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NEW PROBLEMS IN THE ADMINISTRATION OF THE LABOR-MANAGEMENT RELATIONS ACT: THE TAFT-HARTLEY INJUNCTION

by
Frank W. McCulloch*

I. THE CASELOAD PROBLEM
A. Rising Caseload And Delay

THE increasingly serious and all-embracing problem faced by the National Labor Relations Board arises from an unexpected and almost unexplainable upsurge in the number of cases. For the first ten years of the Taft-Hartley Act, this number remained fairly constant with the Board receiving in the neighborhood of 13,000 unfair labor practice charges and representation petitions in each of these years. Then something happened. In 1958, the number of cases jumped to 16,000; in 1959 and 1960, to 21,000, and in 1961, to over 22,000. They are running now at the rate of over 23,000, an increase of 10,000 cases a year in five years.

An unfortunate but unavoidable consequence was delay; the five members of the Labor Board were simply unable to handle the increased number of disputes. The answer to this "delay" problem given by every independent group which has studied the problem is the delegation of Board authority, subject to a discretionary type of review. This solution has been endorsed by every present member, and every recent past Chairman, of the National Labor Relations Board.

B. R-Case Delay Reduced By Delegation

The Landrum-Griffin amendments permit the board to delegate greater authority in representation cases to the Regional Directors. This delegation was made effective on May 15, 1961. As of the middle of October 1961, the Board had processed 350 election cases, received 101 requests for Board review, and granted thirteen such requests. The consequences of the delegation were as expected. The average number of days from date of petition to direction of election dropped from ninety to forty-four days, more than a fifty per cent time saving.

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Thus other touchy problems of unit determinations (what to do about technicals, driver-salesmen, seasonal supervisors, craft severance, employer administrative arrangements, etc.), jurisdiction (e.g., foreign flag ships), contract bar, permissible limits of representation election campaign propaganda, eligibility, schism and the like, still abound. However, the delay factor in our representation casework has been greatly reduced by delegation.

The President’s Reorganization Plan Number 5 would have permitted the delegation of similar authority in unfair labor practice cases to our Trial Examiners, but Congress rejected this plan. As of the last count, it took approximately 400 days to process an unfair labor practice case. The majority of these cases charge employer discrimination against employees for their union activities. In fiscal 1961, for example, seventy-eight per cent of the charges against employers involved allegations of illegal discharge. No matter how just the grievance may be, it still takes approximately 400 days to process the case. The panel of labor experts appointed by the then Senator Kennedy and headed by the present Solicitor General Archibald Cox commented that “these shocking delays seriously affect the usefulness of the National Labor Relations Act.”

C. Board Procedures Being Reviewed

The Board is well aware of this delay problem, and a task force headed by Board Member Gerald Brown is now exploring the possibility of revising our Rules of Procedure throughout the pleading, the hearing, the appeal, and the post-decisional stages, with the emphasis upon sharpening the issues and shortening the records and stages of delay. This task force has already made some valuable suggestions concerning internal management problems, which should be beneficial.

Insofar as delay is caused by an increasingly large caseload, there are several tools known to Congress by which this “input” of cases may be discouraged. For example, in the related field governed by the Railway Labor Act, Congress made it a crime punishable by fine and imprisonment for an employer in the industries covered by this Act to interfere in the employees’ right of self-organization. To cite a second device designated to prevent violations of the law in allied areas of conduct, the Walsh-Healey Act permits (but does not require) the “‘blacklisting’ of government contractors who violate the minimum wage, maximum hour, and bookkeeping provisions of that Act.
II. The Injunction Problem

A. Greater Use Of Taft-Hartley Injunctions

Congress has given the Board neither of the tools provided in the Railway Labor Act or the Walsh-Healey Act to discourage repeated violations of the Labor-Management Relations Act, and hence a large caseload exists; but Congress has not left the Board impotent to prevent irreparable injury during the long period it takes during the administrative process. Congress has provided in sub-sections 10(e), (f), (j), and (l) of the Act that the Board either may or shall seek temporary injunctive relief in the courts.

The use of the labor injunction is thus a "new" problem for the Board—new because our delay problem makes us re-examine its potential; new also because of an increased public awareness and interest in its proper utilization.

The Cox Panel, mentioned above, spent considerable time on the problems of the Taft-Hartley injunctions. Late in the spring of 1961 a Congressional Subcommittee under the chairmanship of Congressman Roman Pucinski conducted an extended series of hearings on the NLRB Administration of the Labor-Management Relations Act. Witness after witness singled out the use of the injunction as a key topic for his testimony.

