Section 10(j) Manual

Office of the General Counsel

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PREFACE

This Manual has been prepared by the General Counsel of the National Labor Relations Board pursuant to his authority under Section 3(d) of the Act. It is designed only to provide operational and procedural guidance for the Agency's staff in administering the National Labor Relations Act. It is not intended to be a compendium of substantive or procedural law, nor a substitute for a knowledge of the law, evidence, or procedure. The matters contained herein are not General Counsel or Board rulings or directives and are not a form of authority binding on the General Counsel or the Board.[1]

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USER'S GUIDE
2020 Edition

1.0 INTRODUCTION

The 10(j) Manual is intended to be a general guideline for the processing of Section 10(j) cases. The Manual consists of two parts: the User's Guide and the Appendices that follow. The User's Guide explains each step in the process and instructs Board agents on their responsibilities in processing 10(j) cases. To assist in meeting those responsibilities, this guide contains material to help identify the situations in which interim injunctive relief under Section 10(j) may be necessary. It also explains how to conduct an investigation to elicit evidence relevant to determining whether Section 10(j) relief is "just and proper" in a particular case. This guide provides instruction on the procedure to follow once a Regional office has decided that a case warrants immediate interim injunctive relief, including the preparation of the memorandum recommending 10(j) relief, the preparation of papers for district court, how to argue the case in district court, and how to address any other litigation issues that may arise.

The appendices that follow the User's Guide contain material to support Board agents throughout the 10(j) process. Among other things, there are checklists, suggested questions for investigation, sample documents, model arguments, and citations to relevant research material. Of course, Board agents should use these documents to the extent they are relevant to their 10(j) case and modify them as needed to fit the facts or particular legal theories in their case. For ease of use, Board agents can obtain access to many of these documents on the agency's internal website. This will allow Board agents to download into their computers the necessary documents for processing their 10(j) cases.

This manual was prepared by the Injunction Litigation Branch with the sole purpose of supporting the Regions in their efforts to achieve a prompt and effective remedy in those cases that require immediate 10(j) injunctive relief. The material was prepared based on the knowledge and experience of legions of Board agents who have litigated 10(j) cases throughout the country. Please contact the Injunction Litigation Branch if additional assistance is needed at any time.

1.1 General 10(j) Principles

Section 10(j) of the Act authorizes the Board to seek injunctive relief in U.S. District Court in situations where, due to the passage of time, the normal adjudicative processes of the Board likely will be inadequate to effectively remedy the alleged violations. Such injunctive relief may be sought as soon as an unfair labor practice complaint is issued by the General Counsel and remains in effect until the Board finally adjudicates the unfair labor practice case. It may be requested by the charging party or sought by the Regional Office, sua sponte. It is imperative that Board agents be aware of the types of situations where such relief may be appropriate, the requirements for additional investigation in those situations, and the internal procedures to be followed in such cases.

Congress created Section 10(j) relief as a means to preserve or restore the lawful status quo ante, so that the purposes of the Act are not frustrated and the final order of the Board is not rendered meaningless by the passage of time. Congress recognized that a respondent's illegal acts could, in some cases, permanently alter the situation and prevent the Board from effectively remedying the violations by its final order. Thus, to justify Section 10(j) relief, the Board must demonstrate how the alleged violations threaten statutory rights and the public interest while the parties await a final Board order.

This involves two elements of proof:

1. a sufficient showing that an unfair labor practice has occurred; and

2. a sufficient showing that there is a threat that the Board's ultimate remedial order will be a nullity.

The first element is often referred to as the "merits analysis," and the latter element is often referred to as a threat of "remedial failure." In many circuits these elements are tested under the two-prong analysis of whether there is "reasonable cause to believe" that the Act has been violated as alleged in the unfair labor practice complaint and whether interim injunctive relief, pending a final Board order, is "just and proper." The First, Fourth, Seventh, Eighth and Ninth Circuits have abandoned the "reasonable cause" test as the limit of a district court's inquiry into the merits of the unfair labor practice case and held that requests for Section 10(j) injunctions should be evaluated under traditional equitable principles; the Second Circuit utilizes a hybrid of the two-prong analysis and traditional equitable principles. A more precise definition of the standards for each circuit is set out in the Model 10(j) standards for each circuit contained in Appendix D.

The merits analysis of a 10(j) case is the same as the merits determination of any unfair labor practice charge, except that Regions should be aware of the need to also examine alleged violations under the law of the applicable U.S. Court of Appeals, primarily in decisions involving the enforcement of Board orders. What distinguishes a 10(j) case from other unfair labor practice cases is the need to show the threat of remedial failure. This threat may be demonstrated by the nature and extent of the alleged violations, and the anticipated and actual impact of the unremedied violations upon statutory rights that is expected to continue until a Board order issues. For instance, if an unfair labor practice complaint alleges that an employer unlawfully discharged an employee during a union organizing campaign, interim reinstatement of the discriminatee may be necessary to avoid affecting the remaining unit employees' support for the union or "chilling" their willingness to engage in protected union activities during the Board proceedings.

Courts differ as to whether the Board must introduce direct evidence of "chill" to establish that such injury, or chill, is threatened. Some courts have been willing to examine the very nature and extent of the particular unfair labor practices to determine, by inference, whether the violation will, over time, tend to chill or undermine remaining unit employee support for a union or employee willingness to engage in other protected concerted activity. Other courts are less likely to infer a chilling effect on employee statutory rights; instead, they insist upon evidence that the violation is actually having a chilling effect. In either case, however, direct

evidence of chill is always probative as to the need for Section 10(j) relief and should be sought in every Section 10(j) case.

The quantum of evidence required to establish the need for Section 10(j) relief varies depending upon the type of case involved, the applicable case law, and the judicial circuit in which injunctive relief is sought. The absence of direct evidence of impact in a particular case does not necessarily mean that Section 10(j) proceedings are inappropriate. The existence or absence of such evidence is always relevant to the evaluation of a case, however, and the Regions should always attempt to obtain such evidence.

2.0 IDENTIFYING POTENTIAL 10(j) CASES

Early identification of potential 10(j) cases is critical to avoid the threat of remedial failure. When a case warrants 10(j) relief, the longer it takes to obtain that relief, the greater the threat of remedial failure. For this reason, Board agents should evaluate every new charge to determine whether it might be a potential 10(j) case.

Most potential 10(j) cases are identified at the outset by the charging party who requests 10(j) relief. However, a substantial portion of 10(j) requests are sua sponte, i.e., the Regions identify the case as requiring 10(j) relief even if the charging party does not. For this reason, Board agents should "think 10(j)" even if there is no specific request. In addition, although most 10(j) cases are identified around the time an initial charge is filed, in others the need for injunctive relief might not arise until the respondent has demonstrated a pattern of violations over a period of time. Therefore, Board agents should be alert at every stage of case processing for the potential need for a 10(j) injunction. There are also certain categories of cases that are mandatory submissions to the Injunction Litigation Branch, whether a Region considers Section 10(j) proceedings are appropriate or not; those categories are indicated below.

2.1 Categories of Section 10(j) Cases

The Board may seek Section 10(j) injunctions for any alleged violation of the Act, other than those enumerated in Section 10(l). The following categories of cases, however, are particularly likely to threaten the efficacy of the Board's order.[2]

1. Interference with Organizational Campaign (No Majority Union Support)

In these cases the union has either not obtained a card majority from employees in an appropriate unit or the Region's complaint does not seek a remedial bargaining order for some other reason. Section 10(j) proceedings are authorized to prevent the irreparable destruction of a union's nascent organizational campaign. These cases usually involve an employer's response to an organizational campaign with serious, if not massive, unfair labor practices: threats, coercive interrogations, surveillance of protected activities, improper grant of benefits, and unlawful employee discipline, including discriminatory discharges. Such violations virtually "nip in the

[2] A separate list of the 10(j) categories in outline form is located in Appendix A of this Manual.

bud" the union's campaign or clearly threaten to do so if not immediately enjoined. Accordingly, an order is typically sought to enjoin the violations alleged, as well as an affirmative order to reinstate any discriminatees. See, generally, Schaub v. West Michigan Plumbing & Heating, Inc., 250 F.3d 962 (6th Cir. 2001); Sharp v. Webco Industries, Inc., 225 F.3d 1130 (10th Cir. 2000); Pye v. Excel Case Ready, 238 F.3d 69 (1st Cir. 2001); Pascarell v. Vibra Screw, Inc., 904 F.2d 874 (3rd Cir. 1990); Aguayo v. Tomco Carburetor Co., 853 F.2d 744 (9th Cir. 1988).

Regions should consult Memorandum GC 10-07, Effective Section 10(j) Remedies for Unlawful Discharges in Organizing Campaigns, and Memorandum GC 11-01, Effective Remedies in Organizing Campaigns, for best practices in processing Section 8(a)(3) discharge nip-in-the-bud cases.

Pursuant to Memorandum GC 10-07, Memorandum GC 14-03, Affirmation of 10(j) Program, and Memorandum GC 18-05, Utilization of Section 10(j) Proceedings, Regions must submit to the Injunction Litigation Branch *all* meritorious Section 8(a)(3) discharge nip-in-the-bud cases that do not settle, including those where the Region believes that Section 10(j) relief is not warranted.

Appendix G-3 of this Manual contains a model just and proper argument for reinstatement in Section 10(j) nip-in-the-bud cases.

2. Interference with Organizational Campaign (Majority Union Support)

These cases are the same as those in the previous category, except that the union has obtained a card majority in an appropriate unit, and the Region's complaint pleads that the unfair labor practices are sufficiently egregious to preclude the holding of a fair election (or rerun election) and thus warrant the imposition of a remedial bargaining order under NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). In such cases, the relief typically sought includes a broad cease and desist order, an affirmative order to reinstate any discriminatorily discharged employees and, to ensure that the Board's ultimate remedial Gissel bargaining order will not be a nullity--i.e., for the benefit of a union totally bereft of employee support--an interim bargaining order will also be requested. See, generally, Scott v. Stephen Dunn & Assoc., 241 F.3d 652 (9th Cir. 2001); NLRB v. Electro-Voice, Inc., 83 F.3d 1559 (7th Cir. 1996); Murphy v. Hogan Transports, Inc., 607 Fed.Appx. 70 (2d Cir. 2015); Seeler v. The Trading Port Inc., 517 F.2d 33 (2d Cir. 1975). Accord: Levine v. C&W Mining Co., Inc., 610 F.2d 432 (6th Cir. 1980); Asseo v. Pan American Grain Co. Inc., 805 F.2d 23 (1st Cir. 1986).

Memorandum GC 10-07, Effective Section 10(j) Remedies for Unlawful Discharges in Organizing Campaigns, referenced above in Category 1, also applies to Gissel cases. Thus, the Regions should consult Memorandum GC 10-07 for best practices in processing Gissel cases.

Further, Regions must submit to the Injunction Litigation Branch *all* meritorious Gissel complaint cases that do not settle, including those where the Region believes that Section 10(j) relief is not warranted. See Memorandum GC 10-07; Memorandum GC 99-8 Guideline Memorandum Concerning *Gissel*.

Also, for guidance on preparing the court papers for a Gissel 10(j) case, see Appendix G-2 of this Manual.

3. Subcontracting or Other Change to Avoid Bargaining Obligation

These cases involve an employer's implementation of a major entrepreneurial-type decision that adversely impacts unit employees: for example, subcontracting or relocating entire plants, departments, or product lines. Such changes may be discriminatorily motivated--i.e., designed either to interfere with an organizational campaign or to escape from an incumbent union--and, therefore, may violate Section 8(a)(3). In addition, these changes can independently violate Section 8(a)(5) if undertaken without bargaining over the decision, when required, with the incumbent union. In these types of cases, the Board seeks Section 10(j) relief, including the affirmative restoration of operations, because of the devastating impact such decisions can have on the affected bargaining units--namely, elimination of all or a substantial part of the unit and termination of unit employees. The injury done to employee support for the union, either the incumbent or the one seeking recognition, is very often fatal unless injunctive relief is obtained. Moreover, by restoring and preserving the status quo ante, injunctive relief freezes the circumstances, thereby permitting the Board to issue a final restoration order that will not be judged later by an enforcing circuit court as too burdensome on the respondent because of the passage of time or the alienation of the old facility or equipment. See, generally, Hirsch v. Dorsey Trailers, 147 F.3d 243 (3d Cir. 1998); Maram v. Universidad Interamericana de Puerto Rico. Inc., 722 F.2d 953 (1st Cir. 1983); Frankl v. HTH Corp., 650 F.3d 1334 (9th Cir. 2011), cert. denied 132 S.Ct. 1821 (2012);Paulsen v. Remington Lodging & Hospitality, LLC, 773 F.3d 462, 468-469 (2d Cir. 2014); Aguayo v. Quadrtech Corp., 129 F.Supp.2d 1272 (C.D. CA 2000); Dunbar v. Carrier Corp., 66 F.Supp.2d 346 (N.D.N.Y. 1999).

4. Withdrawal of Recognition from Incumbent

These cases involve an employer's withdrawal of recognition from an incumbent union, where the employer is unable to prove an actual loss of the union's continued majority status. Very often, such a withdrawal of recognition is accompanied by other independent unfair labor practices designed to undermine employee support for the incumbent union. This category includes withdrawal of recognition from a newly certified union, when the union is first attempting to establish itself among the employees. Section 10(j) relief is sought in these cases, including affirmative bargaining orders, to ensure that the employees will not be denied the benefits of union representation for the entire period of litigation before the Board and to prevent the irreparable injury to the union's support among the employees, which predictably would occur if the union were unable to represent them. See, generally, Overstreet v. El Paso Disposal, 625 F.2d 844 (5th Cir. 2010); Lineback v. Irving Ready-Mix, Inc., 653 F.3d 566 (7th Cir. 2011); Dunbar v. Park Associates, Inc., 23 F. Supp.2d 212, 218, 159 LRRM 2353 (N.D.N.Y.), affd. mem. 166 F.3d 1200 (2d Cir. 1998); Brown v. Pacific Telephone & Telegraph Co., 218 F.2d 542 (9th Cir. 1955); D'Amico v. Townsend Culinary, Inc., 22 F. Supp.2d 480, 492 (D. Md. 1998); Overstreet v. Tucson Ready Mix, Inc., 11 F. Supp.2d 1139, 1148-49 (D. Ariz. 1998); De Prospero v. House of the Good Samaritan, 474 F.Supp. 552 (N.D. N.Y. 1978); Sachs v. Davis & Hemphill. Inc., 295 F.Supp. 142 (D. Md. 1969), affd. 71 LRRM 2126 (4th Cir. 1969), vacated as moot and opinion withdrawn, 72 LRRM 2879 (4th Cir. 1969).

Pursuant to Memorandum GC 06-05, First Contract Bargaining Cases, and GC Memoranda 14-03 and 18-05, Regions should submit a recommendation to ILB whenever the withdrawal of recognition occurs while the parties are bargaining for a first contract.

Appendix G-1 contains model just and proper arguments for bargaining orders in withdrawal-of-recognition cases (and other 8(a)(5) violations).

5. Undermining of Bargaining Representative

This category closely resembles the previous category in that the cases involve a variety of employer unfair labor practices designed to undermine employee support for an incumbent or newly certified union; however, in this category, the employer has not literally withdrawn recognition from the union but has taken action that undermines the union in the eyes of employees and impairs the union's authority to effectively represent employees. The violations can include threats, the discharge of key union officers or activists, or implementing important changes in working conditions either discriminatorily or without bargaining with the union. The need for Section l0(j) relief is to prevent the predictable, irreparable erosion of employee support for the incumbent union. See, generally, Kreisberg v. HealthBridge Mgmt. LLC, 732 F.3d 131 (2d Cir. 2013); Lineback v. Spurlino Materials, LLC, 546 F.3d 491 (7th Cir. 2008); Ahearn v. Jackson Hosp. Corp., 351 F.3d 226 (6th Cir. 2003); Harrell v. Am. Red Cross, 714 F.3d 553 (7th Cir. 2013); Frankl v. HTH Corp., 693 F.3d 1051 (9th Cir. 2012); Arlook v. Lichtenberg & Co., 952 F.2d 367 (11th Cir. 1992); Kinard v. Dish Network Corp., 890 F.3d 608 (5th Cir. 2018); Pascarell v. Vibra Screw Inc., 904 F.2d 874 (3d Cir. 1990); Eisenberg v. Wellington Hall Nursing Home. Inc., 651 F.2d 902 (3d Cir. 1981); Morio v. North American Soccer League, 632 F.2d 217 (2d Cir. 1980); Overstreet v. Thomas Davis Medical Centers, 9 F.Supp.2d 1162 (D. Ariz. 1997); Silverman v. Major League Baseball Player Relations Committee, Inc., 880 F.Supp. 246 (S.D.N.Y.), aff'd 67 F.3d 1054 (2d Cir. 1995).

Pursuant to Memorandum GC 06-05, First Contract Bargaining Cases, Regions must submit to the Injunction Litigation Branch *all* meritorious Section 8(a)(1), (3) or (5) (or Section 8(b)(1)(A) or 8(b)(3)) cases arising after a union has been certified as the bargaining representative of a unit and the union has requested bargaining for an initial collective bargaining agreement, including those where the Region believes that Section 10(j) relief is not warranted. See also Memorandum GC 18-05, Utilization of Section 10(j) Proceedings, and Memorandum GC 14-03, Affirmation of 10(j) Program. The Region should also carefully consider the propriety of additional remedies in both the injunction and administrative cases. See Memorandum GC 07-08, Additional Remedies in First Contract Bargaining Cases; Memorandum GC 08-09, Submission of First Contract Bargaining Cases to the Division of Advice; Memorandum GC 11-06, First Contract Bargaining Cases: Regional Authorization to Seek Additional Remedies and Submissions to Division of Advice.

Appendix G-1 contains model just and proper arguments for 8(a)(5) violations that undermine an incumbent union (and other 8(a)(5) violations).

6. Minority Union Recognition

Cases in this category typically involve alleged violations of Section 8(a)(2) and 8(b)(1)(A) where an employer grants exclusive recognition to a union that does not represent an uncoerced majority of employees in the unit. The cases can also include a wide variety of illegal assistance to and/or domination of a labor organization. The danger posed by such cases is that, absent interim relief, the assisted union will become so entrenched in the unit that, by the time the Board issues an order, the affected employees will be unable freely to exercise their Section 7 right to select or reject union representation. See, generally, Kaynard v. Mego Corp., 633 F.2d 1026, 1033-1035 (2d Cir. 1980); Fuchs v. Jet Spray Corp., 560 F.Supp. 1147, 1156 (D. Mass. 1983), aff'd per curium 725 F.2d 664 (1st Cir. 1983). Accord: Zipp v. Dubuque Packing Co., 112 LRRM 3139 (N.D. Ill. 1982).

One court rejected this theory as grounds for interim relief because, under the status quo, employees enjoyed the benefits of a fair contract and the result of an injunction would have been to leave employees unrepresented during the time the Section 8(a)(2) case was pending before the Board. Eisenberg v. Hartz Mountain Corporation, 519 F.2d 138 (3d Cir. 1975). A Section 10(j) injunction to withdraw recognition from a minority union may be appropriate notwithstanding such considerations where the injunction makes an election possible before the Board decision issues. Thus, we have sought Section 10(j) if the petitioning union indicates it will, upon issuance of an injunction, make a request to proceed to an election and agree to withdraw the 8(a)(2) charge if the allegedly assisted union wins (cf. Carlson Furniture Industries, 157 NLRB 851 (1966)), and the Regional Director is satisfied that the injunction will restore the conditions necessary to a free and fair election.

7. Successor Refusal to Recognize and Bargain

In this category, an employer acquiring a business and becoming the legal "successor" to an existing bargaining relationship under NLRB v. Burns International Security Services, 406 U.S. 272 (1972), and Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987), has refused to recognize and bargain with the predecessor employer's incumbent union. In some cases, the finding of a successorship may be predicated on the employer's allegedly discriminatory refusal to hire the predecessor's employees in a deliberate attempt to avoid any bargaining obligation. The danger of irreparable injury is similar to that present in the withdrawal of recognition situation--i.e., the employees are denied the benefits of union representation for the entire duration of the Board proceeding and the passage of time foreseeably will sever employee ties and loyalty to the union. See, generally, Bloedorn v. Francisco Foods, Inc. d/b/a Piggly Wiggly, 276 F.3d 270 (7th Cir. 2001); Small v. Avanti Health Sys., 661 F.3d 1180 (9th Cir. 2011); Hoffman v. Inn Credible Caterers, Ltd., 247 F.3d 360 (2d Cir. 2001); Chester v. Grane Healthcare Co., 666 F.3d 87 (3d Cir. 2011); Frye v. Specialty Envelope, Inc., 10 F.3d 1221 (6th Cir. 1993); Asseo v. Centro Medico del Turabo, 900 F.2d 445 (1st Cir. 1990); Scott v. El Farra Enterprises. Inc., 863 F.2d 670 (9th Cir. 1988).

Pursuant to Memorandum GC 18-05, Utilization of Section 10(j) Proceedings, and Memorandum GC 14-03, Affirmation of 10(j) Program, Regions must submit to the Injunction Litigation Branch *all* meritorious successor refusal to bargain and successor discriminatory

refusal-to-hire cases that do not settle, including those where the Region believes that Section 10(j) relief is not warranted.

Appendix G-8 of this Manual contains model just and proper arguments for both successor refusal to bargain and successor discriminatory refusal-to-hire cases.

8. Conduct During Bargaining Negotiations

In these cases, one party to a collective-bargaining relationship has engaged in a refusal to bargain in good faith. The violation may be based upon a wide variety of situations--such as a refusal to meet and bargain, a refusal to supply relevant and necessary information requested by the other party, an insistence to impasse during negotiations on a permissive or illegal subject of bargaining, or a course of conduct reflecting a bad-faith refusal to bargain with an open mind and a sincere desire to reach an acceptable agreement. Where such violations pose a real danger of creating industrial unrest and/or of undermining employee support for the union, Section 10(j) relief may be appropriate. See, generally, Harrell v. Am. Red Cross, 714 F.3d 553 (7th Cir. 2013); Frankl v. HTH Corp, 650 F.3d 1334 (9th Cir. 2011), cert. denied 132 S.Ct. 1821 (2012); Rivera-Vega v. ConAgra, Inc., 70 F.3d 153 (1st Cir.); aff'g 876 F.Supp. 1350 (D. P.R. 1995); Kobell v. United Paperworkers Intern., 965 F.2d 1401 (6th Cir. 1992); Fleischut v. Burrows Paper Corp., 162 LRRM 2719, 2723 (S.D. Miss. 1999); Silverman v. Reinauer Transportation Co., 130 LRRM 2505 (S.D.N.Y. 1988), aff'd mem. No. 89-6010 (2d Cir. June 23, 1989); Boire v. SAS Ambulance Services. Inc., 108 LRRM 2388 (M.D. Fla. 1980), aff'd per curium 657 F.2d 1249 (5th Cir. 1981); Douds v. I.L.A., 241 F.2d 278 (2d Cir. 1957).As noted above, pursuant to Memorandum GC 06-05, First Contract Bargaining Cases, Regions must submit to the Injunction Litigation Branch *all* meritorious Section 8(a)(1), (3) or (5) (or Section 8(b)(1)(A) or 8(b)(3)) cases arising after a union has been certified as the bargaining representative of a unit and the union has requested bargaining for an initial collective bargaining agreement, including those where the Region believes that Section 10(j) relief is not warranted. See also Memorandum GC 18-05, Utilization of Section 10(j) Proceedings, and Memorandum GC 14-03, Affirmation of 10(j) Program. The Region should also carefully consider the propriety of additional remedies in both the injunction and administrative cases. See Memorandum GC 07-08, Additional Remedies in First Contract Bargaining Cases; Memorandum GC 08-09, Submission of First Contract Bargaining Cases to the Division of Advice; Memorandum GC 11-06, First Contract Bargaining Cases: Regional Authorization to Seek Additional Remedies and Submissions to Division of Advice.

Appendix G-1 contains model just and proper arguments for interim bargaining orders in cases involving non-Gissel bargaining violations.

9. Mass Picketing and Violence

This category encompasses cases in which a labor organization or its agents have engaged in restraint or coercion of employees, typically those who choose to refrain from engaging in Section 7 activities such as a strike. These violations of Section 8(b)(1)(A) include: mass picketing that blocks ingress and egress to the plant or worksite; violence and threats thereof at or away from a picket line; and, damage to private property. In these cases, there is, of course, a concurrent state interest which may be protected through local police authorities and

the state court system. However, there are cases in which state authorities are unwilling or unable to control the situation. In those cases, Section 10(j) relief is warranted because the threatened injury cannot be adequately remedied by a Board order issued many months later. See, generally, Frye v. District 1199, 996 F.2d 141 (6th Cir. 1993); Squillacote v. Local 248. Meat & Allied Food Workers, 534 F.2d 735 (7th Cir. 1976); Ahearn v. ILWU, Locals 21 and 4, 721 F.3d 1122 (9th Cir. 2013). As to the comity issues, compare Clark v. International Union UMWA (Clinchfield Coal, 714 F.Supp. 791 (W.D. Va. 1989) and Clark v. International Union UMWA (Covenant Coal), 722 F.Supp. 250 (W.D. Va. 1989).

10. Section 8(d) and 8(g) Notice Requirements for Strike or Picketing

These cases involve union strikes or picketing undertaken in contravention of the notice and waiting periods set forth in Section 8(d) (federal and state mediation) and 8(g) (notices to health care institutions). Section 10(j) relief is often sought when unions engage in such violations, and where the economic activity is having or threatens to have a substantial adverse impact on the other party's operations. Absent quick relief, the Board's final order may not adequately restore the status quo, ensure that the parties' dispute will be open to the ameliorative effects of mediation under Section 8(d), or that adequate arrangements for the continuity of patient care may be made by the affected institution under Section 8(g). The relief sought includes the cessation of the strike and picketing unless and until the union properly complies with the requirements of 8(d) or 8(g). See, generally, McLeod v. Compressed Air, etc., Workers, 292 F.2d 358 (2d Cir. 1961). Accord: McLeod v. Communications Workers of America, 79 LRRM 2532 (S.D. N.Y. 1971).

11. Refusal to Permit Protected Activity on Private Property

These cases involve an employer's interference with the right of employees to engage in protected Section 7 activity in nonworking exterior areas on the private property of an employer. Such activity can include employee picketing or handbilling arising from a labor dispute; it may, in certain circumstances, encompass nonemployee efforts to disseminate organizational material to employees. Such cases involve an analysis of the employer's private property rights, the Section 7 rights being exercised or restrained, and any alternative means of communication. Where the protected rights prevail, an employer's denial of or interference with such rights violates Section 8(a)(1) of the Act. See, Hudgens v. NLRB, 424 U.S. 507 (1976); Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992). When the employer's illegal conduct is having a substantial adverse impact on the protected activity, Section 10(j) relief may be warranted, inasmuch as these disputes are often of a temporal nature. Absent quick relief, the Board's ultimate remedial order will come too late. See, Eisenberg v. Holland Rantos Co., Inc., 583 F.2d 100 (3d Cir. 1978); Baudler v. Am. Baptist Homes of the West, 798 F.Supp.2d 1099 (N.D. Cal. 2011); Calatrello v. Rite Aid of Ohio, 823 F.Supp.2d 690 (N.D. Ohio 2011). But see Silverman v. 40-41 Realty Associates, Inc., 668 F.2d 678 (2d Cir. 1982).

Section 10(j) relief also may be appropriate where the denial of access to an incumbent union constitutes a unilateral change in terms and conditions of employment. See Sheeran v. American Commercial Lines, Inc., 683 F.2d 970 (6th Cir. 1982).

12. Union Coercion to Achieve Unlawful Object

These cases typically involve union conduct violative of Section 8(b)(1)(B), 8(b)(2) or 8(b)(3) of the Act. Very often the misconduct arises in negotiations where the union insists to the point of impasse that an employer agree to a permissive or illegal subject of bargaining, or where the union's conduct amounts to restraint or coercion of the employer in its selection of representatives for the purposes of collective bargaining or grievance adjustment. Where the union's misconduct creates industrial unrest or is having substantial adverse impact on the employer's operations, or is affecting employees in a unique and possibly irreparable manner, Section 10(j) relief becomes appropriate. See, generally, Boire v. I.B.T., 479 F.2d 778 (5th Cir. 1973). Accord: Small v. Operative Plasters', 611 F.3d 483 (9th Cir. 2010); Kentov v. Sheet Metal Workers, 418 F.3d 1259 (11th Cir. 2005); Kobell v. United Paperworkers Int'l Union, 965 F.2d 1401 (6th Cir. 1992); D'Amico v. Industrial Union of Marine and Shipbuilding Workers, 116 LRRM 2508 (D. Md. 1984).

13. Interference with Access to Board Processes

These cases involve employer or union retaliation against employees for having resorted to the processes of the Board, typically for filing charges or giving testimony under the Act. Such retaliation may include threats, discharges, the imposition of internal union discipline, or even the institution of groundless lawsuits meant to retaliate or harass employees for their resort to the Board's processes. Such violations are often worthy of Section 10(j) relief, inasmuch as the chilling impact of such misconduct may preclude other employees from filing timely charges with the Board, or from giving testimony needed in ongoing administrative proceedings. See, generally, Sharp v. Webco Industries, 265 F.3d 1085 (10th Cir. 2001); Humphrey v. United Credit Bureau, 99 LRRM 3459 (D. Md. 1978). Accord: Wilson v. Whitehall Packing Co., 108 LRRM 2165 (W.D. Wisc. 1980). But see Szabo v. P.I.E., 878 F.2d 209 (7th Cir. 1989).

Appendix G-5 of this Manual contains model just and proper arguments for reinstatement in 8(a)(4) cases involving interference with Board processes.

14. Segregating Assets

In these cases, a respondent has allegedly committed unfair labor practices that are being litigated before the Board and the ultimate Board remedy may include some measure of backpay for affected employees. During litigation, the respondent begins to close down operations and/or to liquidate its physical assets. These circumstances create a danger that, after liquidation, the respondent's assets will be dispersed and there will be no assets to satisfy the Board's backpay order. Depending on the circumstances, Section 10(j) relief may be sought to restrict the respondent's alienation of assets unless or until it establishes an escrow or bond in an amount of money equal to the Region's best estimate of anticipated net backpay plus interest. See, generally Blyer v. Unitron Color Graphics of NY, Inc., 1998 WL 1032625 (E.D.N.Y. 1998); Aguayo v. Chamtech Service Center, 157 LRRM 2299 (C.D. Cal. 1997); Jensen v. Chamtech Service Center, 155 LRRM 2058 (C.D. Cal. 1997); Maram v. Alle Arecibo Corp., 110 LRRM 2495 (D.P.R. 1982). In other circumstances, relief under the Federal Debt Collection Procedures Act may be the more appropriate vehicle. Whenever a case arises in this category, Regions should

submit these cases jointly to ILB and the Contempt, Compliance, and Special Litigation Branch (CCSLB).

15. Miscellaneous

These cases involve imminent threats to statutory rights that do not fit into any of the first fourteen categories. Examples may include injunctions against the prosecution of certain lawsuits, employer violence, and interference with employee activities for mutual aid and protection. See, generally Lineback v. Printpack, Inc., 979 F. Supp. 831 (S.D. Ind. 1997) (enjoin prosecution of alleged baseless and retaliatory Section 303 LMRA suit); Sharp v. Webco Industries, 265 F.3d 1085 (10th Cir. 2001) (enjoin prosecution of preempted state court lawsuit).

The foregoing categories are not exclusive. Cases may arise in various contexts that are not encompassed by these categories but that still warrant extraordinary injunctive relief. The common denominator for all cases in which Section 10(j) relief is sought is that the Board's ultimate remedial order will be unable to restore completely the status quo and, thereby, neutralize the damage caused by the violations.

Therefore, when taking a charge or investigating a case that falls within one of the above categories, or when circumstances otherwise suggest a threat of remedial failure, Board agents should be particularly alert for the potential need for 10(j) relief.

3.0 NOTICE TO PARTIES & EXPEDITION OF 10(j) CASES

The Region should identify potential Section 10(j) cases as early in the investigation as possible, ideally at case docketing or after first contact with the charging party. As soon as it appears that 10(j) relief may be considered, the Region immediately should notify all parties of this fact and invite the parties to submit evidence and argument relevant to the 10(j) consideration. See Casehandling Manual Section 10310.1. In those categories where submission of a case to ILB is mandatory (currently “nip in the bud” cases, first contract bargaining cases, successor refusal to recognize and bargain cases, and Gissel bargaining order cases), the Region should inform the parties that, if merit is found and there is no settlement, the matter will be submitted to ILB. The parties should be invited to submit relevant evidence and argument on the question of whether an injunction is necessary or appropriate.

Although Section 10(j) cases do not have statutory priority, the Agency has determined that, based upon policy considerations, any cases involving Section 10(j) relief should have priority over all other non-statutory priority cases in the Region (see Casehandling Manual 10310.6 and 102.94(a) Rules and Regulations). This expedition is necessary because inordinate delay in processing a Section 10(j) case diminishes the effectiveness of any relief obtained. Delay may entirely preclude relief where the situation has so changed that restoration of the status quo is impossible or would be no more effective than the Board's order in due course. Regions should therefore be reluctant to grant postponements to parties for production of witnesses and position statements.

4.0 INVESTIGATING AND ANALYZING "JUST AND PROPER"

As noted above, a 10(j) case differs from other unfair labor practice cases because the circumstances of the case make it likely that the Board's ultimate order will be ineffective to restore the status quo. Accordingly, when investigating an unfair labor practice charge that includes 10(j) consideration, the Board Agent will determine whether there is evidence establishing a violation of the Act but should also conduct additional investigation and analysis to determine whether a Board order in due course will be inadequate to protect statutory rights. To make these determinations, the 10(j) investigator should focus on the impact of those unfair labor practices on statutory rights. The Region should also determine the type of interim relief that is needed to preserve the status quo so that the Board can issue an effective remedy.

The quantum of evidence required to establish the need for Section 10(j) relief will vary depending upon the type of case involved, the applicable case law, and the judicial circuit in which injunctive relief is sought. Although some courts are willing to infer the irreparable injury to statutory rights from certain violations, others may require actual evidence of harm. For this reason, the existence or absence of direct evidence of impact in a particular case is always relevant to the evaluation of the need for 10(j) relief. Its absence does not necessarily mean that Section 10(j) proceedings are inappropriate. But, the ability of the Regions to adduce demonstrable evidence of irreparable harm or undermining effects of the unfair labor practices increases the Board's chances for success in litigating "just and proper" issues in Section 10(j) proceedings.

In any case being considered for 10(j) relief, the Board Agent should routinely question witnesses about the impact of the alleged violations on statutory rights, including possible "chill" on Section 7 rights, and include witness responses in their initial affidavits. In some instances, evidence of chill will be apparent from the nature of the violations, such as the discharge of a prominent activist or threats of plant closure made by high level officials at captive audience meetings. In any event, Board Agents should make every attempt to obtain both objective and subjective evidence which can be put before a district court. Objective evidence would include such things as a drop in the number of union authorization cards obtained after the onset of the unfair labor practices or a decrease in attendance at union organizing meetings. Subjective evidence is usually provided in statements given by employees, or union or employer representatives, about the state of mind of employees as a result of the unfair labor practices; e.g. fear of job loss or anger at the Union. The charging party may identify witnesses or evidence to support the need for 10(j) relief. Although evidence from the affected employees is most persuasive, evidence can be obtained from another employee or union business representative to whom the affected employee expressed concern.[3] Union representatives can provide useful evidence in a variety of circumstances, such as whether a respondent's unlawful conduct has had an impact on an organizing campaign or the bargaining process.

In developing the appropriate questions, Board Agents should determine whether the case falls within one of the 15 categories of Section 10(j) cases and consider the nature of the remedy

[3] See the model argument to support the use of hearsay evidence in Section 10(j) proceedings, in Appendix G-7.

the Region would seek in a 10(j) proceeding. These categories are discussed above in Section 2.1 and outlined in Appendix A. Board Agents should then refer to Appendix B of this Manual which provides a checklist of questions designed to adduce relevant evidence as to the need for interim relief. The checklist is grouped by the types of violations alleged and is cross-referenced to the 15 Section 10(j) categories.

There may be situations where a charged party refuses to cooperate in an investigation and, as a result, the Region anticipates that dispositive evidence will be adduced at trial regarding the propriety of Section 10(j) relief. In those circumstances, it may be necessary to delay the consideration of seeking 10(j) relief and schedule the case for an expedited administrative hearing within 28 days after complaint issues, in accordance with the applicable procedures.[4] However, postponing the Section 10(j) decision until after the administrative hearing concludes should be done only in rare and exceptional circumstances, and only after consultation with ILB. After respondent produces its evidence pursuant to either procedure, the Region should reevaluate the need for Section 10(j) relief.

4.1 Region's Evaluation of Whether to Seek 10(j) Relief

After the Region completes its 10(j) investigation, it should evaluate whether 10(j) proceedings are appropriate. In determining whether to recommend the institution of 10(j) proceedings, the Region should consider the strength of the violations as well as the threat of remedial failure. The Region should also consider the case in light of the "just and proper" theories set forth in established 10(j) case law,[5] as well as the "just and proper" evidence adduced during the Region's investigation and provided by the parties. The Region's evaluation generally should be made at the same time that it determines whether to issue complaint on the allegations in the charge(s). The Region's Final Investigative Report, Agenda Minute or other decisional document should discuss the issue of whether 10(j) relief is warranted, including the nature of the "just and proper" investigation.

4.2 Region Concludes Injunction Proceedings Not Warranted

Except in circumstances where 10(j) submissions to ILB are mandatory, Regions may independently conclude that Section 10(j) proceedings should not be instituted, without submitting the case to ILB. In those instances, it should inform the parties of its decision that injunctive relief is not warranted.

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[4] See Memorandum GC 94-17, Expedited Hearings; Memorandum OM 06-60, Section 10(j) Cases and Expedited Hearings; Memorandum GC 10-07, Effective Section 10(j) Remedies for Unlawful Discharges in Organizing Campaigns.

[5] See Appendix E of this Manual for a list of court cases for each 10(j) category.

