctive relief was not warranted.\footnote{98}

The Court of Appeals for the Seventh Circuit vacated and remanded the district court decision. Focusing on the statutory language of sections 10(j) and 10(l), the court of appeals rejected the proposition that the existence of "reasonable cause" should play any part in the section 10(j) analysis, emphasizing that the two sections operate differently. The court explained:

"Reasonable cause" is the trigger of the Board's duty under § 10(l). Because § 10(l) is mandatory, Congress had to establish the boundary of the Board's obligation . . . . "Reasonable cause" under § 10(l) thus serves two functions: it requires the Board to investigate before filing suit, and it allows the Board to filter out claims of violations that do not justify litigation.

Section 10(j) has a different structure. This law never requires the Board to sue, and the Board may act on its own schedule . . . . Having given the Board unfettered discretion not to sue under § 10(j), Congress did not need the threshold that 'reasonable cause' represents under § 10(l).\footnote{99}

Not only did the Pioneer Press court take issue with courts that had been treating the two sections with distinct functions and texts as identical, it concluded that the "reasonable cause" inquiry was basically rendered meaningless if a court, interpreting the "just and proper" language, undertook an analysis under the traditional equitable approach with its likelihood-of-success-on-the-merits component. The court observed in that regard:

When courts apply traditional equitable principles to inquire whether an injunction is "just and proper" under § 10(j), no further purpose is served by asking the district judge, as a preliminary matter, to determine whether the Director has established reasonable cause. To the extent it is important, the inquiry is part of the analysis of whether injunctive relief is just and proper . . . . The two questions, we have noted, "tend[] to merge." If the General Counsel's legal theory is inapt or if the facts are stacked against the agency's position (i.e., if there is truly no reasonable cause to believe someone has breached the NLRA), it's a safe bet that injunctive relief is not "just and

\footnote{98. Pioneer Press, 881 F.2d at 488.}

\footnote{99. Id. at 489.}
proper." In fact, the district judge would be required to deny relief under such circumstances, because an injunction may not issue unless the plaintiff has at least a modest chance of success on the merits. Because the district judge must consider the strength of the Director's case in order to make this decision, nothing is gained by engrafting onto § 10(j) proceedings a preliminary "reasonable cause" test.100

Thus, the court held that it could only engage in an interpretation of whether an injunction would be just and proper. The standard to be considered when interpreting whether injunctive relief is just and proper is the traditional standard applied to injunction cases in other settings. As such, failure to establish irreparable injury and likelihood of success on the merits dooms any request for injunctive relief under section 10(j).101

D. Miller v. California Pacific Medical Center102

Expanding on the Pioneer Press analysis, the Ninth Circuit in Miller v. California Pacific Medical Center developed a similar, yet different, analysis of the section 10(j) injunction.103 Where Pioneer Press interpreted "just and proper" as a call for traditional equitable criteria, California Pacific combined the historical viewpoint of the "just and proper" analysis with the traditional equitable analysis favored in Pioneer Press.

In 1994, the NLRB sought a section 10(j) injunction to restore nurses employed by Children's Hospital of San Francisco to the union-represented collective bargaining status they held before the hospital merged with non-union Pacific Presbyterian Medical Center. The district court, applying the two-prong test, granted the Board's petition for an injunction. The Ninth Circuit reversed.104

In reversing, the California Pacific court created a new formula for district courts to use when adjudicating section 10(j) cases. Like Pioneer Press, the new test eliminates the "reasonable cause" prong, calling it confusing because it made the court focus on the preliminary investigation instead of the likelihood of success on the merits.105 While positing that

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100. Id. at 491 (citations omitted) (emphasis added). The Seventh Circuit also concluded that it could be reasonably inferred that the Board has established reasonable cause if it petitions for an injunction, stating that "[u]nless acting capriciously, the General Counsel would establish something like 'reasonable cause' as the threshold for filing an administrative complaint." Id. at 490 n.2.
101. Id. at 494.
102. 19 F.3d 449 (9th Cir. 1994) (en banc).
103. Id.
104. Id. at 461.
105. Id. at 457.
"just and proper" is another way of saying appropriate or equitable, the Ninth Circuit, unlike the Seventh Circuit in Pioneer Press, fused the two prevalent interpretations of the "just and proper" prong into a single query. Under the California Pacific analysis, a court applies traditional equitable criteria to determine whether failure to grant an injunction would frustrate the remedial purposes of the NLRA. The court explained its rationale:

We therefore hold that in determining whether interim relief under § 10(j) is "just and proper," district courts should consider traditional equitable criteria. They must do so, however, through the prism of the underlying purpose of § 10(j), which is to protect the integrity of the collective bargaining process and to preserve the Board's remedial power while it processes the charge.107

What the "prism" means is somewhat unclear, although in explaining its rationale the court observed that "it is necessary to factor in the district court's lack of jurisdiction over unfair labor practices, and the deference accorded to NLRB determinations by the courts of appeals." Thus, the court emphasized that deference to the NLRB is still necessary when analyzing what is just and proper, even when applying traditional equitable criteria.

E. Sharp v. Parents in Community Action, Inc.109

The latest entrant to the section 10(j) field is the Eighth Circuit, which rejected the Board's argument that a showing of "likelihood of success on the merits gives too little deference to the agency's interpretation of the facts and the inferences to be drawn from such facts." In Sharp v. Parents in Community Action, Inc., the Eighth Circuit held, and the Board even concedes, that section 10(j)'s reference to "just and proper" incorporates traditional equitable principles. However, in the Board's view, "requiring it to show a likelihood of success on the merits [gave] too little deference to the agency's interpretation[s] of the facts and the inferences to be drawn from [such] facts." Rejecting the Board's recommendation to keep the "reasonable cause" analysis, the court emphasizes the inherent flexibility in traditional equitable principles.

The court states that the basis for injunctive relief is irreparable harm.

106. Id. at 458.
107. Id. at 459-460.
108. Id. at 460 (citing NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 829 (1984)).
109. 172 F.3d 1034 (8th Cir. 1999).
110. Id. at 1038.
111. Id.
112. Id.
113. Id.
and inadequacy of legal remedies. However, in determining the propriety of relief under section 10(j), the Eighth Circuit interprets the irreparable harm to be addressed as the harm to the collective bargaining process or to other protected employee activities if a remedy must await the Board's full adjudicatory process. The court concludes by reciting Eighth Circuit precedent, holding that "the question in each case is whether the extraordinary remedy of a preliminary injunction is 'necessary either to preserve the status quo or to prevent frustration of the basic remedial purpose of the Act.'" The court then announced the Eighth Circuit standard:

In deciding whether a § 10(j) injunction would be "just and proper" under traditional equitable principles, . . . the inquiry should focus initially on the question of irreparable injury—whether the Board has satisfied the court that the case presents one of those rare situations in which the delay inherent in completing the adjudicatory process will frustrate the Board's ability to remedy the alleged unfair labor practices. If the Board clears that relatively high hurdle, the court must then balance any competing irreparable injury to respondent, and it must consider likelihood of success on the merits, examining that factor, not in isolation, but "in the context of the relative injuries to the parties and the public." The purpose of this inquiry into the merits is not to second guess the Board's decision to commence enforcement proceedings. Rather, likelihood of success is relevant to the issuance of a preliminary injunction "because the need for the court to act is, at least, in part, a function of the validity of the applicant's claim."