This public concern necessitates a re-examination of the problems involved; but before turning to the problems of the Taft-Hartley injunctions, I would like to sketch the problems of the labor injunction in general terms. A return to first principles is sometimes helpful when re-examining an old problem in new guise.

As noted by Frankfurter and Greene on the opening page of their classic treatise, The Labor Injunction, "How labor injunctions came to be and how they operate in practice, the uses which they serve and the abuses to which they have given rise, must be known if we are to determine whether the labor injunction in action represents a desirable social policy."¹

B. Early History Of Labor Injunctions

The history of the judicial efforts to crush labor unions is quite lengthy. Initially, as illustrated by the 1806 Philadelphia Cordwainers Case,² any combination of workmen to raise their wages was held to be criminal in and of itself.

The War between the States witnessed the amassing of large

¹ Frankfurter & Greene, The Labor Injunction 1 (1930).
fortunes, and in the post-war period these profits were utilized to initiate and develop the modern industrial system. The multifold abuses of this system were vividly pictured by the so-called "muck-rakers" of the late nineteenth century, and a changing moral climate provided room for the existence and even the desirability of unions. Justice Holmes, then Chief Justice of the Massachusetts Court, wrote that a strike might be justified, and that "in all such cases the ground of decision is policy; and the advantages to the community, on the one side, and the other, are the only matters really entitled to be weighed."

Much earlier, Holmes' predecessor, the great Chief Justice Shaw, had held that a purpose to organize a union is not unlawful, "the legality of such an association will therefore depend upon the means to be used for its accomplishments." State judges, closer to the electorate, became somewhat more chary in their issuance of labor injunctions. The arena then turned to the federal courts, where many fascinating chapters evolved which intermesh to form the history of the labor injunction.

One chapter deals with the use of federal troops to enforce judicial decrees. During the 1870's and 1880's, when the Knights of Labor were engaging in widespread strike activity, the law permitted the federal marshals to call out a posse comitatus to enforce the decrees of federal judges. The posses largely consisted of the federal troops in the area. The use of federal troops to break strikes led to the passage of legislation which provided that only the President could call forth the troops to execute the laws. President Cleveland used troops in the famous Pullman Strike of 1894, and the protest of Illinois' Governor Altgeld equalled that of Arkansas' Governor Faubus when a later President sent in federal troops to enforce a different kind of federal court decree.

Another chapter concerns the use of yellow dog contracts. Traditionally, equity can only act to protect a "property" interest. A contract creates a property right, but most employment relationships are terminable at will. This led to the innovation of the yellow dog contract, an agreement by the employee that he would not join a union during his employment. Once signed, any organizational effort by a union constituted an inducement to breach a contract, a traditional area subject to equity relief. The Supreme Court sustained this theory of the strike injunction in *Hitchman Coal & Coke Co. v. Mitchell.* When states such as Kansas sought to outlaw the yellow

\[\text{\textsuperscript{9}}\text{Plant v. Woods, 176 Mass. 492, 57 N.E. 1011 (1900).}\]
\[\text{\textsuperscript{4}}\text{Commonwealth v. Hunt, 45 Mass. (4 Met.) 111 (1842).}\]
\[\text{\textsuperscript{5}}\text{245 U.S. 229 (1917).}\]
dog contract by legislation, the Supreme Court held that such legislation unconstitutionally infringed on the liberty of contact.⁶

Congressional efforts to "curb the Supreme Court" are a third chapter, a theme which frequently recurs, albeit in different contexts. Many state legislatures had passed remedial statutes limiting the conditions under which injunctions could be issued in labor disputes. Arizona, for example, provided that an employer could seek damages as the result of an unlawful strike, that an employer could obtain injunctive relief against violent and unlawful union conduct, but that an employer could not obtain injunctive relief against lawful picketing for immediate economic objectives. The Arizona Supreme Court sustained this legislation, but the Supreme Court, in *Truax v. Corrigan,*⁷ held that the statute unconstitutionally deprived an employer of the "equal protection of the laws." The *Truax, Coppage,* and other such decisions resulted in efforts headed by the first Senator LaFollette to "curb the Supreme Court." Legislation was introduced designed to deprive the Supreme Court of jurisdiction to hear appeals from State Courts in labor cases. However, these efforts were no more successful than the recent attempts by some present Members of Congress to enact similar Court-curbing legislation in another area of "equal protection" cases.