5.0 SUBMISSION OF 10(j) CASE TO THE BOARD

5.1 Relationship between the Unfair Labor Practice Proceeding and 10(j) Proceeding

In considering whether to seek injunctive relief, the Region should keep in mind the relationship between the administrative proceeding and any injunction proceeding that is instituted under Section 10(j) of the Act. The statute provides that the Board may petition a district court for temporary relief "upon issuance of a complaint." Therefore, an administrative unfair labor practice complaint is a necessary predicate for seeking injunctive relief.

The Board may not seek relief in district court for a violation that is not alleged in the complaint. Similarly, the Board may not argue in district court a theory of violation that is not also being argued in the ancillary administrative proceeding. However, the converse is not true. Thus, while the violations alleged in the 10(j) petition must be alleged in the administrative complaint, it is not always necessary to seek interim relief for every violation alleged in the administrative complaint, or to argue each of several alternative theories of violation in a Section 10(j) proceeding. Instead, in every 10(j) case, the Region should evaluate the unfair labor practice complaint to determine which violations must be remedied on an interim basis to avoid remedial failure. In addition, the Region may consider omitting complaint allegations from the 10(j) petition if they are weak on the merits and not necessary to support the need for interim relief.

In addition, the remedies sought in the administrative complaint should also typically track those sought on an interim basis in a Section 10(j) proceeding. Like violations alleged, not all remedies sought in the administrative proceeding need to be sought in a Section 10(j) proceeding, but all remedies sought in a Section 10(j) proceeding should be alleged and sought in the administrative proceeding. There are some remedies, primarily backpay, which are considered “legal” remedies that can be made whole by an eventual Board order and should not be sought in an “equitable” 10(j) proceeding. There are other administrative remedies for which comparable remedies are sought in 10(j) proceedings, such as posting and/or reading of the district court 10(j) order rather than posting and/or reading of a Board notice. Some remedies are unique to Section 10(j) proceedings; for example, the interim “mothballing” of a facility and/or an injunction against the sale of a facility which is alleged to have been discriminatorily closed, in order to preserve the effectiveness of a possible eventual Board order to restore work to the facility.

Regions should remain vigilant about recommending 10(j) proceedings in cases even when there are related charges still unresolved in the Region. If a case needs immediate injunctive relief, the Region should not wait for additional related charges to be resolved before submitting the original case to Washington. If those related charges are ultimately found to be meritorious and also need 10(j) relief, the Region should call the Injunction Litigation Branch,

especially before postponing an administrative hearing to account for an amended or consolidated complaint[6]

5.2 Preparing the Section 10(j) Memorandum to the General Counsel

After the Region determines that a case has merit and concludes that 10(j) proceedings are appropriate, the Region makes a recommendation in writing to the General Counsel, through the Injunction Litigation Branch (ILB) of the Division of Advice, as to whether it believes that Section 10(j) relief is warranted. The 10(j) memorandum should be submitted to the ILB within 14 days of the merit determination. If the General Counsel agrees that 10(j) proceedings should be sought, the Region's memorandum provides the foundation for the General Counsel's request for authorization from the Board and is typically provided to the Board with the cover memorandum from the General Counsel and ILB. Therefore, the Region's memorandum should contain the necessary information, analysis, and recommendations for the General Counsel and the Board to decide whether to recommend and to authorize Section 10(j) relief in the case. The Region's memorandum should not analyze dismissed allegations or other irrelevant issues or discuss matters that pertain to the General Counsel's Section 3(d) authority.

5.2.1 Content of the 10(j) Memorandum

[redacted]

[redacted]

[6] See Memorandum OM 01-33, Timely Processing of Section 10(j) Case When Multiple Related Charges are Filed.

[redacted]

[redacted]

5.2.2 Resources for preparing the 10(j) Memorandum

[redacted]

[redacted]

[redacted]

5.3 Division of Advice Evaluation

[redacted]

[redacted]

[redacted]

[redacted]

5.4 Inform ILB of Changed Circumstances

The Region should routinely inform ILB of any new developments in cases submitted for 10(j) authorization at all stages of 10(j) processing, including after Board authorization. For example, the filing of additional charges, changes in the status of discriminatees, problems with the evidence at the ALJ hearing, possible settlement, issuance of an ALJ decision, or other changed circumstances could enhance or detract from the district court litigation and any appellate review of a 10(j) order.

5.5 Board Authorization and Timing of Filing Petition

If the Board authorizes Section 10(j) proceedings, ILB will immediately notify the Region. The Region should file the Section 10(j) petition within 48 hours (2 business days) after receiving notice from ILB that the Board has authorized the use of Section 10(j). If a settlement is imminent, or if other exigent circumstances exist, the Regional Office should consult with ILB for authorization to delay filing the petition outside the 48-hours.

During the 48 hours from the authorization of Section 10(j) proceedings until the filing of the Section 10(j) court papers, the Region should vigorously continue to pursue settlement efforts

5.6 Nip-in-the-bud and Gissel Cases

Regions should consult Memorandum GC 10-07, Effective Section 10(j) Remedies for Unlawful Discharges in Organizing Campaigns, for best practices in processing Section 8(a)(3) discharge nip-in-the-bud cases and Gissel cases. Where in conflict, the practices set forth in Memorandum GC 10-07 take precedence over the procedures described in this User's Guide.

6.0 PREPARING 10(j) PAPERS FOR DISTRICT COURT

As mentioned above, the Region should file the 10(j) petition in district court within 48 hours (2 business days) after notice by the ILB that the Board has authorized the use of Section 10(j). The typical documents to be filed in the U.S. District Court include:

- Petition for Injunctive Relief (attach charge, complaint and Regional Director's affidavit)
- Proposed Order to Show Cause
- Memorandum of Points and Authorities
- Proposed Findings of Fact and Conclusions of Law
- Proposed Temporary Injunction Order (should track the 10(j) memo to Board)
- The evidence in support of the Petition (affidavits; documentary evidence)
- In cases to be tried on the basis of the ALJ record, the ALJ record (if available) accompanied by a Motion to Try on the Administrative Record

Examples of these basic pleadings, as well as others that might be applicable (i.e., a sample motion for a Temporary Restraining Order) are included in Appendix H of this Manual and in iSearch.[9]

The Region should always check the local district court rules to determine the procedures that should be followed in filing the papers. Most courts maintain their own website containing the rules and other pertinent information. The rules can also be obtained from Westlaw via a link on the ILB website on the agency's internal website. If the Region does not have prior experience in filing Section 10(j) proceedings in a particular district court, it may be helpful to contact the civil branch of the local U.S. Attorney's office or other attorneys in the area who are well practiced in civil litigation to help explain the vagaries of the local district court. It could also prove worthwhile to telephone the court and establish contact with someone in the clerk's office who can provide help on some of these procedural matters.

In preparing the papers for filing, the Region should ensure that the court is made aware at the outset that the Board's 10(j) petition should be given expedited treatment under 28 U.S.C. Section 1657(a), which gives priority to preliminary injunction cases in federal courts. Typically, this may be accomplished by indicating in the cover letter accompanying the filing of the court papers that treatment of the case is governed by Section 1657(a).

6.1 The Evidence

[redacted]

[9] If the Board has authorized a 10(j) protective order to sequester assets, refer to Appendix I for samples of the model pleadings.

[redacted]

When trying the case on affidavits, the Region should prepare a volume of the affidavits and exhibits upon which it intends to rely and, as noted above, file those with the initial papers. In the past, Regions generally filed a motion to try the case on affidavits. However, recent experience filing such motions has frequently led to additional procedural litigation regarding the use of affidavits, and/or unnecessary discovery requests where the affidavits were not filed with initial pleadings. This additional delay in the litigation could be avoided if the affidavits are simply proffered along with the petition and supporting memorandum. If, nevertheless, there is litigation over the use of affidavits, Regions should refer to the sample arguments in Appendix K.

[redacted] In some cases, depending on timing, a record of the hearing before an administrative law judge (or relevant portions thereof) can be used in place of, or in conjunction with, affidavits. The administrative record will generally only support the merits of the violations, and not the need for injunctive relief. For this reason, 10(j) cases heard on the administrative record will also require supplementary evidence on the need for interim relief either in the form of affidavits or live testimony before the district court judge. If the administrative hearing is held before the filing of the 10(j) petition in district court, the Region should attempt to introduce just and proper evidence in the administrative hearing to avoid having to call witnesses before the district court. The Region should explain to the ALJ that 10(j) relief is being seriously considered.

[redacted] See Memorandum GC 18-05, Utilization of Section 10(j) Proceedings. Section 10(j) proceedings are intended to provide quick relief to prevent a respondent's unfair labor practices from succeeding. Any Board delay, especially after Section 10(j) proceedings are authorized, is routinely used by respondents to argue that Section 10(j) relief is not necessary. Nevertheless, ILB realizes that, in certain cases, it may be prudent to wait some minimal amount of time for an administrative law judge record.

When using the administrative transcript in a 10(j) proceeding, the Region should file a motion to hear the case on the administrative record, with a copy of the record attached. This should be filed simultaneously with the petition. Sample motions and a model memorandum to support such motions are contained in Appendix K of this Manual. In some instances, a district

court will insist on hearing live testimony to prove the violations or just and proper allegations in the petition. In that case, the Region should be prepared to present witnesses at a 10(j) hearing in district court to prove the merits of the petition allegations. (See more about the district court argument and/or hearing below in Section 7.0 et seq.)

6.2 The Memorandum of Points and Authorities

In preparing the Memorandum of Points and Authorities, the Region should keep in mind that the district court judge or magistrate is unlikely to be as familiar with labor law principles as an administrative law judge. Thus, the Board's memorandum in support of the Petition for Injunctive Relief should lay out a theory of violation in greater detail than the Region is likely to do in its administrative litigation and should avoid labor law jargon. Also, the Board's memorandum should include applicable circuit law on the merits, including any cases cited in the General Counsel's memorandum to the Board. Of course, the Region should be cognizant of any page limits imposed by the district court, and the drafting challenges presented by that limit.

The General Counsel's memorandum to the Board, supplementing Region's memorandum regarding Section 10(j) relief are the blueprint for the district court petition and memorandum of points and authorities, and a repository of solutions for anticipated litigation problems in the case. The Region should rely upon these two documents, together with other resources, such as the Model 10(j) standards in Appendix D, the list of important 10(j) cases in Appendix E, and sample 10(j) pleadings in Appendix H, to draft papers in appropriate format for the district court.

In drafting the memoranda of points and authorities, the Region should follow the guidance in the document entitled "Rules for Writing an Effective District Court Brief in a 10(j) Injunction Case" which was prepared by ILB and provided to each region, and is also located in Appendix F-1. As noted in Appendix F-1, in addressing the propriety of interim relief, the Region should utilize the just and proper argument set forth by ILB in the General Counsel's memorandum to the Board.

For guidance on specific formatting, the Region should follow the local district court rules and consult prior memoranda of points and authorities that the Region filed in support of other 10(j) petitions. If sample memoranda of points and authority are unavailable in the regional office, the Region can request samples from the Injunction Litigation Branch or locate samples in the database of 10(j) samples in iSearch. A listing of recommended samples available from ILB is located in Appendix F-2 of this Manual.

The Region must submit memoranda and proposed orders in nip-in-the-bud and Gissel cases to the ILB for review prior to filing in district court. See Memorandum GC 10-07, Effective Section 10(j) Remedies for Unlawful Discharges in Organizing Campaigns.

The respondent is afforded the opportunity to file answering papers and, where relevant, counter-affidavits and exhibits. The Region may need to file a reply brief and rebuttal affidavits and exhibits to answer unanticipated arguments raised by the respondent. Check the local district court rules to determine whether these are permitted as a matter of course or by motion. The Region should consult with ILB if it determines that a reply is not necessary.

6.3 Maintaining District Court Papers in NxGen

The Regions are responsible for maintaining all district court documents in NxGen. ILB's notification to the Region that the Board has authorized injunction proceedings [redacted] in NxGen. The [redacted] is the repository for all papers filed in district court during the litigation of the 10(j). Therefore, immediately upon filing, Regions should upload the file-stamped version of all documents filed in the district court – whether filed by the Region, respondent, and/or any amici or other party. If necessary, the Region can use [redacted] as a container while drafting the court documents. For proper instructions on uploading documents to the district court action, please refer to the 10(j) instructions in the NxGen Training Library on the Operations page on the agency's internal website.

7.0 ORAL ARGUMENT IN DISTRICT COURT

Once the Region files the initial 10(j) papers in district court, the case will be assigned to a judge who should schedule a hearing.[10] As shown in the following sections, numerous resources are available to assist Board attorneys in their preparation to argue before a federal district court judge. In addition to these resources, the Injunction Litigation Branch is available at all times to provide additional guidance and support as the 10(j) hearing approaches.

7.1 Preparing for the 10(j) Hearing

Unless the court has specifically limited the issues to be addressed at hearing, the Board attorney should be prepared to address all aspects of the 10(j) case. [redacted]

[redacted]

In general, it is significantly more likely that the court will require live testimony on the just and proper nature of interim relief.

[10] If the judge does not set a date for a hearing after 30 days from the filing of the petition, refer to section 9.2 on District Court Delay in Issuing 10(j) Decision regarding how to proceed.

Often, however, the district court hearing is non-evidentiary, providing an opportunity to present oral arguments in support of the petition. [redacted]

[redacted]

There are certain steps the Board attorney should take prior to the hearing to help address these preeminent concerns of the district court. [redacted]

7.2 Moot Court

A moot court session with ILB prior to a district court hearing is mandatory. See Memorandum OM 08-12, Section 10(j) Cases and Moot Court Oral Argument Preparation. A moot court provides the Board attorney with a greater level of familiarity and experience articulating the arguments it will make to the court. It also provides exposure to another point of view. Moot courts with ILB are generally held via the agency's video conferencing equipment. In addition to the ILB moot court, Board attorneys can also arrange a moot court with the supervisors or managers in their Regional office.

7.3 At the District Court Hearing or Oral Argument

Here are some general points to review before a district court hearing or oral argument:

[redacted]

[redacted]

[redacted]

7.4 Charging Party Intervention

Occasionally, a charging party may wish to intervene as a party in the Section 10(j) proceeding.

8.0 DISCOVERY IN 10(j) LITIGATION

Respondents, however, often seek discovery. Courts frequently grant discovery because, despite the priority nature of Section 10(j) cases, the Board is subject to normal discovery procedures under the Federal Rules of Civil Procedure (Rules 26-37 and 45) in a district court proceeding. Board attorneys should be prepared to respond quickly to reasonable discovery requests and to produce relevant, non-privileged evidence.

[11] See Memorandum GC 99-4, Participation by Charging Parties in Section 10(j) Injunction and Section 10(j) Contempt Proceedings, located in Appendix M of this Manual.

[redacted]

The Region should immediately contact the Injunction Litigation Branch whenever it receives a discovery request in a Section 10(j) case.

9.0 OTHER LITIGATION ISSUES

9.1 Impact of ALJD on 10(j) Litigation

Frequently, an ALJ issues a decision in an unfair labor practice case when there is a related 10(j) petition pending before a district court. In that event, the Board attorney should review the ALJD and determine whether the ALJ's findings support or undercut the allegations in the 10(j) petition. The Region should also immediately notify the Injunction Litigation Branch of the issuance of the ALJD and/or the life of an injunction, if already obtained.

A favorable ALJD supports the Board's effort to convince a district court judge that there is either "reasonable cause" to believe respondent violated the Act as alleged in the 10(j) petition, or that there is a "likelihood of success" in proving the violations before the Board. Therefore, if the ALJ's findings support the 10(j) petition allegations, then the Region should submit a copy of the ALJ's decision to the district court judge who is presiding over the 10(j) petition. The Region should send a cover letter or motion, whichever is appropriate under the local rules, that explains how the ALJ's decision supports the 10(j) petition. A proposed cover letter and motion, with relevant arguments and case citation, are included in Appendix O of this Manual.

In the event of an adverse ruling by an ALJ, Board Rule 102.94(b) requires notification of the district court. Therefore, if the ALJ recommends dismissal of some or all of the complaint allegations that are also contained in the 10(j) petition, or denies remedies sought in the 10(j) petition, the Region should immediately notify ILB. [redacted]

[12] Appropriate portions of the Model Memorandum should be filed in support of a motion to limit discovery. A model motion and order limiting discovery are also in Appendix N. **Note that the Model Memorandum discusses numerous types of discovery problems that arise in 10(j) proceedings; therefore, the Region should be careful to use only those parts of the Memorandum, Model Motion and Model Order that concern its particular discovery request.**

[redacted]

[redacted]

9.2 District Court Delay in Issuing 10(j) Decision

The Board authorizes the use of injunction proceedings when immediate interim relief is needed to preserve the effectiveness of the Board's ultimate remedial order. For this reason, time is always of the essence in a 10(j) case. Just as the Agency makes every effort to expedite internal agency processes in every 10(j) case, the district court also should act quickly to resolve the 10(j) petition.

For this reason, the Region should be prepared to take action if it does not receive a prompt decision from a district court judge. Specifically, if a district court fails to set a hearing date, or issue a decision within 60 days after the close of the Section 10(j) hearing or the last court filing, the Region should contact the court by letter, with copy to all counsel, informing the court of the pendency of the Region's Section 10(j) petition, the statutory priority of this proceeding, and the need to prevent irreparable injury to employee statutory rights as earlier described in the Region's court papers and inquiring about the status of the case. If necessary, the Region may need to file a motion to expedite the case. In extreme circumstances, ILB can file a petition for a writ of mandamus in the court of appeals to compel the district court to rule on the Section 10(j) petition. [redacted] The Region should keep ILB apprised of all developments concerning expediting the Section 10(j) decision.

9.3 Withdrawal or Dismissal of the 10(j) Petition

For various reasons, it may be necessary for the Region to consider withdrawing or seeking dismissal of the Section 10(j) petition while it is pending in district court and before the court issues a decision. This may occur if the parties have settled the underlying labor dispute, or if there are other changed circumstances that render injunctive relief no longer appropriate. The Section 10(j) petition should not be withdrawn or dismissed, however, without the Region first conferring with the Injunction Litigation Branch.

10.0 POST INJUNCTION PROCEDURES

A number of issues may arise after a district court issues a decision either granting or denying the Board's 10(j) petition. As always, the Region should immediately inform the Injunction Litigation Branch of the issuance of a district court's decision in any 10(j) matter, and promptly e-mail a copy of the 10(j) decision or order. However, the granting or denial of a 10(j)

injunction is not the end of a 10(j) case. Whether the decision is a win or a loss, a number of issues may arise.

10.1 Notification to ALJ or Board

Whenever a district court issues a Section 10(j) injunction in a pending unfair labor practice case, the Region must notify either the presiding ALJ or the Board, depending on the stage of the administrative proceeding, and request expeditious processing of the case. Section 102.94(a) of the Board's Rules and Regulations requires that the Board give expedited treatment to any complaint that is the basis for interim injunctive relief.

Notification to the Board should be in the form of either a motion to the Board or a letter to the Executive Secretary requesting that the Board expedite the case pursuant to 102.94(a). Although notification also can be included in the Region's brief to the Board, this should not be the sole method of notification.

The letter/motion notifying the Board should be sent as soon as the case has been transferred to the Board or, if the injunction is granted while the case is pending before the Board, as soon thereafter as possible.

This procedure will enable the Board to more quickly "red flag" the case for expedited handling.

10.2 Modification or Clarification of 10(j) Order

When a district court issues an order granting interim injunctive relief under Section 10(j) of the Act, the Region immediately should determine whether the relief granted differs from that which was requested in the 10(j) petition. If the relief granted does not exactly track the language of the petition and the proposed 10(j) order, the Region should determine whether the relief obtained is clear, capable of compliance, and provides the relief necessary to restore the status quo. If the order is vague or omits relief the district court obviously intended to grant, then the Region should consider whether to file a motion to clarify the order. If the Region is aware of a change in circumstances, or has otherwise obtained new evidence which, had it been heard by the district court, would have affected the case, then the Region should consider whether to ask for a modification of the order. In either instance, the Region should confer with the Injunction Litigation Branch regarding any possible defects in the district court order and for authorization to file a motion clarifying or modifying the order.

10.3 Appeal Consideration if 10(j) Relief is Denied

The Injunction Litigation Branch evaluates each Section 10(j) loss, in part or in total, as a potential appeal. The Board, as a federal agency, has 60 days from entry of the district court order to file a notice of appeal (Fed. R. App. P. 4(a)(1)(B)). Consequently, Regions should immediately inform the ILB of the entry of a final order in district court and provide the decision and order. This will trigger the appeal consideration process by ILB personnel.

In addition to the district court decision itself, the ILB bases the propriety of an appeal on three sets of documents: the record before the district court, a transcript of district court

proceedings, and the Region's recommendation as to the merits of an appeal. ILB will have electronic access to the district court record uploaded to the district court action in NxGen, as instructed in Section 6.3, *supra*. The Region, however, is responsible for ordering the transcript and should contact ILB in each case to determine whether the transcript is necessary for the appeal consideration. A transcript may be unnecessary in certain circumstances, such as situations where the district court granted most of the requested relief and an appeal by Respondent is unlikely. The Region should advise ILB once it receives the transcript and upload it to the district court action with the rest of the record.

The Region's role in an appeal consideration culminates with the submission of a written recommendation. Although it is unnecessary to reiterate the merits of the petition, the Region should briefly relate the procedural history of the case before the district court, including the date the Region filed the petition; the date, nature and disposition of pertinent, substantive motions that bear on the ability to secure the requested relief (e.g., motions to dismiss); the hearing dates; and the evidentiary basis upon which the case was tried (e.g., affidavits or ALJ transcript). Since the 10(j) loss is reviewed in light of the evidentiary posture at trial, it is crucial to identify any material record evidence that differed from the facts upon which the Board authorized injunctive proceedings and analyze what, if any, impact the changed record would have on a decision to appeal. The Region should also identify any evidence that the court discredited and analyze the propriety of the credibility resolution according to circuit law.

The Region also should consider whether the decision is subject to reversal pursuant to the standard of review in the relevant circuit. [redacted]

[redacted]

[redacted]

[redacted]

10.4 Monitoring Compliance with the 10(j) Injunction

To ensure the effectiveness of a 10(j) decree, the Region should monitor the respondent's compliance with all aspects of the district court's order, especially any affirmative provisions,

such as reinstatement, bargaining, or rescission orders. The Region should take the following steps in order to monitor compliance:

- Once the injunction is issued, the Region should maintain contact with the charging party, employees, or other interested parties to stay apprised of respondent's post-injunction conduct.

- The Region should keep in mind any deadlines contained in the injunction (e.g., for reinstatement offers to be made, for the affidavit of compliance to be filed) and check that respondent has taken appropriate action within the prescribed time periods.

- The Region should also inquire whether any triggering events or actions required by the charging party, such as a union's request for bargaining or for rescission of unilateral changes, have taken place.

10.5 Investigating Possible Contempt of the 10(j) Injunction

If a respondent appears to be in noncompliance, the Region should conduct an investigation to determine whether the agency should institute contempt proceedings to force compliance with the 10(j) order. Post-injunction monitoring and contempt proceedings are essential tools in making sure that Section 10(j) decrees fulfill their purpose. The following are guidelines for these important post-injunction procedures.

[redacted]

10.6 Submitting a Contempt Recommendation to ILB

If the Region's post-decree investigation indicates that the respondent is not complying with the 10(j) injunction, and the Region determines there is "clear and convincing" evidence to indicate that the respondent is in contempt, the Region should submit the case to the Injunction Litigation Branch with a recommendation regarding whether to institute contempt proceedings. The Region's memorandum should include the following:

[redacted]

[redacted]

A sample contempt memorandum issued by ILB containing relevant contempt principles, arguments, and the suggested format for a contempt decree, is located in Appendix Q of this Manual.

10.7 Impact of an Informal Settlement Agreement on a Section 10(j) Order.

From time to time, cases in which the Board has obtained interim Section 10(j) relief are subsequently settled by an informal settlement agreement. However, the language contained in the standard informal settlement agreement may create a compliance problem when there is an outstanding 10(j) decree.

[redacted]

[redacted]

10.8 Adjustment of the Section 10(j) case

There may be occasions when a respondent is willing to adjust the Section 10(j) case either before a 10(j) petition is filed or while the case is pending in district court but desires to litigate the underlying unfair labor practice case before the Board. [redacted]

[redacted]

[redacted]

10.9 Issuance of Board Decision in Underlying Unfair Labor Practice Case

A 10(j) order is designed to provide interim relief during the pendency of the administrative proceeding and preserve the Board's ability to issue a meaningful order. Therefore, at some point while a 10(j) injunction is in effect, the Board will issue its final order in the underlying unfair labor practice case. When the final Board order issues, the 10(j) injunctive decree dissolves as a matter of law.[17]

When a 10(j) order is in effect, and the Board issues an order in the underlying case, the Region should immediately advise ILB of the issuance of the Board's order. ILB can provide sample papers to instruct the Region on the best method for informing the district court of the issuance of the Board decision and its impact on the 10(j) decree. The Region should also consider and, where appropriate, discuss with ILB and the Appellate Court Branch whether there is a need for a Section 10(e) injunction to protect statutory rights pending enforcement of the Board order.

11.0 CONCLUSION

Section 10(j) of the Act remains a powerful tool for this Agency to effectively enforce the rights guaranteed by the Act. The Injunction Litigation Branch is committed to providing Agency personnel with the resources to help identify, investigate, and litigate Section 10(j) cases. Please feel free to contact ILB to discuss any questions or problems that may arise during any stage of processing a 10(j) case.

[17] Barbour v. Central Cartage, Inc., 583 F.2d 335, 336-337 (7th Cir. 1978); Johansen v. Queen Mary Restaurant Corp., 522 F.2d 6 (9th Cir. 1975).

APPENDIX A

THE 10(J) CATEGORIES

1. Interference with organizational campaign (no majority)

- includes traditional"nip-in-the-bud" unfair labor practices, such as threats, coercive interrogations, surveillance of protected activities, improper grant of benefits, and unlawful employee discipline, including discriminatory discharges
- if it includes shutdown or relocation of operations, subcontracting, or transfer of operations to alter ego or single or joint employer, see Category 3
- if it includes minority union recognition, see Category 6

2. Interference with organizational campaign (majority)

- includes *Gissel* cases where union has obtained a majority of authorization cards and employer engaged in serious and egregious unfair labor practices (see Memorandum GC 99-8 *Guideline Memorandum Concerning Gissel*)
- will include unfair labor practices similar to Category 1

3. Subcontracting or other change to avoid bargaining obligation

- these involve an employer's implementation of a major entrepreneurial-type decision which may include shutdown or relocation of operations, transfer of operations to alter ego, or single, or joint employer
- changes may be discriminatorily motivated in violation of Section 8(a)(3) and/or independently violative of Section 8(a)(5)

4. Withdrawal of recognition from incumbent

5. Undermining of bargaining representative

- includes implementation of important changes in working conditions, either discriminatorily or without bargaining with the union
- may include any of the additional types of violations listed in Category 1, above
- see also successor refusal to bargain (Category 7) or conduct during bargaining (Category 8)

6. Minority union recognition

- includes variety of illegal assistance to and/or domination of a labor organization

7. Successor refusal to recognize and bargain

- includes discriminatory refusal to hire predecessor's employees

8. Conduct during bargaining

- includes refusal to provide relevant information, delay or refusal to meet, insistence to premature impasse or impasse on permissive or illegal subjects of bargaining, unlawful course of conduct in bargaining, or surface bargaining

9. Mass picketing and violence

- includes mass picketing which blocks ingress and egress to the plant or worksite, violence and threats thereof, and damage to property

10. Notice requirements for strikes or picketing under Section 8(d) and (g)

- includes strikes or picketing undertaken in contravention of the notice and waiting periods set forth in Section 8(d) (Federal and State mediation) and 8(g) (notices to health care institutions)

11. Refusal to permit protected activity on property

- may include employee picketing or handbilling arising from a labor dispute, or nonemployee efforts to disseminate organizational material to employees

- may also include a unilateral change in past practice or contractual term granting access to an incumbent union

12. Union coercion to achieve unlawful objective

- may involve union insistence to impasse on permissive or illegal subject of bargaining, or union conduct that amounts to restraint or coercion of the employer in its selection of representatives for the purposes of collective-bargaining or grievance adjustment

13. Interference with access to Board processes

- may involve employer or union retaliation against employees for having resorted to the processes of the Board

- retaliation may include threats, discharges, the imposition of internal union discipline, or the institution of groundless lawsuits

14. Segregating assets

- includes any alienation of assets which may require a protective order to preserve respondent's assets for backpay

15. Miscellaneous

- includes injunction against certain lawsuits, employer violence, and interference with employee activities for mutual aid and protection

APPENDIX B

CHECKLIST FOR INVESTIGATION OF REQUESTS FOR THE 10(J) RELIEF

The following questions may help to elicit evidence relevant to the analysis of whether 10(j) relief is "just and proper" in a particular case. It should be emphasized that 10(j) determinations are made on a case-by-case basis, following careful examination by the Office of the General Counsel and the Board, of all relevant facts and law. These determinations are not dependent upon the presence or absence of any particular fact. The questions are grouped according to the types of violations for which relief is sought.[1] For each type of violation, we have cross-referenced the applicable categories of cases.

A. Unlawful Antiunion Activities and Discharge of Employees (Categories 1, 2, 3, 4, and 5)

1. Are ULPs isolated or do they form a pattern aimed at destruction of organizing campaign?

2. Size of bargaining unit (greater impact in small unit).

3. Number and percentage of unit employees subjected to ULPs.

4. Was knowledge of unfair labor practices widespread among employees?

5. Were violations committed by senior employer officials?

6. Were 8(a)(3) violations committed in a manner intended to intimidate other employees?

7. Were discriminatees active in union?

   (a) What did they do?

   (b) Were they perceived as leaders by other employees?

   (c) Are they willing to resume the campaign if reinstated?

8. Are ULPs blocking a representation case or a scheduled election?

   (a) Is union willing to revive campaign and/or proceed to an election if court orders injunctive relief?

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[1] This checklist is designed to assist Board agents in conducting investigations, and is not intended as an exhaustive list of relevant inquiries. Board agents should pursue all relevant leads based upon the facts of the case and current law and consult with their supervisor about the scope of the investigation.

9. Any scattering of employees "to the four winds"?

   (a) Which discriminatees desire reinstatement?

   (b) If employees do not desire reinstatement, why not (fear, intimidation, better job elsewhere)?

   (c) Types of interim employment discriminatees have obtained: wage rates, locations in relation to employer's facility (scattering of employees reduces likelihood of return to employer).

10. Evidence of chill/loss of support on organizing activities.

   (a) Evidence of chill/loss of support for incumbent union (drifting away of members, deterioration of union's legitimacy with members). Employees refuse to talk to union organizers, take union literature or cards, wear union insignia, or assume leadership positions.

   (b) Statements by employees that they are afraid for their jobs, afraid to support the union, or, in case of grant of benefits, no longer see a need for the union (hearsay statements from a union business agent may be admitted to show employee state of mind).

   (c) Lower attendance at union meetings.

   (d) Employees revoke or seek return of union authorization cards.

   (e) Reduction in rate at which cards are signed, after ULPs commenced.

   (f) Employees crossing organizational/recognitional picket lines.

   (g) Employees sign antiunion petition.

11. Evidence of chill/loss of support for incumbent union (drifting away of members, deterioration of union's legitimacy with members).

   (a) Drop in union membership, including the absence of new members where membership has been on the increase.

   (b) Cancellation of dues checkoff.

   (c) Decrease in number of grievances filed or fear of filing grievances (assuming employer is complying with grievance machinery).

   (d) Statements of dissatisfaction by employees, including desire to strike, engage in work stoppages, or violence.

   (e) If there is a strike, number and percentage employees who cross picket lines after ULPs.

(f) Lower attendance at union meetings.

(g) Reluctance to talk to union officials or become involved in union activities.

(h) Employees sign antiunion petition.

(i) Longevity of employment, and intimacy/cohesiveness of employees in unit.

B. Unlawful Employer Refusal to Recognize and Bargain (Including *Gissel* Bargaining Order, Unlawful Withdrawal of Recognition, Successor Refusal to Recognize, Unlawful Conduct During Negotiations--Insistence on Change in Unit or other Nonmandatory Subject, Refusal to Meet and Deal) (Categories 2, 3, 4, 5, 7, and 8)

1. Length of collective-bargaining relationship (likelihood of loyalty to union).

2. Size of bargaining unit (small size accentuates any 8(a)(1) and (3) violations).

3. Number and percentage of employees in bargaining unit affected by ULPs.

4. Actual loss of support for union (see A.10, above).

5. Any problems with union's majority status (coerced or tainted cards) or with appropriate unit? In "good-faith doubt" cases, how strong is employer's defense?

6. Has the union threatened to strike or has it already commenced a strike? (Industrial unrest favors interim bargaining order.)

   (a) What kind of strike is it (e.g., ULP strike, economic strike, or unprotected strike)?

   (b) What effect, if any, is the strike having on the employer's operations? Is public interest being affected by strike, e.g., municipal/state construction, or other quasi-public services?

   (c) Has union made unconditional offer to return to work? Has employer hired permanent replacements?

7. Have employees been locked out? Have they been replaced?

8. Have employer's bargaining violations caused, exacerbated or prolonged strike; or precluded negotiations on other subjects?

9. Is there a history of amiable bargaining between the parties? Is this bargaining for a first agreement? Is bargaining following a recent Board election? Was representation case protracted?

10. In *Gissel* bargaining order cases:

    (a) How large was the union's card majority?

    (b) Any demonstrable loss of majority?

        (1) Withdrawal or revocation of union authorization cards.

        (2) Union lost Board-conducted election.

        (3) Lower attendance at union meetings.

        (4) Employees resigned from union membership.

        (5) Employees sign antiunion petition.

        (6) Employees reluctant to take leadership positions in union.

    (c) Serious nature of violations, including "hallmark" violations (e.g., discharges, threats to close, 8(a)(1) violations committed by senior employer agents).

    (d) Any dissemination of violations among employees: number and who affected and knew of violations

    (e) Have unfair labor practices continued?

    (f) Any mitigating circumstances between time majority established and 10(j) hearing.

        1) Substantial employee turnover not due to employer's ULPs (e.g., seasonal business).

        2) Change in management or management policies toward union; removal of agents who committed ULPs.

        3) Employer's voluntary remedy for some of violations, e.g., reinstate some of 8(a)(3)s

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C. Unlawful Unilateral Changes (Categories 2, 3, 4, 5, 7, and 8)

1. Did changes affect important working conditions? Were substantial numbers of unit employees affected? Are employees upset? Is union being blamed for its inability to correct changes? (See A,10, above.)

    (a) Has employer discontinued health-care coverage for unit employees? Have any employees foregone medical care as a result?

    (b) Has employer eliminated nonmonetary benefits at core of union's representational status (e.g., refused to process grievances, denied union representatives access to plant)?

    (c) Has employer failed to pay benefit fund contributions? Are any union benefit funds insolvent, or in serious risk of insolvency, as a result?

    (d) Has union acceded to unlawful employer demands in grievance handling or negotiations?

2. Were unremedied unilateral changes a major stumbling block to the parties' negotiations?

3. Are unilateral changes isolated in nature or is there a pattern? History of prior ULPs?

4. Does union want prior working conditions restored?

5. Is union pursuing any Section 301 remedy?

6. In cases involving a successor's refusal to recognize union that represented predecessor's employees, how do terms and conditions of predecessor differ from successor?

D. Unlawful Refusal to Provide Relevant Information (Categories 2, 3, 4, 5, 7, and 8)

1. Are parties now bargaining?

2. How, if at all, does the absence of requested information affect the likelihood that parties will reach agreement?

3. Is information requested relevant to major issue in dispute?

E. Unlawful Shutdown of Operations (including relocation or subcontracting) (Category 3)

1. Extent of employer's alienation of property.

(a) Is plant/equipment presently offered for sale or lease?

(b) What assets has employer already relocated/moved/ sold?

(c) Did employer dispose of any critical assets while ULP proceeding pending? (If so, restoration order may already be burdensome.)

2. Was there a legitimate loss of work, i.e., would restoration fail to restore jobs because they were lost as a result of lawful economic changes?

3. Does restoration order threaten employer's viability, given size of company and extent of operations?

4. Number and percentage of employees affected by relocation/sub-contracting closing. (See also A, above.)

5. Number and extent of ULPs (the more flagrant, the more equitable the restoration relief). (See also A, above.)

6. If shutdown in violation of bargaining obligation, how would restoration, or lack thereof, affect bargaining? Would a bargaining order without restoration be effective?

F. Unlawful Employer Recognition of Assisted Union (Category 6)

1. Extensiveness of employer interference (e.g., percentage of unit employees unlawfully influenced to support minority union)?

2. Is there an incumbent union or rival union with majority support? Could QCR be raised?

3. If so, has the support for the incumbent/majority union been diminished by ULPs (see A,10, above)?

4. Has rival union petitioned for election; is it willing to file Carlson waiver and request to proceed to election if 10(j) decree is granted?

5. If there are accompanying 8(a)(1) and (3) violations, are they continuing?

6. Is minority union contract in effect?

(a) Does it have a union-security clause?

(b) Is it favorable or unfavorable to employees?

7. Is 8(a)(2) union unlawfully dominated, or merely assisted?

G. Unlawful Violence and other Picket Line Misconduct (Category 9)

1. Nature of violations speaks for itself. However, how strong is evidence for union agency?

2. Union action to stop violence and misconduct.

   (a) Has union disavowed violence and/or disciplined any members, withheld strike benefits, or prohibited offending members from picketing?

   (b) Has union effectively aided misconduct (e.g., provided strike benefits to picketers engaged in misconduct; provided legal assistance or paid bail bond of members arrested for misconduct)?

3. State authorities' willingness and ability to control the misconduct.

   (a) What efforts have state or local police made to stop the misconduct? To what extent have these efforts been successful in halting the misconduct?

   (b) Has charging party resorted to state court? Has state court issued any injunctions and/or contempt citations to stop misconduct? To what extent have these state court orders been successful in stopping the misconduct?

H. Unlawful Strikes and Picketing in Violation of 8(d) and 8(g) Notice Provisions (Category 10)

1. What is economic impact of strike or picketing on normal operations of employer or customers? In 8(g) cases, has strike interrupted continuity of patient care (e.g., disruptions to normal services to patients, cutback in elective surgery, disruptions of receipt of supplies, refusals of patients or other employees to cross picket lines)?

2. Has any party requested mediation by FMCS or the state mediation services? How much mediation took place? Did charging party frustrate mediation?