While California Pacific emphasizes the need to consider traditional equitable criteria in the context of "preventing frustration of the remedial purposes of the Act," Sharp takes this prism analysis a step further by positing that considering whether the remedial purposes of the Act have

114. The Eighth Circuit's standard test for preliminary injunctions is:

1. The threat of irreparable harm to the movant;

2. The balance between the harm to the movant and the harm to other parties if the injunction is granted;

3. The movant's probability of success on the merits; and

4. The public interest.


115. Sharp, 172 F.3d at 1038.

116. Id. at 1039 (quoting Minnesota Mining & Mfg. Co. v. Meter, 385 F.2d 265, 270 (8th Cir. 1967)).

117. Id. (citations omitted).

118. Id.
been frustrated should be engaged in only when analyzing the irreparable harm component of the traditional test.\textsuperscript{119}

\textbf{F. Present Standards}

At present, the state of the law is fractured and confused as to when an injunction should be issued under section 10(j). The First and Second Circuits have begun to champion the Seventh, Eighth, and Ninth Circuit's more or less traditional approach to the "just and proper" inquiry, but have kept the "reasonable cause" prong intact.\textsuperscript{120} The Seventh, Eighth, and Ninth Circuits have not engaged in that preliminary inquiry. A number of circuits continue to stubbornly hold to the two-prong test.\textsuperscript{121} Furthermore, both a district court of the District of Columbia and a district court of Maryland have applied a traditional equitable test.\textsuperscript{122}

A legal practitioner faced with defending a client against a petition for injunctive relief is faced with differing obligations depending on the circuit and even the particular judge. From the deference given to the Board, to the definition of "just and proper," to the burden of defending against a showing of "reasonable cause," to understanding what is truly meant by using the traditional equitable approach, the practitioner, even after researching the law of a particular circuit, is faced with a daunting task.

Even with respect to the \textit{Pioneer Press/California Pacific} analysis, there are minor nuances and interpretations which make it difficult to pin down exactly what needs to be proven to establish or defend against the need for interlocutory relief. For example, in \textit{California Pacific}, the court held that irreparable injury will be assumed if the respondent admits the substance of the unfair labor practice charge or if the Board demonstrates

\begin{itemize}
\item \textsuperscript{119} \textit{Id.}
\item \textsuperscript{120} The First Circuit returned to the reasonable cause analysis, even though it realized the futility in retaining a reasonable cause requirement when a court must assess the likelihood of success component under the just and proper analysis. Pye v. Sullivan Brothers Printers, Inc., 38 F.3d 38 (1st Cir. 1994) (holding that without a clear likelihood of success, injunctive relief is not just and proper, and that the \textit{sine qua non} of the injunctive relief analysis is whether the plaintiffs are likely to succeed on the merits); \textit{see also} Kaynard v. Mego Corp., 633 F.2d 1026 (2d Cir. 1980).
\item \textsuperscript{121} For example, in the 1997 case of \textit{Schaub v. Detroit Newspaper Agency}, 984 F. Supp. 1048, 1052 (E.D. Mich. 1997), aff'd, 154 F.3d 276 (6th Cir. 1998), a district court followed the Sixth Circuit precedent of the two-prong approach, stating that the Sixth Circuit's just and proper analysis of "frustration of the remedial purposes of the Act" gives the court a narrower scope of discretion. Many circuit courts have made similar findings. \textit{See generally} Dowd v. Int'l Longshoremen's Ass'n, AFL-CIO, 975 F.2d 779 (11th Cir. 1992); Gottfried v. Frankel, 818 F.2d 485 (6th Cir. 1987); Kobell v. Suburban Lines Inc., 731 F.2d 1076 (3d Cir. 1984); Boire v. Pilot Freight Carriers, Inc., 515 F.2d 1185 (5th Cir. 1975); Angle v. Sacks, 382 F.2d 655 (10th Cir. 1967).
\end{itemize}
that it is likely to prevail on the merits. However, if the charge is contested or the Board has only a fair chance of success on the merits, the court must evaluate the potential irreparable injury.

Equally troubling is the Seventh Circuit's alteration of its traditional approach. In NLRB v. Electro-Voice, Inc., the Seventh Circuit, while applying equitable criteria, emphasized that its underlying task is to determine whether harm to organizational efforts is so great as to permit persons violating the Act to accomplish their unlawful objectives, rendering the Board's remedial powers ineffectual. And while the NLRB's Regional Director is not entitled to prevail simply because she brings a complaint, the court held that once the Director presents evidence sufficient to tip the scales in her favor, nothing more is required. In addition, the court stated that no rule of law limits injunctive relief to serious and extraordinary circumstances. Similar to California Pacific, this language suggests less of an emphasis on balancing of the harms or a likelihood of success component and more emphasis on providing deference to the Board. In fact, a recent district court case in the Seventh Circuit cites California Pacific's prism analysis with approval.