Next consider the perversion of certain federal statutes to create "federal question" jurisdiction. The Interstate Commerce Act was primarily designed to protect the midwest farmer from the exorbitant charges of the railroads; but it was also utilized as a source of federal question jurisdiction to justify injunctions against railroad unions. This practice was approved in *In re Debs.*⁸ The Sherman Act of 1890 was intended as a safeguard against the consequences of massed aggregations of capital, but early was utilized against the combinations of laboring men.⁹ This practice, in turn, resulted in the Clayton Act’s pronouncement that: "The labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor organizations. . . ."

The last chapter to be considered is the impact of labor injunctions on federal diversity jurisdiction. Federal courts have jurisdiction when the parties on each side of the controversy are citizens of different states, *i.e.*, when there is a need for an impartial tribunal. Federal courts accepted "diversity" jurisdiction in suits filed by New

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⁶ *Coppage v. Kansas,* 236 U.S. 1 (1915).
⁷ 237 U.S. 312 (1911).
⁸ 155 U.S. 564 (1895).
⁹ See *Gompers v. Bucks Stove & Range Co.,* 221 U.S. 418 (1911).
York employers to enjoin New York employees from striking in New York on the fiction that the New York employer was a citizen of Delaware because incorporated there. The long fight against this fiction terminated with the 1958 Amendments to the Judicial Code, providing in part that for jurisdictional purposes, a corporation is a citizen of the state where it has its principal place of business. If, as sometimes happened during the height of the federal court labor injunction, the employer was unincorporated or incorporated in the states where his factory was located, the suit was brought by an out-of-state stockholder, an out-of-state creditor, or an out-of-state customer naming both the employer and the union as parties defendant. The federal courts ignored economic reality and instead subscribed to the purely technical allegations of diversity of citizenship. This had an impact on the present doctrine of realignment, i.e., for purposes of diversity jurisdiction, the courts can look through the allegations in the complaint and re-align the parties according to their rightful interests in the results sought.

Throughout the long history of the labor injunction the problem of "states rights" has been present. The Conformity Act requires the federal court judges to conform to the laws of the states wherein they sit. Mr. Justice Storey, however, in Swift v. Tyson" held that a state court decision is not a "law" within the meaning of the Conformity Act. For almost a century, until Swift v. Tyson was overruled by Erie R.R. v. Tompkins, the federal judges were free, and made liberal use of this freedom to issue injunctions when petitions therefor would have been denied by the state court across the square. The natural consequence was the cry that the federal government was intruding into an area reserved to the states by the tenth amendment.

C. Opposition To Labor Injunctions

The use of labor injunctions by the federal judiciary was not without great protest. The Debs injunction, which broke the Pullman strike, was sustained by the Supreme Court in 1895. The 1896 Democratic platform inveighed against "Government by injunction" in these words:

We denounce arbitrary interference by Federal authorities in local affairs as a violation of the Constitution of the United States and a crime against free institutions; and we especially object to government by injunction as a new and highly dangerous form of oppression by

10 14 U.S. (16 Pet.) 166 (1842).
11 304 U.S. 64 (1938).
which Federal Judges, in contempt of the laws of the States and rights of citizens, become at once legislators, judges and executioners.

By 1908 the platforms of both the Democratic and Republican Parties had planks against the unbridled use of the labor injunction. Bills were introduced in each session of Congress for twenty years, from 1894 until 1914, designed to curb the use of the labor injunction. President Teddy Roosevelt sent five successive messages to Congress asking the reform. President Taft, in his 1909 State Of The Union Message stressed the need for reform.

In 1912 Wilson was elected President, on the promise of a New Freedom. This campaign pledge of a New Freedom resulted, among other things, in the Clayton Act of 1914. Section 6 of that Act provides in part:

That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof. . . .

John W. Davis, a Congressman from West Virginia, was a staunch supporter of this Act. He spoke of “five glaring abuses which have crept into the administration of this remedy” (the labor injunction):

- The issuance of injunctions without notice.
- The issuance of injunctions without bond.
- The issuance of injunctions without detail.
- The issuance of injunctions without parties.
- And in trade disputes particularly, the issuance of injunctions against certain well-established and indispensable rights.