3. Has employer replaced strikers? (If so, operation may not be disrupted.)

4. Has union offered to supply critical employees despite strike?

I. Unlawful Denial of Access to Property[2] (Category 11)

1. Union's use of alternative means of communications with its intended audience.

[2] Many of these questions may already be answered as part of the investigation of the merits of an access case under *Lechmere*.

APPENDIX B

(a) What methods of contacting audience has union used (e.g., mass media, requested employee names/addresses from employers?

(b) How successful have these efforts been?

(c) Has the employer attempted to block these efforts?

2. Has the employer attempted to make some accommodation (e.g., inside v. outside mall entrances)?

3. If access is sought to solicit employees, would it occur during working or nonworking time?

4. Is the closest public location for picketing/handbilling hazardous? If so, how?

5. If union is only handbilling, could union lawfully picket and communicate essence of message to public?

6. Has union picketing continued on disputed property without incident after access was initially denied?

7. If incumbent union is seeking access to established bargaining unit, are there any grievance matters on site, e.g., safety problems, needing union physical inspection?

8. Will the purpose of the union's picketing be over before the Board order issues (e.g., union's economic strike, construction project, political campaign, safety problem)?

9. If union is engaged in an organizing campaign:

(a) Had union obtained any authorization cards before it began picketing? After picketing began? If so, how many? How were they obtained?

(b) How many employees attended union meetings before picketing began? After picketing began?

(c) Did union ask employer for list of employee names and addresses? What was employer's response?

10. If union is protesting area standards, is there any evidence that primary employer's substandard benefits threaten to undermine union benefits elsewhere, e.g., union is about to negotiate master agreement and union employers demand concessions because of primary employer?

11. Has picketing caused any work cessation or other disruption to date? Are there any allegations that union engaged in threats or violence, blocked ingress?

12. Is union's intended audience located in inherently inaccessible place? (E.q., out-of-state employees, logging camp, ships without public facilities nearby.)

J. Union Coercion (Strike, Threats, Fines, etc.) to Achieve Unlawful Object (Categories 12 and 13)

1. What, if any, adverse impact is union's conduct having on the employer's operation (e.g., affecting relationship with customers, bidding on work)?

2. What, if any, adverse impact is union's conduct having on employees (e.g., is union attempting unlawfully to enforce contract, prevent implemen-tation of contract, or impair employee rights to select union)?

3. Is employee victim of unlawful discipline precluded from participating in intraunion political affairs?

4. Is internal union discipline threatening labor contract stability with an employer?

5. Is union's conduct disrupting negotiations, or an employer's choice of bargaining representative?

K. Unlawful Filing and/or Maintenance of Civil Lawsuit to Interfere with Protected Activity, Internal Union Discipline (Categories 12 and 13)

1. Have any employees abandoned protected activity as a result of suit? Has respondent publicized lawsuit, fines to other employees?

2. What relief is respondent seeking in its lawsuit (e.g., damages, how much; jail term in criminal complaint cases)?

3. When is trial scheduled (more imminent, the greater need for interim relief)?

4. Has employee been required to pay union fines or is payment required imminently?

5. Can sued employee afford legal representation?

6. Has sued party moved state court to stay proceeding in light of Board's ULP complaint? If so, what result? If not, why not?

7. Is suit unlawful because it lacks reasonable basis in fact of law under *Bill Johnson's* or, alternatively because preempted or for "unlawful object" (*Bill Johnson's* fn. 5)?

8. Is an R case being blocked by respondent's misconduct?

L. Unlawful Interference with Access to Board Processes (Including Fines, Lawsuits) (Category 13)

1. Have any employees expressed fear of filing charges, or declined to file charges, cooperate in Board investigation, give testimony or otherwise participate in Board processes?

2. Have any employees changed prior testimony given in an affidavit or Board hearing as a result of employer or union action?

3. For lawsuits, union discipline, initiated in retaliation for participation in Board proceedings, see also section K, above.

4. Where conduct complained of is discharge for going to Board, are employees other than those discriminated against aware of discrimination? For what reasons do these employees believe that discriminatees were discharged (most relevant in small plant)? See also section A, above.

M. Alienation of Assets to Avoid Board Liability (Protective Orders) (Category 14)

1. What is estimated monetary liability from ULPs?

2. Has employer indicated intent to close operation and/or liquidate its assets?

3. Has employer begun to liquidate its assets (e.g., removed equipment or materials, closed plant or placed it on market)? When?

4. Any evidence that assets were transferred with motive to evade backpay liability?

5. Is public auction scheduled to sell assets? When?

6. Are assets under judicial control (i.e., bankruptcy court, state proceeding to protect creditors, receivership)? Where? Can Board file a proof of claim?

7. Where the business is winding down, what is the likelihood that the liquidated assets will exceed the claims of secured creditors, current bona fide business expenses and liens of record?

8. Has employer expressed willingness to post bond to cover potential monetary liability or give written assurances to set aside sufficient funds to satisfy its financial liability?

9. Has employer refused to provide Board with reasonable method of oral/written communication or address? Are whereabouts of the employer known?

10. Has employer refused to comply with investigative subpoena regarding alienation of assets?

11. Has employer demonstrated propensity to misuse corporate form (e.g., creation of alter egos, commingling personal and corporate funds, inordinate salaries to officers or distribution of dividends to shareholders in closely held corporation)?

12. Is Region prepared to amend complaint or issue backpay specification to name another entity as a derivative respondent with backpay liability (e.g., single employer, joint employer, alter ego, *Perma Vinyl* successor)? Presence of deep pockets may moot need for protective order.

APPENDIX C

SUGGESTED OUTLINE FOR REGIONAL MEMORANDUM RECOMMENDING 10(j) RELIEF

I. BACKGROUND

A. Procedural history, including date charge(s) filed, by whom, date complaint issued, and scheduled hearing date, if any

B. If related representation case, include procedural history of representation case, such as date representation petition filed, date election held or scheduled to be held, outcome of election, or present status of representation proceeding

C. Brief description of parties

1. location and nature of employer's operations

2. size of overall work force as well as number of employees in relevant unit

3. collective-bargaining history, if any, including term of most recent collective-bargaining agreement

II. FACTS

A. Describe events in chronological order

B. Include titles of managers/supervisors

C. Include all facts relevant to support prima facie case for each violation alleged in complaint

D. Include all facts relevant to rebut respondent defenses

E. Include all facts relevant to prove "just & proper" (i.e., evidence of impact)

III. MERITS ANALYSIS

A. Indicate appropriate standard for circuit in which case arises

B. Provide analysis for each unfair labor practice that is alleged in complaint and that you recommend litigating in the 10(j) proceeding. Minor independent violations of Section 8(a)(1) may be treated summarily.

1. use all facts necessary to support the allegation

2. where credibility disputes exist, provide explanation for resolution of dispute

3. indicate other anticipated evidentiary problems and how Region expects to resolve them

4. cite the Board and, where possible, relevant circuit court law to support the theory of violation alleged in the complaint (not necessary for routine violations)

5. address adverse precedent in the circuit in which the case would be heard

6. provide analysis to show why Board would grant any special remedies requested in administrative case (i.e., Gissel bargaining order, restoration of operations) and circuit court law enforcing those remedies

C. Provide analysis to rebut respondent defenses

IV. JUST AND PROPER ANALYSIS (IF INCLUDED; NOT REQUIRED AS OF SEPTEMBER 2017)

A. Indicate test for judging propriety of relief for circuit in which case arises

B. Explain why interim relief is necessary to preserve efficacy of final Board order using theories of just and proper, e.g., chill, threat of scattering, absence of leaders, undermining of union support, impediment to bargaining, etc.

1. Use evidence adduced during investigation

2. Use inferences permitted by 10(j) caselaw

C. Distinguish the case from adverse 10(j) precedent, if any

D. If applicable, respond to respondent's arguments that injunctive relief would be unduly burdensome

E. Where the recommended injunctive relief differs from that which is sought in the underlying administrative proceeding, explain the discrepancy

V. PROPOSED ORDER

A. Include separate sections for the cease and desist and affirmative provisions (including catch-all, narrow or broad cease and desist)

B. The proposed relief should track the relief sought in the underlying administrative proceeding (but see IV,E., above)

C. Include relief which is unique to 10(j) proceedings such as posting of the district court's order, affidavit of compliance, and where applicable, access to books and records (e.g., to monitor preferential hiring list).

VI. ATTACHMENTS

A. Include a sheet listing all counsel of record in the case

B. Send with the 10(j) recommendation any position statements submitted by the parties which address the issue of 10(j) relief

C. Send a copy of the administrative complaint and if available, the answer. If complaint is not ready, send it to ILB when issued.

APPENDIX D – SECTION 10(j) STANDARDS

FIRST CIRCUIT

THE STATUTORY SCHEME PURSUANT TO WHICH INJUNCTIVE RELIEF IS SOUGHT: THE APPLICABLE STANDARDS

Section 10(j) of the Act[1] authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint, and it could thereby render a final Board order ineffectual. *See Fuchs v. Hood Indus., Inc.*, 590 F.2d 395, 396 (1st Cir. 1979) (citing S. Rep. No. 105, 80th Cong., 1st Sess., at pp. 8, 27 (1947), reprinted at I *Legislative History of the Labor Management Relations Act of 1947* 414, 433 (Government Printing Office 1985)). Thus, Section 10(j) was intended to prevent the potential frustration or nullification of the Board's remedial authority caused by the passage of time inherent in Board administrative litigation. *See Pye v. Excel Case Ready*, 238 F.3d 69, 75 (1st Cir. 2001); *Asseo v. Centro Medico del Turabo*, 900 F.2d 445, 454-55 (1st Cir. 1990); *Angle v. Sacks*, 382 F.2d 655, 659-60 (10th Cir. 1967) (cited in *Sharp v. Webco Indus.*, 225 F.3d 1130, 1135 (10th Cir. 2000)).

To resolve a 10(j) petition, a district court in the First Circuit considers only two issues: whether there is "reasonable cause to believe" that a respondent has violated the Act and whether

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[1] Section 10(j) (29 U.S.C. § 160(j)) provides:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in 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.

temporary injunctive relief is "just and proper." *Pye*, 238 F.3d at 72; *Centro Medico*, 900 F.2d at 450, 453; *Asseo v. Pan Am. Grain Co.*, 805 F.2d 23, 25-26 (1st Cir. 1986).

A. The "Reasonable Cause" Standard

In determining whether there is reasonable cause to believe that the Act has been violated, the district court may not decide the merits of the case. *See Centro Medico*, 900 F.2d at 450; *Maram v. Universidad Interamericana de Puerto Rico*, 722 F.2d 953, 958-959 (1st Cir. 1983). Rather, the court's role is limited to determining whether "the Regional Director's position was fairly supported" by the evidence. *Centro Medico*, 900 F.2d at 450; *Maram*, 722 F.2d at 959. The district court "is not the ultimate fact-finder, but merely determines what facts are likely to be proven to determine if the standard for an injunction has been met." *Pye*, 238 F.3d at 71, n. 2.

The district court should not resolve contested factual issues and should defer to the Regional Director's version of the facts if it is "within the range of rationality." *Maram*, 722 F.2d at 958; *Rivera-Vega v. ConAgra, Inc.*, 70 F.3d 153, 158, 163 (1st Cir. 1995). *Accord*: *Hood Indus.*, 590 F.2d at 397 (district court's function is limited to whether contested factual issues could ultimately be resolved by the Board in favor of the General Counsel). The district court also should not attempt to resolve issues of credibility of witnesses. *See Fuchs v. Jet Spray Corp.*, 560 F.Supp. 1147, 1150-51 n. 2 (D.Mass. 1983), *aff'd per curiam* 725 F.2d 664 (1st Cir. 1983); *Ahearn v. Jackson Hospital Corp.*, 351 F.3d 226, 237 (6th Cir. 2003); *Gottfried v. Frankel*, 818 F.2d 485, 493, 494 (6th Cir. 1987) (district court is not permitted to resolve conflicts in evidence; respondent's attack on credibility of Board's witnesses merely establishes conflict in evidence); *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1570 (7th Cir. 1996).

Similarly, on questions of law, the Regional Director need only establish that the legal theories relied on are "not without substance." *Union de Tronquistas de Puerto Rico, Local 901 v. Arlook*, 586 F.2d 872, 876 (1st Cir. 1978).[2] *Accord*: *Chester v. Grane Healthcare Co.*, 666 F.3d 87, 101 (3d Cir. 2011) ("our 'reasonable cause' inquiry directs us to examine whether the Director's legal theory is 'substantial and non-frivolous'"); *Overstreet v. El Paso Disposal, L.P.*, 625 F.3d 844, 850, 855 (5th Cir. 2010); *Ahearn*, 351 F.3d at 237.

B. The "Just and Proper" Standard

Interim injunctive relief is appropriate to preserve and restore the status quo "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. . . " *Centro Medico*, 900 F.2d at 455 (quoting *Angle*, 382 F.2d at 660). District courts in the First Circuit rely on the traditional standards for granting preliminary injunctive relief to make that judgment. *Pye*, 238 F.3d at 73; *Centro Medico*, 900 F.2d at 454. Under those standards, relief is appropriate if the Board demonstrates: (1) a likelihood of success on the merits; (2) the potential for irreparable injury in the absence of relief; (3) that such injury outweighs any harm preliminary relief would inflict on the defendant; and (4) that preliminary relief is in the public interest. *Pye***,** 238 F.3d at 73, n.7; *Centro Medico*, 900 F.2d at 454. The Board must demonstrate that irreparable injury is "likely" in the absence of an injunction. *Small v. Avanti Health Systems, LLC*, 661 F.3d 1180, 1191 (9th Cir. 2011) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008). *See also Frankl v. HTH Corp.*, 650 F.3d 1334, 1355 (9th Cir. 2011).

The First Circuit has also recognized that the public interest is served by granting interim injunctive relief that strengthens the collective-bargaining process. *Pye*, 238 F.3d at 75, n.11;

[2] *Union de Tronquistas* involved an injunction proceeding under Section 10(l) of the Act (29 U.S.C. Section 160(l)). Section 10(l) is a companion provision to Section 10(j); it mandates the Board to seek temporary injunctions involving certain enumerated violations, such as secondary boycotts. The legal analysis under the two sections is basically the same. *See, e.g., Boire v. Int'l Bhd. of Teamsters*, 479 F.2d 778, 787 n.7 (5th Cir. 1973); *Kobell v. Suburban Lines, Inc.*, 731 F.2d 1076, 1084 (3d Cir. 1984).

Centro Medico, 900 F.2d at 455. Section 10(j) interim relief "is designed to prevent employers from using unfair labor practices in the short run to permanently destroy employee interest in collective bargaining." *Pye*, 238 F.3d at 75.

APPENDIX D – SECTION 10(j) STANDARDS

SECOND CIRCUIT

THE STATUTORY SCHEME PURSUANT TO WHICH INJUNCTIVE RELIEF IS SOUGHT: THE APPLICABLE STANDARDS

Section 10(j) of the Act,[1] authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint, and it could thereby render a final Board order ineffectual. *See Kreisberg v. HealthBridge Mgmt., LLC*, 732 F.3d 131, 143 (2d Cir. 2013); *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d 1047, 1055 (2d Cir. 1980); *Seeler v. The Trading Port, Inc.*, 517 F.2d 33, 38 (2d Cir. 1975) (citing S. Rep. No. 105, 80th Cong., 1st Sess., at pp. 8, 27 (1947)), reprinted at I *Legislative History of the Labor Management Relations Act of 1947* 414, 433 (Government Printing Office 1985)). Thus, Section 10(j) was intended to prevent the potential frustration or nullification of the Board's remedial authority caused by the passage of time inherent in Board administrative litigation. *See, e.g., Seeler*, 517 F.2d at 37-38.

To resolve a 10(j) petition, a district court in the Second Circuit considers only two issues: whether there is "reasonable cause to believe" that a respondent has violated the Act and whether temporary injunctive relief is "just and proper." *Paulsen v. Remington Lodging & Hosp., LLC*, 773 F.3d 462, 468-469 (2d Cir. 2014); *Kreisberg*, 732 F.3d at 141-142; *Hoffman v.*

[1] Section 10(j) (29 U.S.C. Section 160(j)) provides:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in 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.

Inn Credible Caterers, Ltd., 247 F.3d 360, 365 (2d Cir. 2001); *Silverman v. J.R.L. Food Corp. d/b/a Key Food*, 196 F.3d 334, 335 (2d Cir. 1999). *See also Mattina v. Kingsbridge Heights Rehab. and Care Ctr*, 329 F. App'x 319, 321 (2d Cir. 2009).

A. The "Reasonable Cause" Standard

The "Regional Director's determinations regarding 'reasonable cause' receive significant deference." *Paulsen*, 773 F.3d at 469. In determining whether there is reasonable cause to believe that the Act has been violated, the district court may not decide the merits of the case. *See Kaynard v. Mego Corp.*, 633 F.2d 1026, 1032-1033 (2d Cir. 1980). Rather, the court's role is limited to determining whether there is "reasonable cause to believe that a Board decision finding an unfair labor practice will be enforced by a Court of Appeals." *Mego Corp.*, 633 F.2d at 1033(quoting *McLeod v. Business Machine and Office Appliance Mechanics Conference Board*, 300 F.2d 237, 242 n. 17 (2d Cir. 1962)). The district court should not resolve contested factual issues; the Regional Director's version of the facts "should be given the benefit of the doubt" (*Seeler*, 517 F.2d at 37) and, together with the inferences therefrom, "should be sustained if within the range of rationality" (*Mego Corp.*, 633 F.2d at 1031). The district court also should not attempt to resolve issues of credibility of witnesses. *Palby Lingerie.*, 625 F.2d at 1051-1052, n. 5. *See also NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1570, 1571 (7th Cir. 1996); *Fuchs v. Jet Spray Corp.*, 560 F. Supp. 1147, 1150-51 n. 2 (D. Mass. 1983), *aff'd per curiam* 725 F.2d 664 (1st Cir. 1983).

Similarly, on questions of law, the district court "should be hospitable to the views of the [Regional Director], however novel." *Mego Corp.*, 633 F.2d at 1031 (quoting *Danielson v. Joint Bd. of Coat, Suit and Allied Garment Workers' Union, I.L.G.W.U.)*, 494 F.2d 1230, 1245 (2d Cir. 1974)). The Regional Director's legal position should be sustained "unless the [district] court is convinced that it is wrong." *Palby Lingerie*, 625 F.2d at 1051. Accord: *Silverman v. Major League Baseball Player Relations Comm., Inc.*, 67 F.3d 1054, 1059 (2d Cir. 1995) ("appropriate deference must be shown to the judgment of the NLRB, and a district court should decline to

grant relief only if convinced that the NLRB's legal or factual theories are fatally flawed"); *Hoffman*, 247 F.3d at 365.

B. The "Just and Proper" Standard

The Second Circuit has recognized that Section 10(j) is among those "legislative provisions calling for equitable relief to prevent violations of a statute" and courts should grant interim relief thereunder "in accordance with traditional equity practice, 'as conditioned by the necessities of public interest which Congress has sought to protect.'" *Morio v. North American Soccer League*, 632 F.2d 217, 218 (2d Cir. 1980) (quoting *Seeler*, 517 F.2d at 39-40). In applying these principles the Second Circuit has concluded that Section 10(j) relief is warranted where serious and pervasive unfair labor practices threaten to render the Board's processes "totally ineffective" by precluding a meaningful final remedy (*Mego Corp.*, 633 F.2d at 1034 (discussing *Seeler*, 517 F.2d at 37-38)); or where interim relief is the only effective means to preserve or restore the status quo as it existed before the onset of the violations (*Seeler*, 517 F.2d at 38); or where the passage of time might otherwise allow the respondent to accomplish its unlawful objective before being placed under any legal restraint (*Palby*, 625 F.2d at 1055). *Accord*: *Kreisberg*, 732 F.3d at 143; *Paulsen*, 773 F.3d at 469; *Hoffman*, 247 F.3d at 368 (Section 10(j) relief "is just and proper when it is necessary to prevent irreparable harm or to preserve the status quo"); *Silverman v. Major League Baseball Player Relations Comm., Inc.*, 880 F. Supp. 246, 255 (S.D.N.Y.), *aff'd* 67 F.3d 1054 (2d Cir. 1995). The "principal purpose of a § 10(j) injunction is to guard against harm to the collective bargaining rights of employees." *Paulsen*, 773 F.3d at 469.

APPENDIX D – SECTION 10(j) STANDARDS

THIRD CIRCUIT

THE STATUTORY SCHEME PURSUANT TO WHICH INJUNCTIVE RELIEF IS SOUGHT: THE APPLICABLE STANDARDS

Section 10(j) of the Act,[1] authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint, and it could thereby render a final Board order ineffectual. *See Chester v. Grane Healthcare Co.*, 666 F.3d 87, 92-93 (3d Cir. 2011) (citing S. Rep. No. 105, 80th Cong., 1st Sess., at pp. 8, 27 (1947), reprinted at I *Legislative History of the Labor Management Relations Act of 1947* 414, 433 (Government Printing Office 1985)). *Accord*: *Pascarell v. Vibra Screw Inc.*, 904 F.2d 874, 878 (3d Cir. 1990).

To resolve a Section 10(j) petition, a district court in the Third Circuit considers only two issues: whether there is "reasonable cause to believe" that a respondent has violated the Act and whether temporary injunctive relief is "just and proper." *Chester*, 666 F.3d at 100; *Hirsch v. Dorsey Trailers, Inc.*, 147 F.3d 243, 247 (3d Cir. 1998); *Pascarell*, 904 F.2d at 877; *Kobell v. Suburban Lines, Inc.*, 731 F.2d 1076, 1078 (3d Cir. 1984).

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[1] Section 10(j) (29 U.S.C. § 160(j)) provides:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in 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.

APPENDIX D – SECTION 10(j) STANDARDS

A. The "Reasonable Cause" Standard

In determining whether there is reasonable cause to believe that the Act has been violated, a district court may not decide the merits of the case and the Regional Director need not adduce evidence sufficient to prove a violation. *See Kobell*, 731 F.2d at 1083-1084. *See also Chester*, 666 F.3d at 100 ("it is not [the court's] role to adjudicate the merits of the underlying claim"); *Eisenberg v. Wellington Hall Nursing Home, Inc.*, 651 F.2d 902, 906 (3d Cir. 1981) (improper for district court to pass upon ultimate issue of alleged proscribed employer motivation for discharges). Instead, the reasonable cause standard imposes a "low threshold of proof" on the Regional Director. *Eisenberg*, 651 F.2d at 905; *Kobell*, 731 F.2d at 1084. This standard is satisfied as long as (1) the Regional Director's legal theory is "substantial and not frivolous" and (2) viewing contested factual issues favorably to the Board, sufficient evidence supports that theory. *Chester*, 666 F.3d at 100 (citing *Pascarell*, 904 F.2d at 882). In making this examination, the district court should not attempt to resolve issues of credibility of witnesses. *See Ahearn v. Jackson Hosp. Corp*., 351 F.3d 226, 234 (6th Cir. 2003). *Accord*: *Fuchs v. Jet Spray Corp.*, 560 F. Supp. 1147, 1150-51 n. 2 (D. Mass. 1983), *aff'd per curiam* 725 F.2d 664 (1st Cir. 1983).

B. The "Just and Proper" Standard

Injunctive relief is "just and proper" under Section 10(j) "when the nature of the alleged [violations] are likely to jeopardize the integrity of the bargaining process and thereby make it impossible or not feasible to restore or preserve the status quo pending litigation." *Pascarell*, 904 F.2d at 878. Thus, a district court must focus on the public interest in protecting the integrity of the bargaining process. *Chester*, 666 F.3d at 99 (citing *Pascarell*, 904 F.2d at 876); *Eisenberg*, 651 F.2d at 906-907. The "critical determination" for the court is "whether, absent an injunction, the Board's ability to facilitate peaceful management-labor negotiation will be impaired." *Pascarell*, 904 F.2d at 879. An injunction is appropriate when a failure to grant interim relief likely would "prevent the Board, acting with reasonable expedition, from effectively exercising its ultimate remedial powers." *Chester*, 666 F.3d at 102 (quoting *Kobell*,

731 F.2d at 1091-1092. *Accord*: *Sharp v. Webco Indus., Inc.*, 225 F.3d 1130, 1133 (10th Cir. 2000) (citing *Angle v. Sacks*, 382 F.2d 655 (10th Cir. 1967)).

APPENDIX D – SECTION 10(j) STANDARDS

FOURTH CIRCUIT

THE STATUTORY SCHEME PURSUANT TO WHICH INJUNCTIVE RELIEF IS SOUGHT: THE APPLICABLE STANDARDS

Section 10(j) of the Act[1] authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint, and it could thereby render a final Board order ineffectual. *See Muffley v. Spartan Mining Co.*, 570 F.3d 534, 543-44 (4th Cir. 2009). *See also Scott v. Stephen Dunn & Assocs.*, 241 F.3d 652, 659 (9th Cir. 2001); *Miller v. Cal. Pac. Med. Ctr.*, 19 F.3d 449, 455 n.3 (9th Cir. 1994) (en banc) (quoting S. Rep. No. 105, at 8, 27 (1947), *reprinted in* I NLRB, *Legislative History of the Labor-Management Relations Act, 1947*, at 414, 433 (1985)). Thus, Section 10(j) was intended to prevent the potential frustration or nullification of the Board's remedial authority caused by the passage of time inherent in Board administrative litigation. *See Muffley*, 570 F.3d at 543-44.

Section 10(j) directs district courts to grant relief that is "just and proper." In the Fourth Circuit, district courts rely on traditional equitable principles to determine whether interim relief is appropriate. *Muffley*, 570 F.3d at 541-42. The Fourth Circuit requires that the Director show (1) a likelihood of success on the merits; (2) that irreparable harm is likely absent an injunction; (3) that the balance of equities tips in favor of injunctive relief and (4) that an injunction is in the

[1] Section 10(j) (29 U.S.C. Section 160(j)) provides:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in 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.

public interest. *Henderson v. Bluefield Reg'l Hosp.*, 902 F.3d 432, 439 (4th Cir. 2018). The traditional equitable criteria, including the threat of irreparable harm, should be considered in the context of the underlying purpose of Section 10(j), which is to preserve the Board's remedial powers. *Henderson*, 902 F.3d at 439; *Muffley*, 570 F.3d at 543 (citing *Miller*, 19 F.3d at 459-60).

A. Likelihood of Success

The Regional Director makes a threshold showing of likelihood of success by producing "some evidence" in support of the unfair labor practice charge "together with an arguable legal theory." *Miller*, 19 F.3d at 460 (cited by *Muffley*, 570 F.3d at 541). In assessing whether the Regional Director has met this minimal burden, district courts must take into account that Section 10(j) confers no jurisdiction to pass on the ultimate merits of the unfair labor practice case and that, ultimately, the Board's determination on the merits will be given considerable deference. *See Bloedorn v. Francisco Foods, Inc*, 276 F.3d 270, 287 (7th Cir. 2001); *Miller*, 19 F.3d at 460, and cases there cited. In a 10(j) proceeding, the district court should sustain the Regional Director's factual allegations if they are "within the range of rationality" and, "[e]ven on an issue of law, the district court should be hospitable to the views of the [Director], however novel." *Bloedorn*, 276 F.3d at 287; *Danielson v. Joint Bd.*, 494 F.2d 1230, 1245 (2d Cir. 1974) (cited with approval in *Miller*, 19 F.3d at 460). Finally, the district court should not resolve credibility conflicts in the evidence. *See Scott*, 241 F.3d at 662; *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1570, 1571 (7th Cir. 1996).

B. Balancing the Equities

In applying traditional equitable principles to a 10(j) petition, district courts should consider the matter through the "prism of the underlying purpose of Section 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." *Scott*, 241 F.3d at 66, (quoting *Miller*, 19 F.3d at 459-60). The Fourth Circuit recognizes that the public interest is an important factor in the exercise of

equitable discretion. *Muffley*, 570 F.3d at 543. *See also Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). Section 10(j) thus implements the public interest to protect the Board's remedial power from compromise by the passage of time inherent in obtaining an enforceable Board order. *See Muffley*, 570 F.3d at 544. Accordingly, in evaluating whether irreparable injury to the policies of the Act is threatened, as well as in balancing the hardships, the district court must consider whether declining to issue the injunction will permit the passage of time inherent in the administrative proceeding to cause " a very real—and potentially irreparable—harm to the effectiveness of the Board's eventual order." *Muffley*, 570 F.3d at 544.

APPENDIX D – SECTION 10(j) STANDARDS

FIFTH CIRCUIT

THE STATUTORY SCHEME PURSUANT TO WHICH INJUNCTIVE RELIEF IS SOUGHT: THE APPLICABLE STANDARDS

Section 10(j) of the Act[1] authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint, and it could thereby render a final Board order ineffectual. *See* S. Rep. No. 105, 80th Cong., 1st Sess., at pp. 8, 27 (1947), reprinted in I *Legislative History of the Labor Management Relations Act of 1947* 414, 433 (Government Printing Office 1985). *See also Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1188 (5th Cir. 1975).

To resolve a Section 10(j) petition, a district court in the Fifth Circuit considers only two issues: whether there is "reasonable cause to believe" that a respondent has violated the Act and whether temporary injunctive relief is "just and proper." *See Kinard v. Dish Network Corp.*, 890 F.3d 608, 612 (5th Cir. 2018); *McKinney v. Creative Vision Res., LLC*, 783 F.3d 293, 296-297 (5th Cir. 2015); *Overstreet v. El Paso Disposal, L.P.*, 625 F.3d 844, 851, 854 (5th Cir. 2010); *Overstreet v. El Paso Elec. Co.*, 176 F. App'x 607, 609 (5th Cir. 2006) (per curiam). *Accord*: *Chester v. Grane Healthcare Co.*, 666 F.3d 87, 94-100 (3d Cir. 2011); *Glasser v. ADT Sec. Sys., Inc.*, 379 F. App'x 483, 485, n.2 (6th Cir. 2010) (citing *Ahearn v. Jackson Hosp. Corp.*, 351 F.3d 226, 235 (6th Cir. 2003)); *Arlook v. S. Lichtenberg & Co., Inc.*, 952 F.2d 367, 371 (11th Cir.

[1] Section 10(j) (29 U.S.C. Section 160(j)) provides:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in 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.

1992). The Regional Director must establish both prongs of the test "with reasonable clarity in order to obtain injunctive relief." *McKinney*, 783 F.3d at 297-298.

A. The "Reasonable Cause" Standard

In determining whether there is reasonable cause to believe that the Act has been violated, the district court may not decide the merits of the case. *See Pilot Freight*, 515 F.2d at 1191. *Accord*: *Chester*, 666 F.3d at 100; *Ahearn*, 351 F.3d at 237. Rather, the district court's role in evaluating "reasonable cause" is limited to determining whether the Regional Director's "theories of law and fact are not insubstantial and frivolous." *Pilot Freight*, 515 F.2d at 1189. *See also El Paso Disposal*, 625 F.3d at 850. *Accord*: *Chester*, 666 F.3d at 100, 101.

As to questions of law, the district court should be hospitable to the views of the Regional Director, even if the legal theories relied on are considered novel or untested. *Boire v. Int'l Bhd. of Teamsters*, 479 F.2d 778, 789-92 (5th Cir. 1973); *Lewis v. New Orleans Clerks & Checkers, I.L.A. Local No. 1497*, 724 F.2d 1109, 1114-15 (5th Cir. 1984).[2] *Accord*: *Frankl v. HTH Corp.*, 650 F.3d 1334, 1356 (9th Cir. 2011).

As to factual matters, the Regional Director need present only "enough evidence to permit a rational factfinder, considering the evidence in the light most favorable to the Board, to rule in favor of the Board." *El Paso Disposal*, 625 F.3d at 851 n.10, 855 (citing *Arlook*, 952 F.2d at 371). *Accord*: *Chester.*, 666 F.3d at 100; *Kaynard v. Mego Corp.*, 633 F.2d 1026, 1031 (2d Cir. 1980). Indeed, the Fifth Circuit rejects the requirement that the Board show a "heightened factual threshold" such as that found in the traditional four-part test for equitable

[2] *Lewis* involved an injunction proceeding under Section 10(l) of the Act (29 U.S.C. Section 160(l)). Section 10(l) is a companion provision to Section 10(j); it mandates the Board to seek temporary injunctions involving certain enumerated violations, such as secondary boycotts. The legal analysis under the two sections is basically the same. *See, e.g.*, *Int'l Bhd. of Teamsters*, 479 F.2d at 787 n.7.

relief utilized in other circuits. *See El Paso Disposal.*, 625 F.3d at 851. In determining whether the Regional Director has met the Fifth Circuit's "minimal burden of proof" (*El Paso Disposal*, 625 F.3d at 851 n.11 (citing *Arlook*, 952 F.2d at 371)), a district court should not attempt to resolve conflicts in the evidence or the credibility of witnesses. *See Arlook*, 952 F.2d at 372-73; *Gottfried v. Frankel*, 818 F.2d 485, 493, 494 (6th Cir. 1987) (district court is not permitted to resolve conflicts in the evidence; respondent's attack on credibility of Board's witnesses merely establishes conflict in the evidence); *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1570-71 (7th Cir. 1996). Rather, courts should give the regional director's version of disputed facts the "benefit of the doubt." *Seeler v. The Trading Port*, 517 F.2d 33, 36-37 (2d Cir. 1975).

B. The "Just and Proper" Standard

Injunctive relief is "just and proper" under Section 10(j) to "prevent the destruction of employee interest in collective bargaining, irreparable injury to the union's bargaining power, and the undermining of the effectiveness of any resolution through the Board's process." *El Paso Disposal*, 625 F.3d at 856. *Accord*: *Arlook*, 952 F.2d at 372, 374 ("just and proper" standard met where Section 10(j) interim relief would be "more effective" to protect employee statutory rights than a final Board order); *Int'l Bhd. of Teamsters*, 479 F.2d at 788 (interim relief warranted where, absent such relief, "Board processes would be of little avail" to the affected employees); *Chester*, 666 F.3d at 102. In other words, interim relief is warranted where the unfair labor practice "'has caused identifiable and substantial harms that are unlikely to be remedied effectively by a final administrative order from the NLRB.'" *Kinard*, 890 F.3d at 613 (quoting *McKinney*, 783 F.3d at 299)). Thus, in the Fifth Circuit, interim relief is appropriate if the evidence demonstrates that:

> "(1) the employer's alleged violations of the NLRA and the harm to the employees or to the union are concrete and egregious, or otherwise exceptional; and (2) those harms, as a practical matter, have not yet taken their adverse toll,

> such that injunctive relief could meaningfully preserve the status quo . . . that existed before the wrongful acts."

Kinard, 890 F.3d at 612 (quoting *McKinney*, 783 F.3d at 298). *Accord*: *El Paso Disposal*, 625 F.3d at 857 (in 10(j) cases, the question is one of "equitable necessity," that is, whether interim relief is necessary to preserve the lawful status quo ante pending the Board's ultimate administrative adjudication); *Pascarell v. Vibra Screw Inc.*, 904 F.2d 874, 878 (3d Cir. 1990) (10(j) relief warranted where violations "are likely to jeopardize the integrity of the bargaining process and thereby make it impossible or not feasible to restore or preserve the status quo pending litigation."); *Asseo v. Centro Medico del Turabo, Inc.*, 900 F.2d 445, 454-55 (1st Cir. 1990) (same). Egregious unfair labor practices are those which, "in the context of *that particular case*, ha[ve] caused identifiable and substantial harms." *Kinard*, 890 F.3d at 613 (emphasis in original) (quoting *McKinney*, 783 F.3d at 299).

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APPENDIX D – SECTION 10(j) STANDARDS

SIXTH CIRCUIT

THE STATUTORY SCHEME PURSUANT TO WHICH INJUNCTIVE RELIEF IS SOUGHT: THE APPLICABLE STANDARDS

Section 10(j) of the Act,[1] authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint, and it could thereby render a final Board order ineffectual. *See Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d 962, 970 (6th Cir. 2001); *Levine v. C & W Mining Co., Inc.*, 610 F.2d 432, 436-437 (6th Cir. 1979) (quoting S. Rep. No. 105, 80th Cong., 1st Sess., 27 (1947), reprinted in I *Legislative History of the Labor Management Relations Act of 1947* 433 (Government Printing Office 1985)). *Accord*: *Fleischut v. Nixon Detroit Diesel, Inc.*, 859 F.2d 26, 28-29 (6th Cir. 1988). Thus, Section 10(j) was intended to prevent the potential frustration or nullification of the Board's remedial authority caused by the passage of time inherent in Board administrative litigation. *See Kobell v. United Paperworkers Int'l. Union*, 965 F.2d 1401, 1406 (6th Cir. 1992).

To resolve a Section 10(j) petition, a district court in the Sixth Circuit considers only two issues: whether there is "reasonable cause to believe" that a respondent has violated the Act and whether temporary injunctive relief is "just and proper." *See Ahearn v. Jackson Hosp. Corp.*,

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[1] Section 10(j) (29 U.S.C. § 160(j)) provides:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in 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.

351 F.3d 226, 234-235 (6th Cir. 2003); *Schaub*, 250 F.3d at 969; *Gottfried v. Frankel*, 818 F.2d 485, 493 (6th Cir. 1987); *Glasser v. ADT Sec. Sys., Inc.*, 379 F. App'x 483, 485, n.2 (6th Cir. 2010). *Accord*: *Chester v. Grane Healthcare Co.*, 666 F.3d 87, 94-100 (3d Cir. 2011); *Overstreet v. El Paso Disposal, L.P.*, 625 F.3d 844, 850-851, 854 (5th Cir. 2010).

A. The "Reasonable Cause" Standard

The Regional Director bears a "relatively insubstantial" burden in establishing "reasonable cause." *McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 339 (6th Cir. 2017) (quoting *Ahearn*, 351 F.3d at 237). In determining whether there is reasonable cause to believe that the Act has been violated, a district court may not decide the merits of the case. *Id*. *See also Schaub*, 250 F.3d at 969; *Gottfried*, 818 F.2d at 493. *Accord*: *Chester*, 666 F.3d at 100. Instead, the Regional Director's burden in proving "reasonable cause" is "relatively insubstantial." *See Schaub*, 250 F.3d at 969; *Kobell*, 965 F.2d at 1406; *Levine v. C & W Mining Co., Inc.*, 610 F.2d 432, 435 (6th Cir. 1979). Thus, the district court must accept the Regional Director's legal theory as long as it is "substantial and not frivolous." *McKinney*, 875 F.3d at 339; *Ahearn*, 351 F.3d at 237; *Fleischut*, 859 F.2d at 29; *Kobell*, 965 F.2d 1407. *Accord*: *Chester*, 666 F.3d at 101; *Overstreet*, 625 F.3d at 850, 855. Factually, the Regional Director need only "produce some evidence in support of the petition." *Kobell*, 965 F.2d at 1407. The district court should not resolve conflicts in the evidence or issues of credibility of witnesses but should accept the Regional Director's version of events as long as facts exist which could support the Board's theory of liability. *See Ahearn*; *Schaub*, 250 F.3d at 969; *Gottfried*, 818 F.2d at 493, 494.