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124. Id. at 459-60 (explaining that "in statutory enforcement cases where the government has met the 'probability of success' prong ... we presume it has met the 'possibility of irreparable injury' prong because the passage of the statute is itself an implied finding by Congress that violations will harm the public. Therefore, further inquiry into irreparable injury is unnecessary.") (quoting United States v. Nutri-Cology, Inc., 982 F.2d 394 (9th Cir. 1992)); see also Overstreet v. Thomas Davis Med. Ctr., P.C., 9 F. Supp. 2d 1162 (D. Ariz. 1997).
125. 83 F.3d 1559 (7th Cir. 1996).
126. Id. at 1567.
127. Id. at 1567-68.
128. Id. (citing Kinney v. Pioneer Press, 881 F.2d 485, 493 (7th Cir. 1989)). Courts, however, have continuously held that section 10(j) relief is an extraordinary remedy. Kinney v. Int'l Union of Operating Eng'rs, 994 F.2d 1271, 1277 (7th Cir. 1993) ("[I]t is an extraordinary tool because it injects the legal system into disputes before a full airing of the facts and a careful consideration of the law, and mistakes can be costly."); Arlook v. S. Lichtenberg & Co., 952 F.2d 367, 374 (11th Cir. 1992); Kobell v. Suburban Lines, Inc., 731 F.2d 1076, 1091 n.26 (3d Cir. 1984); Boire v. Pilot Freight Carriers, Inc., 515 F.2d 1185, 1192 (5th Cir. 1975); Clark v. Fieldcrest Cannon, Inc., No 4:94 CV 00308, 1994 WL 1027520, at *3 (M.D.N.C. Aug. 25, 1994).
129. Lineback v. Printpack Inc., 979 F. Supp. 831, 847 (S.D. Ind. 1997). Other traditional equitable factors are also analyzed with different interpretations. For example, the public interest factor has been met with a variety of approaches. In the district court case of Sharp v. Tri-State Mechanical, Inc., No. 95-C-0392, 1995 WL 661101 (W.D. Wis. Aug. 25, 1995), the court, using the Pioneer Press approach, concluded that the traditional equitable public interest factor is non-dispositive. The public, the court reasoned, has an equal interest in deterring illegitimate efforts to inhibit labor organizing and protecting employers from the imposition of sanctions based on unfounded charges of unfair labor practices. Id. at *4. Yet in Electro-Voice, the Seventh Circuit defined public interest as "harm to the public interest stemming from the injunction that is tolerable in light of the
With different approaches undertaken by courts, the potential for forum shopping by the NLRB is apparent. According to section 10(j), the Board may bring an action against a party in any district court where the unfair labor practice occurred or where the party resides or transacts business. There has been no evidence uncovered that would indicate that the NLRB is currently engaging in this type of practice. However, as the circuit courts continue to split further apart, especially as to the deference afforded to the Board or whether "reasonable cause" continues to be part of the analysis, the temptation to forum shop will increase.

Not only is forum shopping an unfortunate risk of the multitude of legal standards, but inconsistent evidentiary standards and pre-hearing procedures, notably discovery, will continue to plague the section 10(j) proceedings. It is fundamental to note that if discovery is permitted in future section 10(j) proceedings, it will be shaped and limited by the nature of the hearing and the respective burdens of proof that must be met by each party to the section 10(j) proceedings. If, for example, irreparable harm or success on the merits, as defined by traditional notions of equitable relief, must be shown, then the courts will allow the parties to engage in discovery to prove or to disprove those elements. If, on the other hand, the inquiry is simply the exceedingly deferential two-prong standard, courts may be tempted to limit discovery, believing the issues to be limited to reasonable cause to believe an unfair labor practice exists and the frustration of the bargaining process.

benefits achieved by the relief. In other words, when examining whether an injunction is in the public interest, a court must weigh the potential public benefits against the potential public costs." Electro-Voice, 83 F.3d at 1573-74 (citation omitted). Also, the Seventh Circuit held that there is a public interest in preventing the frustration of the remedial purposes of the Act. Id. at 1574. In California Pacific, the public interest factor considers whether an unfair labor practice will succeed because the Board takes too long to investigate and adjudicate the charge. California Pacific, 19 F.3d at 460. How this differs from a consideration of irreparable injury is uncertain. See Lineback, 979 F. Supp. at 847 (holding that the director need not show harm to third parties to meet public interest test).

130. See Fahrenkopf, supra note 49, at 1159 n.3.
131. Courts inconsistently have permitted discovery in section 10(j) proceedings. Compare NLRB v. Modern Drop Forge Co., No. 96 C 5573, 1997 WL 120572 (7th Cir. Mar. 14, 1997) (ordering NLRB Regional Director to give deposition testimony) and Dial Info. Serv. v. Thornburgh, 938 F.2d 1535 (2d Cir. 1991) (allowing respondent to take expedited discovery in preliminary injunction request) with Gottfried v. Frankel, 818 F.2d 485, 493 (6th Cir. 1987) (holding hearing transcripts, affidavits, and exhibits sufficient) and Johnston v. J.P. Stevens & Co., 341 F.2d 891, 892 (4th Cir. 1965) (affirming district court's decision to try case on affidavits alone).
V. A CALL FOR A SIMPLE APPROACH: (HISTORICAL FEAR OF LABOR INJUNCTIONS SHOULD NOT NECESSITATE DIFFERENT PRELIMINARY INJUNCTION STANDARDS)

As stated previously, courts even disagree about how to apply traditional equitable criteria to the "just and proper" analysis. As illustrated in California Pacific, Electro-Voice, and Sharp, courts have struggled to harmonize the traditional equitable criteria with the historical deference given to the Board found in the two-prong approach. This struggle, and the resulting complexity, is unnecessary because traditional equitable criteria, in and of themselves, provide the protection and the guidance necessary to adjudicate labor injunctions under section 10(j).

A. The Preliminary Injunction

Necessarily, the granting of preliminary injunctive relief requires an adjustment of the rights of the parties without a full adjudication of the facts. When dealing with non-section 10(j) or section 10(l) injunctions, federal courts have consistently and uniformly considered any and all relevant factors carefully before granting or denying such relief. No single factor is dispositive or dispensable. Moreover, the fact that all of the circuit courts have arrived at substantially the same traditional equitable test is no coincidence. As the Supreme Court has observed, "[w]e are dealing here with the requirements of equity practice with a background of several hundred years of history." The equitable practices established by the federal courts have been trained, tested and refined through iteration upon iteration. As the Supreme Court further declared, "[w]e do not believe that... a major departure from that long tradition... should be lightly implied.

With minor distinctions among circuits, the preliminary injunction standard for non-section 10(j) or section 10(l) injunctions can be

134. See EEOC v. Astra USA, Inc., 94 F.3d 738, 742 (1st Cir. 1996) (adopting traditional test over EEOC objections); Gold Coast Publ'ns, Inc. v. Corrigan, 42 F.3d 1336, 1343 (11th Cir. 1994) (adopting traditional test); Int'l Bhd. of Teamsters v. Local Union No. 810, 19 F.3d 786, 789 (2d Cir. 1994) (adopting "now familiar" test); Virginia Carolina Tools, Inc. v. Int'l Tool Supply, Inc., 984 F.2d 113, 119 (4th Cir. 1993) (adopting traditional test); United States v. Odessa Union Warehouse Co-op., 833 F.2d 172, 177 (9th Cir. 1987) (holding that district courts must follow "well-established principles"); Roland Mach. Co. v. Dresser Indus., 749 F.2d 380, 388 (7th Cir. 1984) (adopting preliminary injunction standard based on long line of cases); Eli Lilly & Co. v. Premo Pharm. Labs. Inc., 630 F.2d 120, 137 (3d Cir. 1980) (adopting traditional test); Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 113 (8th Cir. 1977) (explaining that in the traditional test no one factor is determinative).