The Clayton Act attempted to correct these abuses in a number of ways. Time limitations were imposed on the ex parte temporary restraining orders. The complaint and the orders were required to be detailed. Contempt proceedings were to be by jury if the contemptuous acts were illegal. Certain activities, mainly the various forms of picketing, were singled out specifically as immune from restraining orders or injunctions “in any case between an employer and employees . . . growing out of a dispute concerning terms or conditions of employment.” Samuel Gompers hailed this Act as “the industrial magna charta,” but he reckoned without the ingenuity of the federal courts. The courts, in the language of Frankfurter and Greene, “stuck close to the bark of this language.”

The Clayton Act prohibits injunctions in any case “between an employer and an employee.” However, by going on strike, the em-
ployee terminates the employment relationship, and the Clayton Act is therefore not applicable. The Act prohibits an injunction in “a dispute concerning terms or conditions of employment”; but “unionization” of a shop is not a “term or condition of employment.” The Act protects “peaceful and lawful” persuasion; but a strike against a unionized employer to induce withdrawal of patronage from a non-union employer is not “lawful.” So reasoned the federal courts, and following the Clayton Act, injunctions were issued in ten of the next thirteen cases in which they were requested.

The Supreme Court endorsed this restricted interpretation of the Clayton Act. In *Duplex Printing Press Co. v. Deering,* 12 the Court enjoined the Machinists and affiliated unions from striking against Duplex and its customers to win a closed shop, an eight-hour day, and a union scale of wages. In the *Bedford Cut Stone* case, 13 the Court restrained a union refusal to work upon stone which had been quarried by men working in opposition to the union.

Decisions such as these led to a renewal of the legislative struggle against use of the labor injunction. This effort culminated in 1932 with the Norris-LaGuardia Act which enjoyed great popular support. It was passed by large majorities in both Houses of Congress, commanded strong support in both the Democratic and Republican parties, and was approved by President Hoover.

The Norris-LaGuardia Act was designed to end the abuses in the use of the labor injunction; not the labor injunction itself. This was accomplished by two different methods. First, it imposed procedural restrictions which litigants had to observe to get injunctions; and second, it restricted the substantive content of the injunction which the federal courts might issue.

Procedurally, the ex parte injunction was put to an end with the provision that all temporary restraining orders should become void within five days unless continued after trial in court within such period, and even ex parte orders must be based upon the testimony of witnesses presented in a court hearing. The complainant was required to come into court with clean hands and show that he had made full use of existing governmental mediation machinery to effect a settlement of the dispute. The judge was required to find as a fact, before an injunction could be issued, that the injury to the complainant’s property was imminent and that his injury would be greater than that which the defendants would suffer if the injunc-

12 254 U.S. 443 (1921).
tion were granted. If violence was claimed, the court was required to bring in public officers and satisfy itself that existing public protection was inadequate. Jury trial, upon demand, was made available to those charged with contempt.

Substantively, a long list of activities were protected from injunction. These included strikes, payment of strike benefits, picketing, etc. All these activities were protected in all cases “involving or growing out of a labor dispute,” and a labor dispute was defined to include “any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating . . . terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relations of employer and employee.”

The Norris-LaGuardia Act achieved its intended effect. Prior to its enactment, there were at least 508 reported labor injunctions, the great majority issued during the 1920’s. In the next twenty-five years, only 43 federal court injunctions, apart from Taft-Hartley restraining orders, survived the initial five day ex parte restraining order. Nine of these were issued at the request of the Government; in most of the others, there were findings that no “labor dispute” was involved.

If there is still a problem of “government by injunction,” it lies in the injunctions issued under the Taft-Hartley Act. President Kennedy has called together a group of experts to advise on the use of injunctions under the National Emergencies’ provisions of that Act. Moreover, the Labor Board is presently re-evaluating the use of injunctions under the sections of the Act within the province of the Board.

III. TAFT-HARTLEY INJUNCTIONS

Sections 10(e), (l), and (j) are the provisions of the Labor-Management Relations Act governing injunctions and will be discussed in order before drawing any general conclusions.

A. Section 10(e) Injunctions

Section 10(e) provides that whenever one of the Board’s orders (made after notice, hearing, appeal from the trial examiner, etc.) is disobeyed, the Board may petition the appropriate court of appeals “for enforcement of such order and for appropriate temporary relief or restraining order.” Section 10(e)’s injunctive provisions were in the original 1935 Wagner Act, and neither at that time nor in the

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Taft-Hartley Amendments was there any congressional discussion of their intended use.