B. The "Just and Proper" Standard

Injunctive relief is "just and proper" under Section 10(j) where it is "necessary to return the parties to the status quo pending the Board's processes in order to protect the Board's remedial powers under the NLRA." *Kobell*, 965 F.2d at 1410 (quoting *Gottfried*, 818 F.2d at

495).[2] *Accord*: *Schaub*, 250 F.3d at 970. Thus, "[i]nterim relief is warranted whenever 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.'" *Sheeran v. American Commercial Lines, Inc.*, 683 F.2d 970, 979 (6th Cir. 1982) (quoting *Angle v. Sacks*, 382 F.2d 655, 660 (10th Cir. 1967)). Accord: *Ahearn*, 351 F.3d at 239; *Fleischut*, 859 F.2d at 30-31; *Chester*, 666 F.3d at 102.

[2] The "status quo" referred to in *Gottfried v. Frankel* is that which existed before the charged unfair labor practices took place. See *Fleischut*, 859 F.2d at 30 n.3.

APPENDIX D – SECTION 10(j) STANDARDS

SEVENTH CIRCUIT

THE STATUTORY SCHEME PURSUANT TO WHICH INJUNCTIVE RELIEF IS SOUGHT: THE APPLICABLE STANDARDS

Section 10(j) of the Act,[1] authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. *See Harrell v. American Red Cross*, 714 F.3d 553, 556 (7th Cir. 2013); *Lineback v. Spurlino Materials, LLC*, 546 F.3d 491, 499 (7th Cir. 2008); *Bloedorn v. Francisco Foods, Inc.*, 276 F.3d 270, 286 (7th Cir.2001). Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint, and it could thereby render a final Board order ineffectual. *See* S. Rep. No. 105, 80th Cong., 1st Sess., at pp. 8, 27 (1947), reprinted in I *Legislative History of the Labor Management Relations Act of 1947* 414, 433 (Government Printing Office 1985) (cited in *NLRB v. P*I*E Nationwide, Inc.*, 894 F.2d 887, 891 (7th Cir. 1990)). Thus, Section 10(j) was intended to prevent the potential frustration or nullification of the Board's remedial authority caused by the passage of time inherent in Board administrative litigation. *See Lineback v. Irving Ready-Mix Inc.*, 653 F.3d 566, 570 (7th Cir. 2011); *Spurlino Materials*, 546 F.3d at 500; *Kinney v. Pioneer Press*, 881 F.2d 485, 493-494 (7th Cir. 1989).

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[1] Section 10(j) (29 U.S.C. § 160(j)) provides:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in 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.

APPENDIX D – SECTION 10(j) STANDARDS

Section 10(j) directs district courts to grant relief that is "just and proper." The Seventh Circuit holds that to determine what relief is "just and proper," district courts should apply the general equitable standards for considering requests for preliminary injunctions. *Spurlino Materials*, 546 F.3d at 499-500; *Bloedorn*, 276 F.3d at 286; *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1566 (7th Cir. 1996); *Kinney*, 881 F.2d at 490. The Regional Director is entitled to interim relief when: (1) the Director has no adequate remedy at law; (2) the labor effort would face irreparable harm without interim relief, and the prospect of that harm outweighs any harm posed to the employer by the proposed injunction; (3) "public harm" would occur in the absence of interim relief; and (4) the Director has a reasonable likelihood of prevailing on the merits of his complaint. *Harrell*, 714 F.3d at 556; *Spurlino Materials*, 546 F.3d at 500; *Bloedorn*, 276 F.3d at 286. The Director bears the burden of establishing the first, third and fourth prongs by a preponderance of the evidence. *Spurlino Materials*, 546 F.3d at 500; *Bloedorn*, 276 F.3d at 286. "The second prong is evaluated on a sliding scale: The better the Director's case on the merits, the less its burden to prove that the harm in delay would be irreparable, and vice versa." *Spurlino Materials*, 546 F.3d at 500 (quoting *Bloedorn,* 276 F.3d at 286, 298). *See also Hoosier Energy Rural Elec. Coop, Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009); *Judge v. Quinn*, 612 F.3d 537, 546 (7th Cir. 2010).[2]

[2] [redacted]

APPENDIX D – SECTION 10(j) STANDARDS

A. Likelihood of Success

The Regional Director makes a threshold showing of likelihood of success by showing that its chances are "better than negligible." *Spurlino Materials,* 546 F.3d at 502; *Electro-Voice,* 83 F.3d at 1568. In assessing whether the Regional Director has met this burden, a district court must take into account that Section 10(j) confers no jurisdiction to pass on the ultimate merits of the unfair labor practice case, *Spurlino Materials, LLC*, 546 F.3d at 502; *Electro-Voice*, 83 F.3d at 1567, and that, ultimately, the Board's determination on the merits will be given considerable deference, *Bloedorn*, 276 F.3d at 287. Thus, in a 10(j) proceeding, the district court should determine whether "the Director has 'some chance' of succeeding on the merits." *Harrell*, 714 F.3d at 556; *Spurlino Materials, LLC,* at 502. The district court should not resolve credibility conflicts in the evidence. *Electro-Voice*, 83 F.3d at 1570, 1571. *See also Gottfried v. Frankel*, 818 F.2d 485, 493, 494 (6th Cir. 1987).

B. Balancing the Equities

The irreparable harm to be avoided in a Section 10(j) case is the threatened frustration of the remedial purpose of the Act and of the public interest in deterring continued violations. *Squillacote v. Local 248, Meat & Allied Food Workers*, 534 F.2d 735, 744 (7th Cir. 1976) (cited with approval in *Kinney*, 881 F.2d at 491).[3] In evaluating whether irreparable injury to the

[3] *Electro-Voice* notes that when equitable relief is the ultimate relief sought, an additional element "no adequate remedy at law" is part of traditional equity analysis for which petitioner must show that an award of damages would be "seriously deficient." 83 F.3d at 1567 (quoting *Roland Machinery v. Dresser Industries*, 749 F.2d 380, 386-87 (7th Cir. 1984)). As here, a Board proceeding resulting in permanent injunctive relief is the sole avenue of relief for conduct made unlawful under the National Labor Relations Act. Thus, in Section 10(j) cases, the "adequate remedy at law" inquiry is whether, in the absence of immediate relief, the harm flowing from the alleged violation cannot be prevented or fully rectified by the final judgment. *Id.* at 386; *Harrell*, 714 F.3d at 557. This inquiry effectively is the same as the question of "irreparable harm" to the petitioner. *Electro-Voice*, 83 F.3d at 1572-73.

policies of the Act is threatened, as well as in balancing such harms against any threatened harm to the respondent or the public interest, the district court must "take into account the probability that declining to issue the injunction will permit the allegedly unfair labor practice to reach fruition and thereby render meaningless the Board's remedial authority." *Miller v. Cal. Pac. Med. Ctr.*, 19 F.3d 449, 460 (9th Cir. 1993) (citing *Amoco Prod. Co. v. Village of Gambell,* 480 U.S. 531, 545 (1987)). *Accord*: *Asseo v. Centro Medico del Turabo, Inc.*, 900 F.2d 445, 455 (1st Cir. 1990) (Section 10(j) relief is appropriate whenever the circumstances create a reasonable apprehension that, absent an injunction, the efficacy of the Board's final order may be nullified or frustrated during regular Board litigation). "In appropriate circumstances, the same evidence that establishes the Director's likelihood of proving a violation of the NLRA may provide evidentiary support for a finding of irreparable harm." *Bloedorn*, 276 F.3d at 297-98. *See also Harrell*, 714 F.3d at 557.**[4]** "[T]he interest at stake in a section 10(j) proceeding is 'the public interest in the integrity of the collective bargaining process.'" *Bloedorn*, 276 F.3d at 300 (quoting *Eisenberg v. Wellington Hall Nursing Home, Inc.*, 651 F.2d 902, 906-07 (3d Cir. 1981)). *See also Harrell*, 714 F.3d at 557.

4 [redacted]

APPENDIX D – SECTION 10(j) STANDARDS

EIGHTH CIRCUIT

THE STATUTORY SCHEME PURSUANT TO WHICH INJUNCTIVE RELIEF IS SOUGHT: THE APPLICABLE STANDARDS

Section 10(j) of the Act,[1] authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint, and it could thereby render a final Board order ineffectual. *See Minnesota Mining and Mfg Co. v. Meter*, 385 F.2d 265, 269-270 (8th Cir. 1967) (citing S. Rep. No. 105, 80th Cong., 1st Sess. 27 (1947), *reprinted in* I NLRB, Legislative History of the Labor-Management Relations Act, 1947, at 414, 433 (1985)). Thus, Congress intended for Section 10(j) to prevent the potential frustration or nullification of the Board's remedial authority caused by the passage of time inherent in Board administrative litigation. *Minnesota Mining*, 385 F.2d at 271 (citing *Angle v. Sacks*, 382 F.2d 655, 660 (10th Cir. 1967)). *Accord*: *McKinney v. Southern Bakeries, LLC*, 786 F.3d 1119, 1122 (8th Cir. 2015); *Sharp v. Webco Indus., Inc.*, 225 F.3d 1130, 1133 (10th Cir. 2000).

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[1] Section 10(j) (29 U.S.C. Section 160(j)) provides:

> The Board shall have power, upon issuance of a complaint . . . 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.

APPENDIX D – SECTION 10(j) STANDARDS

Section 10(j) directs district courts to grant relief that is "just and proper." In the Eighth Circuit, district courts apply a traditional equitable analysis to consider whether interim relief is just and proper. *McKinney*, 786 F.3d at 1122-23; *Osthus v. Whitesell Corp.*, 639 F.3d 841, 844-845 (8th Cir. 2011); *Sharp v. Parents in Cmty. Action, Inc.*, 172 F.3d 1034, 1039 (8th Cir. 1999). That is, the court must evaluate: "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." *Parents in Cmty. Action*, 172 F.3d at 1038, n.2 (citing *Dataphase Syst., Inc. v. CL Sys., Inc.*, 640 F.2d 109 (8th Cir. 1981) (en banc)); *McKinney*, 786 F.3d at 1123. In evaluating the warrant for interim relief, the court must take a flexible and pragmatic approach in balancing the factors, and no one factor is determinative. *Dataphase*, 640 F.2d at 113. Where the irreparable harm to the movant is greater than the possible injury to other parties, the need to show likelihood of success is lower, and conversely, where the harm is greater to the other parties than to the movant, the burden of showing likelihood of success is great. *Dataphase*, 640 F.2d at 112-113. *See Henderson v. Bodine Aluminum, Inc.*, 70 F.3d 958, 961 (8th Cir. 1995) ("preliminary injunctions become easier to obtain as the plaintiff faces progressively graver harm"); *Hoosier Energy Rural Elec. Coop, Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009) ("the more net harm an injunction can prevent, the weaker the plaintiff's claim on the merits can be"). In any case, the movant must "demonstrate that irreparable injury is *likely* in the absence of an injunction." *Sierra Club v. U.S. Army Corps of Engineers*, 645 F.3d 978, 992 (8th Cir. 2011) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 129 S.Ct. 365, 375 (2008)).

A. Balancing the Equities

APPENDIX D – SECTION 10(j) STANDARDS

In deciding whether a Section 10(j) injunction is "just and proper," the court focuses initially on the question of irreparable injury. *McKinney*, 786 F.3d at 1123; *Parents in Cmty. Action*, 172 F.3d at 1039. The irreparable harm to be avoided in a Section 10(j) case is the "harm to the collective bargaining process or to other protected employee activities if a remedy must await the Board's full adjudicatory process." *Parents in Cmty. Action*, 172 F.3d at 1038, 1040. An interim injunction is appropriate when it is "necessary either to preserve the status quo or prevent frustration of the basic remedial purposes of the Act." *Parents in Cmty. Action*, 172 F.3d at 1039 (quoting *Minnesota Mining*, 385 F.2d at 270); *McKinney*, 786 F.3d at 1124 (inquiry is whether "injunction is necessary to preserve the effectiveness of the ordinary adjudicatory process").

In evaluating whether irreparable injury to the policies of the Act is threatened, as well as in balancing such harms against any threatened harm to the respondent or the public interest, the district court must take into account the probability that declining to issue the injunction will permit the "alleged unfair labor practice to reach fruition and thereby render[] meaningless the Board's remedial authority… ." *Small v. Avanti Health Sys., LLC*, 661 F.3d 1180, 1191 (9th Cir. 2011) (quoting *Frankl v. HTH Corp.*, 650 F.3d 1334, 1362 (9th Cir. 2011)). And, granting interim injunctive relief to strengthen the collective-bargaining process serves the public interest. *See Bloedorn v. Francisco Foods, Inc.*, 276 F.3d 270, 300 (7th Cir. 2001) ("the interest at stake in a section 10(j) proceeding is 'the public interest in the integrity of the collective bargaining process'"); *Asseo v. Centro Medico del Turabo, Inc.*, 900 F.2d 445, 455 (1st Cir. 1990).

B. Likelihood of Success

APPENDIX D – SECTION 10(j) STANDARDS

Once the Regional Director has established irreparable injury, the district court examines likelihood of success on the merits, not in isolation, but "in the context of the relative injuries to the parties and the public." *Parents in Cmty. Action*, 172 F.3d at 1039 (quoting *Dataphase*, 640 F.2d at 113). In evaluating the likelihood of success, the district court considers only whether there are "suspected" statutory violations. *Parents in Cmty. Action*, 172 F.3d at 1038. In assessing whether the Regional Director has met this requirement, the district court must take into account that it has no jurisdiction under Section 10(j) to adjudicate the merits of an unfair labor practice case. *Parents in Cmty. Action*, 172 F.3d at 1039; *Frankl*, 650 F.3d at 1356. The court must also factor in the deference accorded to the Board's determination on the merits by courts of appeals. *Frankl*, 650 F.3d at 1356. *See also NLRB v. Swift Adhesives*, 110 F.3d 632, 634 (8th Cir. 1997) (Eighth Circuit reviews a final Board order "with great deference"); *NLRB v. Dorothy Shamrock Coal Co.*, 833 F.2d 1263, 1265 (7th Cir. 1987). The district court should sustain the Regional Director's factual allegations if they are "within the range of rationality," and "[e]ven on an issue of law, the district court should be hospitable to the views of the [Director], however novel." *Danielson v. Joint Bd.*, 494 F.2d 1230, 1245 (2d Cir. 1974) (cited with approval in *Miller v. Cal. Pac. Med. Ctr.*, 19 F.3d 449, 460 (9th Cir. 1994) (en banc)). *See also Frankl*, 650 F.3d at 1356. The district court should not resolve credibility conflicts in the evidence, but rather focus on whether the Regional Director's evidence is sufficient to show a "better than negligible" chance of success. *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1568 (7th Cir. 1996). *See also Frankl*, 650 F.3d at 1356; *Small*, 661 F.3d at 1190.

APPENDIX D – SECTION 10(j) STANDARDS

NINTH CIRCUIT

THE STATUTORY SCHEME PURSUANT TO WHICH INJUNCTIVE RELIEF IS SOUGHT: THE APPLICABLE STANDARDS

Section 10(j) of the Act authorizes United States district courts to grant temporary injunctions that are "just and proper" pending the Board's resolution of unfair labor practice proceedings. 29 U.S.C. § 160(j)[1] Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint. *See Scott v. Stephen Dunn & Associates*, 241 F.3d 652, 659 (9th Cir. 2001); *Miller v. Cal. Pac. Med. Ctr.*, 19 F.3d 449, 455 n.3 (9th Cir. 1994) (en banc) (quoting S. Rep. No. 105, 80th Cong., 1st Sess. at 8, 27 reprinted in 1 Leg. Hist. 414, 433 (LMRA 1947)).

In the Ninth Circuit, district courts rely on traditional equitable principles to determine whether interim relief is appropriate. *Coffman v. Queen of the Valley Med. Ctr.*, 895 F.3d 717, 725 (2018); *Small v. Avanti Health Sys., LLC*, 661 F.3d 1180 (9th Cir. 2011); *Frankl v. HTH Corp.*, 650 F.3d 1334, 1355 (9th Cir. 2011). Thus, to obtain a preliminary injunction, the Regional Director must establish (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in the Board's favor, and (4) that an injunction is in the public interest. *Frankl*, 650 F.3d at 1355

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[1] Section 10(j) (29 U.S.C. § 160(j)) provides:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in 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.

(citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 129 S.Ct. 365, 374 (2008)). These elements are evaluated on a "sliding scale" in which the required showing of likelihood of success decreases as the showing of irreparable harm increases. *See Alliance for the Wild Rockies v. Cotrell*, 632 F.3d 1127, 1131-1134 (9th Cir. 2011). When "the balance of hardships tips sharply" in the Director's favor, the Director may establish only that "serious questions going to the merits" exist so long as there is a likelihood of irreparable harm and the injunction is in the public interest. *Frankl*, 650 F.3d at 1355 (quoting *Alliance for the Wild Rockies*, 632 F.3d at 1135). The "serious questions" standard permits the district court to grant an injunction where it "cannot determine with certainty that the [Director] is more likely than not to prevail on the merits of the underlying claims, but where the costs outweigh the benefits of not granting the injunction." *Alliance for the Wild Rockies*, 632 F.3d at 1133 (quoting *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010)).

A. Likelihood of Success

Likelihood of success in a § 10(j) proceeding "is a function of the probability that the Board will issue an order determining that the unfair labor practices alleged by the Regional Director occurred and that the Ninth Circuit would grant a petition enforcing that order." *Frankl*, 650 F.3d at 1355. S*ee also Small*, 661 F.3d at 1187. In evaluating the likelihood of success, "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." *Frankl*, 650 F.3d at 1356 (quoting *Miller*, 19 F.3d at 460). The Regional Director need not prove, however, that the respondent committed the alleged unfair labor practices by a preponderance of the evidence as required in the underlying administrative proceeding. *See Scott*, 241 F.3d at 662. Such a

standard would "improperly equat[e] 'likelihood of success' with 'success.'" *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 394 (1981).

Rather, the Regional Director makes a threshold showing of likelihood of success by producing "some evidence" in support of the unfair labor practice charge "together with an arguable legal theory." *Small*, 661 F.3d at 1187 (quoting *Frankl*, 650 F.3d at 1356). *See also* S*cott*, 241 F.3d at 662 (the Regional Director need only show "a better than negligible chance of success"). Therefore, in a § 10(j) proceeding, the district court should sustain the Regional Director's factual allegations if they are "within the range of rationality" and, "[e]ven on an issue of law, the district court should be hospitable to the views of the [Regional Director], however novel." *Frankl*, 650 F.3d at 1356. "A conflict in the evidence does not preclude the Regional Director from making the requisite showing for a section 10(j) injunction." *Scott*, 241 F.3d at 662.

B. Balancing the Equities

In applying traditional equitable principles to a § 10(j) petition, courts must consider the matter in light 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." *Miller*, 19 F.3d at 459-60. In evaluating the likelihood of irreparable harm to the Act's policies and in considering the balancing of equities, district courts must "take into account the probability that declining to issue the injunction will permit the allegedly unfair labor practice to reach fruition and thereby render meaningless the Board's remedial authority." *Id*. *See also Small*, 661 F.3d at 1191; *Frankl*, 650 F.3d at 1362.

Likely irreparable injury is established in a § 10(j) case by showing "a present or impending deleterious effect of the likely unfair labor practice that would likely not be cured by

later relief." *Frankl*, 650 F.3d at 1362. The Director can make the requisite showing of likely irreparable harm either through evidence that such harm is occurring, *see, e.g., Scott*, 241 F.3d at 667, 668, or from "inferences from the nature of the particular unfair labor practice at issue [which] remain available." *Frankl*, 650 F.3d at 1362. The same evidence and legal conclusions establishing likelihood of success, together with permissible inferences regarding the likely interim and long-run impact of the likely unfair labor practices, provide support for a finding of irreparable harm. *Small*, 661 F.3d at 1191 (quoting *Frankl*, 650 F.3d at 1363).

The public interest in a Section 10(j) case "is to ensure that an unfair labor practice will not succeed because the Board takes too long to investigate and adjudicate the charge." *Frankl*,

650 F.3d at 1365 (quoting *Miller*, 19 F.3d at 460). *See also Small*, 661 F.3d at 1197. A strong showing of likelihood of success and of likely irreparable harm will establish that Section 10(j) relief is in the public interest. *Coffman*, 895 F.3d at 729 (quoting *Frankl*, 650 F.3d at 1365). *See also Bloedorn*, 276 F.3d at 300.

APPENDIX D – SECTION 10(j) STANDARDS

TENTH CIRCUIT

THE STATUTORY SCHEME PURSUANT TO WHICH INJUNCTIVE RELIEF IS SOUGHT: THE APPLICABLE STANDARDS

Section 10(j) of the Act,[1] authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint, and it could thereby render a final Board order ineffectual. *See* S. Rep. No. 105, 80th Cong., 1st Sess., at pp. 8, 27 (1947), reprinted in I *Legislative History of the Labor Management Relations Act of 1947* 414, 433 (Government Printing Office 1985) (cited in *Sharp v. Webco Indus., Inc.*, 225 F.3d 1130, 1136 (10th Cir. 2000) *and Angle v. Sacks*, 382 F.2d 655, 659-660 (10th Cir. 1967)). Thus, Section 10(j) was intended to prevent the potential frustration or nullification of the Board's remedial authority caused by the passage of time inherent in Board administrative litigation. *Id*. at 659. *Accord*: *Kobell v. United Paperworkers Int'l Union*, 965 F.2d 1401, 1406 (6th Cir. 1992).

To resolve a Section 10(j) petition, a district court in the Tenth Circuit considers only two issues: whether there is "reasonable cause to believe" that a respondent has violated the Act and whether temporary injunctive relief is "just and proper." *See Sharp*, 225 F.3d at 1133, 1137;

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[1] Section 10(j) (29 U.S.C. § 160(j)) provides:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in 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.

Angle, 382 F.2d at 658, 660. *Accord*: *Chester v. Grane Healthcare Co.*, 666 F.3d 87, 94-100 (3d Cir. 2011); *Overstreet v. El Paso Disposal, L.P.*, 625 F.3d 844, 850-851, 854 (5th Cir. 2010); *Glasser v. ADT Sec. Sys., Inc.*, 379 F. App'x 483, 485, n.2 (6th Cir. 2010) (citing *Ahearn v. Jackson Hosp. Corp.*, 351 F.3d 226, 235 (6th Cir. 2003)).

A. The "Reasonable Cause" Standard

In determining whether there is reasonable cause to believe that the Act has been violated, a district court in the Tenth Circuit may not decide the ultimate merits of the case. *Angle*, 382 F.2d at 661 (merits of unfair labor practice allegations to be resolved by the Board). Accord: *Chester*, 666 F.3d at 100; *Ahearn*, 351 F.3d at 237. Rather, the Regional Director "must only produce some evidence 'that [its] position is fairly supported by the evidence.'" *Sharp*, 225 F.3d at 1134 (quoting *Asseo v. Centro Medico del Turabo, Inc.*, 900 F.2d 445, 450 (1st Cir. 1990)). Further, the Regional Director need only advance legal theories that are "valid, substantial and not frivolous" in order to "permit a rational factfinder, considering the evidence in the light most favorable to the Board, to rule in favor of the Board." *Sharp*, 225 F.3d at 1134 (quoting *Arlook v. S. Lichtenberg & Co., Inc.*, 952 F.2d 367, 371 (11th Cir. 1992)). *Accord*: *Chester*, 666 F.3d at 101; *Overstreet*, 625 F.3d at 850, 855; *Ahearn*, 351 F.3d at 237. The district court should not resolve contested factual issues. *See Ahearn*, 351 F.3d at 237. Nor should it attempt to resolve issues of credibility of witnesses. *Id.*; *Gottfried v. Frankel*, 818 F.2d 485, 493, 494 (6th Cir. 1987) (district court is not permitted to resolve conflicts in evidence; respondent's attack on credibility of Board's witnesses merely establishes conflict in evidence).

B. The "Just and Proper" Standard

Section 10(j) implements the public interest to protect the Board's remedial power from compromise by the passage of time inherent in obtaining an enforceable Board order. Thus, for Section 10(j) relief to be just and proper, "the circumstances of the case must demonstrate that

there exists a probability that the purposes of the Act will be frustrated unless temporary relief is granted." *Sharp*, 225 F.3d at 1135 (quoting *Angle v. Sacks*, 382 F.2d at 660). *Accord*: *Chester*, 666 F.3d at 102; *Ahearn*, 351 F.3d at 239. Accordingly, the relief to be granted is that which will preserve, or restore as nearly as possible, the status quo existing before the alleged unfair labor practices occurred. *See Angle*, 382 F.2d at 661. *See also Pascarell v. Vibra Screw Inc.*, 904 F.2d 874, 878 (3d Cir. 1990) (10(j) relief warranted where violations "are likely to jeopardize the integrity of the bargaining process and thereby make it impossible or not feasible to restore or preserve the status quo pending litigation").

APPENDIX D – SECTION 10(j) STANDARDS

ELEVENTH CIRCUIT

THE STATUTORY SCHEME PURSUANT TO WHICH INJUNCTIVE RELIEF IS SOUGHT: THE APPLICABLE STANDARDS

Section 10(j) of the Act,[1] authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint, and it could thereby render a final Board order ineffectual. *See* S. Rep. No. 105, 80th Cong., 1st Sess., at pp. 8, 27 (1947), reprinted in I *Legislative History of the Labor Management Relations Act of 1947* 414, 433 (Government Printing Office 1985). *See also NLRB v. Hartman and Tyner, Inc.*, 714 F.3d 1244, 1249 (11th Cir. 2013); *Arlook v. S. Lichtenberg & Co., Inc.*, 952 F.2d 367, 371 (11th Cir. 1992) (quoting *Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1188 (5th Cir. 1975)).

To resolve a Section 10(j) petition, a district court in the Eleventh Circuit considers only two issues: whether there is "reasonable cause to believe" that a respondent has violated the Act and whether injunctive relief is "just and proper." *See Hartman and Tyner*, 714 F.3d at 1250; *Arlook*, 952 F.2d at 371. *Accord*: *Chester v. Grane Healthcare Co.*, 666 F.3d 87, 94-100 (3d Cir. 2011); *Overstreet v. El Paso Disposal, L.P.*, 625 F.3d 844, 850-851, 854 (5th Cir. 2010); *Glasser*

[1] Section 10(j) (29 U.S.C. § 160(j)) provides:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in 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.

v. ADT Sec. Sys., Inc., 379 F. App'x 483, 485, n.2 (6th Cir. 2010) (citing *Ahearn v. Jackson Hosp. Corp.*, 351 F.3d 226, 235 (6th Cir. 2003)).

A. The "Reasonable Cause" Standard

In determining whether there is reasonable cause to believe that the Act has been violated, the district court may not decide the merits of the case. *See Arlook*, 952 F.2d at 372-373 (citing *Pilot Freight*, 515 F.2d at 1191). *Accord*: *Chester*, 666 F.3d at 100; *Ahearn*, 351 F.3d at 237. Rather, the district court's role is limited to evaluating whether (1) the Regional Director's theory of violation is "substantial, nonfrivolous [and] coherent" and (2) the evidence, considered in the light most favorable to the Board, would permit a rational factfinder to rule in the Board's favor. *Arlook*, 952 F.2d at 371-372. *Accord*: *Boire v. Int'l Bhd. of Teamsters*, 479 F.2d 778, 789-92 (5th Cir. 1973) (legal theories need only be "substantial and not frivolous"); *Chester*, 666 F.3d at 101; *Overstreet*, 625 F.3d at 850, 855; *Ahearn*, 351 F.3d at 237. In determining whether the Regional Director has met this "minimal burden" (*Pilot Freight*, 515 F.2d at 1189), a district court should not attempt to resolve conflicts in the evidence or the credibility of witnesses. *Arlook*, 952 F.2d at 372-373; *Ahearn*, 351 F.3d at 237; *Gottfried v. Frankel*, 818 F.2d 485, 493, 494 (6th Cir. 1987) (respondent's attack on credibility of Board's witnesses merely establishes conflict in the evidence).

B. The "Just and Proper" Standard

Injunctive relief is "just and proper" under Section 10(j) "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 NLRA will be frustrated." *Hartman and Tyner*, 714 F.3d at 1250 (quoting *Arlook*, 952 F.2d at 372). *Accord*: *Chester*, 666 F.3d at 102; *Ahearn*, 351 F.3d at 239. In the Eleventh Circuit, injunctive relief is shown to be "equitably necessary" where, for

example, union organizational efforts are being extinguished by employer unfair labor practices, unions and employees have already suffered substantial damage from probable violations and future violations are likely to be repeated absent an injunction. *Hartman and Tyner*, 714 F.3d at 1250; *Arlook*, 952 F.2d at 372. Therefore, it is "just and proper" for a district court to grant interim relief where a Section 10(j) injunction would be "more effective" to protect employee statutory rights than a final Board order. *Arlook*, 952 F.2d at 374. *Accord*: *Pascarell v. Vibra Screw Inc.*, 904 F.2d 874, 878 (3d Cir. 1990) (10(j) relief warranted where violations "are likely to jeopardize the integrity of the bargaining process and thereby make it impossible or not feasible to restore or preserve the status quo pending litigation."); *Asseo v. Centro Medico del Turabo, Inc.*, 900 F.2d 445, 454-455 (1st Cir. 1990) (same).

APPENDIX D – SECTION 10(j) STANDARDS

D.C. CIRCUIT

THE STATUTORY SCHEME PURSUANT TO WHICH INJUNCTIVE RELIEF IS SOUGHT: THE APPLICABLE STANDARDS

Section 10(j) of the Act,[1] authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint. *See* S. Rep. No. 105, 80th Cong., 1st Sess., at pp. 8, 27 (1947), reprinted at *I Legislative History of the Labor Management Relations Act of 1947* 414, 433 (Government Printing Office 1985). Thus, Section 10(j) was intended to prevent the potential frustration or nullification of the Board's remedial authority caused by the passage of time inherent in Board administrative litigation. *See, e.g., Sharp v. Webco Indus., Inc.*, 225 F.3d 1130, 1133 (10th Cir. 2000) (citing *Angle v. Sacks*, 382 F.2d 655, 659 (10th Cir. 1967)); *Kobell v. United Paperworkers Int'l Union*, 965 F.2d 1401, 1406 (6th Cir. 1992).

To resolve a 10(j) petition, the district court in the District of Columbia considers only two issues: whether there is "reasonable cause to believe" that the Act has been violated and whether the "remedial purposes of the law will be served by pendente lite [injunctive] relief."

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[1] Section 10(j) (29 U.S.C. § 160(j)) provides:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in 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.

APPENDIX D – SECTION 10(j) STANDARDS

See Int'l. Union, U.A.W. v. NLRB (Ex-Cell-O Corp.), 449 F.2d 1046, 1051 (D.C. Cir. 1971) (Section 10(e) (29 U.S.C. Section 160(e)) temporary injunction case; "in order to obtain temporary relief under § 10(j) or § 10(e), the Board need only establish that there is reasonable cause to believe that the Act has been violated, and that remedial purposes of the law will be served by pendente lite relief").[2] The "usually strict standards for equitable relief in private actions do not apply when [] important public purposes are threatened." *Ex-Cell-O Corp.*, 449 F.2d at 1051. Several circuits have adopted this two-part standard, the second half of which is also characterized as whether temporary injunctive relief is "just and proper." *See, e.g.*, *Chester v. Grane Healthcare Co.*, 666 F.3d 87, 94-100 (3d Cir. 2011); *Overstreet v. El Paso Disposal, L.P.*, 625 F.3d 844, 850-851, 854 (5th Cir. 2010); *Glasser v. ADT Sec. Sys., Inc.*, 379 F. App'x 483, 485, n.2 (6th Cir. 2010) (citing *Ahearn v. Jackson Hosp. Corp.*, 351 F.3d 226, 235 (6th Cir. 2003)); *Sharp*, 225 F.3d at 1133, 1137; *Arlook v. S. Lichtenberg & Co., Inc.*, 952 F.2d 367, 371 (11th Cir. 1992).

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[2] The four-part test articulated by the district court in *Gold v. State Plaza, Inc.*, 435 F. Supp. 2d 110, 118-119 (D. D.C. 2006) and *D'Amico v. U.S. Serv. Indus., Inc.*, 867 F.Supp. 1075, 1085 (D. D.C. 1994), is not binding on the district court in this case. *Fund for Animals v. Mainella*, 335 F. Supp. 2d 19, 27 (D. D.C. 2004) ("a decision by a district court has no precedential effect"); *Flowers v. Executive Office of the President*, 142 F. Supp. 2d 38, 42 (D. D.C. 2001) (same). In any event, even under the four-part test, the Board's strong "likelihood of success" on the merits supports the issuance of an injunction, the need for interim relief outweighs any minimal harm to the Employer, and injunctive relief is in the public interest. *See Gold v. State Plaza, Inc.*, 435 F. Supp. 2d at 119 (the "public interest … lies in ensuring that the purposes of the statute are furthered and that the processes of the Board, and any ultimate remedies it imposes are effective").

APPENDIX D – SECTION 10(j) STANDARDS

A. The "Reasonable Cause" Standard

In determining whether there is reasonable cause to believe that the Act has been violated, the district court may not decide the ultimate merits of the case. *Angle*, 382 F.2d at 661 (merits of unfair labor practice allegations to be resolved by the Board); *Chester*, 666 F.3d at 100; *Ahearn*, 351 F.3d at 237. Rather, the Regional Director "must only produce some evidence 'that [its] position is fairly supported by the evidence.'" *Sharp*, 225 F.3d at 1134 (quoting *Asseo v. Centro Medico del Turabo, Inc.*, 900 F.2d 445, 450 (1st Cir. 1990)). Further, the Regional Director need only advance legal theories that are "valid, substantial and not frivolous" in order to "permit a rational factfinder, considering the evidence in the light most favorable to the Board, to rule in favor of the Board." *Sharp*, 225 F.3d at 1134 (quoting *Arlook, Inc.*, 952 F.2d at 371). *Accord*: *Chester*, 666 F.3d at 101; *Overstreet*, 625 F.3d at 850, 855; *Ahearn*, 351 F.3d at 237. The district court should not resolve contested factual issues. *Ahearn*, 351 F.3d at 237. Nor should it attempt to resolve issues of credibility of witnesses. *Id.*; *Gottfried v. Frankel*, 818 F.2d 485, 493, 494 (6th Cir. 1987) (district court is not permitted to resolve conflicts in evidence; respondent's attack on credibility of Board's witnesses merely establishes conflict in evidence).

B. The "Just and Proper" Standard

As the District of Columbia Circuit has recognized, interim injunctive relief is appropriate to protect the remedial purposes of the Act and, in particular, to preserve the Board's remedial powers from compromise by the passage of time inherent in obtaining a Board order. *Ex-Cell-O Corp.*, 449 F.2d at 1051. Thus, Section 10(j) relief is appropriate 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" unless

such relief is granted. *Angle*, 382 F.2d at 660 (cited in *Sharp*, 225 F.3d at 1133-1135); *Pascarell v. Vibra Screw Inc.*, 904 F.2d 874, 878 (3d Cir. 1990) (injunctive relief is warranted when the alleged violations "are likely to jeopardize the integrity of the bargaining process and thereby make it impossible or not feasible to restore or preserve the status quo pending litigation"). *Accord*: *Chester*, 666 F.3d at 102; *Ahearn*, 351 F.3d at 239. In determining what interim relief is "just and proper," the district court should consider what is necessary to preserve or restore as nearly as possible the status quo before the alleged violations occurred. *See Sharp*, 225 F.3d at 1134 (citing *Angle v. Sacks*, 382 F.2d at 661); *Kobell*, 965 F.2d at 1410; *Ex-Cell-O Corp.*, 449 F.2d at 1051.