136. Id. at 330.
summarized as follows: to be entitled to a preliminary injunction, a litigant must first demonstrate that there is no adequate remedy at law and that he or she will suffer irreparable harm that cannot be prevented or fully rectified after trial if relief is not immediately granted. Courts must also consider any irreparable harm that the defendant might suffer from the injunction—harm that would not be cured by either the defendant ultimately prevailing in the trial or by an injunction bond. The second threshold a plaintiff must cross is showing some type of likelihood of succeeding on the merits. Although this threshold is low, it is important to determine how likely the success is because this determination ultimately balances the relative harms. The more likely the plaintiff is to win the underlying litigation, the less heavily the balance of harms must weigh in his or her favor; the less likely a victory, the greater the need for the balance of harms to weigh in plaintiff's favor. This is known as the "sliding scale" approach. Implicit in this approach is the incentive for the ruling judge to minimize errors. As explained by Judge Posner writing for a panel of the Seventh Circuit:

The judge must try to avoid the error that is more costly in the circumstances. That cost is a function of the gravity of the error if it occurs and the probability that it will occur. The error of denying an injunction to someone whose legal rights have in fact been infringed is thus more costly the greater the magnitude of the harm that the plaintiff will incur from the denial and the greater the probability that his legal rights really have been infringed. And similarly the error of granting an injunction to someone whose legal rights will turn out not to have been infringed is more costly the greater the magnitude of the harm to the defendant from the injunction and the smaller the likelihood that the plaintiff's rights really have been infringed.

The court further noted that while judges have historically needed to use their "discretionary" powers to rule on requested injunctive relief, in fact, the analytical procedure is a true legal standard—the factors to be considered are few and definite. They are to be compared in a particular sequence and in accordance with a specific formula which requires first deciding whether the petitioning party has crossed specific thresholds and then weighing the likely harms from the grant or denial of the injunction based on the strength of the petitioning party's case.

When a preliminary injunction has consequences beyond the immediate parties, the public interest must also be added to the weighing

139. Id.
140. Id. at 388-89.
process. Thus, a court may have to weigh the harm an injunction will cause the public against the benefits achieved by the relief.\textsuperscript{141}

Like all preliminary relief, section 10(j) relief is exercised without the advantage of a full adjudication of the facts, involves large scale, high-cost repercussions, and implicates the concerns of persons not directly associated with the litigation.\textsuperscript{142} The section 10(j) injunction is an "extraordinary tool because it injects the legal system into disputes before a full airing of the facts and a careful consideration of the law, and mistakes can be costly."\textsuperscript{143} Thus, consideration of all the traditional protections and factors—including likelihood of success on the merits and balance of harms—is no less important in section 10(j) cases than in any other context. As the First Circuit explains, in section 10(j) cases, "where the preliminary relief is essentially the final relief sought, the likelihood of success should be strong."\textsuperscript{144} To ensure that parties' rights are not trampled on, to ensure that an extraordinary remedy be adjudicated fairly, impartially, and consistently, the answer is straightforward: courts should analyze section 10(j) cases under the traditional standard of equitable relief. This approach offers consistency, clarity, and fairness. In short, the section 10(j) injunction, in most respects, should be analyzed and adjudicated no differently than any other request for preliminary injunctive relief.

\textbf{B. The Elimination of "Reasonable Cause"}

As recent circuit court decisions have concluded, the "reasonable cause" prong is not an appropriate test to be used in section 10(j) injunctions.\textsuperscript{145} Surely, if Congress wanted "reasonable cause" to be used in any aspect of the section 10(j) proceeding, the language would have been included in the section. The fact that Congress only used the language in

\begin{footnotes}
\footnote{141. Kinney v. Pioneer Press, 881 F.2d 485, 490 n.3 (7th Cir. 1989) (citing West Allis Mem'l Hosp., Inc. v. Bowen, 852 F.2d 251, 253 (7th Cir. 1998)).}
\footnote{142. Section 10(j) relief implicates the interest of individuals not associated with the proceedings, including workers who lose jobs to reinstatement orders and subcontractors. See Maram v. Universidad Interamericana de Puerto Rico, Inc., 722 F.2d 953 (1st Cir. 1983) (holding subcontractor loses janitorial contract with company when injunction restores discharged janitorial employees).}
\footnote{143. Kinney v. Int'l Union of Operating Eng'rs, 994 F.2d 1271, 1277 (7th Cir. 1993); see also Calatrello v. "Automatic" Sprinkler Corp. of Am., 55 F.3d 208, 215 (6th Cir. 1995) (seeking injunction would require company to spend more than six million dollars to restore operations); Miller v. LCF, Inc., No. 94-3372, 1994 WL 669837, at *1-*2 (N.D. Cal. Nov. 29, 1994) (seeking to enjoin company from closing facility before a union representation election, even though that operation had lost millions of dollars).}
\footnote{144. Asseo v. Pan Am. Grain Co., 805 F.2d 23, 29 (1st Cir. 1986).}
\footnote{145. Miller v. California Pac. Med. Ctr., 19 F.3d 449, 457 (9th Cir. 1994); Kinney v. Pioneer Press, 881 F.2d 485, 490 (7th Cir. 1989).}
\end{footnotes}
section 10(l) is telling and determinative. As pointed out in D'Amico v. United States Service Industries, Inc.: For Congress to have required that "reasonable cause" be shown would make no sense under Section 10(j) because the "reasonable cause" determination required by Section 10(l) focuses on the preliminary investigation before the issuance of a formal complaint, a point that already has passed under Section 10(j), rather than the likely success of prevailing on the merits of the already-filed complaint.

In sum, "reasonable cause" may be the inquiry the Board (or its Regional Attorney) must conduct in determining whether to file a complaint, but the courts, in determining what is "just and proper," should employ the familiar standards customarily used in suits seeking injunctions.

The result of the misunderstood merging of section 10(j) and section 10(l) standards is confusion and unnecessary deference for the Board's prosecution of the section 10(j) case. It is readily apparent why the Board advocates the use of the "reasonable cause" prong in both section 10(j) and section 10(l) actions. The extreme deference created by the interpretation of the term creates a virtual rubber stamp for the Board. And as case after case illustrates, this deference seeps into a court's analysis.