The Board has used the 10(e) injunctive remedy very sparingly, on an average, not more than three or four times a year. The single largest category of cases are those in which we seek to enjoin the dissipation of assets when we seek to enforce a back pay award. We have also used 10(e) to prevent an employer from negotiating with a union which has been determined to be company dominated, or with one not certified after an election. Other instances of its utilization are those in which the Board sought to enjoin an employer from renewed anti-union activities which would further postpone an election; and to restrain a union from engaging in secondary boycott activities against employers other than those involved in our case-in-chief.

The Board has had a good record of success in the courts, particularly since the enactment of Taft-Hartley. It has been suggested that more extended use be made of this injunctive power, particularly against those activities which could be enjoined under Sections 10(l) and (j). These two sections authorize temporary injunctive relief in the district court prior to determination of the issues of the Board. After the Board has arrived at its decision, the district court injunction under 10(l) terminates, and it is argued with some justification that the Board should seek to enjoin the resumption of these activities pending circuit court enforcement of the order.

B. Section 10(l) Injunctions

Section 10(l) is the mandatory injunction section. In essence, and with qualifications not too important for the present discussion, it provides that when a charge is received by the Board concerning alleged violations by labor unions of the so-called secondary boycott, hot cargo, and organizational picketing provisions, and when an investigation of these charges gives "reasonable cause to believe such charge is true and that a complaint should issue," the Board is required to petition the appropriate district court for a temporary injunction pending final Board disposition of the matter. Section 10(l) also authorizes, but does not require, the Board to seek an injunction when a jurisdictional strike is alleged.

At this point a short analysis of the section 10(l) injunction is pertinent. Since the injunctions against the "hot cargo" clause and "organizational picketing" were added by the 1959 Landrum-Griffin amendments, a long range evaluation must be confined to the so-called secondary boycott types of activities.
In the past five years the Board has petitioned for 649 injunctions under 10(1), with an increase each year.\(^{19}\) This number of injunction petitions does not mean that the Board files a petition every time it receives a charge. The statute provides that the Board shall petition for an injunction whenever after investigation it "has reasonable cause to believe such charge is true and that a complaint should issue." In 1960, the Board received 1,003 such charges, but after investigation, filed only 219 complaints and requests for injunction. In 1959, the Board received 844 charges under 8(b)(4) and filed only 129 petitions for injunction. In 1958, the Board received 719 charges under 8(b)(4) and petitioned for 127 injunctions.

In short, there is nothing automatic about petitioning for an injunction upon receipt of an employer charge that a union has engaged in a secondary boycott situation. There is a careful investigation by Board staff members to determine whether or not there is "reasonable cause to believe such charge is true and that a complaint should issue." Although some injunction petitions are issued within days (as recently in the case of missile site disputes within our jurisdiction), in a majority of cases filed in the first three years of the Taft-Hartley Act, a month or more was required to investigate the charges thoroughly and compile the evidence before an injunction was filed.\(^{19}\)

The district courts are more apt to find "reasonable cause" for the issuance of injunctions than are the employees of the Board. The district courts, of course, do not and cannot go fully into the merits. They base their rulings on a reasonable cause to believe that the violation has been committed, and that equitable relief is "just and proper." Their issuance of an injunction is reversible on appeal only for an abuse of discretion. In 1960, only ninety-two of the 219 petitions filed under Section 10(1) went to final order, the courts granting injunction in eighty-three cases and denying injunction in nine. In 1959, sixty petitions went to final order, injunctions being granted in fifty cases and denied in ten. In 1958, sixty-eight injunction petitions went to final order, fifty-nine were granted and nine denied. In this most recent three-year period, 220 petitions under 10(l) went to final order with the district courts granting 192 injunctions and denying twenty-eight of the injunction petitions.

A historic justification for the preliminary labor injunction is that it does not pass finally on the merits of the controversy. Therefore, it is argued, there is nothing wrong in judging on probabilities rather

\(^{18}\) Blumenthal, Mandatory Injunction and the NLRB, 2 Lab. L.J. 7 (1951).
than on facts and a careful, long look at the legal principles. However, as pointed out by Frankfurter and Greene, "The tentative truth results in making ultimate truth irrelevant." The injunction often handcuffs the union, and it is forced to make the best terms available, thereby mooring the case. Board statistics bear this out. Of the first seventy-two petitions under 10(1) for temporary injunctions, twelve never reached trial because of settlement, and an additional sixteen never reached Board decision because of settlement or other similar action. In 1960, the federal district courts issued eighty-three injunctions under 10(1), and seventy-three of these cases were settled without further Board action.