APPENDIX E

List of Court Cases for Each 10(j) Category; Relevant Law Review Articles; and Enforcement Cases Relevant to Just and Proper Arguments

REVISED September 2019

[W= win; L= loss]
[***** = more important case]
(parenthetical indicates additional issues addressed in the case)

I. SECTION 10(j) CASES BY CATEGORY[1]

1. Interference with Organizational Campaign (no majority)

Circuit Court decisions:

Angle v. Sacks, 382 F.2d 655 (10th Cir. 1967) (W) (classic "nip in the bud" case; infers irreparable harm from the nature of the violation, no independent just and proper evidence required)[*]

Aguayo v. Tomco Carburetor, 853 F.2d 744 (9th Cir. 1988) (W) (discharge of union organizing committee members; protect potential collective-bargaining process; job rights of replacements subordinate to reinstatement rights discriminatees; good language on delay)

Sharp v. Parents in Cmty. Action, Inc., 172 F.3d 1034 (8th Cir. 1999) (L) (no public interest served by reinstatement of single 8(a)(3) where no ongoing union campaign)[*]

Sharp v. Webco Indus., 225 F.3d 1130 (10th Cir. 2000) (W) (discriminatory selection for layoffs; union attempting to revive stalled campaign; good language on delay)[*]

Pye v. Excel Case Ready, 238 F.3d 69 (1st Cir. 2001) (W) (classic "nip in the bud" case; loss of union support coincides with unlawful discharges)[*]

Schaub v. W. Mich. Plumbing & Heating, Inc., 250 F.3d 962 (6th Cir. 2001) (W) (reinstatement of single 8(a)(3) in early stages of campaign)

NLRB v. Hartman and Tyner, Inc., 714 F.3d 1244 (11th Cir. 2013), *aff'g* 2012 WL 2513485 (S.D. Fl. June 29, 2012) (W on c&d order & affirm. order for ee names and addresses, L on reinstatement of six employees & all other affirm. provs.)(denies interim reinstatement b/c of Board's 4 mo. Delay (applies *Boire v.*

[1] For a description of the case categories, see the Section 10(j) Manual, Section 2.1

Pilot Freight case contrary to 5th Cir's later *El Paso Disposal* decision), chill from discharges had already occurred, and U camp. had "grown cold" before discharges)

McDermott v. Ampersand Pub'g, 593 F.3d 950 (9th Cir. 2010) (L) (8(a)(3) discharges where ee's/U sought to have ER uphold "journalistic ethics"; inj. denied under 9th Cir's heightened standard for granting inj. where inj. could infringe upon respondent's 1st Amend. rights bc it would require ER to reinstate ee's who, through "journalistic ethics" demands, could conceivably seek to control what newspaper printed)

Paulsen v. Remington Lodging & Hospitality, LLC, 773 F.3d 462 (2d Cir. 2014) (partial W) (affirming d. ct.'s denial of reinstatement order for some employees due to "changed circumstances," i.e., Er had voluntarily made offers already; reversing ct's refusal to reinstate discriminatee who had not already received voluntary offer from Er)

Overstreet v. Shamrock Foods Co., 679 F. App'x 561 (9th Cir. 2017) (W) (affirming interim reinstatement and c&d)

Barker v. Industrial Hard Chrome, Ltd., 2007 WL 1771513 (7th Cir. June 14, 2007) (W) (granting injunction pending appeal, including interim reinstatement, in 8(a)(1) protected concerted activity context)

District Court decisions:

NLRB v. Ona Corp., 605 F. Supp. 874 (N.D. Ala. 1985) (W) (single 8(a)(3); good evidence of "chilling" impact)

Silverman v. Whittall & Shon, 1986 WL 15735, *1 (S.D.N.Y. June 6, 1986) (W) (good language on "chill"; "no other worker in his right mind would participate")

Hoffman v. Cross Sound Ferry Serv., 1982 WL 2016 (D. Conn. Feb. 22, 1982) (good language on chill)

Sharp v. La Siesta Foods, Inc., 859 F. Supp. 1370 (D. Kan. 1994) (L) (union lost election, campaign had stopped and no post-election violations)[*]

D'Amico v. U.S. Service Indus., 867 F. Supp. 1075 (D. D.C. 1994) (W) (inform unit employees about terms of decree; multi-site in scope; rejects "unclean hands" defense)

Fleischut v. Avondale Indus., 1995 WL 27464 (E.D. La. Jan. 23, 1995) (L) (insufficient showing of irreparable harm to union's campaign)

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Blyer v. P & W Elec., Inc., d/b/a Pollari Electric, 141 F. Supp. 2d 326 (E.D.N.Y. 2001) (W)(reinstatement of 3 employees in unit of 15)

Johnson v. Sunshine Piping, Inc., 238 F. Supp. 2d 1297 (N.D. Fl. 2002) (L) (insufficient showing of irreparable harm to union's campaign)

Chavarry v. E.L.C. Elec., Inc., 2004 WL 2137644 (S.D. Ind. June 29, 2004) (W) (ULPs followed unresolved election)

Lineback v. Frye Elec., Inc., 539 F. Supp. 2d 1111 (S.D. Ind. 2008) (W) (interim reinstatement of 2 employees)

Hoffman v. Pennant Foods Co., 2008 WL 1777382 (D. Conn. Apr. 15, 2008) (W/L) (interim reinstatement of union leader after two lost elections; however, other remedies, including union access, not just and proper)

Hooks v. Ozburn-Hessey Logistics, 775 F. Supp. 2d 1029 (W.D. Tenn. 2011)(W) (discharges during organizing campaign)

Muffley v. Jewish Hosp. & St. Mary's Healthcare, Inc., 2012 WL 1576143 (W.D. Ky, May 3, 2012) (W reinstatement, L on notice posting & reading)(good language on discharge of prominent U supporter and on delay; ER cannot use defense of lack of U support to support arg. of no chill where ER engaged in other ulps designed to dampen interest in U)

Overstreet v. Santa Fe Tortilla Co., 2013 WL 3921178 (D.N.M., July 26, 2013) (W) (discharge of 2 ees for PCA & a U activities; good lang. on delay (6 mos bet. discharge & 10(j) pet.))

Fernbach v. Raz Dairy, Inc., 881 F. Supp. 2d 452 (S.D.N.Y. 2012) (W) (8(a)(3) disch. of ee identified as U ringleader & mult. 8(a)(1)'s; good lang. re: reinstatement is for benefit of remaining ees and not the discriminatee; good lang re: how reinstatement after Bd order permits irrep. harm & insuff. to preserve the status quo as it existed before ULPs; orders notice reading)

Rubin v. Am. Reclamation, Inc., 2012 WL 3018335 (C.D. Cal. July 24, 2012) (W) (substantial 8(a)(1)'s, including threat of facility closure & numerous 8(a)(3) discharges; good lang. re: irrep. harm & scattering)

Barker v. Latino Express, Inc., 2012 WL 1339624 (N.D. Ill. Apr. 18, 2012) (W) (substantial 8(a)(1)'s, include. threat of facility closure & numerous 8(a)(3) dischs.; orders Spanish trans. notice posting).

Fernbach v. 3915 9th Ave. Meat & Produce Corp., 870 F. Supp. 2d 342 (S.D.N.Y. 2012) (W) (nip-in-the-bud case w/ 5 discharges; good discuss. of chill evod. where discharges killed U campaign)

Overstreet v. Albertson's, LLC, 868 F. Supp. 2d 1182 (D.N.M. 2012) (W) (8(a)(3) disch., surveillance, & other 8(a)(1)'s; good lang re: delay & how dist. ct. does not evaluate credibility or resolve disputed facts in analyzing r/c)

Garcia v. Green Fleet Sys., LLC, 2014 WL 5343814 (C.D. Cal. Oct. 10, 2014) (W/L) (8(a)(1)s & 8(a)(3)s incl. dischs.; evid. problems go to weight, not admissibility; employee was employer's agent; independent contractor analysis; chill evid. fell within hearsay exception; fear of retaliation well-founded based on 8(a)(1)s even absent retaliatory discharges; translation and posting of order; denying employee contact information to union)

Drew-King v. Deep Distributors of Greater NY, Inc., 194 F. Supp. 3d 191, 193 (E.D.N.Y. 2016) (W) (relying heavily on ALJD for reas. cause; need for cease and desist order to protect organizing; rejecting Er's unfounded speculation of ees' ineligibility due to immigration status)

Overstreet v. David Saxe Productions, LLC, 2019 WL 332406 (D. Nev. Jan. 24, 2019) (W in substantial part) (discharges during an organizing campaign).

Walsh v. Mountain View Care and Rehabilitation Center, LLC, 2019 WL 2865891 (M.D. Pa. July 2, 2019) (W) (single discharge during organizing drive).

2. Interference with Organizational Campaign (majority)

Circuit Court decisions:

Seeler v. Trading Port, Inc., 517 F.2d 33 (2d Cir. 1975) (W) (correct view of status quo)[*****]

Boire v. Pilot Freight Carriers, Inc., 515 F.2d 1185 (5th Cir. 1975) (L) (incorrect view of status quo)[*****]

Levine v. C & W Mining Co., 610 F.2d 432 (6th Cir. 1979) (W) (also read the district court opinion)

Kaynard v. Palby Lingerie, Inc., 625 F.2d 1047 (2d Cir. 1980) (W) (disputed unit not bar to relief; good language on risk of error; employer can condition cba on Board sustaining GC's complaint)

Kaynard v. MMIC, Inc., 734 F.2d 950 (2d Cir. 1984) (W) (unresolved election not bar to relief)

Asseo v. Pan Am. Grain Co., 805 F.2d 23 (1st Cir. 1986) (W) (quotes D.C. Circuit in *Tiidee*)

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NLRB v. Electro-Voice, Inc., 83 F.3d 1559 (7th Cir. 1996) (W) (follows *Seeler* view of status quo; good language on need to reinstate; employer retains right to discipline for cause)[*****]

Scott v. Stephen Dunn & Assocs, 241 F.3d 652 (9th Cir. 2001) (W) (8(a)(1) *Gissel*; costs of collective bargaining not bar to interim relief)

District Court decisions:

Gottfried v. Mayco Plastics, Inc., 472 F. Supp. 1161 (E.D. Mich. 1979), *affd. mem.*, 615 F.2d 1360 (6th Cir. 1980) (W) (union lost election; mass reinstatement; rejects defense that employer already made offers of recall; also good language on delay)

Lightner v. Dauman Pallet, Inc., 823 F. Supp. 249 (D.N.J. 1992) (W) (has good evidentiary ruling on "chilling" impact)

Garner v. MacClenny Prods., Inc., 859 F. Supp. 1478 (M.D. Fla. 1994) (W) (only 8(a)(1) violations; unresolved election)

Hoeber v. KNZ Constr., Inc., 879 F. Supp. 451 (E.D. Pa. 1995) (W) (good language on need for interim bargaining order)

Ahearn v. Beckley Mech., Inc., 1999 WL 328775 (S.D.W. Va. Mar. 29, 1999) (W) (8(a)(1) violations)

Moore-Duncan v. Aldworth Co., 124 F. Supp. 2d 268 (D.N.J. 2000) (interim bargaining order runs against joint employer)

Sharp v. Ashland Constr. Co., 190 F. Supp. 2d 1164 (W.D. Wis. 2002) (W) (good language on status quo and grants Board access to hiring records)

Kendellen v. Evergreen Ame. Corp., 2006 WL 1047473 (D.N.J. Apr. 17, 2006) (W) (8(a)(1) violations, post-lost election)

Barker v. Regal Health & Rehab Ctr., 632 F. Supp. 2d 817 (N.D. Ill. 2009) (W) (8(a)(3) discharges)

Muffley v. Dynamic Energy, Inc., 2011 WL 2604798 (S.D.W. Va. June 30, 2011) (L)

Ley v. Novelis Corp., 2014 WL 4384980 (N.D.N.Y. Sept. 4, 2014) (L/W) (denying bargaining order because evidence of ULPs ambiguous and unclear whether majority ever supported union; granting other relief)

Overstreet v. One Call Locators Ltd., 46 F. Supp. 3d 918 (D. Ariz. 2014) (W/L) (reinstating one of two discriminatees and granting bargaining order)

Rubin v. Vista Del Sol Health Servs., Inc., 80 F. Supp. 3d 1058 (C.D. Cal. 2015) (W) (discussion of hearsay evidence; hallmark 8(a)(1)s and (3)s; good discussion of why delay not basis for denying injunction)

Osthus v. A.S.V., Inc., 2015 WL 1530434 (D. Minn. Apr. 2, 2015) (L/W) (8(a)(1) violations only; post-lost election; denying bargaining order but granting C&D)

Ley v. Wingate of Dutchess, Inc., 182 F. Supp. 3d 93 (S.D.N.Y. 2016) (W) (refusing to consider employee turnover as factor against bargaining order)

Walsh v. W.B. Mason Co., 219 F. Supp. 3d 209 (D. Mass. 2016) (W/L) (interim bargaining order granted; two of six employees ordered reinstated; three months between consolidation of complaints and filing of 10(j) petition did not render relief inappropriate)

Ohr v. MTIL, Inc., 2017 WL 5444009 (N.D. Ill. Nov. 14, 2017) (W/L) (granting bargaining order but denying reinstatement)

3. Subcontracting or Other Change to Avoid Bargaining Obligation

Circuit Court decisions:

Levine v. C & W Mining Co., 610 F.2d 432 (6th Cir. 1979) (L) (discriminatory subcontracting; won *Gissel;* but lost on prohibition against sale of trucks [*****]

Maram v. Universidad Interamericana De Puerto Rico, Inc., 722 F.2d 953 (1st Cir. 1983) (W) (8(a)(3) subcontracting of janitorial department; statutory rights of discriminatees superior to job rights of replacements; good language on passage of time)

Calatrello v. Automatic Sprinkler Corp. of Am., 55 F.3d 208 (6th Cir. 1995) (L) (8(a)(3) subcontracting; won reasonable cause, lost on j & p based on expense of restoration of old operation)

Hirsch v. Dorsey Trailers, Inc., 147 F.3d 243 (3d Cir. 1998) (W) (granted "mothball" order; good language on delay)

Frankl v. HTH Corp., 650 F.3d 1334 (9th Cir. 2011), *cert. denied,* 132 S.Ct. 1821 (2012) (W)(employer used management company to bargain with union then removed management company when it came close to reaching a contract;

employer then refused to "hire" bargaining committee members and withdrew recognition)[*]

Overstreet v. Gunderson Rail Servs., LLC, 587 F. App'x 379 (9th Cir. 2014) (L) (closure of facility; equities weighed against order to reopen facility)

District Court decisions:

Zipp v. Bohn Heat Transfer Grp., 1982 WL 2072 (C.D. Ill. June 22, 1982) (W) (work relocation; with 8(a)(5) information)

Kobell v. Thorsen Tool Co., 1982 WL 2093 (M.D. Pa. Dec. 29, 1982) (W) (work relocation)

Eisenberg v. Suburban Transit Corp., 1983 WL 1998 (D.N.J. Jan. 21, 1983) (W) ("single employer," work relocation)

Silverman v. Imperia Foods, Inc., 646 F. Supp. 393 (S.D.N.Y. 1986) (W) (8(a)(3) accelerated plant relocation and mass discharge; good language on need to restore lawful status quo)

D'Amico v. A.G. Boone, 647 F. Supp. 1546 (W.D. Va. 1986) (L), *supplemented in* 660 F. Supp. 534 (W.D. Va. 1987) (W) (8(a)(3) work relocation; lost first on interim restoration, but then won Rule 60(b)(6) motion for "mothball" order)

Kobell v. J.D. Hinkle & Sons, 1988 WL 159195 (N.D.W. Va. Sept. 26, 1988) (L) (restoration was too burdensome)

Frye v. Seminole Intermodal Transport, Inc., 1992 WL 321555 (S.D. Ohio Sept. 8, 1992) (W) (work relocation; good language on potential destruction of unit)

Miller v. LCF, Inc., 1994 WL 669837 (N.D. Cal. Nov. 18, 1994) (L) (work relocation; employer was losing money at old location)

Frye v. Kentucky May Coal Co., 1994 WL 739464 (E.D. Ky. Dec. 21, 1994) (L) (discriminatory subcontracting; unit employees were working for subcontractor at original location)

Bernstein v. Carter & Sons Freightways, Inc., 983 F. Supp. 994 (D. Kan. 1997) (W) (discriminatory subcontracting; restoration of operations not unduly burdensome; also grants Gissel remedy)

Aguayo v. Quadrtech Corp., 129 F. Supp. 2d 1273 (C.D. Cal. 2000) (W) (discriminatory work relocation; also obtained TRO)

Dunbar v. Carrier Corp., 66 F. Supp. 2d 346 (N.D.N.Y. 1999) (W) (unilateral work relocation)

Kreisberg v. Stamford Plaza Hotel & Conference Ctr., 849 F. Supp. 2d 279, 282 (D. Conn. 2012) (W) (subcontracting out ees' work to frustrate U activity)

Barker v. A.D. Conner, Inc., 807 F. Supp. 2d 707 (N.D. Ill. 2011) (W) (soliciting ees to decertify U, threats to close facility, direct dealing, failure to engage in effects bargaining over closure, & using alter ego to avoid bargaining; good lang. re: irrep. harm; issuance of ALJD is not valid basis for denying 10(j) relief)

Gold v. Eng'g Contractors, Inc., 831 F. Supp. 2d 856 (D. Md. 2011) (W) (ER created new corporate entity in order to avoid bargaining, withdrew recognition from U, term. all ees affiliated with the U, & only retained ees who discontinued U membership; good lang. re: irrep. harm).

Fernbach v. Sprain Brook Manor Rehab, LLC, 91 F. Supp. 3d 531 (S.D.N.Y. 2015) (W) (subcontracting by successor employer)

Leach v. Oliva Supermarkets LLC, 2015 WL 4392097 (D.N.J. July 15, 2015) (W) (alter ego; "small and intimate" unit exception inapplicable where 70% of unit ees were new)

Osthus v. TruStone Fin. Fed. Credit Union, 182 F. Supp. 3d 901 (D. Minn. 2016) (L/W) (refusal to bargain about and apply contract to ees at relocated branches insufficiently severe to justify interim bargaining order where employer still bargained as to other locations; ordering notice posting to prevent loss of U support)

4. Withdrawal of Recognition from Incumbent

Circuit Court decisions:

Brown v. Pacific Tel. & Tel. Co., 218 F.2d 542 (9th Cir. 1954) (W) (8(a)(5) and 8(a)(2); "drifting away" of union members; C.J. Pope's concurring opinion)

Sachs v. Davis & Hemphill, Inc., 1969 WL 4752 (4th Cir. May 2, 1969) (W) (classic "good-faith doubt" case; also read the district court opinion)

Pye v. Sullivan Brothers Printers, Inc., 38 F.3d 58 (1st Cir. 1994) (L) (novel union merger)

Overstreet v. El Paso Disposal, 625 F.3d 844 (5th Cir. 2010) (W) (refusal to reinstate ULP strikers, withdrawal of recognition) [*]

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Glasser v. ADT Security Servs., 379 F. App'x 483 (6th Cir. 2010), *rev'g and remanding* 2009 WL 1383291 (W.D. Mich. May 14, 2009) (withdrawal of recognition after "merger" of units; dist. ct denied injunction bc it found Board had not est. r/c, notwithstanding favorable ALJD; CA6 reverses finding of no r/c and remands for determination of whether j/p).

Lineback v. Irving Ready-Mix, Inc., 653 F.3d 566 (7th Cir. 2011), *aff'g* 780 F. Supp. 2d 747 (N.D. Ind. 2011) (W) (ER withdrew recog. after CBA expired & offered ee's indiv. employment K's; rejects ER defense that it was permitted to withdraw recog. under 8(f); "a decline in U's mem, loss of ee benefits, & ongoing erosion of the ER-U relationship, are suff. to establish irrep. harm)

Frankl v. HTH Corp., 650 F.3d 1334 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1821 (2012) (W) (employer used management company to bargain with union then removed management company when it came close to reaching a contract; employer then refused to "hire" bargaining committee members and withdrew recognition)[*]

McKinney v. Southern Bakeries, LLC, 786 F.3d 1119 (8th Cir. 2015) (L) (reversing bargaining order injunction; 8th Cir. "high hurdle" to establish threshold showing of irreparable harm; loss of representation in the interim does not meet the circuit's requirement of "serious and extraordinary" case).[*]

Coffman v. Queen of the Valley Medical Center, 895 F.3d 717 (9th Cir. 2018) (W) (Er could not withdraw recognition when it engaged in unconditional bargaining before it tested certification; granting bargaining order and reinstatement of 1 ee)

District Court decisions:

DeProspero v. House of the Good Samaritan, 474 F. Supp. 552 (N.D.N.Y. 1978) (W) (affiliation of incumbent union with another union)

Balicer v. Helrose Bindery, Inc., 1972 WL 1004 (D.N.J. Dec. 27, 1972) (W) (alter ego)

Pascarell v. Gitano Group, Inc., 730 F. Supp. 616 (D.N.J. 1990) (W) (relocated part of operation)

Ledford v. Mining Specialists, Inc., 865 F. Supp. 314 (S.D.W. Va. 1993) (L) (alter ego)

Hoffman v. Hartford Hosp., 1995 WL 420821 (D. Conn. Mar. 31,1995) (W) (hospital merger)

Hirsch v. Konig, 895 F. Supp. 688 (D.N.J. 1995) (W) (good language on delay after ALJ hrg.)

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Ahearn v. House of Good Samaritan, 884 F. Supp. 654 (N.D.N.Y. 1995) (W)

D'Amico v. Townsend Culinary, Inc., 22 F. Supp. 2d 480 (D. Md. 1998) (W) (bad faith bargaining tainted later showing of employee disaffection from union)

Dunbar v. Park Assocs., Inc., 23 F. Supp. 2d 212 (N.D.N.Y. 1998) (W) (tainted good faith doubt)

McDermott v. Scott, 1999 WL 734053 (C.D. Cal. May 27, 1999) (W)

Overstreet v. Tucson Ready Mix, Inc., 11 F. Supp. 2d 1139 (D. Ariz. 1998) (W) (tainted good faith doubt; successor employer improperly delayed bargaining)

Moore-Duncan v. Horizon House Developmental Servs., 155 F. Supp. 2d 390 (E.D. Pa. 2001) (W) (very good just and proper language)[*]

Aguayo v. San Diego/Imperial Counties Chapter of the Am. Red Cross, 2000 WL 33260711 (S.D. Cal. Dec. 14, 2000) (L) (Regional Director did not prove likelihood of success on taint theory and court was reluctant to impose apparent minority union on unit)

Kinney v. Cook Cnty. Sch. Bus, 2000 WL 748121 (N.D. Ill. June 1, 2000) (W) (w/d of recognition during term of K where employer had no right to terminate agreement)

Moore-Duncan v. Laneko Eng'g Co., 2003 WL 23139070 (E.D. Pa. Dec. 23, 2003) (W) (distinguished Third Circuit's "small and intimate" unit doctrine)

Glasser v. Heartland Health Care Ctr. d/b/a Plymouth Court, 333 F. Supp. 2d 607 (E.D. Mich. 2003) (W) (w/d of recognition during term of agreement)

Pye v. Y.W.C.A. of W. Mass., 419 F. Supp. 2d 20 (D. Mass. 2006) (W) (w/d of recognition during term of orally agreed-upon contract)

Pye v. EAD Motors E. Air Devices, Inc., 2004 WL 1635842 (D.N.H. July 22, 2004) (W) (has 8(a)(2) committee)

Reichard v. Foster Poultry Farms, 425 F. Supp. 2d 1090 (E.D. Cal. 2006) (W) (union affiliation)

Gold v. State Plaza, Inc., 481 F. Supp. 2d 43 (D.D.C. 2006) (W) (employer solicited anti-union petition)

McDermott v. Peyton Cramer, Inc. d/b/a Power Ford of Torrance, 2006 WL 2859314 (C.D. Cal. Sept. 26, 2006) (L) (court found minimum likelihood of

success that ER's w/d was based on tainted decert petition; balance of harms roughly equal) *vacated as moot*, 2007 WL 1839332 (C.D. Cal. June 26, 2007)

Calatrello v. Carriage Inn of Cadiz, 2006 WL 3230778 (S.D. Ohio Nov. 6, 2006) (W) (w/d of recognition under *Levitz*; 89-ee unit)

Kendellen v. Interstate Waste Servs. of N.J., 2007 WL 121435 (D.N.J. Jan. 11, 2007) (L) (court found injunction not just and proper; change of status quo occurred before obligation to bargain over ee transfers) [case settled before appeal]

Norelli v. SFO Good-Nite Inn, 2007 WL 662477 (N.D. Cal. Mar. 1, 2007) (W) (w/d of recognition during contract term and based on tainted petition; discharge of 2 in 22-ee unit); 2007 WL 2344994 (N.D. Cal. Aug. 16, 2007), (L) (refusal to extend affirmative bargaining order beyond 6 months)

Muffley v. APL Logistics Mgmt., 2008 WL 544455 (W.D. Ky. Feb. 27, 2008) (W) (w/d of recognition under *Levitz*; dueling employee petitions)

Timmins v. Narricot Indus., LP, 567 F. Supp. 2d 835 (E.D. Va. 2008), *vacated as moot* 360 F. App'x 419 (4th Cir. 2010) (L) (tainted petition; injunction would not be just and proper)

Glasser v. Heartland Health Care Ctr., 632 F. Supp. 2d 659 (E.D. Mich. 2009) (W) (tainted petition; injunction limited to 4 months)

Norelli v. Fremont-Rideout Health Group, 632 F. Supp. 2d 993 (E.D. Cal. 2009) (W) (w/d of recognition under Levitz)

Garcia v. Sacramento Coca-Cola Bottling Co., 733 F. Supp. 2d 1201 (E.D. Cal. 2010) (W)(withdrawal of recognition after union merger)

Mattina v. Ardsley Bus Corp., 711 F. Supp. 2d 314 (S.D.N.Y. 2010) (W) (tainted withdrawal of recognition)

Hubbel v. Patrish, LLC, 903 F. Supp. 2d 813 (E.D. Mo. 2012) (W) (ref. to barg. for successor K, unil. disch. of all unit ees, unil. subcontracting of all unit work, & unlawful withdrawal of recog.; good lang. re: irrep. harm, delay, & scattering; ER arg. that it cannot afford backpay weighs in favor of 10(j) bc interim reinstatement stops back pay accrual)

Lineback v. SMI/Div. of DCX-Chol Enterprises, Inc., 2014 WL 5798428 (N.D. Ind. Nov. 7, 2014) (W) (successor bar precluded w/d of recognition; rescission of unil. change to pay date left to employees' decision)

Ohr v. Arlington Metals Corp., 148 F. Supp. 3d 659 (N.D. Ill. 2015) (L) (tainted petition)

Hooks v. AIM Aerospace Sumner, Inc., 2018 WL 838043 (W.D. Wash. Feb. 13, 2018) (L) (tainted petition)

Murphy v. NSL Country Gardens, LLC, 2019 WL 2075590 (D. Mass. May 10, 2019) (W) (tainted withdrawal of recognition (assistance) followed by discharges)

5. Undermining of Bargaining Representative [see also Category 8]

Circuit Court decisions:

Morio v. N. Am. Soccer League, 632 F.2d 217 (2d Cir. 1980) (W) (individual employment contracts; court can grant remedies typically granted by Board; also read district court opinion)

Eisenberg v. Wellington Hall Nursing Home, 651 F.2d 902 (3d Cir. 1981) (W) (discharged employees on union bargaining committee; employer retains right to discipline for cause)

Squillacote v. Advertisers Mfg., 677 F.2d 544 (7th Cir. 1982) (W) (c & d order against unilateral changes during "test of certification" 8(a)(5) litigation)

Sheeran v. Am. Commercial Lines, Inc., 683 F.2d 970 (6th Cir. 1982) (W) (unilateral rescission of union hiring hall and union access to vessels; rejects *Collyer-Dubo* defense)

Gottfried v. Frankel, 818 F.2d 485 (6th Cir. 1987) (W) (harass key union officials; summons and complaint not necessary for 10(j) petition; employer not entitled to full evidentiary hearing on reasonable cause issues; good language on delay)[*]

Fleischut v. Nixon Detroit Diesel, Inc., 859 F.2d 26 (6th Cir. 1988) (W) (fact that ALJ hearing was imminent not relevant to just and proper inquiry)

Pascarell v. Vibra Screw, 904 F.2d 874 (3d Cir. 1990) (W) (discharge of employees on bargaining committee; good language on "chill" and delay)[**]

Arlook v. S. Lichtenberg & Co., 952 F.2d 367 (11th Cir. 1992) (W) (harass union stewards and probationary employees; unilateral changes; newly certified union is vulnerable; good language on passage of time)[*]

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Schaub v. Detroit Newspaper Agency, 154 F.3d 276 (6th Cir. 1998) (L) (insufficient adverse impact on union's employee support and parties' negotiations)

Lineback v. Spurlino Materials, LLC, 546 F.3d 491 (7th Cir. 2008) (W) (unilateral implementation of new classification and selection criteria during 1st contract bargaining; discriminated against union leaders)

Ahearn v. Jackson Hosp. Corp., 351 F.3d 226 (6th Cir. 2003) (W) (discharge of former strikers employees where union is newly certified)[*]

Harrell v. Am. Red Cross, 714 F.3d 553 (7th Cir. 2013), *aff'g in part & rev'g in part* 2011 WL 5436264 (C.D. Ill. Nov. 9, 2011) (dist. ct's order granting 10(j) relief for only 1 unil. change while denying relief for other unil. changes was an abuse of discretion - "limited injunction failed to fully address the harms that it recognized"; ALJ's finding of violation supports r/c finding; can infer irrep. harm from the nature of the violation; good lang. re: harm from unil. changes).[*]

Frankl v. HTH Corp., 693 F.3d 1051 (9th Cir. 2012) (Frankl II) (W) (consolidated case with enforcement of NLRB order and the second injunction action against HTH; COA affirms dist ct injunction against HTH for unil. changes, an 8(a)(3) discharge, denial of info. requests; conflicting evid. does not preclude r/c finding; disch of active & open U supporters "sends a message that the ER will take action against U supporters"; 8(a)(5) violations, including unil. changes & refusal to provide info. "has long been understood as likely causing an irreparable injury to U representation"), *aff'g* 825 F. Supp. 2d 1010 (D. Haw. 2011) (W) [*]

McKinney v. Ozburn-Hessey Logistics, 875 F.3d 333 (6th Cir. 2017) (W/L) (retaliation against supporters post-certification; cir. ct. agreed that discriminatory reassignment of union activist should be rescinded because of adverse impact on union support during critical period of initial contract bargaining but reversed the interim reinstatement of 1 discriminatee)

Kinard v. Dish Network Corp., 890 F.3d 608 (5th Cir. 2018) (W/L) (unil. 50% wage cut; dist. court need not compare instant facts to prior ULP cases to assess "egregiousness")[*]

Henderson v. Bluefield Hosp. & Greenbrier VMC, 902 F.3d 432 (4th Cir. 2018) (L) (in 4th Cir. initial inquiry in 4-part test is likelihood of irreparable harm; harm cannot be inferred from nature of bad-faith bargaining violation, rather there must be a showing of likely irreparable harm)[*]

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District Court decisions:

Overstreet v. Western Professional Hockey League, Inc., 656 F. Supp. 2d 1114 (D. Ariz. 2009) (L) (minimal likelihood of success established regarding employer's bad-faith bargaining; no irreparable harm as parties reached agreement on some issues)

Overstreet v. Thomas Davis Med. Ctrs., 9 F. Supp. 2d 1162 (D. Ariz. 1997) (W) (post-election unilateral changes; interim bargaining order only requires respondent to meet and bargain in good faith)

Silverman v. Major League Baseball Player Relations Comm., 880 F. Supp. 246 (S.D.N.Y. 1995) (W) (unilateral changes in sport's free agency; need to restore bargaining equality)

LeBus v. Manning, Maxwell & Moore, Inc., 218 F. Supp. 702 (W.D. La. 1963) (W) (test of certification; stresses prevention of industrial unrest)

Kinney v. Chicago Tribune Co., 132 LRRM 2795 (N.D. Ill. 1989) (L) (pay unnecessary wages to recalled strikers)

Ahearn v. Dunkirk Ice Cream Co., 1989 WL 169121 (W.D.N.Y. Sept. 14, 1989) (W) (abrogate grievance/arbitration provisions)

Reynolds v. Curley Printing Co., 247 F. Supp. 317 (M.D. Tenn. 1965) (W) (post-certification 8(a)(3) subcontracting and surface bargaining)

Pascarell v. Orit Corp., 705 F. Supp. 200 (D.N.J. 1988) (W) (refusal to properly recall ULP strikers)

Bordone v. Talsol Corp., 799 F. Supp. 796 (S.D. Ohio 1992) (W) (discriminatory changes in t & c after certification)

Kobell v. Beverly Health & Rehab. Servs. 987 F. Supp. 409 (W.D. Pa. 1997) (W) (interim reinstatement of ULP strikers granted)

Dunbar v. Colony Liquor and Wine Distribs., 15 F. Supp. 2d 223 (N.D.N.Y. 1998) (W) (lawful plant relocation, but unlawful "effects" bargaining; refusal to consider employee transfers)

Aguayo v. South C. Refuse Corp., 1999 WL 547861 (C.D. Cal. June 28, 1999) (W) (refusal to recall ULP strikers and to comply with terms of agreed-upon labor agreement)

Lineback v. Printpack, Inc., 979 F. Supp. 831 (S.D. Ind. 1997) (W) (interim reinstatement of union president during contract negotiations)

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Calatrello v. NSA, a Div. of Southwire Co., 164 LRRM 2500 (W.D. Ky. 2000) (W) (bad faith bargaining and refusal to recall ULP strikers; good language for need to protect newly certified union)

Clements v. Alan Ritchey, Inc., 165 F. Supp. 2d 1068 (N.D. Cal. 2001) (L) (unilateral changes, direct dealing, and unlawful discharges; court found insufficient evidence that employer knew of union activity or made unilateral changes after union election)

Mattina v. Chinatown Carting Corp., 290 F. Supp. 2d 386 (S.D.N.Y. 2003) (W) (discharge of employees and refusal to comply with area contract)

Barker v. Indus. Hard Chrome Ltd., 2007 WL 163204 (N.D. Ill. Jan. 18, 2007) (L) (mass discharge of 20 strikers out of 90-ee unit during 1st contract bargaining), 2007 WL 1771513 (7th Cir. June 14, 2007) (W) (injunction pending appeal)

Chester v. Eichorn Motors, Inc., 504 F. Supp. 2d 621 (D. Minn. 2007) (W) (discharged 3 ees in 4-ee unit; unilateral changes; direct dealing; extensive 8(1)s; court refused to order interim rescission of unilateral changes)

Mattina v. Kingsbridge Heights Rehab. and Care Center, 2008 WL 3833949 (S.D.N.Y. Aug. 14, 2008), *affd*. 329 F. App'x 319 (2d Cir. 2009) (W) (unilateral changes to health benefits, causing ULP strike; ER ordered to restore benefits and reinstate strikers upon unconditional offer to return)

Pye v. Longy School of Music, 759 F. Supp. 2d 153 (D. Mass. 2011) (W/L) (lost bargaining order over broad decision to restructure faculty in recently-certified unit, but won bargaining over "effects" such as how to restructure)

Blyer v. One-Stop Kosher Supermarket, Inc., 720 F. Supp. 2d 221 (E.D.N.Y. 2010) (W) (refusal to recognize union after entering into voluntary recognition agreement)

Lund v. Case Farms Processing, Inc., 794 F. Supp. 2d 809, (N.D. Ohio 2011) (W) (discharge of two union supporters in large unit and numerous 8(a)(1)s to undermine recently certified bargaining representative)

Garcia v. Fallbrook Hosp., 952 F. Supp. 2d 937 (S.D. Cal. 2013) (W) (overall bf bargain., cond. barg., insistence to impasse on permiss. sub./refusal to bargain over mand. subj., ref. to bargain over effects of discharge of 2 ees, and ref. to provide info.; denies ER defense of deferral to 301 lawsuit)

Garcia v. S&F Market Healthcare, 2012 WL 1322888 (C.D. Cal. Apr. 17, 2012) (W) (overall bf bargaining; good lang. re: demon. irrep. harm in 8(a)(5) case "not

a heavy burden"; good lang re: delay /5-month delay after complaint "commendable" bc it gave ct a developed record)

McDermott v. Veritas Health Servs., Inc., 2011 WL 2693922 (C.D. Cal., May 9, 2011) (L) (tech. 8(a)(5) case w/ unil. changes, 8(a)(3) disch., & misc. 8(a)(1)'s; 10(j) not j/p bc passage of time & lack of evid. to show that add'l harm will occur before Bd. order), *aff'd mem.*, 469 F.App'x 544 (9th Cir. 2012) (dist. ct. did not abuse its discretion).

Ahearn v. Remington Lodging & Hospitality, 842 F. Supp. 2d 1186 (D. Alaska 2012) (W) (unil. changes, 8(a)(3) dischs., maintaining & enforcing unlawful handbook rules, premature decl. of impasse, withdrawal of recog., & failing to provide info.; good lang re: defer. To ALJ's cred. findings, delay (dist. *Ampersand*, explains that delay may be more permissible in 8(a)(5) cases than in 8(a)(3) reinstatement cases, & explains that delay for ALJ decision provides ct w/ benefit of developed record; irrep. harm; notice reading ordered).

Hooks v. Remington Lodging & Hospitality, LLC, 8 F. Supp. 3d 1178 (D. Alaska 2014) (W) (second injunction against same employer) (j/p notwithstanding two years between first complaint and second 10(j) petition)

Gottschalk v. Piggly Wiggly Midwest, LLC, 861 F. Supp. 2d 962 (E.D. Wis. 2012) (W) (unil. changed 19 ees from full-time to part-time/constructively disch. ees; good lang. re: harm from unil. changes).

Pate v. Bodega Latina Corp., 2015 WL 12661924 (C.D. Cal. July 30, 2015) (W) (unil. change to vacation policy & 8(a)(3) disch.)