146. As the Supreme Court has observed, where a question of federal law turns on a statute and the intention of Congress, a court must first look to the statutory language and then to the legislative history, if the language is unclear. Blum v. Stenson, 465 U.S. 886, 896 (1984).
148. Id. at 1083 (citing California Pacific, 19 F.3d at 457).
149. Id. at 1085 (citing Pioneer Press, 881 F.2d at 490).
150. The Pioneer Press court also notes the complex body of law concerning standards of appellate review that reasonable cause has spawned. Pioneer Press, 881 F.2d at 491.
151. Whether reasonable cause should be a factor courts use to determine the propriety of injunctive relief under section 10(l) is also in dispute. The likelihood of success criteria tends to eliminate the need for reasonable cause in both section 10(j) and section 10(l) cases. See Kinney v. Int'l Union of Operating Engrs, Local 150, 994 F.2d 1271, 1278 (7th Cir. 1993). Some commentators posit that reasonable cause should be solely confined to the Board's decision about whether or not to bring a petition for injunctive relief under section 10(l). A careful reading of section 10(l) certainly seems to support the proposition that the term reasonable cause is used in relation to the NLRB's actions and is separate and distinct from the limited guidance provided to the courts. See California Pacific, 19 F.3d at 456. But see Maram v. Universidad Interamericana de Puerto Rico, Inc., 722 F.2d 953, 958 (1st Cir. 1983) (noting that because of the special importance Congress attaches to section 10(l) offenses, there is a strong presumption of irreparable harm, with the balance in favor of the charging party and public interest favoring an injunction and therefore the judicial inquiry should be whether there is reasonable cause to believe an offense had been committed).
152. See Boire v. Pilot Freight Carriers, Inc., 515 F.2d 1185, 1189 (5th Cir. 1975).
and interpretation of whether injunctive relief is just and proper.\textsuperscript{153} Although the issuance of a complaint is the prerequisite for a section 10(j) relief, the rationale behind the decision to issue the complaint does not seem to be intended by Congress to be controlling regarding the appropriateness of such relief. As the \textit{California Pacific} court explained, "the level of belief required to proceed to court cannot equate with the level of proof required to succeed in court."\textsuperscript{154}

\section*{C. "Just and Proper" Means Traditional Equity}

The standard for determining the propriety of injunctive relief under section 10(j) is simply through an interpretation of the term "just and proper". The "just and proper" standard serves as the guidepost for courts when faced with an injunction request by the Board. What "just and proper" actually means has been disputed. Yet when considering the language of the provision, and its lack of congressional guidance, it is clear, as a number of courts have now concluded, that the term "just and proper" simply refers to traditional equitable criteria.

Significantly, there is an absence of legislative history concerning the meaning of "just and proper." In fact, as stated previously, there is minimal history dealing with section 10(j) or section 10(l) in general. The debates that did center on these sections primarily focused on section 10(l). In addition, the House version of the Act did not even contain a section 10(j).\textsuperscript{155}

\begin{itemize}
\item \textsuperscript{153} A good illustration of this point can be found in the case of \textit{Dunbar v. Landis Plastics, Inc.}, 977 F. Supp. 169 (N.D.N.Y. 1997). The court, in denying the employer's discovery requests and an evidentiary hearing for the purpose of considering the just and proper issue, stated:

\begin{quote}
Because of the extreme deference to which the NLRB is entitled on the "reasonable cause" prong of the Section 10(j) test, I need not conduct a formal evidentiary hearing. The injunction proceedings in federal court must not evolve into a hearing on the merits of the unfair labor practice charges because the district court must not usurp the NLRB's role. Moreover, even though the "just and proper" prong lies more fully within the court's discretion, it is not an avenue by which I can decide the merits of the underlying unfair labor practice charges.
\end{quote}

\textit{Id.} at 176 (citations omitted).

\item In \textit{Pioneer Press}, the court noted that the district court devoted the bulk of its attention to reasonable cause and only one page to the question of whether the injunction was appropriate. 881 F.2d at 493. \textit{See also} \textit{Silverman v. J.R.L. Food Corp.}, 196 F.3d 334 (2d Cir. 1999) (ignoring the just and proper analysis and solely focusing on reasonable cause).

\item \textsuperscript{154} 19 F.3d at 457.

\item Section 12 of the House of Representative's version of the Act provided the federal courts with independent jurisdiction over cases involving concerted violations and would
It is reasonable, therefore, to assume that Congress knew of the approach used by courts when faced with labor injunctions in the past—the abuses that were seemingly addressed by Norris-LaGuardia. Congress was also aware of the traditional equitable criteria courts had used in deciding both labor and other preliminary injunctions. Yet there was no call to change the courts' perspective on labor injunctions, only the generic phrase "just and proper". To argue that courts should view labor injunctions under section 10(j) or section 10(l) as anything other than preliminary injunctions is simply not supported by the legislative history. It is likely that the term "just and proper" was lifted from sections 10(e) and (f) of the Wagner Act, passed twelve years before. In both sections, dealing with enforcement of Board orders, appellate courts have the power to grant temporary relief as they deem just and proper.

1. The Supreme Court Review

The Supreme Court has provided guidance when faced with statutory ambiguity regarding preliminary relief with the cases of Hecht v. Bowles and Weinberger v. Romero-Barcelo. In Hecht, a case decided during World War II, the Court was asked to have permitted private parties to commence actions for injunctive relief. Note, Temporary Injunctions Under Section 10(j) of the Taft-Hartley Act, 44 N.Y.U. L. Rev. 181, 190-191 (1969) (citing H.R. 3020, 80th Cong., § 12(b) (1st Sess., 1947)).

156. The Norris-LaGuardia Act was passed in 1932, just fifteen years before the Taft-Hartley Act.

157. The United States Code states:

The Board shall have power to petition any court of appeals of the United States . . . for the enforcement of such order and for appropriate temporary relief or restraining order . . . . Upon the filing of such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper.

29 U.S.C. § 160(e); see also 29 U.S.C. § 160(f) (detailing the review of final order of the Board on petition to the court).

158. It is interesting to note that cases interpreting the just and proper standard under sections 10(e) and (f) have used the two-prong analysis of section 10(j) to determine the propriety of injunctive relief. See NLRB v. United States Serv. Indus., Inc., 152 L.R.R.M. (BNA) 3038 (D.C. Cir. 1996); NLRB v. Heck's Inc., 390 F.2d 655 (4th Cir. 1968) (determining that the Board has not met the standard of the two-prong analysis to obtain temporary relief under section 10(e)); NLRB v. Aerovox, 389 F.2d 475 (4th Cir. 1967) (affirming the use of the two-prong analysis for cases under 10(e) and holding that the government is not required to show irreparable injury when it seeks an injunction to give effect to an act of Congress).


interpret the phrase "shall be granted" as used in the temporary and permanent injunction provision found in section 205(e) of the Emergency Price Control Act of 1942. The Act stated that an injunction "shall be granted" upon application by a government administration. In determining that "shall be granted" does not mandate an injunction merely because the Price Administrator of the Office of Price Administration requested it, the Court held:

We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made.