Since the court injunction is in most cases dispositive of the issue, it is interesting to see whether or not the district courts are in agreement with the Labor Board. The experience of the first three years indicates that the incidence of agreement is in accordance with the law of probabilities. In the first thirty-two cases to reach the Board wherein the district courts had taken final action, the Board was in complete agreement with the courts in fifteen cases, and was in complete disagreement with the courts in fifteen cases, and was in partial agreement and in partial disagreement with the courts in two cases.

This result is not unexpected considering the complexity of the legal issues, and the fact that the 10(1) injunction petition may well be the first "labor" case brought before the particular federal district judge, and he is obligated to make a decision under a terrific time pressure.

Both the Cox Panel and the Pucinski Subcommittee recommended legislative change, that Section 10(1) "permit" rather than "require" the Board to seek an injunction. This is a matter beyond the Board's province, but another recommendation of the Pucinski Committee is not. The Report of that Committee:

finds that Section 10(1) cases, once the court injunction has been issued, have not been expedited in the administrative process. The Labor Board Rules and Regulations require that such cases "shall be given priority" (Sec. 102.97), but there are so many cases given priority that this is apparently meaningless. The Subcommittee recommends that the labor Board give these cases expeditious treatment by new devices and techniques, such as: permitting the respondent to appeal directly to the Board on the basis of the facts found by the court which issued the injunction; by denying all requests for exten-

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17 Frankfurter & Greene, The Labor Injunction 79 (1930).
19 I refer to the construction gate and ambulatory picketing cases which are in the forefront of "secondary boycott situations"; and to the contract-bar rules which are involved in "organizational" picketing.
sion of time; by curtailing the number of days permitted in filing complaints, answers, exceptions, and other legal documents; by establishing a special "expediting" section at the Board level for treating such cases, and so on.

These recommendations are now under careful study by the Board.

C. Section 10(j) Injunctions

Section 10(j) is the "discretionary" injunction section. It authorizes the Board to petition a district court for "appropriate temporary relief or restraining order" in respect to any unfair labor practice, whether committed by an employer or a union, after a Board complaint has been issued.

Section 10(j) was added in the Taft-Hartley Amendments, and it was incorporated in the Act due to the inability of the Board in "some instances" to "correct unfair labor practices until after substantial injury has been done." The need for section 10(j) was expressed in the Senate Report as follows:

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.

The Board, however, has requested very few 10(j) injunctions, only forty-eight in the past fourteen years, despite some sixty requests annually. In 1960, the Board filed five petitions for injunction under section 10(j), one against an employer, three against unions, and one against both the employer and the union. Two of the cases were settled before court action; the three petitions against unions resulted in injunctions. In 1959, there were four petitions for injunctions against unions; all of which were granted. There was one petition for an injunction against an employer, and the case was settled before the court acted on the petition. In 1958, there were six petitions for injunctions against unions; three were granted, one was denied, and two cases were settled before the court acted. We petitioned for one injunction against an employer, and it was granted.

There has been a total of thirty-three petitions for injunctions against unions, of which twenty-three were granted and in ten cases the matter was settled before court action. There have been twelve injunctions sought against employers, of which five were granted,
two denied, and in five cases the matter was settled before court action. There have been three petitions sought against both employer and unions; all were granted.

1. Increased Use of 10(j) Injunctions

A number of witnesses before the Pucinski Committee complained bitterly about what they described as a lack of "even-handed justice." They pointed out, for example, that since 1952, the Labor Board has sought 601 injunctions against unions pursuant to Section 10(l), an additional seventeen injunctions against unions under section 10(j), and only six injunctions against employers, all under section 10(j). The Pucinski Committee rejected any concept that justice can be achieved mechanically, i.e., by dividing the total number of injunctions equally between those against employers and those against unions. However, the Pucinski Committee did conclude that "failure to utilize the 10(j) discretionary injunction sometimes results in irreparable injury," and the Committee recommended that:

The Labor Board give careful consideration to greater utilization of the 10(j) injunction in situations when unfair labor practice charges are filed and the Board finds reasonable cause to believe that such unfair labor practice is continuing and will be continued unless restrained, and will cause irreparable property or personal injury or injury to the exercise of rights guaranteed by section 7.