Osthus v. Ingredion, Inc., 2016 WL 4098541 (N.D. Iowa July 28, 2016) (L) (overall bf bargain., implementation of final offer absent impasse; insufficient evidence of irrep. harm)

Rubin v. Hosp. of Barstow, Inc., 2016 WL 4547152 (C.D. Cal. Aug. 29, 2016) (W) (overall bf bargain., unil. changes, denial of info. requests)

Cowen v. Star Fisheries Inc, 2017 WL 2111413 (C.D. Cal. May 13, 2017) (W) (ULPs during strike) (imminent ALJ hearing and availability of compensatory damages do not obviate need for injunction; rights of discriminatees outweigh those of replacements)

Lindsay v. Mike-Sell's Potato Chip Co., 254 F. Supp. 3d 969 (S.D. Ohio 2017) (L) (ER sold product distribution routes to independent contractors without bargaining; interim rescission unnecessary to preserve Bd.'s remedial power and posed undue hardship on ER and contractors)

Binstock v. DHSC, LLC, 2017 WL 3895096 (N.D. Ohio Sept. 5, 2017) (W/L) (surface barg., unil. changes, denial of info. requests; granting requested relief except transfer of retirement assets)

Overstreet v. Apex Linen Service, Inc., 2018 WL 832851 (D. Nev. Feb. 12, 2018) (W/L) (bad-faith bargaining, unilateral changes, discharges during first-contract bargaining; won reinstatement and some 8(a)(1)s and (5)s, lost some 8(a)(1)s and (5)s) (good language on how newly certified union is more susceptible to ULPs and value of order to offer reinstatement even if some employees have moved on)

Lindsey v. Shamrock Cartage, Inc., 2018 WL 6528432 (S.D. Ohio Dec. 12, 2018) (W) (recognizing compelling need for interim reinstatement of activist discharged during first contract bargaining)

Perez v. Noah's Ark Processors, LLC, 2019 WL 2076793 (D. Neb. May 10, 2019) (W) (bad faith bargaining; ct. adopts Bd's model just and proper argument verbatim)

6. Minority Union Recognition

Circuit Court decisions:

Eisenberg v. Hartz Mountain Corp., 519 F.2d 138 (3d Cir. 1975) (L) (seemingly fair contract with assisted union; time limits on 10(j) decrees)[*****]

Kaynard v. Mego, 633 F.2d 1026 (2d Cir. 1980) (W) (accretion; a "tussle" among the parties; Board ordered to expedite final decision on merits)[*]

Muffley v. Voith Indus. Servs., Inc., 551 F. App'x 825 (6th Cir. 2014) (L) (injunction not necessary to require successor employer to remedy 8(2) conduct after long hiatus between employers)

District Court decisions:

Hirsch v. Trim Lean Meat Products, Inc., 479 F. Supp. 1351 (D. Del. 1979) (W) (includes *Gissel*)

Fuchs v. Jet Spray Corp., 560 F. Supp. 1147 (D. Mass. 1983) (W) (good entrenching analysis re 8(a)(2) union)

Zipp v. Dubuque Packing Co., 1982 WL 2015 (N.D. Ill. Jan. 15, 1982) (W) (premature recognition)

Greene v. Senco, Inc., 282 F. Supp. 690 (D. Mass. 1968) (W) (Regional Director does not have to litigate entire ULP complaint)

Chavarry v. Innovative Commc'ns. Corp., 146 F. Supp. 2d 747 (D.V.I. 2000) (W) (w/d of recognition from newly certified union and grant of recognition to minority union where no accretion)

Moran v. LaFarge N. Am., Inc., 286 F. Supp. 2d 1002 (N.D. Ind. 2003) (W) (interim relief warranted where Region sought to unblock representation case filed by second union)

McDermott v. Dura Art Stone, Inc., 298 F. Supp. 2d 905 (C.D. Cal. 2003) (W) (employer and incumbent union negotiated successor contract when parties knew that union had lost its majority)

Glasser v. Comau, Inc., 767 F. Supp. 2d 778 (E.D. Mich. 2011) (L)

Fernbach v. Sprain Brook Manor Rehab, LLC, 91 F. Supp. 3d 531 (S.D.N.Y. 2015) (W) (successor employer recognized minority union)

Kreisberg v. Emerald Green Bldg. Servs., LLC, 169 F. Supp. 3d 261 (D. Mass. 2015) (W) (successor employer recognized minority union)

7. Successor Refusal to Recognize and Bargain

Circuit Court decisions:

Solien v. Merchants Home Delivery, Inc., 557 F.2d 622 (8th Cir. 1977) (L) (good language on delay)

Kobell v. Suburban Lines, Inc., 731 F.2d 1076 (3d Cir. 1984) (L) (*Kallmann*; small and intimate unit exception; rejects *Crain* and *Mack* defense re job rights of replacements)

*Scott v. El Farra Enter*s., 863 F.2d 670 (9th Cir. 1988) (W) (*Kallmann;* court must defer to Board's choice of remedy)

Asseo v. Centro Medico del Turabo, 900 F.2d 445 (1st Cir. 1990) (W) (failure to hire union steward; good language on public interest)

Frye v. Specialty Envelope, Inc., 10 F.3d 1221 (6th Cir. 1993) (W)[*]

Hoffman v. Inn Credible Caterers, Ltd., 247 F.3d 360 (2d Cir. 2001) (W) (substantial and representative complement issue)[*]

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Bloedorn v. Francisco Foods, Inc. d/b/a Piggly Wiggly, 276 F.3d 270 (7th Cir. 2001) (W) (*Kallmann* successor; good language re loss of benefits of collective bargaining; winning ALJD supports Region's likelihood of success on merits; infers irreparable harm from the nature of the violation, no independent just and proper evidence required)[*]

Muffley v. Spartan Mining Co., 570 F.3d 534 (4th Cir. 2009) (W/L) (*Kallmann*) (court adopted four-part equitable standard; upheld Board's delegation authority to GC under 3(d) and district court's interim reinstatement of discriminatees but denied cross-appeal for interim bargaining order; good language on delay)[*]

Chester v. Grane Healthcare Co., 666 F.3d 87 (3d Cir. 2011) (W) (successor refusal to bargain where ER was previously a public ER and transitioned to a private ER; upholds dist ct's bargaining order under successorship principles and remands issue of whether inj. Should be granted for 8(a)(3) failure-to-hire claim bc dist ct had applied *Winter*'s 4-part equitable test rather than j/p & r/c, and 3d Cir determines j/p and r/c is still standard after *Winter*), *aff'g in part and remanding* 797 F. Supp. 2d 543 (W.D. Pa. 2011). [*]

Small v. Avanti Health Sys., 661 F.3d 1180 (9th Cir. 2011) (W) (favorable ALJD can support likelihood of success element; quotes *Frankl v. HTH I* and has very good lang. re: immeasurable benefits of U rep. & irrep. harm from delay in barg., irrep. harm in successor refusal-to-bargain cases, delay, & min. harm to ER by requiring ER to barg. in good faith; infers irreparable harm from the nature of the violation, no independent just and proper evidence required) [*]

McKinney v. Creative Vision Resources, L.L.C., 783 F.3d 293 (5th Cir. 2015) (L) (successor refusal to bargain did not meet 5th Cir. standard for "egregious or exceptional" harms where there was no evidence of loss of support, no additional violations, and long delay).[*]

Paulsen v. PrimeFlight Aviation Services, Inc., 718 F. App'x 42 (2d Cir. 2017) (W) (affirming bargaining order against successor, including restriction on bargaining over certain subjects; remanded to dist. ct. for entry of c&d order as a "standard part" of 10(j) relief and complement to the bargaining order).

District Court decisions:

Squillacote v. U.S. Marine Corp., 1984 WL 148024 (E.D. Wis. May 10, 1984) (W)

Mack v. Air Express Int'l, 471 F. Supp. 1119 (N.D. Ga. 1979) (L) (rights of replacements)

Asseo v. El Mundo Corp., 706 F. Supp. 116 (D.P.R. 1989) (W) (*Kallmann*)

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Watson v. Moeller Rubber Prods., 792 F. Supp. 1459 (N.D. Miss. 1992) (W) (respondent took over one plant of multi-plant unit of predecessor)

Asseo v. Bultman Enters., 913 F. Supp. 89 (D.P.R. 1995) (W) (*Kallmann*)

Donner v. NRNH, Inc., 1999 WL 1276537 (W.D.N.Y. Nov. 22, 1999) (W) (*Kallmann*)

Wells v. Brown & Root, Inc., 65 F. Supp. 2d 1264 (S.D. Ala. 1999) (L) (*Kallmann*; weak 8(a)(3) hiring scheme)

Dunbar v. Onyx Precision Servs., 129 F. Supp. 2d 230 (W.D.N.Y. 2000) (W) (8(a)(2) union involved)

Glasser v. Precision Gage-Dearborn, LLC, 2003 WL 22140116 (E.D. Jan. 27, Mich. 2003) (W) (substantial and representative complement; burden on employer to show employee disaffection from union)

Small v. Marine Spill Response Corp., 2006 WL 1429445 (C.D. Cal. May 17, 2006) (W) (court gave deference to Region's unit determination)

Chester v. CMPJ Enterprises, 2007 WL 1994045 (D. Minn. July 2, 2007) (W) (*Kallmann*)

Hoffman v. Parksite Group, 596 F. Supp. 2d 416 (D. Conn. 2009) (W) (*Kallmann*; substantial and representative complement)

Kreisberg v. Pressroom Cleaners, Inc., 2012 WL 6197405 (D. Conn. Dec. 12, 2012) (W) (*Kallmann*; successor refusal-to-hire U ees from predecessor & various 8(a)(1) statements made to new ee's; good lang. on ees scattering despite current desire to return to work).

Paulsen v. GVS Props., LLC, 904 F. Supp. 2d 282 (E.D.N.Y 2012) (L) (no r/c to find that ER was *Burns* successor where NY law required ER not to displace predecessor's ees for at least 90 days; *Burns* requires that hiring of predecessor's ees is voluntary)

Calatrello v. JAG Healthcare, Inc., 2012 WL 4919808 (N.D. Ohio, Oct. 16, 2012) (W) (*Kallmann*, unil. changes, dischs. of 3 U supporters, & unlawful no-solicitation rule; notice reading ordered)

Ohr v. Nexeo Solutions, LLC, 871 F. Supp. 2d 794 (N.D. Ill. 2012) (L) (no r/c to find that ER is "perfectly clear" successor, where asset purchase agrmt. provided only that successor would recog. the units & stated it was not adopting or assuming CBA's, & successor wrote letters to ees stating that it was changing their t/cs of employment).

Muffley v. Adv. Metal Techs. of Ind., 2013 WL 593980 (S.D. Ind. Feb. 15, 2013) (W/L) (successor refusal to hire 2 ees & surface barg.; finds no r/c on refusal-to-hire claim, but grants 10(j) relief on surface barg.)

Fernbach v. Sprain Brook Manor Rehab, LLC, 91 F. Supp. 3d 531 (S.D.N.Y. 2015) (W) (minority union and unil. subcontracting to avoid bargaining obligation)

Kreisberg v. Emerald Green Bldg. Servs., LLC, 169 F. Supp. 3d 261, 264 (D. Mass. 2015) (W) (*Kallmann*; successor recognizes minority union)

Harrell v. Ridgewood Health Care Ctr., Inc., 154 F. Supp. 3d 1258 (N.D. Ala. 2015) (L) (*Kallmann*; 8(a)(1)s, refusals-to-hire, and refusals to bargain and provide info. insufficiently egregious to support injunction; instatement not just and proper because petition filed more than one year after successor commenced operation; bargaining order not just and proper absent evid. that U could not reconstitute itself upon final Board order)

Hardy-Mahoney v. Everport Terminal Servs., Inc., 2017 WL 1092325 (N.D. Cal. Mar. 23, 2017) (L) (*Kallmann* successor; minority union; found likelihood of success unsatisfied because defenses were "non-frivolous"; passage of time rendered injunctive relief inappropriate)

Nelson v. Advocate Health & Hosps. Corp., 273 F. Supp. 3d 919 (N.D. Ill. 2017) (W) (historical bargaining unit remained appropriate)

8. Conduct During Bargaining Negotiations [see also Category 5]

Circuit Court decisions

Douds v. ILA, 241 F.2d 278 (2d Cir. 1957) (W) (union insisted upon change in historic unit; also read district court decision)

McLeod v. General Electric Co., 366 F.2d 847 (2d Cir. 1966) (L) (employer refusal to meet with union's bargaining committee; order improperly changed status quo)

Minn. Min. & Mfg. Co. v. Meter, 385 F.2d 265 (8th Cir. 1967) (L) (union bargaining committee; 10(j) order improperly changed status quo)

Rivera-Vega v. ConAgra, Inc., 70 F.3d 153 (1st Cir. 1995), *aff'g*. 876 F. Supp. 1350 (D.P.R. 1995), *stay denied* 879 F. Supp. 165 (W) (denial of financial information; bad faith bargaining; unilateral changes; employer lockout)[*****]

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Kobell v. United Paperworkers Int'l Union, AFL-CIO, 965 F.2d 1401 (6th Cir. 1992) (W) (8(b)(3) pooling of union's contract ratification votes)

Harrell v. Am. Red Cross, 714 F.3d 553 (7th Cir. 2013), *aff'g in part & rev'g in part* 2011 WL 5436264 (C.D. Ill. Nov. 9, 2011) (unil. changes; good lang. re: infer. irrep. harm from the nature of the violation; unil. changes "prevent the U from discussing terms" & and "'strike at the heart of the U's ability to effectively represent the unit of employees.'")[*]

Frankl v. HTH Corp., 650 F.3d 1334 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1821 (2012) (deems Bd's auth. as significant & is "hospitable" to GC's view of the law, even when novel, bc of GC's expertise in labor policy; "irrep. injury is established if a likely ULP is shown along w/ a present or impending deleterious effect of the likely ULP that would likely not be cured by later relief.. . . inferences from the nature of the part. ULP at issue remain available") [*]

Kreisberg v. HealthBridge Mgmt, LLC, 732 F.3d 131 (2d Cir. 2013) (W) (unlawful implementation of last offer in absence of valid impasse and where many prior unremedied ULPs; ER ordered to restore T&C and reinstate 600+ ULP strikers)

Henderson v. Bluefield Hosp. & Greenbrier VMC, 902 F.3d 432 (4th Cir. 2018) (L) (in 4th Cir. initial inquiry in 4-part test is likelihood of irreparable harm; harm cannot be inferred from nature of bad-faith bargaining violation, rather there must be a showing of likely irreparable harm)[*]

District Court decisions:

Boire v. SAS Ambulance Ser., Inc., 1980 WL 2130 (M.D. Fla. Oct. 20, 1980) (W) (refusal to bargain with 8(a)(3)s on union committee)

Little v. Portage Realty Corp., 1970 WL 5431 (N.D. Ind. Mar. 10, 1970) (W) (bad faith bargaining)

Johansen v. Operating Engineers, Local Union No. 12, 1978 WL 23204 (C.D. Cal. Aug. 2, 1978) (W) (permissive bargaining subject)

Squillacote v. Generac Corp., 304 F. Supp. 435 (E.D. Wis. 1969) (W) (denial of relevant information)

Penello v. U.M.W., 88 F. Supp. 935 (D.D.C. 1950) (W) (remove union's permissive subjects which were stumbling block to parties' negotiations)

Hirsch v. Tube Methods, Inc., 1986 WL 8951 (E.D. Pa. Aug. 19, 1986) (W) (classic bad faith bargaining)[*]

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Silverman v. Reinauer Transp. Cos., 1988 WL 159172 (S.D.N.Y. Nov. 15, 1988) (W) (employer insisted upon change in historic unit; order required removal of subject from bargaining and required recall of ULP strikers)

Frye v. Pony Express Courier Corp., 1994 WL 758335 (S.D. Ohio July 7, 1994) (L) (refusal to meet at reasonable times)

Kobell v. United Refining Co., 1998 WL 794860 (W.D. Pa. Nov. 2, 1998) (W) (unilateral changes after union's certification, with animus motive)

Fleischut v. Burrows Paper Corp., 1999 WL 1036515 (S.D. Miss. Sept. 30, 1999) (W) (bad faith bargaining)

Friend v. District Council of Painters No. 8, 1997 WL 861825 (N.D. Cal. Dec. 17, 1997) (W) (multi-employer unit)

Blyer v. Pratt Towers, Inc., 124 F. Supp. 2d 136 (E.D.N.Y. 2000) (W) (bad faith bargaining and discharge of striking employees)

Garcia v. Fallbrook Hosp., 952 F. Supp. 2d 937 (S.D. Cal. 2013) (W) (overall bad faith bargain/ conditional bargaining, refusal to provide info.)

Paulsen v. Renaissance Equity Holdings, 849 F. Supp. 2d 335 (E.D.N.Y. 2012) (W/L) (surface barg., ref. to provide info., conditioning lockout on permiss. subject of barg., replacing ULP strikers, & unilateral subcontracting of unit work; excellent lang. re: irrep. harm from loss of health care benefits; dist. ct. orders BO & reinstatement of strikers, but refuses to reinstate to wage level contained in expired CBA)

Paulsen v. All American School Bus Corp., 967 F. Supp. 2d 630 (E.D.N.Y. 2013), stay denied 2013 WL 5744483 (E.D.N.Y. Oct. 23, 2013), (implementation of last offer for 8000 employees in absence of good faith impasse)

Diaz v. Prof'l Transp., Inc., 996 F. Supp. 2d 1215 (M.D. Fla. 2014) (L) (failure to meet & confer, conditional barg.; not j/p where no evidence of disaffection & not "extraordinary" case)

McKinney v. Kellogg Co., 33 F. Supp. 3d 937 (W.D. Tenn. 2014) (W) (insistence to impasse and lockout re permissive subject)

Ohr v. Arlington Metals Corp., 148 F. Supp. 3d 659 (N.D. Ill. 2015) (L) (overall bf barg.)

Osthus v. Ingredion, Inc., 2016 WL 4098541 (N.D. Iowa July 28, 2016) (L) (overall bf bargain., implementation of final offer absent impasse)

Rubin v. Hosp. of Barstow, Inc., 2016 WL 4547152 (C.D. Cal. Aug. 29, 2016) (W) (overall bf bargain., unilateral changes, denial of info. requests)

Binstock v. DHSC, LLC, 2017 WL 3895096 (N.D. Ohio Sept. 5, 2017) (W/L) (surface barg., unil. changes, denial of info requests; granting requested relief except transfer of retirement assets)

Overstreet v. Apex Linen Service, Inc., 2018 WL 832851 (D. Nev. Feb. 12, 2018) (W/L) (bad-faith bargaining, unilateral changes, discharges during first-contract bargaining; won reinstatement and some 8(a)(1)s and (5)s, lost some 8(a)(1)s and (5)s) (good language on how newly certified union is more susceptible to ULPs and value of order to offer reinstatement even if some employees have moved on)

Perez v. Noah's Ark Processors, LLC, 2019 WL 2076793, at *5 (D. Neb. May 9, 2019) (quoting Region's argument, court agrees that failure to bargain in good faith "'is likely to irreparably erode employees' support for their chosen representative over time because the Union is unable to protect the employees or affect their working conditions while the case is pending before the Board. The employees predictably will shun the Union because their working conditions will have been virtually unaffected by collective bargaining for several years, and they will have little, if any, reason to support the Union. This lost support for the Union will not be restored by a final Board order in due course. By the time the Board issues its final order, it will be too late; employees will have given up on their union.'").

9. Mass Picketing and Violence

Squillacote v. Local 248, Meat & Allied Food Workers, 534 F.2d 735 (7th Cir. 1976) (W) (union agency; TRO and Rule 65; civil contempt)[*****]

Frye v. Dist. 1199, 996 F.2d 141 (6th Cir. 1993) (W) (good language on irreparable harm; scope of just and proper relief)

Ahearn v. ILWU, Locals 21 and 4, 721 F.3d 1122 (9th Cir. 2013) (contempt of 10j order against picketline misconduct) (W, but L on nonparty damages) (§303 lawsuit was not secondary ER's sole remedy for damages; evidence supported civil contempt damages award to CP; comp. damages award to nonparties (police & RR) was abuse of discretion)

Grupp v. Steelworkers, 532 F. Supp. 102 (W.D. Pa. 1982) (W) (joint venture)

Compton v. Puerto Rico Newspaper Guild, 343 F. Supp. 884 (D.P.R. 1972) (W)

Squillacote v. Auto Workers, 384 F. Supp. 1171 (E.D. Wis. 1974) (L) (unremedied 8(a)(5) complaint)

Squillacote v. Local 248, Meat & Allied Food Workers, 390 F. Supp. 1180 (E.D. Wis. 1975) (W) (state suit not bar)

Vincent v. Local 359, UE, 1969 WL 191689 (N.D.N.Y. Dec. 15, 1969) (W) (blocking ingress)

Clark v. UMWA, 722 F. Supp. 250 (W.D. Va. 1989) (L) (state court decree was effective)

Clark v. UMWA, 714 F. Supp. 791 (W.D. Va. 1989) (W) (state court decree was not effective)

Bloedorn v. Teamsters Local 695, 1989 WL 165246 (W.D. Wis. June 26, 1989) (W) (affidavit of compliance)

Kollar v. United Steelworkers of Am., 161 LRRM 2307 (N.D. Ohio 1999) (W) (decree directs U.S. Marshals to take "all actions" to enforce provisions and prohibitions of order)

10. Notice Requirements for Strike or Picketing (8(d) & 8(g))

McLeod v. Sewer Workers, 292 F.2d 358 (2d Cir. 1961) (W)

Glasser v. Douglas Autotech Corp., 781 F. Supp. 2d 546 (W.D. Mich. 2011) (L) (employer later locked out and then discharged strikers where union had failed to give timely 8(d) notice before striking, so that the strike was unprotected)*

McLeod v. CWA, 1971 WL 878 (S.D.N.Y. Dec. 13, 1971) (W)

Curry v. Trabajadores, 86 F. Supp. 707 (D.P.R. 1949) (W)

Schneid v. UMW, 40 LRRM 2529 (N.D. Ill. 1957) (W)

Blyer v. Local 1814, ILA, 724 F. Supp. 1092 (E.D.N.Y. 1989) (L) ("technical" violation)

11. Refusal to Permit Protected Activity on Property

Eisenberg v. Holland Rantos Co., 583 F.2d 100 (3d Cir. 1978) (W) (industrial park)

Silverman v. 40-41 Realty Assocs., 668 F.2d 678 (2d Cir. 1982) (L) (office building)

Baudler v. Am. Baptist Homes of the West, 798 F. Supp. 2d 1099 (N.D. Cal. 2011) (W) (discriminatory enforcement of no-access rule against U supporters during strike vote)

Calatrello v. Rite Aid of Ohio, 823 F. Supp. 2d 690 (N.D. Ohio 2011) (W) (enjoining filing and maintenance of lawsuits that interfered w/ ees' ability to picket and handbill)

12. Union Coercion to Achieve Unlawful Object (including some 10(l) decisions)

Boire v. IBT, 479 F.2d 778 (5th Cir. 1973) (W) (expansion of unit; substantial and not frivolous legal theory)[*****]

D'Amico v. Shipbuilding Workers, 1984 WL 49165 (D. Md. May 10, 1984) (W) (internal union discipline)

Compton v. Carpenters, 220 F. Supp. 280 (D.P.R. 1963) (W)

Evans v. I.T.U., 76 F. Supp. 881 (S.D. Ind. 1948) (W)

Brown v. NMU, 104 F. Supp. 685 (N.D. Cal. 1951) (W) (hiring hall)

Madden v. UMW, 79 F. Supp. 616 (D.D.C. 1948) (W)

Elliott v. Sheet Metal Workers Local 49, 42 LRRM 2100 (D.N.M.) (W) (multiemployer bargaining)

Jaffee v. Newspaper and Mail Deliverers, 97 F. Supp. 443 (S.D.N.Y. 1951) (W)

Kohn v. Southwest Reg'l Council of Carpenters, 289 F. Supp. 2d 1155 (C.D. Cal. 2003) (L) (bannering was not equivalent to secondary picketing)

Overstreet v. Carpenters, Local 1506, 409 F.3d 1199 (9th Cir. 2005) (L)(bannering)

Kentov v. Sheet Metal Workers, 418 F.3d 1259 (11th Cir. 2005) (W) (union's mock funeral process was equivalent to secondary picketing)

Gold v. Mid-Atlantic Regional Council of Carpenters, 407 F. Supp. 2d 719 (D. Md. 2005) (L) (bannering)

Moore-Duncan v. Sheet Metal Workers (E.P. Donnelly), 624 F. Supp. 2d 367 (D.N.J. 2008) (L) (no reasonable cause established that union's enforcement of arbitral award challenging Board's prior 10 (k) decision was unlawful; injunction would not be just and proper)

Small v. Operative Plasters' & Cement Masons' Int'l Assoc. Local 200, 611 F.3d 483 (9th Cir. 2010) (W) (10(l)) (lawsuit with illegal object of circumventing 10(k) award; discusses irreparable harms to Bd. and ER)

Hooks v. Int'l Longshore & Warehouse Union, 544 F. App'x 657 (9th Cir. 2013) (W) (10(l)) (grievances and lawsuits)

13. Interference with Access to Board Processes

Sharp v. Webco Indus., 265 F.3d 1085 (10th Cir. 2001) (W) (lawsuit enjoined)

*Szabo v. P*I*E Nationwide, Inc.*, 878 F.2d 207 (7th Cir. 1989) (L) (no chill)

Humphrey v. United Credit Bureau of Am., 1978 WL 1668 (D. Md. June 26, 1978) (W) (lawsuit)

Wilson v. Whitehall Packing Co., 1980 WL 18761 (W.D. Wis. May 28, 1980) (W) (lawsuit)

Hirsch v. Pilgrim Life Ins. Co., 1982 WL 31310 (E.D. Pa. May 20, 1982) (W) (lawsuit)

Zipp v. Caterpillar, Inc., 858 F. Supp. 794 (C.D. Ill. 1994) (L) (insufficient evidence of chill)

14. Segregating Assets

NLRB v. Burnette Castings Co., 177 F.2d 203 (6th Cir. 1949) (W) (Section 10(e); bond alternative)

NLRB v. Interstate Equip. Co., 1970 WL 5435 (7th Cir. Apr. 14, 1970) (W) (Section 10(e))

NLRB v. A.N. Elec. Corp., 1992 WL 465776 (2d Cir. July 15, 1992) (W) (Section 10(e))

NLRB v. Horizon Hotel Corp., 1998 WL 729013 (1st Cir. June 29, 1998) (W) (Section 10(e))

NLRB v. Rosedale Fabricators, L.L.C., 2004 WL 1666136 (5th Cir. June 2, 2004) (W)(10(e) and All Writs Act)

Jensen v. Chamtech Serv. Ctr., 1997 WL 351081 (C.D. Cal. Apr. 7, 1997) (W) (10j petition based upon backpay specification)

Aguayo v. Chamtech Serv. Ctr., 1997 WL 828644 (C.D. Cal. Nov. 19, 1997) (W) (ex parte TRO protective order granted under 10j and All Writs Act)

Maram v. Alle Arecibo Corp., 1982 WL 2024 (D.P.R. Mar. 17, 1982) (W) (disappearing equipment)

Norton v. New Hope Indus., 119 LRRM 3086 (M.D. La. 1985) (W) (individual's personal assets; duty to provide information)

Kobell v. Menard Fiberglass Prods., 678 F. Supp. 1155 (W.D. Pa. 1988) (W) (includes reinstatement and preferential hiring list)

Schaub v. Brewery Prods., 715 F. Supp. 829 (E.D. Mich. 1989) (W) (need only estimate amount of backpay)

Fuchs v. Workroom For Designers, Inc., 1984 WL 49162 (D. Mass. Apr. 3, 1984) (W) (appointment of special master with receivership powers)

Model Argument for "Protective Order" or Sequestration of Assets Injunctions Under Section 10(j) (Section 10(j) Manual)[*****]

15. Miscellaneous

Eisenberg v. Lenape Prods., 781 F.2d 999 (3d Cir. 1986) (L) (*Washington Aluminum* discharges) (read C.J. Becker's dissent); *see also* discussion in *Vibra Screw*, 904 F.2d 874 (3d Cir. 1990)

Luster Coate Metallizing, Inc., Case 3-CA-19735, G.C. 10(j) Memorandum dated March 22, 1996 (*Washington Aluminum* discharges)

Ryder Student Transp. Serv., Inc., Cases 1-CA-35799, GC 10(j) Memorandum dated February 3, 1998 (mutual aid or protection activities; discharge of strikers protesting discharge of another employee)

Lineback v. Printpack, Inc., 979 F. Supp. 831 (S.D. Ind. 1997) (W) (enjoin prosecution of alleged baseless and retaliatory Section 303 LMRA suit)

Sharp v. Webco Indus., 265 F.3d 1085 (10th Cir. 2001) (W) (enjoin prosecution of preempted lawsuit)

Baudler v. Am. Baptist Homes of the W., 798 F. Supp. 2d 1099 (N.D. Cal. 2011) (W) (*Hot Shoppes* failure to reinstate economic strikers where ER motivated by indep. unlawful purpose; good lang. re: conflict in evid. does not preclude RD from est. r/c)

McKinney v. Citmed Corp., 2017 WL 2414777 (S.D. Ala. June 2, 2017) (L) (mutual aid or protection activities; suspension and discharge of strikers)

II. OTHER SECTION 10(j)-RELATED CASES

Kinney v. Fed. Sec., Inc., 272 F.3d 924 (7th Cir. 2001) (Board's resolution of unfair labor practice case moots a 10(j) appeal)

McLeod v. Gen. Elec. Co., 257 F. Supp. 690 (S.D.N.Y. 1966) (reversed on other grounds C.A. 2) (district court precluded from examining conduct of Regional Director's investigation of case)

Kessel Food Markets, Inc. v. NLRB, 868 F.2d 881 (6th Cir. 1989) (Board's authorization of 10(j) proceedings does not prejudice Board's decision and order in administrative case)

NLRB v. S.E. Nichols, Inc., 862 F.2d 952 (2d Cir. 1988) (result in 10(j) proceeding not binding on Board in subsequent ULP case)

Fusco v. Richard W. Kaase Baking Co.¸ 205 F. Supp. 459 (N.D. Ohio 1962) (W) (discovery)

U.S. v. Electro-Voice, Inc., 879 F. Supp. 919 (N.D. Ind. 1995) (W) (discovery)

D'Amico v. Cox Creek Refining Co., 126 F.R.D. 501 (D. Md. 1989) (W) (discovery)

Ahearn v. Rescare West Virginia, 208 F.R.D. 565 (S.D.W. Va. 2002) (W) (discovery)

Kobell v. Reid Plastics, Inc., 136 F.R.D. 575 (W.D. Pa. 1991) (W) (discovery)

Dunbar v. Landis Plastics, Inc., 977 F. Supp. 169 (N.D.N.Y. 1997) (W) (discovery)

Lineback v. Coupled Products, Inc., 2012 WL 1867615 (N.D. Ind. May 22, 2012) (L) (discovery)(motion to strike Rule 30(b)(6) deposition of Board agent denied); sanctions assessed against Board 2012 WL 2504909 (N.D. Ind. June 28, 2012)

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Hirsch v. Corban Corp., 968 F. Supp. 239 (E.D. Pa. 1997) (W) (EAJA)

D'Amico v. Marine and Shipbuilding Workers, 630 F. Supp. 919 (D. Md. 1986) (W) (EAJA)

Dunbar v. MSK Corp., 84 F. App'x 115 (2d Cir. 2003), *aff'g* 2002 WL 31828011 (W.D.N.Y. Aug. 27, 2002) (L) (EAJA)

Overstreet v. Farm Fresh Co. Target One, LLC, 2014 WL 4371427 (D. Ariz. Sept. 4, 2014) (L) (EAJA) (partly successful respondent was "prevailing party" entitled to fees)

Harrell v. Ridgewood Health Care Ctr., Inc., 2016 WL 2894105 (N.D. Ala. May 18, 2016) (L) (EAJA).

Lindsay v. Mike-Sell's Potato Chip Co., 2017 WL 5257126 (S.D. Ohio Nov. 13, 2017) (W) (EAJA) (despite 10(j) loss, petition was "substantially justified")

Szabo v. U.S. Marine Corp., 819 F.2d 714 (7th Cir. 1987) (W) (civil contempt; direct dealing; general Board bargaining order covers all 8(a)(5) violations)

Evans v. I.T.U., 81 F. Supp. 675 (S.D. Ind. 1948) (W)(civil contempt)

Humphrey v. Southside Elec. Cooperative, Inc., 1979 WL 15511 (E.D. Va. May 21, 1979) (W) (civil contempt)

Clark v. Int'l Union, UMWA, 752 F. Supp. 1291 (W.D. Va. 1990) (W) (civil contempt; assessed fines not moot after settlement of dispute)

Aguayo v. S. Coast Refuse Corp., 2000 WL 1280915 (C.D. Cal. Feb. 29, 2000) (W) (civil contempt)

Asseo v. Bultman Enters., 951 F. Supp. 307 (D.P.R. 1996) (W) (civil contempt; name corporate officer as joint contemnor)

U.S. v. Hochschild, 977 F.2d 208 (6th Cir. 1992) (W) (criminal contempt)

Centra, Inc. v. Hirsch, 606 F. Supp. 530 (E.D. Pa. 1985) (W) (unsuccessful respondent attempt to enjoin Board prosecution of 10(j) proceeding)

Mattina v. Saigon Grill Gourmet Rest., 2009 WL 323507 (S.D.N.Y. Feb. 4, 2009) (W) (civil contempt)

Silverman v. JRL Food Corp., 196 F.3d 334 (2d Cir. 1999) (W) (district court must give deference to findings of ALJD)

Fuchs v. Hood Indus., 590 F.2d 395 (1st Cir. 1979) (W) (district court may not hold 10(j) proceeding in abeyance to wait for decision of ALJ)

Innovative Comm'n Corp., 333 NLRB 665 (2001) (W) (Board will not consider evidence adduced before district court in 10(j) case which was not formally made a part of the administrative record)

NLRB v. Jackson Hosp., 786 F. Supp. 2d 123, 128 (D.D.C. 2011) (W) (in proceeding involving contempt of Bd. order, judge concludes that decision of dist. ct. judge in 10(j) proceeding is not *res judicata* on the Bd in admin. hearings or actions to enforce a Bd. order).

Ahearn v. ILWU, 721 F.3d 1122 (9th Cir. 2013) (W) (affirming civil contempt damages against union for violation of 10(j) against picketing misconduct; reversing award of damages to third parties).

Ohr v. Latino Express, Inc., 776 F.3d 469 (7th Cir. 2015) (W) (affirming civil contempt adjudication for failing to comply with reinstatement 10(j))

Garcia v. Green Fleet Sys., LLC, 2014 WL 5343814 (C.D. Cal. Oct. 10, 2014) (W/L) (chill evid. fell within hearsay exception)

Rubin v. Vista Del Sol Health Servs., Inc., 80 F. Supp. 3d 1058 (C.D. Cal. 2015) (W) (discussion of hearsay evidence)

Overstreet v. Shamrock Foods Co., 679 F. App'x 561 (9th Cir. 2017) (private settlement with discriminatee did not render 10(j) reinstatement order moot; c&d against coercive statements did not raise risk of First Amendment infringement)

III. LAW REVIEW ARTICLES (for background; not updated)

Paul Weiler, "Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA," 96 Harv. L. Rev. 1769, 1787-1803 (1983)

Paul Weiler, "Striking New Balance: Freedom of Contract and the Prospects for Union Representation," 98 Harv. L. Rev. 351, 354-57 (1984)

Catherine Hodgman Helm, "The Practicality of Increasing the Use of NLRA Section 10(j) Injunctions," 7 Ind. Rel. L.J. 599, 603-607 (1985)

Randal L. Gainer, "The Case For Quick Relief: Use of Section 10(j) of the Labor Management Relations Act in Discriminatory Discharge Cases," 56 Ind. L.J. 515, 517 n. 13 (1981)

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Warren H. Chaney, "The Reinstatement Remedy Revisited," 32 Lab. L.J. 357, 363 (1981)

Note, "The Propriety of Section 10(j) Bargaining Orders in Gissel Situations," 82 Mich. L. Rev. 112 (1983)

Clifford M. Koen, Jr., et al., "10(j) Injunctions: A Shift in NLRB Approach," 46 Lab. L.J. 699 (1995) (notes Board's increasing use of 10(j) in mid-1990's)

Doyle, Jr., John D., "Charging Parties Left Out: Intervention in Section 10(j) National Labor Relations Act Injunction Proceedings," 22 Fordham Urb. L.J. 833 (1995)

Terry A. Bethel, et al., "The Failure of Gissel Bargaining Orders," 14 Hofstra Lab. L.J. 423 (1997) (notes failure of Board Gissel bargaining orders, and discusses use of 10(j) proceedings)

Richard Lapp, "A Call for a Simpler Approach: Examining the NLRA's Section 10(j) Standard," 3 U. Pa. J. Lab. & Emp. L. 251 (2001)(recommends use of traditional equitable criteria rather than old two-part test of "reasonable cause" and "just and proper")

Mary Ann Leuthner, "Need for a Ceasefire in the War on the Workers: Restoring the Balance and Hope of the National Labor Relations Act," 37 J. Marshall L. Rev. 925, 950-52 (2004)

Michael W. Garrison Jr. & Ryan W. Rutledge, "The Standard for Obtaining Section 10(j) Interim Injunctive Relief Under the National Labor Relations Act: The Interplay Between the NLRA and the First Amendment," 27 A.B.A. J. Lab. & Emp. L. 365 (2012)

William K. Briggs, Note, "Deconstructing "Just and Proper": Arguments in Favor of Adopting the "Remedial Purpose" Approach to Section 10(j) Labor Injunctions" 110 Mich. L. Rev. 127 (2011)

Jonathan M. Turner & Jesse M. Koppin, "Discovery in NLRA Section 10(j) Proceedings," 27 A.B.A. J. Lab. & Emp. L. 385 (2012)

Michael T. Morley, "The Federal Equity Power," 59 B.C. L. Rev. 217 (2018) (discussing the development of federal courts' exercise of equitable powers).

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IV. ENFORCEMENT CASES WITH JUST AND PROPER LANGUAGE

U.S. Supreme Court

General policy

NLRB v. Transportation Management Corp., 462 U.S. 393, 397 (1983) ("Employees of an employer covered by the NLRA have the right to form, join, or assist labor organizations.").

NLRB v. J. Weingarten, Inc., 420 U.S. 251, 261-62 (1975) ("the Act declares that it is a goal of national labor policy to protect 'the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of . . . mutual aid or protection.' To that end the Act is designed to eliminate the 'inequality of bargaining power between employees . . . and employers.'").

policy against discharges for engaging in activity protected by the Act:

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33, 34 (1937) (employee organizing "without restraint or coercion by their employer … is a fundamental right … collective action would be a mockery if representation were made futile by interference with freedom of choice.").

Radio Officers' Union v. NLRB, 347 U.S. 17, 40 (1954) ("The policy of the Act is to insulate employees' jobs from their organizational rights. … to allow employees to freely exercise their right to join unions … without imperiling their livelihood.").

NLRB v. Phelps Dodge Corporation, 313 U.S. 177, 186 (1941) ("an embargo against employment of union labor was notoriously one of the chief obstructions to collective bargaining through self-organization. Indisputably the removal of such obstructions was the driving force behind the enactment of the National Labor Relations Act.").

NLRB v. Washington Aluminum Co., 370 U.S. 9, 14 (1962) (terminations for walking out on job due to cold unlawful, recognizing "the policy of the Act to protect the right of workers to act together to better their working conditions.").

policy favoring collective bargaining under the Act:

Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 683 (1944) ("The National Labor Relations Act makes it the duty of the employer to bargain collectively with the chosen representatives of his employees.").

NLRB v. American Natl. Ins. Co., 343 U.S. 395, 402 (1952) ("Enforcement of the obligation to bargain collectively is crucial to the statutory scheme.").

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Ford Motor Co. v. NLRB, 441 U.S. 488, 499 (1979) ("National labor policy contemplates that areas of common dispute between employers and employees be funneled into collective bargaining. The assumption is that this is preferable to allowing recurring disputes to fester outside the negotiation process until strikes or other forms of economic warfare occur.").

Fibreboard Paper Products Corp v. NLRB, 379 U.S. 203, 211 (1964) ("One of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation. The Act was framed with an awareness that refusals to confer and negotiate had been one of the most prolific causes of industrial strife.").

policy favoring lawful strikes under the Act:

NLRB v. Erie Resistor Corp., 373 U.S. 221, 233-235 (1963) ("a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system. … Congress['s] … concern for the integrity of the strike weapon has remained constant. … The courts have likewise repeatedly recognized and effectuated the strong interest of federal labor policy in the legitimate use of the strike.").