... We are dealing here with the requirements of equity practice with a background of several hundred years of history... The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and the private needs as well as between competing private claims. We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied... It is therefore even more compelling to conclude that, if Congress desired to make such an abrupt departure from traditional equity practice as is suggested, it would have made its desire plain.161

Thirty-eight years later, the Court in Weinberger revisited the problem of statutory ambiguity in the injunctive relief context in an action brought under the Federal Water Pollution Control Act. In 1978, the Governor of Puerto Rico, among others, sued to enjoin Navy military training operations on a small island off the Puerto Rican coast. The district court found that the Navy violated the Federal Water Pollution Control Act by discharging ordnance into the waters surrounding the island without first obtaining a permit from the EPA.162 However, the district court refused to enjoin the action.163 The court of appeals reversed the district court, holding that the district court erred in undertaking a traditional balancing test, concluding that the statutory section provides for an absolute obligation to stop pollutants until the permit procedure was followed.164 Citing Hecht, the Supreme Court asserted that in the absence of strong

162. Weinberger, 456 U.S. at 307-08.
163. Id. at 310 (finding that granting the injunctive relief would actually cause harm to the nation because of the importance of the island as a trading center).
164. Id. at 311.
congressional intent courts should follow traditional criteria when considering preliminary injunctions:

These commonplace considerations applicable to cases in which injunctions are sought in the federal courts reflect "a practice with a background of several hundred years of history,"... a practice of which Congress is assuredly well aware. Of course, Congress may intervene and guide or control the exercise of the courts' discretion, but we do not lightly assume that Congress has intended to depart from established principles.\(^{165}\)

Thus, the Court held that Congress did not intend to deny courts the discretion to rely on remedies other than an immediate prohibitory injunction.\(^{166}\) In its decision the Court cited the case of \textit{Porter v. Warner Holding Co.},\(^{167}\) which held:

Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.\(^{168}\)

Significantly, the \textit{Porter} case was decided only one year before the Taft-Hartley Act. Because there was certainly no conclusive legislative command from Congress rejecting a traditional approach to the grant of equitable relief under section 10(j), the Supreme Court mandates that courts interpreting the "just and proper" language of section 10(j) and section 10(l) not depart from established equitable principles.

2. Other Labor Injunctions

Petitions under section 10(j) and/or section 10(l) are not the only instances in which courts are faced with an interlocutory order dealing with labor-related issues. And while the term "just and proper" plays no part in the analyses in those other cases, it is telling that other courts in labor-related injunctions apply traditional equitable criteria. For example, in 1970, the Supreme Court in \textit{Boys Market, Inc. v. Retail Clerks Union Local 770},\(^{169}\) held that the Norris-LaGuardia Act did not prohibit a court from enjoining a strike in breach of a no-strike obligation where the agreement

\(^{165}\) \textit{Id.} at 313.

\(^{166}\) \textit{Id.} at 320; \textit{see also} Mitchell v. Robert De Mario Jewelry, 361 U.S. 288 (1960).

\(^{167}\) 328 U.S. 395 (1946).

\(^{168}\) \textit{Id.} at 398 (citation omitted).

contained dispute resolution procedures dealing with the issues that precipitated the strike. In positing that courts should be able to consider the propriety of an injunction when it is necessary to preserve the integrity of the arbitral process, the court held that district courts must consider whether the issuance of an injunction would be warranted under ordinary principles of equity, including a balance of harms analysis and whether irreparable injury will be caused to the employer.171

Under a Boys Market analysis, courts continue to use traditional equitable principles to determine whether injunctive relief is appropriate in disputes under the Norris-LaGuardia Act. For example, in American Postal Workers Union v. United States Postal Service,172 the Second Circuit held that, in order to obtain a preliminary injunction under a Boys Market analysis, a party must show: (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.173

In addition, district courts use traditional equitable criteria when adjudicating preliminary injunctions brought under the Railway Labor Act ("RLA").174 Whereas the Wagner Act stresses administrative adjudication, while the RLA primarily relies on mediation, both acts deal with similar issues and concerns.175 Whether a major or minor dispute under the RLA, courts issuing injunctions rely on traditional equitable criteria to reach a decision.176

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170. Id. at 252.
171. Id. at 253.
172. 766 F.2d 715 (2d Cir. 1985).
173. Id. at 720.
174. See Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am., Local 787 v. Textron, 919 F. Supp. 783, 789 (M.D. Pa. 1996) (in determining whether an injunction should issue, the court "must carefully weigh four factors: (1) whether the movant has demonstrated a reasonable probability of success on the merits; (2) whether the movant will suffer irreparable injury if the injunction does not issue; (3) whether granting the injunction will result in even greater harm to the nonmoving party; and (4) whether granting the injunction serves the public interest").
175. But see Air Line Pilots Assoc. v. United Air Lines Inc., 802 F.2d 886, 897-98 (7th Cir. 1986) (cautioning that simply because a practice is deemed unlawful under the NLRA does not automatically translate into a finding that the same practice is unlawful under the RLA).
176. See Nat'l Ry. Labor Conference v. Int'l Assoc. of Machinists, 830 F.2d 741 (7th Cir. 1987) (holding that the district court was under an obligation to apply the traditional standards necessary for determining whether or not to issue a preliminary injunction, as well as to heed the particular concerns presented by the requirements of the RLA); Atchison, Topeka, & Santa Fe Ry. Co., v. United Transp. Union, 734 F.2d 317 (7th Cir. 1984) (applying traditional equitable standards in light of the specific requirements of the RLA); S. Pac. Co. v. Bhd. of Locomotive Firemen & Enginemen, 393 F.2d 345 (D.C. Cir. 1967)
Texas Railway Co.,\textsuperscript{177} the Supreme Court held that the district court is free to exercise the typical powers of a court of equity and stated that "[s]ince the power to condition relief is essential to ensure that extraordinary equitable remedies will not become the engines of injustice, it would require the clearest legislative direction to justify the truncation of that power."\textsuperscript{178}

While there are differences between the RLA and the NLRA, it is difficult to discern why actions brought under the RLA for injunctive relief should be treated differently than actions brought under section 10(j), or, for that matter, actions brought under a Boys Market analysis.