Illustrations given by the Pucinski Committee were:

flagrant and aggravated acts of picket line force and violence, the situations of repeated discharge of union adherents, the situations where employers or unions flagrantly refuse to bargain in good faith, and the situations wherein the employer threatens to intimidate his employees by closing the plant or shifting work to affiliated factories.

I am mindful of the Pucinski Committee recommendations, and they appear valid. I am also mindful, and this I do not believe creates any inconsistencies, of the long history of abuses which culminated first in the Clayton Act of 1914 and ultimately in the Norris-LaGuardia Act of 1932.

For example, I am mindful that breaches of the peace may be redressed through criminal prosecutions and civil action for damages; and I am reminded that the Norris-LaGuardia Act prohibits a federal judge from enjoining violence without first consulting with appropriate public officials charged with police enforcement.

I am mindful of the dangers of the ex parte injunction issued on the basis of affidavits filled with sound and fury, but signifying little in the concrete. But I know from the experience of the Norris-
LaGuardia Act that these dangers can be greatly minimized by setting a time limit on the duration of such injunctions and requiring the court attendance of those in the best position to testify as to the facts.

I am mindful of the dangers of the broad injunction prohibiting "opprobrious language," "unlawful conduct," "mass picketing," by the defendants, "their agents, allies, and parties in interest." But I also know that it is possible to frame an injunction order in specific and definite language: "No picketing of gate No. 3, reserved for employees of contractors"; "no more than ten pickets patrolling at any given time," etc., etc.

I am mindful of the complexities of our industrial society and the conflicting interests which must be considered in even the "simplest" labor case. I sympathize with the federal judge who must decide such problems "forthwith" even though he may be totally unfamiliar with the subject. And I realize fully that his decision, though labeled "tentative" and "preliminary," is for practical purposes in many instances final. To quote again from 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 the interdicted interferences. Moreover, the suspension of strike activities, even temporarily, may defeat the strike for practical purposes and doom its resumption even if the injunction is later lifted.

But the Norris-LaGuardia Act requirement that employers come into court with clean hands, i.e., that they first make every effort to resolve the dispute through good faith bargaining, indicates that there is a way out of this dilemma.

I am mindful that seasoned labor-management attorneys advise their clients against the injunction because of the bitterness which spills over into subsequent relationships; and that injunctions are most useful when the parties are struggling against the initial shock of collective bargaining.

But finally, and most importantly, I am mindful that the question of national policy concerning the labor injunction is primarily a task of the legislative body; and that Congress has set forth its policy affirmatively in Section 10(j) of the Labor-Management Relations Act.

2. Guide Lines in Seeking More 10(j) Injunctions

What, then, are the general lines of policy that may guide the
Board's consideration of more extensive use of discretionary injunctions? Each individual petition for a 10(j) injunction must, of course, be decided on its own facts and on its own merits. There are, however, certain criteria or considerations which are applicable in most situations.

First, the extraordinary remedy of injunction should not and cannot become the ordinary remedy in unfair labor practice cases. Congress delegated to the five-man National Labor Relations Board sitting in Washington, and not to the district courts, the duty to give an expert and experienced content and direction to the National Labor Relations Act. It follows that the Board cannot abdicate this function to the 226 judges sitting in the 86 federal district courts. Except for extraordinary injunctive relief, the normal role of the judiciary is set forth in sections 10(e) and (f) of the Act, i.e., the courts of appeals can review our decisions to ascertain whether our fact findings have warrant in the record and our legal conclusions have a reasonable basis in law.

Second (and apart from policy considerations requiring a uniform national labor policy), some, but not all cases, may be competently tried by a seasoned judge with no labor law experience. Some cases involve the application of well-defined doctrine to easily ascertained factual situations; others require a thorough exploration of sophisticated imponderables concerning motive, conflicting legal principles, and rival policy factors. In some cases the violation is clear; in others the violation is veiled. In short, some cases are adaptable to peremptory, judicial resolution by ascertaining the facts; other cases are not.

Third, the factor of clean hands is an important consideration. Has the charging party who requests that we petition for an injunction conformed his conduct to the requirements of the law? Is this the “charged” party’s first alleged offense, or is it a continuing or repetitious pattern?

Fourth, the irreparable injury to the parties and to the public must be considered. Is the industry crucial to the public interest? Does the alleged unfair labor practice involve a wide geographic area and a large number of persons? Will our failure to act create disrespect for lawful processes, public agencies, or national policies? If only the particular parties are concerned, will our subsequent remedy be adequate to restore the status quo and dissipate the consequences of the unfair labor practice?