Necessity of Immediate Relief to Remedy Serious Violations of the Act

NLRB v. C & C Plywood Corp., 385 U.S. 421, 430 (1967) ("[I]n the labor field, as in few others, time is crucially important in obtaining relief.").

Impact of Discharges

NLRB v. Link-Belt Co., 311 U.S. 584, 598 (1941) (discharge of activists during organizing campaign "effectively ... restrain[ed] the employees' choice" and "tend[ed] to have as potent an effect as direct statements to the employees that they could not afford to risk selection of [the union].").

Impact of Bad Faith Bargaining/Refusal to Bargain/Withdrawal of Recognition

Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 49-50 (1987) (employer's refusal to bargain with the union "'disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions.'"), quoting *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 704 (1944).

May Dep't Stores Co. v. NLRB, 326 U.S. 376, 385 (1945) (when an employer unlawfully ignores the bargaining representative, it "minimizes the influence of organized bargaining" and emphasizes to employees "that there is no necessity for a collective bargaining agent.").

Impact of Unilateral Changes on Union's Ability to Bargain Effectively

NLRB v. Katz, 369 U.S. 736, 747 (1962) ("Unilateral action by an employer without prior discussion with the union … must of necessity obstruct bargaining, contrary to the congressional policy.").

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Impact of Unilateral Changes on Union's Support

May Dep't Stores Co. v. NLRB, 326 U.S. 376, 385 (1945) ("unilateral action minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent.").

Impact of Grant of Benefits

NLRB v. Exchange Parts, 375 U.S. 405, 409 (1964) ("The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.").

Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 686 (1944) ("There could be no more obvious way of interfering with [the Section 7] rights of employees than by grants of wage increases upon the understanding that they would leave the union in return. The action of employees with respect to the choice of their bargaining agents may be induced by favors bestowed by the employer as well as by his threats or domination.").

Impact of Threats

NLRB v. Gissel Packing Co., 395 U.S. 575, 589-90, 612-15, 620 (1969) (threats of plant closure "so coercive" that employer "destroy[ed] the laboratory conditions necessary for a fair election," thus necessitating a bargaining order).

Rebuttal Argument in Balancing the Harms

NLRB v. Phelps Dodge Corporation, 313 U.S. 177, 182 (1941) ("Protection of the workers' right to self-organization does not curtail the appropriate sphere of managerial freedom; it furthers the wholesome conduct of business enterprise.").

First Circuit

General policy

NLRB v. Beverly Enterprises-Mass., Inc., 174 F.3d 13, 30 (1st Cir. 1999) ("The NLRA favors an employer's duty to bargain collectively… .").

NLRB v. Boston Dist. Council of Carpenters, 80 F.3d 662, 665, 667 (1st Cir. 1996) (recognizing "the strong public policy favoring collective bargaining" embodied in the NLRA).

Randolph Division, Ethan Allen, Inc. v. NLRB, 513 F.2d 706, 708 (1st Cir. 1975) (the "policy of the National Labor Relations Act is 'to insulate employees' jobs from their organizational rights'"), quoting *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40 (1954).

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Impact of Discharges

NLRB v. William S. Carroll, Inc., 578 F.2d 1, 3, n.1 (1st Cir. 1978) ("firing an employee who has asserted protected rights may chill other employees contemplating similar conduct sympathetic to unionism"). [denying enforcement of Board order]

NLRB v. Horizon Air Services, Inc., 761 F.2d 22, 31-32 (1st Cir. 1985) (where employer discharges employee activists during an organizing drive, the "enduring effects of [the] all-out blitzkrieg … continue to hover like a grey cloud over the shop.").

NLRB v. Horizon Air Services, Inc., 761 F.2d 22, 31 (1st Cir. 1985) (organizational "well was poisoned" by "unwholesome strategems" including the discharge of employee activists).

Impact of Bad Faith Bargaining/Refusal to Bargain/Withdrawal of Recognition

NLRB v. Beverly Enterprises-Mass., Inc., 174 F.3d 13, 24 (1st Cir. 1999) ("An employer's duty to bargain with its employees' chosen representatives is an essential element of our national labor policy.").

Cf. Ryan Iron Works, Inc. v. NLRB, 257 F.3d 1, 14 (1st Cir. 2001) (when an employer unlawfully ignores the bargaining representative, it "weaken[s] the authority of [the] union and encourage[s] employees to doubt its ability to successfully represent them.").

Successor context: *NLRB v. Band-Age, Inc.*, 534 F.2d 1, 4 (1st Cir. 1976) ("A successorship situation requires sensitivity to the interests of both the entrepreneur and the employees. … if it can be said that the employer is reaping the advantages of continuity, the employees' interest in some stability of representation during a period of volatility takes on added significance.").

Impact of Unilateral Changes

NLRB v. Beverly Enterprises-Mass., Inc., 174 F.3d 13, 30 (1st Cir. 1999) ("our national labor policy prefers employers and employees to bargain collectively over terms and conditions of employment, rather than to take unilateral action that can lead to industrial strife.").

Ryan Iron Works, Inc. v. NLRB, 257 F.3d 1, 14 (1st Cir. 2001) (direct dealing and unilateral implementation of changes are "violations of a type that weaken the authority of a union and encourage employees to doubt its ability to successfully represent them.").

Impact of Grant of Wage Increase/Benefits

NLRB v. Horizon Air Services, Inc., 761 F.2d 22, 31 (1st Cir. 1985) (organizational "well was poisoned" by violations including "the grant of benefits to employees to undercut the Union's appeal").

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Impact of Refusal to Grant Wage Increase/Benefits

South Shore Hosp. v. NLRB, 630 F.2d 40, 45 (1st Cir. 1980) (Board properly held that discriminatory refusal to grant wage increase to represented employees "'had a natural and foreseeable effect of chilling employee desires for Union representation'").

Impact of Threats

NLRB v. Horizon Air Services, Inc., 761 F.2d 22, 31-32 (1st Cir. 1985) ("The enduring effects of Horizon's all-out blitzkrieg [including threats of plant closure] against the Union and its proponents continue to hover like a grey cloud over the shop.").

NLRB v. T&J Container Systems, 86 F.3d 1146, 1996 WL 283312 at *7 (1st Cir. 1996) (table) ("threats of discharge and business closure" are "highly coercive in nature").

Impact of Interrogations

NLRB v. Horizon Air Services, Inc., 761 F.2d 22, 31 (1st Cir. 1985) (organizational "well was poisoned" by violations including "star chamber interrogation tactics").

Second Circuit

General policy

NLRB v. GAIU Local 13-B, 682 F.2d 304, 307 (2d Cir. 1982) (the "'policy of the Act is to insulate employees' jobs from their organizational rights'"), quoting *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40 (1954).

Impact of Discharges or Discipline

Abbey's Transp. Servs., Inc. v. NLRB., 837 F.2d 575, 576 (2d Cir. 1988) ("Employees are certain to be discouraged from supporting a union if they reasonably believe it will cost them their jobs.").

NLRB v. Jamaica Towing, Inc., 632 F.2d 208, 212-213 (2d Cir. 1980) ("the reassignment, demotion or discharge of union adherents … may reasonably be calculated to have a coercive effect on employees and to remain in their memories for a long period.").

NLRB v. Caval Tool Div., Chromalloy Gas Turbine Corp., 262 F.3d 184, 188 (2d Cir. 2001) (holding that employer unlawfully disciplined non-unionized worker for challenging new break policy at a meeting and stating that to "protect concerted activities in full bloom, protection must necessarily be extended to intended, contemplated or even referred to group action, lest employer retaliation destroy the bud of employee initiative aimed at bettering terms of employment and working conditions.").

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Impact of Threats

NLRB v. Jamaica Towing, Inc., 632 F.2d 208, 212-213 (2d Cir. 1980) ("threats of plant closure or loss of employment … may reasonably be calculated to have a coercive effect on employees and to remain in their memories for a long period.").

NLRB v. Gordon, 792 F.2d 29, 33 (2d Cir. 1986) (threats of discharge of union adherents are "hallmark violations" which constitute "[f]undamental intrusions into employee rights") (citing *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 212-213 (2d Cir. 1980)).

Impact of Refusal to Bargain

NLRB v. Cayuga Crushed Stone, Inc., 474 F.2d 1380, 1384 (2d Cir. 1973) ("[T]he refusal to bargain itself … erodes the status of the Unions and discourages union membership.").

Impact of Granting of Benefits

NLRB v. Jamaica Towing, Inc., 632 F.2d 208, 212-213 (2d Cir. 1980) ("the grant of benefits to employees … may reasonably be calculated to have a coercive effect on employees and to remain in their memories for a long period.").

MPC Restaurant Corp. v. NLRB, 481 F.2d 75, 77 (2d Cir. 1973) (pay increases and changes to working conditions can "cripple the union's organizing drive.").

Impact of Soliciting/Remedying Grievances

NLRB v. Jamaica Towing, Inc., 632 F.2d 208, 213 (2d Cir. 1980) ("[R]emedying the very grievances which gave rise to the union interest, ... destroy[s] for the moment at least the employees' need for greater strength ... [so that] the employees can not be said to have been free to fairly appraise the value of unionization.") (quoting *Texaco, Inc. v. NLRB*, 436 F.2d 520, 525 (7th Cir. 1971)).

Third Circuit

General Policy

NLRB v. Broad Street Hosp. and Medical Center, 452 F.2d 302, 304-305 (3d Cir. 1971) ("employees should be given maximum opportunity to select or reject bargaining representatives, and that trade union representation must reflect the will of the bargaining unit fairly achieved through democratic processes.").

D'Amico v. NLRB, 582 F.2d 820, 823 (3rd Cir. 1978) (the "'policy of the Act is to insulate employees' jobs from their organizational rights'"), quoting *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40 (1954).

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Impact of Discharges

NLRB v. Juniata Packing Co., 464 F.2d 153, 156 (3d Cir. 1972) ("One recent employee had been discharged for signing a card in favor of unionization. Certainly such conduct is likely to intimidate employees who otherwise would be disposed to support unionization.").

NLRB v. Atlas Microfilming, Div. of Sertafilm, Inc., 753 F.2d 313, 319 (3d Cir. 1985) (discharge of union activist seen as "having a continuing impact").

Impact of Bad Faith Bargaining/Refusal to Bargain/Withdrawal of Recognition

NLRB v. Broad Street Hosp. and Medical Center, 452 F.2d 302, 305 (3d Cir. 1971) ("'the unlawful refusal of an employer to bargain collectively with its employees' chosen representatives disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions.'") (quoting *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 704 (1944)).

Cf. Citizens Publishing & Printing Co. v. NLRB, 263 F.3d 224, 233 (3d Cir. 2001) (when an employer unlawfully ignores the bargaining representative, it "'minimizes the influence of organized bargaining' and emphasizes to employees 'that there is no necessity for a collective bargaining agent.'") (quoting *May Dep't Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945)).

Impact of Unilateral Changes

Citizens Publishing & Printing Co. v. NLRB, 263 F.3d 224, 233 (3d Cir. 2001) ("By unilaterally changing employees' terms and conditions of employment, an employer 'minimizes the influence of organized bargaining' and emphasizes to employees 'that there is no necessity for a collective bargaining agent.'") (quoting *May Dep't Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945)).

Impact of Interrogations

United Oil Mfg. Co. v. NLRB, 672 F.2d 1208, 1212 (3d Cir. 1982) (violations including interrogations conveyed "a powerful message (which) cannot be erased or forgotten.").

Impact of Threats

NLRB v. Atlas Microfilming, Div. of Sertafilm, Inc., 753 F.2d 313, 319 (3d Cir. 1985) (threats of plant closure seen as "having a continuing impact").

NLRB v. Frick Co., 423 F.2d 1327, 1333 (3d Cir. 1970) (threats of job loss were "designed to … discourage membership in the union.").

Electrical Products Div. of Midland-Ross Corp. v. NLRB, 617 F.2d 977, 987 (3d Cir. 1980) (threats of closure have "a psychological impact on … employees that is unlikely to dissipate").

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Impact of Grant of Benefits

United Oil Mfg. Co. v. NLRB, 672 F.2d 1208, 1212 (3d Cir. 1982) (violations including grant of benefits conveyed "a powerful message (which) cannot be erased or forgotten.").

Impact of Threat of Loss of Benefits

NLRB v. Juniata Packing Co., 464 F.2d 153, 156 (3d Cir. 1972) (violations including threatening the loss of various benefits are "likely to intimidate employees who otherwise would be disposed to support unionization.").

Fourth Circuit

Impact of Discharges or Discipline

NLRB v. Williams Enterprises, 50 F.3d 1280, 1289 (4th Cir. 1995) ("The employees were repeatedly reminded of Williams's desire to operate non-union by … the obvious importance of union sentiment in the hiring decisions of several employees … Williams's actions significantly contributed to the employees becoming disaffected with the Union… .).

Minette Mills, Inc. v. NLRB, 983 F.2d 1056 (Table), 1993 WL 2665 *6 (4th Cir. 1993) ("Dismissal of Union supporters … obviously would have had an impact on the then upcoming Union election.").

NLRB v. Instrument Corp. of America, 714 F.2d 324, 729-730 (4th Cir. 1983) ("We are unable to say that the Board unreasonably found this evidence insufficient to prove the dismissals would have occurred even in the absence of pro-union activities. … The ALJ further noted the potential chilling effect of these dismissals on others inclined to favor the union.").

Weldon Mill, a Div. of Belding Hausman Fabrics, Inc. v. NLRB, 953 F.2d 641 (Table), 1992 WL 6330 *3 (4th Cir. 1992) ("firings on account of union activity chill employees' free exercise of § 7 rights.")

NLRB v. Frigid Storage, Inc., 934 F.2d 506, 510 (4th Cir. 1991) ("sternly-worded written warnings, born amidst and prompted by a fierce organizational battle, must inevitably chill the employees' freedom to organize").

Standard-Coosa-Thatcher Carpet Yarn Division, Inc. v. NLRB, 691 F.2d 1133, 1144 (4th Cir. 1982) (discriminatory discipline "tends 'to have a lasting inhibitive effect' on employees' formulation and expression of free choice regarding unionization").

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Impact of Threats

NLRB v. Williams Enterprises, 50 F.3d 1280, 1288 (4th Cir. 1995) (threats of loss of employment "are assumed to be 'highly coercive,' 'to remain in [employee's] memories for a long period,' and to have 'a lasting inhibitive effect on a substantial percentage of the work force.'").

Impact of Refusal to Bargain

NLRB v. Williams Enterprises, 50 F.3d 1280, 1289 (4th Cir. 1995) ("The employees were repeatedly reminded of Williams's desire to operate non-union by … the refusal of Williams to bargain with the Union … Williams's actions significantly contributed to the employees becoming disaffected with the Union… .").

NLRB v. Williams Enterprises, 50 F.3d 1280, 1290 (4th Cir. 1995) ("[A]n employer's unlawful refusal to bargain 'disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions.'") (quoting *Franks Bros. v. NLRB*, 321 U.S. 702, 704 (1944)).

Great S. Trucking Co. v. NLRB, 139 F.2d 984, 986 (4th Cir. 1944) (unlawful refusal to bargain deprives a union "of the opportunity of strengthening its organization. It demonstrated the union's inability to reach an agreement with the employer with the result that as time went on the enthusiasm of its members waned and it made it more difficult for the union to capture the[ir] allegiance… .").

NLRB v. Tower Hosiery Mills, 180 F.2d 701, 706 (4th Cir. 1950) ("It is reasonable to assume, moreover that any decline in union membership has been due in large measure to refusal of respondent to bargain with the union as representative of the employees in the manner contemplated by the Act of Congress… .").

Impact of Unilateral Changes

NLRB v. Appalachian Elec. Power Co., 140 F.2d 217, 219 (4th Cir. 1944) (recognizing that unilateral wage increase "might tend to undermine the prestige and worth" of the union).

Impact of ULPs in Burns Successor Refusal to Bargain/Kallman Successor Refusal to Hire Context

NLRB v. Williams Enterprises, 50 F.3d 1280, 1288-1289, 1290 (4th Cir. 1995) (noting the vulnerability of employee sentiments to unfair labor practices committed during the "unsettling" period of successorship, recognizing in particular "an employer's unlawful refusal to bargain 'disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions.'" (quoting *Franks Bros. v. NLRB*, 321 U.S. 702, 704 (1944))).

Holly Farms Corp. v. NLRB, 48 F.3d 1360, 1366 (4th Cir. 1995) (successorship doctrine "forestall[s] the employee frustration that could result if employees found themselves in substantially the same job, but deprived of the representation of their union.").

Fifth Circuit

General policy

NLRB v. Dothan Eagle, Inc., 434 F.2d 93, 98–99 (5th Cir. 1970) ("the exercise of free choice by the employees … is an important raison d'etre of contemporary labor policy.").

NLRB v. Aclang, Inc., 466 F.2d 558, 562 (5th Cir. 1972) (the "'policy of the Act is to insulate employees' jobs from their organizational rights'"), quoting *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40 (1954).

Impact of Discharges and Ineffectiveness of Final Board Reinstatement Order

NLRB v. Longhorn Transfer Serv., Inc., 346 F.2d 1003, 1006 (5th Cir. 1965) ("[T]he discharge of a leading union advocate is a most effective method of undermining a union organizational effort.").

California Gas Transp., Inc. v. NLRB, 507 F.3d 847, 856 (5th Cir. 2007) (discharges "'live on in the lore of the shop and continue to repress employee sentiment… .'") (quoting *Bandag, Inc. v. NLRB*, 583 F.2d 765, 772 (5th Cir. 1978) (unfair labor practices included discharges and suspensions)).

J.P. Stevens & Co. v. NLRB, 417 F.2d 533, 538 (5th Cir. 1969) (noting that a final Board reinstatement with backpay order is a "mild sanction, the backpay order's impact on the efforts of the remaining employees to organize is at best uncertain.").

Impact of Bad Faith Bargaining/Refusal to Bargain/Withdrawal of Recognition

NLRB v. Haberman Const. Co., 618 F.2d 288, 299 (5th Cir. 1980) (employer's "repudiation of its bargaining obligation" jeopardizes "the union's position as bargaining agent" and "diminish[es] its ability effectively to represent the" employees, while "efficaciously convey[ing] to the employees the futility of engaging in concerted activity").

NLRB v. Powell Elec. Mfg. Co., 906 F.2d 1007, 1015 (5th Cir. 1990) ("an employer's unlawful refusal to bargain collectively with its employees' chosen representatives 'disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions.'") (quoting *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 704 (1944)).

NLRB v. Big Three Indus., Inc., 497 F.2d 43, 52 (5th Cir. 1974) ("employee disaffection with the union in such cases is in all likelihood prompted by the employer-induced failure to achieve desired results at the bargaining table. … By skillful maneuvering, the employer has sapped union sentiments and relegated the union to minority status. … the union's majority status is inexorably eroded by the employer's refusal to bargain.") (citing *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 704 (1944)).

Impact of Unilateral Changes

NLRB v. Dothan Eagle, Inc., 434 F.2d 93, 98 (5th Cir. 1970) (unilateral action "naturally tended to undermine the authority of the[] certified bargaining representative" and "interfere with the exercise of free choice by the employees").

NLRB v. Powell Elec. Mfg. Co., 906 F.2d 1007, 1015 (5th Cir. 1990) ("the company's unilateral implementation of its policies and its refusal to bargain collectively reasonably could have contributed to employee disaffection with the union").

Impact of Interrogations/Surveillance/Promises of Benefits

TRW-United Greenfield Div. v. NLRB, 637 F.2d 410, 418 (5th Cir. 1981) (interrogation "'tends to have a coercive effect upon employees, whether or not the employees have openly declared their support for a union.'").

California Gas Transp., Inc. v. NLRB, 507 F.3d 847, 856 (5th Cir. 2007) ([interrogations, surveillance, promises of benefits] "'live on in the lore of the shop and continue to repress employee sentiment… .'") (quoting *Bandag, Inc. v. NLRB*, 583 F.2d 765, 772 (5th Cir. 1978) (unfair labor practices included coercive interrogation, promises of benefits)).

Impact of Threats

NLRB v. Kaiser Agric. Chemicals, Div. of Kaiser Aluminum & Chem. Corp., 473 F.2d 374, 381 (5th Cir. 1973) (in the face of union organizing, "remarks [such as threatening to curtail or close plant operations, or revoke existing benefits], relatively innocuous in themselves, may create an atmosphere in which employee free choice is rendered impossible.").

California Gas Transp., Inc. v. NLRB, 507 F.3d 847, 856 (5th Cir. 2007) (threats of reprisal or discharge for engaging in protected concerted activities "'live on in the lore of the shop and continue to repress employee sentiment… .'") (quoting *Bandag, Inc. v. NLRB*, 583 F.2d 765, 772 (5th Cir. 1978) (unfair labor practices included threats of reprisals)).

APPENDIX E

Sixth Circuit

General policy

National Cash Register Co. v. NLRB, 466 F.2d 945, 959 (6th Cir. 1972) ("the policy of the NLRA is to 'insulate employees' jobs from their organizational rights.'") (citing *Scofield v. NLRB*, 394 U.S. 423, 429 n.5 (1969), quoting *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40 (1954)).

Impact of Discharge

NLRB v. Valley Plaza, Inc., 715 F.2d 237, 244 (6th Cir. 1983) (discharge of employees who participated in a walkout in early stage of union campaign "would clearly 'have a tendency to undermine the majority's strength and impede the election process'").

United Services for Handicapped v. NLRB, 678 F.2d 661, 665 (6th Cir. 1982) (discharge of union supporters has an inhibitive "continuing effect" on the remaining employees).

NLRB v. Gen. Fabrications Corp., 222 F.3d 218, 233-234 (6th Cir. 2000) (suspending and discharging union supporters results in a situation where a "fair election cannot be held").

Impact of Withdrawal of Recognition / Refusal to Bargain / Bad Faith Bargaining

NLRB v. Aquabrom, Div. of Great Lakes Chem. Corp., 855 F.2d 1174, 1185 (6th Cir. 1988) (refusal to bargain results in "inevitable erosion" of union support and "employee disenchantment with the dormant status of its elected bargaining representative") (internal quotations omitted).

Peters v. NLRB, 153 F.3d 289, 299–300 (6th Cir. 1998) (refusal to bargain "'disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions.'") (quoting *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 704 (1944)).

Impact of Unilateral Changes

V & S ProGalv, Inc. v. NLRB, 168 F.3d 270, 282 (6th Cir. 1999) (an employer's unilateral change "'minimizes the influence of organized bargaining' and emphasizes to the employees 'that there is no necessity for a collective bargaining agent'") (quoting *NLRB v. Plainville Ready Mix Concrete Co.*, 44 F.3d 1320, 1325 (6th Cir. 1995)).

Impact of Failure to Reinstate Strikers

Columbia Portland Cement Co. v. NLRB, 979 F.2d 460, 464–65 (6th Cir. 1992) (unlawful refusal to reinstate strikers is "likely to have undermined the Union's authority generally and influenced … employees to reject the Union as their bargaining representative.") (citations omitted).

APPENDIX E

Impact of Threats

A. Threat of Harsher Discipline/Enforcement of Rules

NLRB v. Gen. Fabrications Corp., 222 F.3d 218, 231 (6th Cir. 2000) (threats to enforce work rules more harshly if employees unionize "'cannot but effect employee sentiment regarding the decision to support or oppose the Union.'") (quoting *United Artist Theatre Circuit, Inc.* 277 NLRB 115, 121 (1985)).

B. Threat to Bargain From Scratch

NLRB v. Gen. Fabrications Corp., 222 F.3d 218, 231 (6th Cir. 2000) (threat that bargaining will "start from zero" is coercive, particularly in atmosphere of anti-union animus).

C. Threat of Plant Closure

G.E.S., Inc. v. NLRB, 697 F.2d 157, 159 (6th Cir. 1983) (noting the "continuing effect" of threats of plant closure made to a single employee).

Indiana Cal-Pro, Inc. v. NLRB, 863 F.2d 1292, 1301 (6th Cir. 1988) (repeated threats of plant closure would have lingering effects that could not be readily dispelled [and] … are among the most flagrant of unfair labor practices") (internal citations omitted).

Donn Products, Inc. 613 F.2d 162, 166 (6th Cir. 1980) ("[w]e recognize that a threat of economic retaliation by closing a plant is one of the most coercive actions which a company can take...") (citing *Automated Business Systems v. NLRB*, 497 F.2d 262, 267 (6th Cir. 1974)).

D. Threat of Discharge

G.E.S., Inc. v. NLRB, 697 F.2d 157, 159 (6th Cir. 1983) (noting the "continuing effect" of an implied threat of discharge).

NLRB v. Valley Plaza, Inc., 715 F.2d 237, 244 (6th Cir. 1983) (threat of discharge "would clearly 'have a tendency to undermine the majority's strength and impede the election process.'") (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n. 32 (1969) (internal citations omitted)).

Impact of Interrogation

Caterpillar Logistics, Inc. v. NLRB, 835 F.3d 536, 543 (6th Cir. 2016) ("[A]ny attempt by an employer to ascertain employee views and sympathies regarding unionism generally tends to cause fear of reprisal in the mind of the employee if he replies in favor of unionism and, therefore, tends to impinge on his [NLRA] rights") (citing *Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354, 1359 (D.C. Cir. 1997), quoting *Struksnes Constr. Co.*, 165 NLRB 1062, 1062 (1967)).

APPENDIX E

Impact of Impression of Surveillance

Caterpillar Logistics, Inc. v. NLRB, 835 F.3d 536, 544 (6th Cir. 2016) (creating an impression of surveillance is illegal "because 'employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways.'") (citing *Flexsteel Indus.*, 311 NLRB 257, 257 (1993)).

Impact of Granting of Benefits

NLRB v. Allen's I.G.A. Foodliner, 651 F.2d 438, 441 (6th Cir. 1981) ("The danger inherent in well-timed increases in benefits is the suggestion of a fist inside a velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.") (quoting *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964)).

G.E.S., Inc. v. NLRB, 697 F.2d 157, 158-59 (6th Cir. 1983) (noting the "continuing effect" of excessive wage increases granted to influence organizing campaign).

Impact of Encouraging/Participating in Decertification Petition

NLRB v. Allen's I.G.A. Foodliner, 651 F.2d 438, 440 (6th Cir. 1981) (observing that "there are 'few more specific methods of interfering with employees' rights freely to choose or not to choose a bargaining representative than to have each summoned to the office of the employer and there to be asked to sign a prepared statement withdrawing from the Union.'") (quoting *NLRB v. H. W. Elson Bottling Co.*, 379 F.2d 223, 225 (6th Cir. 1967)).

General Assessment of Employer Conduct

V & S ProGalv, Inc. v. NLRB, 168 F.3d 270, 275 (6th Cir. 1999) (assessing whether employer's conduct violates the act should take into account "the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.") (quoting *NLRB v. Okun Bros. Shoe Store, Inc.*, 825 F.2d 102, 1005-06 (6th Cir. 1987) (internal citations omitted)).

Seventh Circuit

General policy

Local Union No. 167, Progressive Mine Workers of Am. v. NLRB, 422 F.2d 538, 542 (7th Cir. 1970) ("The policy of the Act is to insulate employees' jobs from their organizational rights." (quoting *Radio Officers' Union of Commercial Telegraphers Union, AFL v. NLRB*, 347 U.S. 17, 40 (1954))).

APPENDIX E

Impact of Discharges

NLRB v. Henry Colder Co., 447 F.2d 629, 631 (7th Cir. 1971) (termination of employee for engaging in union activity "no doubt . . . polluted the 'electoral atmosphere'" and had substantial coercive effect that will "remain in the memory of the employees.").

NLRB v. Copps Corp., 458 F.2d 1227, 1230 (7th Cir. 1972) (constructive discharge of union supporters has a "lingering effect" and tends to "coerce and frighten" employees into withdrawing union support).

NLRB v. Q-1 Motor Exp., Inc., 25 F.3d 473, 475, 481 (7th Cir. 1994) (discharge of pro-union employees provided "chilling lesson" that will "persist and pervade . . . in the memories of those who were there and in the lore of the shop . . .").

NLRB v. Intersweet, Inc., 125 F.3d 1064, 1070-1071 (7th Cir. 1997) (mass discharge constituted an "egregious attempt to defeat unionization" and the workforce would "continue to be chilled by the earlier actions.").

Impact of Bad Faith Bargaining/Refusal to Bargain/Withdrawal of Recognition

Cf. NLRB v. Keystone Steel & Wire, 653 F.2d 304, 307 (7th Cir. 1981) (when an employer unlawfully ignores the bargaining representative, it impairs "the stability of the bargaining relationship" and "create[s] perceptions of unfairness and of union weakness").

Impact of Unilateral Changes

NLRB v. Keystone Steel & Wire, 653 F.2d 304, 307 (7th Cir. 1981) (unlawful unilateral changes "create perceptions of unfairness and of union weakness").

Impact of Promise of Benefits

NLRB v. Henry Colder Co., 447 F.2d 629, 631 (7th Cir. 1971) (promise of benefits for employees to "forget" union "no doubt . . . polluted the electoral atmosphere" and had substantial coercive effect that will "remain in the memory of the employees.").

C & W Super Markets, Inc. v. NLRB, 581 F.2d 618, 623–24, 626 (7th Cir. 1978) (employer's unfair labor practices, including promises of benefits for siding with management, have "lingering effects" that "[will] not soon be dissipated.").

Impact of Interrogations

NLRB v. Brown Specialty Co., 436 F.2d 372, 373, 375 (7th Cir. 1971) (systematic interrogation of employees regarding union membership and activities was "so flagrant and coercive in nature" as to "prevent the holding of an election").

NLRB v. Copps Corp., 458 F.2d 1227, 1230 (7th Cir. 1972) (employer's interrogation of employees about their union activities has a "lingering effect" and tends to "coerce and frighten" employees into withdrawing union support).

C & W Super Markets, Inc. v. NLRB, 581 F.2d 618, 623–24, 626 (7th Cir. 1978) (employer's unfair labor practices, including interrogation of employees "in an atmosphere of animosity towards the union" to discover identity of union supporters, have "lingering effects" that "[will] not soon be dissipated.").

Impact of Threats

NLRB v. Brown Specialty Co., 436 F.2d 372, 373, 375 (7th Cir. 1971) (employer's threats to make working conditions worse and terminate employees if union succeeded were "so flagrant and coercive in nature" as to "prevent the holding of an election").

NLRB v. Henry Colder Co., 447 F.2d 629, 631 (7th Cir. 1971) ("blacklisting threat" by employer "no doubt . . . polluted the electoral atmosphere" and had substantial coercive effect that will "remain in the memory of the employees.").

NLRB v. Copps Corp., 458 F.2d 1227, 1230 (7th Cir. 1972) (threatening employees with reduction in hours has a "lingering effect" and tends to "coerce and frighten" employees into withdrawing union support).

C & W Super Markets, Inc. v. NLRB, 581 F.2d 618, 623–24, 626 (7th Cir. 1978) (employer's unfair labor practices, including threats to cease operations, instructing employees not to engage in union activities, and asking employees to come up with "legitimate" reasons for terminating pro-union employees, have "lingering effects" that "[will] not soon be dissipated.").

NLRB v. Q-1 Motor Exp., Inc., 25 F.3d 473, 475, 481 (7th Cir. 1994) ("'common sense recognizes the dramatic and long term effects'" of threatening employees who supported union with terminal closure, job loss, and other reprisals).

Delay Considerations

Naperville Ready Mix, Inc. v. NLRB, 242 F.3d 744, 759 (7th Cir. 2001) ("courts do not have discretion to impose costs of delay by the Board upon wronged employees" and doing so would "unjustifiably compound their injury.").

Eighth Circuit

General policy

NLRB v. Huttig Sash & Door Co., 377 F.2d 964, 968 (8th Cir. 1967) (Blackmun, J.) ("'in the labor field, as in few others, time is crucially important in obtaining relief.'"), quoting *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 430 (1967).

NLRB v. Spector Freight System, Inc., 273 F.2d 272, 275 (8th Cir. 1960) (the "'policy of the Act is to insulate employees' jobs from their organizational rights'"), quoting *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40 (1954).

APPENDIX E

Impact of Discharges

S. Bakeries, LLC v. NLRB, 871 F.3d 811, 827 (8th Cir. 2017) ("Violations are more likely to 'have detrimental and lasting effects' if they involve 'coercive conduct such as discharge… .'") (quoting *Tenneco Auto., Inc. v. NLRB*, 716 F.3d 640, 650 (D.C. Cir. 2013)).

NLRB v. Hitchiner Mfg. Co., 634 F.2d 1110, 1114 (8th Cir. 1980) (discharge of employee for union activity had "chilling effect" on union support and the "lesson driven home" will not "be soon forgotten by employees").

Fed. Prescription Serv., Inc. v. NLRB, 496 F.2d 813, 818 (8th Cir. 1974) (discharges were "inherently destructive" of employee rights under the Act).

NLRB v. Sitton Tank Co., 467 F.2d 1371, 1372 (8th Cir. 1972) (discharging activists is the "surest method of undermining a union's majority or impeding [the] election process").

Impact of Refusal to Bargain/Bad Faith Bargaining/Withdrawal of Recognition

NLRB v. Miller Waste Mills, 315 F.3d 951, 955 (8th Cir. 2003) (employer's "failure to bargain with the union in good faith after it had been certified to represent the employees" was a "particularly egregious" violation of the Act "designed to undermine union support").

Cf. NLRB v. Hardesty Co., 308 F.3d 859, 865 (8th Cir. 2002) (when an employer unlawfully ignores the bargaining representative, it "send[s] the message to the employees that their union is ineffectual, impotent and unable to represent them").

Impact of Unilateral Changes

NLRB v. Miller Waste Mills, 315 F.3d 951, 955 (8th Cir. 2003) ("dealing with the employees directly and improving their wages and benefits while completely circumventing the union's authority" are "unfair labor practices designed to undermine union support").

NLRB v. Hardesty Co., 308 F.3d 859, 865 (8th Cir. 2002) (employer's unilateral changes to working conditions will "often send the message to the employees that their union is ineffectual, impotent and unable to represent them").

Impact of Withholding Benefits

S. Bakeries, LLC v. NLRB, 871 F.3d 811, 827 (8th Cir. 2017) ("Violations are more likely to 'have detrimental and lasting effects' if they involve 'coercive conduct such as … withholding benefits … .'") (quoting *Tenneco Auto., Inc. v. NLRB*, 716 F.3d 640, 650 (D.C. Cir. 2013)).

APPENDIX E

Impact of Threats

S. Bakeries, LLC v. NLRB, 871 F.3d 811, 827 (8th Cir. 2017) ("Violations are more likely to 'have detrimental and lasting effects' if they involve 'coercive conduct such as … threats to shutdown the company operation.'") (quoting *Tenneco Auto., Inc. v. NLRB*, 716 F.3d 640, 650 (D.C. Cir. 2013)).

NLRB v. Hitchiner Mfg. Co., 634 F.2d 1110, 1114 (8th Cir. 1980) (threats to close or transfer operations are "particularly destructive" of employee rights).

Impact of Impression of Surveillance

NLRB v. Chem Fab Corp., 691 F.2d 1252, 1258 (8th Cir. 1982) (unlawfully creating impression that union activities are under surveillance can "inhibit the employees' right to pursue union activities untrammeled by fear of possible employer retaliation.") (citing *NLRB v. Ralph Printing and Lithographing Co.*, 379 F.2d 687, 691 (8th Cir. 1967)).

Ninth Circuit

General policy

NLRB v. Teamsters Local No. 439, Int'l Bhd. of Teamsters, AFL–CIO, 175 F.3d 1173, 1175 (9th Cir. 1999), citing and quoting *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40 (1954) ("holding that '[t]he policy of the Act is to insulate employees' jobs from their organizational rights'").

Impact of Discharges

Portland Willamette Co. v. NLRB, 534 F.2d 1331, 1334 (9th Cir. 1976) ("discharge for participation in union activities" creates "visible and continuing obstacles to the future exercise of employee rights").

Signal Oil & Gas Co. v. NLRB, 390 F.2d 338, 343 (9th Cir. 1968) ("it can hardly be doubted that investigation and discharge of an employee because he makes a pro-union . . . statement would tend within the meaning of the Act to 'discourage membership in a labor organization . . . .'").

NLRB v. Ultra-Sonic De-Burring, Inc., of Texas, 593 F.2d 123, 125 (9th Cir. 1979) (illegal discharge of union organizers during campaign "eliminated the organizational activity of those already committed to the union while serving to warn others of the consequences should they come to the union's support").

Impact of Bad Faith Bargaining/Refusal to Bargain/Withdrawal of Recognition

Louisiana-Pacific Corp. v. NLRB, 858 F.2d 576, 578, 579 (9th Cir. 1988) (illegal "repudiation of the bargaining obligation" is "a serious unfair labor practice" that "disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions"), quoting *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 704 (1944).

NLRB v. Mrs. Fay's Pies, 341 F.2d 489, 491, 492 (9th Cir. 1965) (employer's bad faith bargaining tactics designed to "subvert employee confidence in the Union's representation").

Impact of Unilateral Changes

economic changes: *East Bay Automotive Council v. NLRB*, 483 F.3d 628, 634 (9th Cir. 2007) (unilateral action with respect to economic terms "is likely to have a long-lasting effect on employee support for a union because each paycheck reminds them of the likely irrelevance of the union."), citing *May Dept. Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945) ("unilateral action minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent.").

changes generally: *East Bay Automotive Council v. NLRB*, 483 F.3d 628, 634 (9th Cir. 2007) (a unilateral change "minimizes the influence of organized bargaining" and emphasizes to employees "that there is no necessity for a collective bargaining agent"), *quoting May Dep't Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945).

Impact of Grant of Wage Increase/Benefits

NLRB v. Anchorage Times Pub. Co., 637 F.2d 1359, 1370 (9th Cir. 1981) ("It is unlikely that those who received [wage increases], or who heard of them, will forget that it is the Company that has the final word on wage increases and decreases.").

Impact of Surveillance

California Acrylic Industries, Inc. v. NLRB, 150 F.3d 1095, 1099-1100 (9th Cir. 1998) (unlawful surveillance "creates fear among employees of future reprisal" and "chills an employee's freedom to exercise his section 7 rights").