Interestingly, under section 7123(d) of the Federal Service Labor-Management Relations Act, courts also have jurisdiction to grant temporary relief if it is found to be just and proper.\textsuperscript{179} That Act, however, distinguishes itself from section 10(j) by further stating that "a court shall not grant temporary relief under this Section if it would interfere with the ability of the agency to carry out its essential functions or if the authority fails to establish probable cause that an unfair labor practice is being committed."\textsuperscript{180} According to Reuben ex rel. Federal Labor Relations Authority v. FDIC\textsuperscript{181}, the District Court for the District of Columbia attempted to define "just and proper" under section 7123(d).\textsuperscript{182} A court retains discretion to exercise traditional equitable judgment under a "just and proper" analysis. "That conclusion flows from the express language of the statute in providing that the Court has jurisdiction to grant any temporary relief it considers just and proper. This sequence of words ('any,' 'it considers,' 'just and proper') is consistent with notions of discretion and equity."\textsuperscript{183}

\footnotesize{(holding that it is the general power of an equity court to impose conditions on those who seek equitable relief where an injunction is sought to enforce the provisions of the RLA).}  
\textsuperscript{177} 363 U.S. 528 (1960).  
\textsuperscript{178} Id. at 532.  
\textsuperscript{179} 5 U.S.C. § 7123(d) (1978). Other statutes have used "just and proper" language to provide guidance for courts in determining whether to issue injunctive relief. See Fair Housing Act, 42 U.S.C. § 3612(k) (1988); Foreign Service Act, 22 U.S.C. § 4109 (1998). Unfortunately, there have been no cases uncovered interpreting the "just and proper" language under those statutes.  
\textsuperscript{180} 5 U.S.C. § 7123(d).  
\textsuperscript{182} Id. at 938-40. The court found it extremely difficult to interpret the term probable cause. The court even attempted to analogize to the section 10(j) reasonable cause requirement, but found there to be no unanimity on that requirement. See also United States v. PATCO, Inc., 524 F. Supp. 160, 163 n.3 (D.D.C. 1981) ("Section 7123 of Title 5 incorporates standards similar to those which are traditional to courts of equity").  
\textsuperscript{183} Reuben, 760 F. Supp. at 941-42.
D. A New Approach

 Courts generally agree that an injunction is an extraordinary measure and should only be granted in those instances in which the normal functions of the judicial or administrative system in question cannot protect a litigant from irreparable harm.\textsuperscript{184} Clearly, for a court to consider imposing a remedy without a full adjudication of the facts, the situation must be one in which no other alternative exists. Judges must issue preliminary remedies with the greatest concern for the rights of the parties and the potentially devastating effect the temporary relief may have on a party. In labor disputes, the decision whether to issue an injunction under section 10(j) or section 10(l), in many instances, has high cost consequences. Review of this issue has become especially important in light of the Board's recent aggressive use of the section 10(j) injunction.\textsuperscript{185} Yet the two-prong approach, still favored by many circuits for its excessive deference to the Board, seems to disregard the ramifications of the injunction, while rubber-stamping the Board's interpretation of the facts.

 Even among the circuits employing the traditional approach, the Board is successful a vast majority of the time. From 1994 to 1998, the Board obtained a successful resolution in 88% of section 10(j) petition cases.\textsuperscript{186} With an increased use of the injunction, it is more likely that there will be cases that have little merit entering the judiciary for temporary relief. In light of its increased use and powerful impact, the two-prong approach does not adequately protect those defending against a section 10(j) petition.

 The traditional equitable approach not only will balance the harms, but it will balance the results. The consequence of analyzing the "just and proper" test under a traditional equitable approach as opposed to other "just and proper" standards—most significantly the "frustration of the remedial purposes of the act" standard—is significant.\textsuperscript{187} The traditional equitable


\textsuperscript{185} In 1997, a total of fifty-two injunctions were sought by the Board, thirty-five of which were brought under section 10(j). 62 NLRB ANN. REP. 160 (1997). During the 14 month period from July 1, 1998 through August 31, 1999, the Board authorized a total of fifty-seven section 10(j) injunctions. NLRB GEN. Couns. REP. (released Nov. 2, 1999), available at http://www.nlrb.gov/press/r2347.html (last visited Oct. 27, 2000). This is in stark contrast to the average of eleven section 10(j) injunctions authorized for the first thirty years after passage of Taft-Hartley (1948-1977). See Burns, supra note 64, at 1027.


\textsuperscript{187} In D'Amico v. Townsend Culinary Inc., 22 F. Supp. 2d 480 (D. Md. 1998), the court held that the key distinction between the just and proper analysis and the equitable approach is the irreparable injury component. The traditional reading of just and proper does not require a showing of irreparable injury, only that injunctive relief would restore the pre-
approach allows the court to balance the equities. The key component of the general preliminary injunction standard is the ability of the judge to balance the harms, weigh the effects of the possible injunctive relief and consider the consequences, and, in short, balance the equities. The foundation for the balancing of the equities approach is the sliding scale which entails consideration of the likelihood of a successful suit.

With respect to eliminating the "reasonable cause" standard and implementing a likelihood of success on the merits component, one key distinction is that under the two-prong approach, "reasonable cause" was a black and white resolution, with the resolution nearly always favoring the petitioning Board. Once the standard was established, the legalities of the case became irrelevant in deciding whether an injunction was just and proper. Thus, regardless of whether the Board petitioned the court with an extremely egregious and obvious case of unfair labor practices or with a somewhat tenuous case, once reasonable cause was established, the strength or weakness of the case became irrelevant.

The equitable approach permits judges not only to consider the potential harm the petitioner will suffer due to the lengthy Board proceedings, but it will permit judges to weigh this harm against the potential harm a respondent will suffer from preliminary relief as well. Further, it will truly enable and compel a judge to consider the relative merit of the underlying case. And while deference to the Board may still be contemplated, such deference will no longer rise to the level of a rubber-stamp.

Proponents of keeping the "reasonable cause" standard, notably the Board, fear that the elimination of the prong may dissipate the deference afforded to the Board. Why a likelihood of success standard would

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188. See supra notes 80-82.
189. A balance of harms analysis may not prove to be so detrimental to the Board. For example, in conducting the balance of harms analysis, the court in Overstreet v. Thomas Davis Medical Centers., P.C., 9 F. Supp. 2d 1162 (D. Ariz. 1997) stated:

The court finds that in weighing the balance of hardships the union will lose more should an injunction not be granted than the Respondent will lose if an injunction be granted .... The imposition of a bargaining order is not unduly burdensome on Respondent because it is not permanent, and any agreement between the parties can contain a condition subsequent to take into account the possibility of the Board or the court of appeals rejecting the Regional Director's decision. Additionally, the bargaining order requires only that Respondent meet with the Union and bargain in good faith, it does not compel Respondent to agree to any particular terms or conditions of employment.

Id. at 1167.
190. See Miller v. California Pacific Medical Center, 19 F.3d 448, 458 (9th Cir. 1994), in which the Board argues, in part, that the district court's lack of jurisdiction over unfair
change the deference afforded to the Board is unclear. In both instances, a
court can defer to the Board's interpretation of the law. As the California
Pacific court states, "[w]hile the district court is not required to defer to the
Board in deciding whether interim relief is 'just and proper,' it should
evaluate the probabilities of the complaining party prevailing in light of the
fact that ultimately, the Board's determination on the merits will be given
considerable deference." More than likely, the concern is that judges,
using the likelihood of success factor, will delve deeper into the legal issues
and possibly question the need for Board deference.