Finally, the Board must determine whether a petition for an injunction is necessary to effectuate the policies of the National Labor
Relations Act, i.e., to encourage the practices of collective bargain-
ing. Does our refusal to seek injunctive relief give the charging party
the unhappy choice of (1) following the long, drawn-out admin-
istrative process with knowledge that the treasure at the end of the
trail is only "fool's gold," (2) resorting to self-help in the form of
economic warfare and thereby impeding the flow of interstate com-
merce, or (3) shrugging off the whole thing with a cynical comment
about the nature of "city hall"?

In the past, more than half of the cases in which section 10(j)
relief has been authorized involved refusals to bargain in compliance
with the thirty day notice and other requirements of the Act. Almost
one-third involved attempts to enforce closed shop conditions or
discrimination in employment opportunities because of non-mem-
bership in a union. Most of the remainder have involved extended
strike violence.

The Board also sought 10(j) injunctive relief against an employer
who discharged his employees for testifying against him in an unfair
labor practice case; against an employer who made unilateral changes
of employment without prior negotiation with the union; against
a union's attempt to retain unlawful closed shop conditions in an
entire industry; and against a union which sought to put a small
milk hauler out of business for failure to agree to illegal hiring
practices.

The Labor Board, in close cooperation with the General Counsel,
is considering the various areas in which the use of the 10(j) in-
junction might be extended, areas where interlocutory and temporary
relief is desirable, and the historic problems of the labor injunction
might be avoided.

3. Possible Areas of Greater 10(j) Use

The thinking of the Board at this point is tentative, and of
necessity, generalized. No hard and fast lines have been laid down
for action in this area. However, to the extent the Board decides
to use discretionary injunctions more often in cases filed with it,
consistent with the five policy considerations mentioned above, i.e.,
unclean hands, irreparable injury, appropriateness for judicial treat-
ment, etc., the Board will probably continue to seek injunctive relief
against serious union picket line violence when it clearly gets beyond
the control of local authorities; it will no doubt continue to seek
injunctive relief against strikes when timely notice is not given to
the mediation services; it will doubtless continue to seek injunctive
relief against union efforts to secure an illegal closed shop type of
situation. These types of charges constitute the great majority of charges which the Board receives.

Turning to the employer unfair labor practices, the greatest number of charges received by the Board continues to be the illegal discharges because of union activities. There could appropriately be a greater emphasis on the use of the injunction to prevent recurring, anti-union campaigns designed to stifle organizational drives. Thus, the Board could well seek injunctions to restore discharged employees to their jobs, if they are the leading union adherents and discharged at the outset of an organizational drive. Experience has taught us that our remedy of ultimate reinstatement with back pay is regarded in some quarters as no more than a fee for a union-hunting license. Here, the Board can seek more injunctions against the creation and domination of “company unions” to avoid freezing of employee sentiment in favor of the assisted union by reason of the benefits received voluntarily from the employer. Finally, we have been most recently requested to seek to enjoin an employer from threatening to close a plant because the employees vote for a union, for this type of threat and action effectively kills freedom of self-organization and collective bargaining beyond hope of resurrection.

The second largest area of employer unfair labor practice cases concerns refusal to bargain. Experience has shown that an employer’s successful postponement of bargaining for the year or two it takes to process a Labor Board case and the additional year or two it takes to secure judicial enforcement of the Labor Board order, frequently dissipates the union’s majority status and weakens its bargaining power to the extent that it can no longer effectively represent the employees. This justifies a more extensive use of Section 10(j) in respect to limited refusals to bargain, such as unilateral changes, refusals to discuss certain matters, refusals to furnish required information, insistence on illegal demands, and the like.

IV. Conclusion

The Board’s desire is not to transfer its problems to the judicial forum. It is the experienced expectation of the Board that violations of the act can be deterred by indicating a readiness to seek injunctive relief when the incentive to resist unfair labor practice charges rests on the advantage of time and delay.

The Labor Board is given the authority to seek injunctions as one means, among others, to remedy the problems that stem from delay. The parties and the public now suffer seriously from this delay in the
processing of labor cases. It is perhaps our greatest single problem. However, it is not in our hands to question the tools given us by Congress to cope with this problem. With trepidation, good faith, and a full knowledge of the pitfalls demonstrated by history, we can nevertheless make our way forward with the 10(j) injunction. There is a good chance that we shall thereby advance collective bargaining and give new meaning to the purposes and promises of the statute.