It is important to note that the regional director at the section 10(j)
stage is not a neutral body—it is a prosecutorial one with a particular axe to
grind. There is often "a great disconnect between prosecutorial perception
and factual and legal reality." The adjudicative process consists of
numerous stages, "including hearing and recommendation by an
administrative law judge (ALJ), review and decision by the NLRB, and
judicial review by the courts of appeals." The unfair labor practice
complaint is the first step in this process. "At any of these stages of the
process, the General Counsel's view of the facts and the law may be, and
often is, rejected." It is not uncommon for the ALJ to rule against the
General Counsel because of a different view of the facts, the law, or both.
Similarly, it is not uncommon for the Board to overturn an ALJ decision
that found in favor of the General Counsel. While it can be argued that
some type of deference should be afforded to the Board when bringing an
injunction, it is clear that courts should consider the Board's position with
the proverbial grain of salt. The reasoning behind granting deference—

labor practice complaints and the limited and deferential review of Board decisions by the
court of appeals is evidence of Congress' intent to give the Board a high level of deference
in section 10(j) proceedings. The Ninth Circuit rejected the Board's rationale, focusing on
the fact that the NLRA provisions that require deference to the Board spell it out clearly.
See also 29 U.S.C. § 160(e) (mandating that on petition for enforcement of its order, the
Board's factual findings shall be deemed "conclusive" if supported by substantial evidence
on the record considered as a whole). Under section 10(j), there is no requirement for
deference, only that an injunction, if ordered, be "just and proper." Id.

191. California Pacific, 19 F.3d at 460.

192. Brief of Amici Curiae of LPA and The American Trucking Association, Inc. in
support of Petitioner at 13, Kobell v. Beverly Health & Rehab. Serv., Inc., 142 F.3d 428 (3d

193. Id. at 12.

194. Id.

195. Id. For example, in 1997 only 70% of cases in which the Board petitioned for
enforcement and/or review of a Board order were affirmed in full by appellate courts. From
1992 to 1996, the Board's success rate was 69%. 62 NLRB ANN. REP. 159, Table 19 A
(1997).


197. For example, during the period from March 3, 1994 through March 2, 1998,
regional offices submitted 708 cases with a recommendation for section 10(j) relief. The
the Board's expertise on NLRA matters—also fails to ring true. Courts are routinely able to handle complex matters in a preliminary injunction context, and it is simply unfair to defer to the Board's view of the merits.

The use of a traditional approach also will provide courts and litigants the necessary consistency and guidance that is so severely lacking at the present time. The traditional approach to preliminary injunctions will promote uniformity among circuits, not only with respect to the standards used by courts in determining the propriety of injunctive relief, but with respect to evidentiary standards, discovery, and all other aspects of the historically litigated preliminary injunction. This consistency and guidance is dependent on courts not analyzing the traditional equitable factors through a "prism" or a deferential cloud. Instead, courts should simply apply the equitable factors with the same unadorned clarity as the court would do with any other interlocutory decision.

Certainly, when considering irreparable harm and adequate remedy of law, the court must take into account the length of the Board processes, the ability of the Board to remedy the situation at a later time, and the effectiveness of such a remedy. And while these questions go to the heart of irreparable injury and adequate remedy of law, they should not be the sine qua non of the injunction analysis. The court must also consider the effect an injunction has on the respondent and whether the Board is likely to win the underlying suit.

Furthermore, the statutory language of section 10(j) can be read in no

general counsel sought authorization for 313 (44%) of those cases. Subsequently, the Board authorized 292 proceedings (93%) of those cases. Thus, 41% of cases in which regional offices originally sought section 10(j) relief were ultimately authorized by the Board. NLRB GEN. COUNS. REP., supra note 186.

198. In former General Counsel Frederick Feinstein's four year report, Feinstein downplayed the circuit court conflict dealing with section 10(j) standards. Feinstein stated that equitable considerations such as irreparable harm to the Board's remedial powers, the harm an injunction may pose on the respondent, and considerations of public interest have always played a part in the just and proper analysis. In addition, Feinstein stated that "the district court's limited inquiry into the merits of the unfair labor practice case and its deference to the Board's expertise, represented by the historic 'reasonable cause' test, are also acknowledged in the 'traditional equity' circuits." Id. Feinstein cited California Pacific, holding that regional directors need only produce "some evidence to support the unfair labor practice charge together with an arguable legal theory," and Electro-Voice, finding that "the district court has no jurisdiction to pass on the merits of the unfair labor practice; the Director satisfies the threshold 'likelihood of success' element by showing that his or her chance of success is 'better than negligible.'" Id.

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other way than to treat the injunction as courts have treated other injunctions. There is no language about different standards in the Act or in its legislative history. This interpretation is also consistent with Supreme Court precedent that, absent statutory language, statutory injunctions should be considered based on the traditional notions of equity. Perhaps even more importantly, using a traditional method will promote fairness to the litigants and prove a consistent guide for practitioners and the courts when faced with the prospect of a section 10(j) injunction.

VI. CONCLUSION

Without the historical fear that has surrounded it, the labor injunction would likely be treated as any other preliminary injunction. It is now time for the fear that permeated the judiciary for decades to dissipate. Protection against judicial abuse is statutorily mandated. Courts generally do not have jurisdiction to take labor matters out of the hands of the administrative agencies, and the days of courts placing their own particular imprimatur on labor issues and policies are long gone. When a case is brought before the judiciary, it is imperative that the courts use the tools and expertise that they have developed over the years with respect to injunctions. There is no reason for injunctions under section 10(j) to be treated any differently than any other injunction. The temporary injunction remedy impacts employers and unions in the same way it impacts private parties. Thus, all the safeguards and procedures used in "regular" injunctions certainly have a needed place in the labor injunction.

200. See supra text accompanying notes 158-167.

201. For example, in Samoff v. Teamsters Local 115, 338 F. Supp. 856 (E.D. Pa. 1972), the court determined that there was reasonable cause to find that a union engaged in prohibited organizational picketing. However, it urged the appellate court to allow an unclean hands determination to be used when analyzing just and proper due to the employer also engaging in unfair labor practices:

Having stated the law, we feel constrained to observe that there must be some cases where the conduct of the employer is so damnable that, notwithstanding the public character of the lawsuit, the Court, out of conscience, ought to be permitted to apply the "unclean hands" doctrine, and deny injunctive relief that benefits a wrongdoer. In making this observation, we are not unmindful of the historic Congressional fear of federal courts becoming too deeply involved in labor disputes without the aid of initial adjudication by an expert agency, and the reticence of Congress to confer injunctive power upon federal judges in labor disputes.

Id. at 867.