Impact of Unlawful Lawsuit on Board Access

Sheet Metal Workers' Intern. Ass'n, Local No. 355 v. NLRB, 716 F.2d 1249, 1261 (9th Cir. 1983) (noting the "chilling effect" of an unlawful retaliatory lawsuit on employees' willingness to access the Board's processes), citing *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983).

Tenth Circuit

General policy

NLRB v. Bartlett-Collins Co., 639 F.2d 652, 656 (10th Cir. 1981) ("The purpose of the Act is to foster collective bargaining and the resolution of industrial disputes.").

NLRB v. American Can Co., 658 F.2d 746, 753 (10th Cir. 1981) (the "'policy of the Act is to insulate employees' jobs from their organizational rights'"), quoting *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40 (1954).

Impact of Discharges

Presbyterian/St. Luke's Medical Center v. NLRB, 723 F.2d 1468, 1478-79 (10th Cir. 1983) (Board properly concluded that illegal discharge of a leading union activist was "'a means of chilling the union activities of others.'").

NLRB v. Wilhow Corp., 666 F.2d 1294, 1305 (10th Cir. 1981) (illegal discharges during an organizing campaign have "potentially lingering effects").

MJ Metal Products, Inc. v. NLRB, 267 F.3d 1059, 1067 (10th Cir. 2001) ("Courts have recognized that the discharge of union supporters may constitute a serious infringement of the NLRA. … it was reasonable to conclude that the effect of the discharges was heightened by the small size of the company").

Impact of Refusal to Promote or Hire

Osteopathic Hosp. Founders Ass'n v. NLRB, 618 F.2d 633, 639 (10th Cir. 1980) (unlawful refusal to promote and hire union supporters are "serious violations of the Act calculated to decrease the level of support enjoyed by the Union within the unit").

Impact of Refusal to Bargain/Bad Faith Bargaining/Withdrawal of Recognition

Manna Pro Partners, L.P. v. NLRB, 986 F.2d 1346, 1354 (10th Cir. 1993) (unlawful refusal to bargain "'may well have affected the employees' morale, organizational activities, and union membership'" and "tended to undermine employee support of the Union"), quoting *Sullivan Indus. v. NLRB*, 957 F.2d 890, 902 (D.C. Cir. 1992).

Coastal Derby Refining Co. v. NLRB, 915 F.2d 1448, 1452 (10th Cir. 1990) (delaying good-faith bargaining encourages "the erosion of a union's support.").

NLRB v. Southwestern Porcelain Steel Corp., 317 F.2d 527, 531 (10th Cir. 1963) (recognizing "the vital importance of good faith bargaining in the effectuation of the basic purposes of the Act").

NLRB v. Community Health Services, Inc., 483 F.3d 683, 688 (10th Cir. 2007) ("an affirmative bargaining order is an appropriate response to a company's repeated refusal to negotiate") (citing *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 704 (1944).

Successor context: *Coastal Derby Refining Co. v. NLRB*, 915 F.2d 1448, 1452 (10th Cir. 1990) (in the successorship context, the "union is in a vulnerable position" because employees might be inclined to withdraw support).

Impact of Unilateral Changes

Intermountain Rural Elec. Ass'n v. NLRB, 984 F.2d 1562, 1570 (10th Cir. 1993) ("unilateral action taken by an employer without prior discussion with the union 'must of necessity obstruct bargaining'"), quoting *NLRB v. Katz*, 369 U.S. 736, 747 (1962).

Impact of Interrogations

NLRB v. Wilhow Corp., 666 F.2d 1294, 1300 (10th Cir. 1981) (interrogations of employees during organizing campaign "restrained unionizing activity.").

Impact of Withholding Benefits During Union Campaign

Plasticrafts, Inc. v. NLRB, 586 F.2d 185, 188 (10th Cir. 1978) (denial of a wage increase in response to protected union activity "inevitably conveys the message that [the employer], not the union, controls the purse strings. Employees will predictably consider that the union is somehow responsible for their failure to receive expected raises. … The giving of such messages is conduct which tends to interfere with employee free choice… .).

Impact of Granting Benefits During Union Campaign

Plasticrafts, Inc. v. NLRB, 586 F.2d 185, 188 (10th Cir. 1978) (grant of a wage increase in response to protected union activity "inevitably conveys the message that [the employer], not the union, controls the purse strings. … The giving of an unexpected raise … will be invariably understood as an attempt by the employer to demonstrate unionization is unneeded, or as an attempt to "buy" the votes of the employees so benefited. The giving of such messages is conduct which tends to interfere with employee free choice… .").

Eleventh Circuit

NOTE: Decisions by the former Fifth Circuit issued before October 1, 1981, are binding as precedent in the Eleventh Circuit. *See Bonner v. City of Prichard, Ala*., 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

General policy

NLRB v. Dothan Eagle, Inc., 434 F.2d 93, 98–99 (5th Cir. 1970) ("the exercise of free choice by the employees … is an important raison d'etre of contemporary labor policy.").

NLRB v. Aclang, Inc., 466 F.2d 558, 562 (5th Cir. 1972) (the "'policy of the Act is to insulate employees' jobs from their organizational rights'"), quoting *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40 (1954).

APPENDIX E

Impact of Discharges and Ineffectiveness of Final Board Reinstatement Order

NLRB v. Longhorn Transfer Serv., Inc., 346 F.2d 1003, 1006 (5th Cir. 1965) ("[T]he discharge of a leading union advocate is a most effective method of undermining a union organizational effort.").

J.P. Stevens & Co. v. NLRB, 417 F.2d 533, 538 (5th Cir. 1969) (noting that a final Board order of reinstatement with backpay is a "mild sanction, the backpay order's impact on the efforts of the remaining employees to organize is at best uncertain.").

Bandag, Inc. v. NLRB, 583 F.2d 765, 772 (5th Cir. 1978) (violations such as a discharge "live on in the lore of the shop and continue to repress employee sentiment… .").

Piggly Wiggly, Tuscaloosa Div. Commodores Point Terminal Corp. v. NLRB, 705 F.2d 1537, 1542 (11th Cir. 1983) ("blitz-like attack" on organizing campaign, including the discharge of employees, resulted in "substantiality dissipating" union's majority status).

NLRB v. McClain of Ga., Inc., 138 F.3d 1418, 1427 (11th Cir. 1998) (discharges during union campaign send "a powerful message of deterrence to other potential union supporters.").

NLRB v. Goya Foods of Fla., 525 F.3d 1117, 1137 (11th Cir. 2008) (termination and suspension of employees based on anti-union animus are "egregious" unfair labor practices).

Impact of Bad Faith Bargaining/Refusal to Bargain/Withdrawal of Recognition

NLRB v. Haberman Const. Co., 618 F.2d 288, 299 (5th Cir. 1980) (employer's "repudiation of its bargaining obligation" jeopardizes "the union's position as bargaining agent" and "diminish[es] its ability effectively to represent the" employees, while "efficaciously convey[ing] to the employees the futility of engaging in concerted activity").

NLRB v. Big Three Indus., Inc., 497 F.2d 43, 52 (5th Cir. 1974) ("employee disaffection with the union in such cases is in all likelihood prompted by the employer-induced failure to achieve desired results at the bargaining table. … By skillful maneuvering, the employer has sapped union sentiments and relegated the union to minority status. … the union's majority status is inexorably eroded by the employer's refusal to bargain.") (citing *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 704 (1944)).

NLRB v. Goya Foods of Fla., 525 F.3d 1117, 1137 (11th Cir. 2008) (employer following "through on its threat that it would never recognize the union" constitutes an "egregious" unfair labor practice).

APPENDIX E

Impact of Unilateral Changes

NLRB v. Dothan Eagle, Inc., 434 F.2d 93, 98 (5th Cir. 1970) (unilateral action "naturally tended to undermine the authority of the[] certified bargaining representative" and "interfere with the exercise of free choice by the employees").

NLRB v. Goya Foods of Fla., 525 F.3d 1117, 1137 (11th Cir. 2008) (unilateral changes are an "egregious" unfair labor practice).

Impact of Interrogations

TRW-United Greenfield Div. v. NLRB, 637 F.2d 410, 418 (5th Cir. 1981) (interrogation "'tends to have a coercive effect upon employees, whether or not the employees have openly declared their support for a union.'").

Impact of Threats

NLRB v. Kaiser Agric. Chemicals, Div. of Kaiser Aluminum & Chem. Corp., 473 F.2d 374, 381 (5th Cir. 1973) (in the face of union organizing, "remarks [such as threatening to curtail or close plant operations, or revoke existing benefits], relatively innocuous in themselves, may create an atmosphere in which employee free choice is rendered impossible.").

Bandag, Inc. v. NLRB, 583 F.2d 765, 772 (5th Cir. 1978) (threats to close strike "directly at the heart of the security of the employees").

Piggly Wiggly, Tuscaloosa Div. Commodores Point Terminal Corp. v. NLRB, 705 F.2d 1537, 1543 (11th Cir. 1983) (threats of plant closure linger for "a longer period of time").

Impact of Surveillance

Belcher Towing Co. v. NLRB, 726 F.2d 705, 708 (11th Cir. 1984) (surveillance of employees' union activities "can have a natural, if not presumptive, tendency to discourage such activity.").

D.C. Circuit

General policy

Lummus Co. v. NLRB, 339 F.2d 728, 733 (D.C. Cir. 1964) (the "'policy of the Act is to insulate employees' jobs from their organizational rights'"), quoting *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40 (1954).

Local 1814, ILA v. NLRB, 735 F.2d 1384, 1387 (D.C. Cir. 1984) (allowing "workers free exercise of their rights to bargain collectively" is "the central policy of the NLRA").

Int'l Union of Elec., Radio & Mach. Workers, AFL-CIO v. NLRB, 426 F.2d 1243, 1249 (D.C. Cir. 1970) ("The obligation of collective bargaining is the core of the

Act" and enforcing that obligation "'is crucial to the statutory scheme.'"), quoting *NLRB v. American Natl. Ins. Co.*, 343 U.S. 395, 402 (1952).

Int'l Union of Elec., Radio & Mach. Workers, AFL-CIO v. NLRB, 426 F.2d 1243, 1249 (D.C. Cir. 1970) ("Effective redress for a statutory wrong should … withhold from the wrongdoer the 'fruits of its violation.'").

Impact of Discharges

Power Inc. v. NLRB, 40 F.3d 409, 423 (D.C. Cir. 1994) (holding that the Board properly "concluded that it is 'difficult to imagine any act of management better calculated to chill union support'" than illegal discharges).

Veritas Health Servs., Inc. v. NLRB, 895 F.3d 69, 83 (D.C. Cir. 2018) ("Unlawful retaliatory firings are 'precisely the type of coercive conduct' that can have lasting effects even five or more years later.").

Traction Wholesale Ctr. Co. v. NLRB, 216 F.3d 92, 106 (D.C. Cir. 2000) (unlawful discharges are "'extremely effective in swaying votes and very difficult to remedy.'").

Garvey Marine, Inc. v. NLRB, 245 F.3d 819, 828 (D.C. Cir. 2001) (employer's pattern of violations, including the discharge of union activists, will likely "'live on in the lore of the shop'" and affect "the ability of new hires and veteran employees alike to vote their true preferences… .").

Impact of Refusal to Bargain/Bad Faith Bargaining/Withdrawal of Recognition

Int'l Union of Elec., Radio & Mach. Workers, AFL-CIO v. NLRB, 426 F.2d 1243, 1249 (D.C. Cir. 1970) ("Employee interest in a union can wane quickly as working conditions remain apparently unaffected by the union or collective bargaining. When the company is finally ordered to bargain with the union some years later, the union may find that it represents only a small fraction of the employees. … Thus the employer may reap a second benefit from his original refusal to comply with the law: he may continue to enjoy lower labor expenses after the order to bargain either because the union is gone or because it is too weak to bargain effectively.").

Cf. Microimage Display Div. of Xidex Corp. v. NLRB, 924 F.2d 245, 253 (D.C. Cir. 1991) (when an employer unlawfully ignores the bargaining representative, it "'undermine[s] support for the Union'" and "'telegraph[s] to the employees that the Union was irrelevant.'").

Impact of Unilateral Changes on Union's Ability to Bargain Effectively

Deming Hosp. Corp. v. NLRB, 665 F.3d 196, 203 (D.C. Cir. 2011) (unlawful unilateral changes "force unions to come to the bargaining table in a position of weakness" and impede meaningful bargaining).

APPENDIX E

Impact of Unilateral Changes on Employee Union Support

Microimage Display Div. of Xidex Corp. v. NLRB, 924 F.2d 245, 253 (D.C. Cir. 1991) (Board properly concluded that unlawful unilateral change "'could not help but undermine support for the Union'" and "'telegraph[ed] to the employees that the Union was irrelevant.'").

Impact of Grant of Benefits

St. Francis Fed'n of Nurses & Health Professionals v. NLRB, 729 F.2d 844, 855 (D.C. Cir. 1984) (Board properly determined that unlawful unit-wide wage increase could "have a lingering effect on employees" by signaling "the lengths to which [the employer] would go to stifle the employees' right to self-organization.").

Impact of Curtailment of Benefits

Veritas Health Servs., Inc. v. NLRB, 895 F.3d 69, 83 (D.C. Cir. 2018) (unlawful curtailment of employee benefits has "detrimental and lasting effects.").

Impact of Threats

Veritas Health Servs., Inc. v. NLRB, 895 F.3d 69, 83 (D.C. Cir. 2018) (unlawful threat to close the facility has "detrimental and lasting effects.").

Traction Wholesale Ctr. Co. v. NLRB, 216 F.3d 92, 106 (D.C. Cir. 2000) (employer's threat to close the plant was designed to nip the organizational drive in the bud).

Garvey Marine, Inc. v. NLRB, 245 F.3d 819, 822, 827 (D.C. Cir. 2001) (pattern of violations, including threats, "created a 'legacy of coercion'" that likely "poisoned the atmosphere").

Positive Effect of Notice Reading

Teamsters Local 115 v. NLRB, 640 F.2d 392, 402 (D.C. Cir. 1981) (reading remedy is "a deliberate attempt to alleviate the workers' fears about the Employer's intentions. … and it may be of substantial benefit to the employees.").

Rules for Writing an Effective District Court Brief in a 10(j) Injunction Case

Succeeding in injunction litigation in the district court is vital to protecting employee rights under the Act. Thus, writing an effective district court brief is imperative.

Introduction to the Brief: Getting the Court's Attention

- Begin the brief with a hard-hitting introductory paragraph. Capture the court's attention and let it know the importance of the matter. Convey that justice demands an injunction. For example, in a nip-in-the-bud case:

  "This case involves an unlawful crusade by ABC Corporation to defeat its employees' right to form or join a union protected by Section 7 of the National Labor Relations Act. ABC's campaign included the discharge of a key Union activist during the midst of an organizing drive. Without an immediate injunction ABC's illegal effort will succeed, permanently thwarting the intent of Congress, the Board's remedial authority, and the employees' statutory rights."

- If the brief is exceptionally long and complex, follow with a couple of additional paragraphs which briefly summarize the case.

- As an aside, for the same reasons, start the oral argument to the district court with a similar powerful opening statement.

The Facts Section: Keeping the Court's Attention

A good Section 10(j) case equates to a good story. Ideally, after reading the compelling narrative told by the Director in the facts section, the court will recognize the need for immediate action.

- Tell the story in chronological order, and end with a description of the harm caused by the employer's conduct.

- Include all facts that will establish a violation of the Act or the just and proper nature of injunctive relief. The facts are the weapons that the Director will use in the argument section. Reading facts for the first time in the argument is a jarring experience.

- Use effective headings. Good headings break up the facts into logical pieces, while also arguing and telling the story. Use "*ABC Forcefully Responds to the Organizing Campaign by Unlawfully Discharging Union Activist Joe Smith"* rather than "*The Violations"*. Use *"ABC's Illegal Discharge of Smith Causes Widespread Fear Among the Employees and Brings the Organizing Campaign to a Grinding Halt"* instead of "*The Evidence of Chill"*. Headings are a powerful tool to draw the court into the story; don't waste this opportunity.

- Accompany each factual assertion with citations to the supporting evidence in the district court record (transcript, affidavits, exhibits).

- Avoid beginning sentences in the facts with "The evidence suggests" or "The record supports" or "The evidence indicates". Instead, state the fact, and then cite to the supporting record evidence.

- Keep the story concise, especially when facing a page limit. Carefully examine each fact and question its necessity. Omit facts that won't be used in the argument, unless they are necessary as background. Ask whether facts related to cumulative violations are necessary, and keep facts related to minor violations brief. In general, omit facts that go to the employer's defenses. This is the Director's story, not the employer's account.

- Consider using actual names throughout the document. Using the terms "Respondent" or "Employer" or "Discriminatee" or "Charging Party" or "Petitioner" makes reading the brief a more impersonal experience.

- Finally, do not cite legal authority or make substantive arguments in the facts section.

The Section 10(j) Standard: Beginning the Argument by Informing the Court of the Rules of the 10(j) Game

- This one is simple. Utilize the standard for the applicable circuit set forth in Appendix D of the 10(j) Manual. Cut and paste.

The Reasonable Cause/Likelihood of Success on the Merits Argument: Providing the Fundamentals of Labor Law to Establish the Major Violations

Focus the argument on the major violations in the case. All violations are *not* created equal, particularly when there is a page limitation.

Educate the court. The court probably has little experience with labor law. Avoid using jargon.

- For the major violations, first set forth the basic legal principles. Set out the text of the applicable sections of the Act. Set forth the applicable legal standards in detail and cite supporting case authority. Include circuit court law, particularly from the circuit where the district court resides. Include enforcement cites for Board cases, and avoid referencing cases where enforcement was denied in relevant part (Keycite). Place the citations in footnotes, not the text, thereby maintaining the flow of the argument and saving space. Excellent resources for legal principles and circuit law include the General Counsel's memorandum to the Board (cases), ILB appellate briefs (principles and cases), and Appellate Court Branch enforcement briefs (principles and cases) (all available in KnowVation).

- Then apply those legal principles to the facts to establish a violation of the Act (the "affirmative case"). Use the facts set forth in the facts section as the weapons to argue the case.

- Finally, rebut the employer's defenses on the merits (the "negative case").

- Once again, use effective headings. Use *"There is Strong Cause to Believe that ABC Discharged Activist Smith in Retaliation for his Union Activity in Violation of Section 8(a)(3) of the Act"* instead of *"Reasonable Cause"*. A strong heading sets the tone for the court when it reads the argument that follows.

- Summarily address the minor violations in footnotes. A couple of sentences and a case cite should be sufficient.

The Just and Proper Argument: Explaining to the Court Why the Board's Final Order Will be Ineffective, and Injustice Will be Done, Unless the Court Acts Immediately

- This one is also simple. Utilize the just and proper argument set forth by ILB in the General Counsel's memorandum to the Board. Again, cut and paste. No more is needed, and no less.

  The court needs a concrete explanation of irreparable harm, an explanation of exactly why the Board's final order will be ineffective absent injunctive relief. This is the critical question in every Section 10(j) case—if the Board's final order will sufficiently remedy the violation, there is no need for an interim injunction. The just and proper argument in the ILB memo was crafted to meet these goals, along with providing the necessary legal support.

- In general, rebut the employer's defenses on just and proper in the reply brief. If the Director will not have an opportunity to file a reply, or that opportunity is uncertain, rebut the anticipated defenses in the opening brief. Also, in the opening brief, address circumstances that might cause the court to deny relief even if not argued by the employer, for instance undue delay. Regarding delay, every 10(j) case involves a time continuum. Note that the harm is not yet irreparable, but it likely will be by the time the Board issues its final order. It is not yet too late, but it will be by then.

- On a side note, study the affirmative just and proper argument *very* carefully. It will be the most important part of the oral argument to the district court. The court must know *exactly why* it needs to act, and do so now, or it won't act.

- Finally, list only Regional personnel as signatories, and exclude the DC folks.

Conclusion: Ensuring the Best Chance at Victory

Following these rules should maximize your success in obtaining an injunction. Of course, these rules are subject to the rules of the court, page limitations, and common sense. If questions arise when drafting the district court brief, please contact ILB.

h:injlit\10j\District Court Briefing Rules

APPENDIX F

Sample memos and briefs in these cases are on iSearch. For documents not found on iSearch contact ILB.

1. Interference with Organizational Campaign (no majority)

Overstreet v. Bodega Latina, D. Ariz. 2015 (9th Cir.)

Overstreet v. SFTC, D. N.M. 2013 (10th Cir.)

McKinney v. Metal Services, E.D. Ark. 2014 (8th Cir.)

Murphy v. Jewish Hosp., W.D. Ky. 2012 (6th Cir.)

Fernbach v. 3815 Meat and Produce Corp., S.D.N.Y. 2012 (2d Cir.)

Rubin v. American Reclamation, C.D. Cal. 2012 (9th Cir.)

Blyer v. Pollari Elec., S.D.N.Y. 2001 (2d Cir.)

Kinney v. Fleming Cos., N.D. Ill. 2001 (7th Cir.)

Kentov v. Point Blank Body Armor, S.D. Fla. 2002 (11th Cir.)

Appellate Briefs –

Paulsen v. CSC Holdings (2d Cir. 2016).

Overstreet v. Shamrock Foods Co. (9th Cir. 2016)

2. Interference with Organizational Campaign (majority) (Gissels)

Osthus v. Terex, D. Minn. 2014 (8th Cir.) (8(a)(1) Gissel)

Binstock v. Ace Heating, N.D. Ohio 2015 (6th Cir.) (8(a)(1) Gissel)

Mori v. Vista del Sol Health Servs., C.D. Cal. 2015 (9th Cir.) (discharges)

Murphy v. Hogan Transp., N.D.N.Y. 2013 (2d Cir.) (discharges)

Sharp v. Ashland Const., W.D. Wisc. 2002 (7th Cir.)

Miller v. Recycling Indus., E.D. Cal. 2001 (9th Cir.)

Dunbar v. Iroquois Foundry, N.D.N.Y. 1997 (2d Cir.)

Appellate Briefs -

Scott v. Stephen Dunn & Associates (9th Cir. 2000) (8(a)(1) *Gissel*; improved wages and working conditions, unit packing)

Murphy v. Hogan Transp. and *Hogan Transp. II* (2d Cir. 2014 and 2015)

3. Subcontracting or Other Change to Avoid Bargaining Obligation

Fernbach v. Sprain Brook Manor, S.D.N.Y. 2014 (2d Cir.) (successor subcontracting & other violations)

Barker v. A.D. Conner, N.D. Ill. 2011 (7th Cir.) (alter ego)

Hubbel v. Patrish LLC, E.D. Mo. 2012 (8th Cir.) (subcontracting)

Schaub v. Commercial Cabinets, E.D. Mich. 2002 (6th Cir.) (alter ego)

Aguayo v. Quadrtech, C.D. Cal. 2000 (9th Cir.) (TRO to prevent runaway shop)

Sharp v. Continental Coal, D. Kan. 2002 (10th Cir.) (subcontracting)

Appellate Briefs –

Kreisberg v. Stamford Plaza (2d Cir. 2012) (subcontracting)

4. Withdrawal of Recognition from Incumbent

Linebak v. SMI, N.D. Ind. 2014 (7th Cir.)

McKinney v. Southern Bakeries, N.D. Ark 2014 (8th Cir. *Master Slack* taint)

Morgan v. Holy Cross Youth and Family Services, E.D. Mich. 2013 (6th Cir.; no actual loss under *Levitz*)

Overstreet v. First Transit, D. N.M. 2013 (10th Cir.; withdrawal of recognition after union merger; excellent introduction section*)

Ahearn v. Jackson Hosp., 6th 2001

Scott v. Bridgestone/Firestone, Inc., (9th Cir. 1998) (tainted withdrawal of recognition)

Appellate Briefs –

McKinney v. Southern Bakeries (8th Cir. 2014)

Lineback v. Irving Ready Mix (7th Cir. 2011)

5. Undermining of Bargaining Representative

Fernbach v. Sprain Brook Manor, S.D.N.Y. 2015 (2d Cir.) – Successor refusal to bargain, unilateral changes, subcontracting, and minority union recognition. *Burns* successor, joint employer, 8(a)(3) subcontracting; 8(a)(3) discharges, rescission of minority CBA, delay

Frankl v. United Site Services, E.D. Cal. 2015 (9th Cir.)– Permanent replacement of economic strikers for an unlawful purpose during bargaining of first contract. Unlawful *Master Slack* withdrawal of recognition

McKinney v. Kellogg Company, W.D. Ten. 2014 (6th Cir.)– (2 part test) Insisting to impasse on non-mandatory subject of bargaining (mid-contract modification); 8(a)(3) and (5) lockout in furtherance of unlawful bargaining position

Muffley v. Advanced Metal Technologies of Indiana, Inc., S.D. Ind. 2012 (7th Cir.) (traditional) partial win - Successor refusal to hire 2 stewards; 8(a)(1) threats and interrogation; unilateral and overly broad rule; first contract bad faith bargaining; failure to provide information.

Appellate Briefs –

McKinney v. Kellogg Co. (6th Cir. 2014)

Harrell v. American Red Cross (7th Cir. 2012)

6. Minority Union Recognition

Fernbach v. Sprain Brook Manor, S.D.N.Y. 2015 (2d; 8(a)(2) union in the successor context)

Frankl v. Bauer's Intelligent Transp., N.D. Cal. 2015 (9th; 8(a)(2) company union created to thwart an organizing campaign)

Appellate Briefs –

Muffley v. Voith Indus. Servs., (6th Cir. 2013)

7. Successor Refusal to Recognize and Bargain

Murphy v. Allways East Transp., S.D.N.Y. 2014 (2d Cir.) (Burns, unit issues)

Ley v. Riccelli, N.D.N.Y. 2015 (2d Cir.) (perfectly clear successor, unit issues)

Small v. Avanti, C.D. Cal. 2011 (9th Cir.) (Burns, majority issues)

Harrell v. Ridgewood, N.D. Ala. 2014 (11th Cir.) (Kallman/Burns)

Precision Gage E.D. Mich. 2002 (6th Cir.) (Burns)

Appellate Briefs –

Chester v. Grane Healthcare, (3d Cir. 2011) (Burns plus some refusals to hire)

Small v. Avanti, (9th Cir. 2011) (Burns)

Hoffman v. Inn Credible Caterers (2d Cir. 2000) (*Burns* successor; harm to public interest)

Cohen v. Samuel Bent (1st Cir. 2000) (*Burns* successor)

Scott v. Catholic Healthcare West South Bay (9th Cir. 2000) (*Burns* successor; non-conforming health care unit)

Bloedorn v. Francisco Foods d/b/a Piggly Wiggly (7th Cir. 2000) (*Kallman*/*Love's BBQ* refusal to hire predecesor employees; interim rescission of unilateral changes)

8. Conduct during Bargaining Negotiations

Garcia v. High Flying Foods, S.D. Cal. 2015 (9th Cir.) (assorted 8(a)(1)s, discharges, and 8(a)(5)s during first contract bargaining)

McKinney v. Kellogg Co., W.D. Tenn. 2014 (6th Cir.) (bad-faith bargaining, lockout)

Ley v. S. Pitts Hose Co., N.D.N.Y. 2014 (2d Cir.) (surface bargaining, no good-faith impasse)

McKinney v. Southern Bakeries, W.D. Ark. 2014 (8th Cir.) (refusal to bargain, discharges, tainted withdrawal of recognition under *Master Slack*)

Gottschalk v. Piggly Wiggly, E.D. Wis. 2012 (7th Cir.) (unilateral changes, need for reinstatement)

Sharp v. Shadow Plastics, W.D. Wisc. 2002 (7th Cir.) (conduct at table and away, inc. unilateral changes)

Appellate Briefs –

Garcia v. High Flying Foods (9th Cir. 2015)

McKinney v. Kellogg Co. (6th Cir. 2014)

Harrell v. American Red Cross (7th Cir. 2012)

9. Mass Picketing and Violence

Hooks v. ILWU (EGT), W.D. Wash. 2011 (9th Cir.)

Model memo based on Silver Line

10. Notice Requirements for Strikes or Picketing Section 8(d) and (g)

(None available at time of printing; call Injunction Litigation Branch for subsequent filings)

11. Refusal to Permit Protected Activity on Property

Hirsch v. The Electrology Co., 89-1537 (3d) (organizing union's access to private property factory driveway)

12. Union Coercion to Achieve Unlawful Object

Sheet Metal Workers' Local Union No. 22, Case 22-CB-5953 (3d Cir. 1989) (unlawful union fine)

13. Interference with Access to Board Processes

Hooks v. Robilio, W.D. Ten. 2003 (6th Cir.) (All Writs jurisdiction, TRO to prevent interference with organizing and access to Board/protect Board's investigative and prosecutorial processes)

Appellate Briefs -

Sharp v. Webco Industries (10th Cir. 2000) (stop preempted state suit against employee charge filing activity)

14. Segregating Assets

Ley v. Ace Masonry, W.D.N.Y. 2012 (2d Cir.) (asset sequestration TRO)

Aguayo v. South Coast Refuse, S.D. Cal. 2002 (9th Cir.)

Cohen v. Estoril Cleaning, D. Mass. 2000 (1st Cir.)

15. Miscellaneous

Lightner v. Coastal Insulation, 2008 (3d) (mutual aid & protection discharges)

Dauman Recycling, Inc., 22-CA-18105 (3d Cir. 1992) (opposition to employer stay motion against *Gissel* bargaining order)

Tennessee Electric Company, 10-CA-24854 (6th Cir. 1991) (memo of points and draft petition dealing with 8(a)(1) lawsuit)

Kingsbury Mini Motors of America, Inc., 3-CA-15824 (2d Cir. 1992) (8(a)(1) denial of access to property which leads to employee's criminal prosecution for trespass; TRO requested)

Appellate Briefs -

Soctt v. PHC-ELKO (9th Cir. 2000) (reinstatement of employee engaged in 8(a)(1) protected concerted activity)

APPENDIX G-1
Model 8(a)(5) argument

[This Appendix has been intentionally withheld]

APPENDIX G-2

GISSEL BARGAINING ORDERS AGAINST EMPLOYERS

Instructions for Briefing *Gissel* 10(j) Cases and Sample Argument

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

APPENDIX G-2

APPENDIX G-2

Sample *Gissel* Argument

A. The District Court Erred by Failing to Find that the Board Will Likely Grant a *Gissel* Bargaining Order

The Director argued below that the violations in the instant case are so serious and substantial that the Board's traditional remedies would be unable to erase the effects of the violations and to restore the conditions necessary to conduct a fair election. Accordingly, as the Director contends, the Board will issue a remedial bargaining order under the *Gissel* doctrine.

In *NLRB v. Gissel Packing Co.*, 385 U.S. 575 (1969), the Supreme Court held that in the appropriate case, the Board may disregard the normal election process for certifying a union and may rely on authorization cards establishing a union's majority support to order an employer which has engaged in sufficiently serious and pervasive unfair labor practices to recognize and bargain with the Union without an election. This Court has also recognized that, in addition to cases marked by outrageous and pervasive employer conduct, bargaining orders are contemplated by *Gissel* in those cases (sometimes referred to as "Category II" cases) marked by "less pervasive practices" which nonetheless have the tendency to undermine a union's majority strength and impede the fair election process. *See Sahara Datsun Inc. v. NLRB*, 811 F.2d 1317, 1322 n. 4 (9th Cir. 1987); *NLRB v. Anchorage Times Publishing Co.*, 637 F.2d 1359, 1368 (9th Cir.), *cert. denied* 454 U.S. 835 (1981) *See also Gissel*, 395 U.S. at 613-15.

Here, SDA retaliated against its employees through an extensive, unlawful campaign of "hallmark" and other violations from almost the moment it learned of the Union organizing effort. In late January 1999, Company officials met to discuss a business slowdown and to determine the number and identities of employees who SDA

intended to lay off for lack of work.. Nonetheless, within days of the beginning of the organizing effort, SDA discarded its layoff plans. Instead, as the district court found, the Company devised and implemented a plan to dilute the Union's strength by packing the bargaining unit with new employees who necessarily did not share their co-workers' history of long-standing grievances. Meanwhile, facility director Mottley, together with SDA president Mooradian and recruitment manager Kommit, instituted a weekly series of mandatory anti-Union meetings with employees during which, on the one hand, they unlawfully solicited employees grievances with promises to redress them should the employees reject the Union and, on the other, threatened employees with more onerous working conditions should the Union win, such as enforcing a mandatory 20-hour per week schedule, reducing breaktime and punching a time clock. The Company also discriminatorily enforced a no-distribution rule, but only as to Union election material, interrogated employees as to their intentions in the election and surveiled them during a Union meeting. Finally, in the month or so leading up to the election, the Company successfully destroyed employee support for the Union by precipitously giving employees much of what they wanted when they first contacted the Union, including an across-the-board wage raise, new telephone headsets and, on the day of the election, ergonomically correct chairs.

These violations, which form the basis of the district court's issuance of a cease-and-desist order, are so serious and substantial that they tend to undermine the Union's majority status and destroy the laboratory conditions necessary for a fair election, warranting a *Gissel* bargaining order.

APPENDIX G-2

In determining the need for a bargaining order, the Board and the courts recognize that certain types of violations, commonly called "hallmark violations," are so coercive that their presence will support the issuance of a bargaining order. *NLRB v. Jamaica Towing, Inc.*, 632 F.2d 208, 212-13 (2d Cir. 1980). In such cases, "the seriousness of the conduct ... justifies a finding without extensive explication that it is likely to have a lasting inhibitive effect on a substantial percentage of the work force .... [It] may reasonably be calculated to have a coercive effect on employees and to remain in their memories for a long period." *Id.*

By granting a significant, unscheduled across-the-board wage increase during an organizing campaign and supplying employees with long-sought after headsets and, finally, new chairs literally hours before the election itself, SDA engaged in multiple, highly coercive "hallmark" violations. These well-timed grants of wage increases and improvements in benefits and working conditions in response to a union organizing campaign constitute hallmark violations supporting a *Gissel* bargaining order because they are likely to powerfully interfere with employee free choice. In enforcing a *Gissel* bargaining order in *NLRB v. Anchorage Times Publishing Co.*, 637 F.2d at 1370, this Court noted that,

> [t]he wage increases, which were granted immediately prior to the election, are the most significant among the many unfair labor practices cited by the Board. It is unlikely that those who received such benefits, or who heard of them, will forget that it is the Company that has the final word on wage increases and decreases.

Accord: United Oil Mfg. Co., Inc., 254 NLRB 1320 (1981), *enfd.* 672 F.2d 1208, 1212 (3d Cir. 1982), *cert. den.* 459 U.S. 1036 (1982) (same); *NLRB v. Jamaica Towing*, 632 F.2d at 212-13, and cases cited at 213 n.3. And SDA's unlawful grant of higher wages

and better working conditions are "likely to convince employees that with an important part of what they were seeking in hand, union representation might no longer be needed." *Capitol-EMI Music, Inc.*, 311 NLRB 997, 1018 (1993), *enfd. mem.* 23 F.3d 339 (4th Cir. 1994). *Accord: NLRB v. WKRG-TV, Inc.*, 470 F.2d 1302, 1319-20 (5th Cir. 1973). *See generally*, *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964), (well-timed increases in benefits likened to "a fist inside the velvet glove"). Additionally, it is difficult, if not impossible, to remedy these violations through conventional means, because "it is not the Board's policy to require that unilaterally granted benefits be rescinded." *Capitol-EMI*, 311 NLRB at 1018.

The Company engaged in another pernicious hallmark violation when it "packed" the bargaining unit with new employees just prior to the election. The Board, with Court support, has long concluded that the packing of a unit with new employees in an attempt to affect the outcome of a representation election clearly interferes with the exercise of the employees' statutory right to freely select a bargaining representative. *See, e.g., America's Best Quality Coatings Corp.*, 313 NLRB 470, 471-72 (1993), *enfd.* 44 F.3d 516 (7th Cir.), *cert. den.* 515 U.S. 1158 (1995) (bargaining order warranted, in part, because "Respondent's willingness to engage in such unit packing casts serious doubt on whether a fair election could be held"); *Maxi Mart*, 246 NLRB 1151, 1160 (1979) (unlawful unit packing where four employees hired "in order to insure that the ballots of bona fide employees would be sufficiently diluted so their desire for union representation would be frustrated"). In *NLRB v. General Wood Preservative Co.*, 905 F.2d 803, 823 (4th Cir. 1990), the Court held that the employer's mere attempt to "rig" the results of an election by packing the bargaining unit with new employees just prior to a union election had "pervasive, enduring and adverse effects upon the minds" of the unit employees which necessarily undermined the integrity of the Board's processes.

Here, the Company suddenly changed its plans to layoff 15 employees almost immediately after it learned of the Union organizing drive and began instead to hire as

many new employees as possible. Manager Kommit even voiced concern that she might not be able to find sufficient applicants fast enough.. By flooding the facility with new employees on the eve of the election, some even on the last day before their eligibility as voters was to be cut off, the Company engaged in "an attack on the entire election process and the essential freedom of choice required for fair elections ... analogous to fraudulent voter registration in public elections." *Burke-Parsons Bowlby*, 288 NLRB 956, 962 (1988), *enfd. sub nom. NLRB v. General Wood Preservative Co.*, *supra*.

Furthermore, SDA's promises of benefits contingent on the Union's defeat similarly have a substantial and lingering effect on employees. *See NLRB v. Davis*, 642 F.2d 350, 353 (9th Cir. 1981); *NLRB v. Tischler*, 615 F.2d 509, 511 (9th Cir. 1980); *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 49 (9th Cir. 1970). And the interrogations of employees, surveillance of their Union activities, and the promulgation of a discriminatory no-distribution policy affecting only Union literature added to the coercive atmosphere inside the SDA facility. *See* e.g., *NLRB v. Davis,* 642 F.2d at 353; and *NLRB v. Ayer Lar Sanitarium,* 436 F.2d at 49.

The cumulative effect of these violations demonstrates a classic "carrot and stick" approach. On the one hand, SDA attempted to buy employees off with a wage raise and new equipment delivered literally hours prior to the Union election while simultaneously threatening them with a loss of "flexibility" and other major changes in their working conditions should the employees select the Union as their representative. These complementary, coercive tactics have a lasting impact on employees and support the issuance of a bargaining order. *See Adam Wholesalers, Inc.,* 322 NLRB 313, 314 (1996) (*Gissel* remedy warranted where, inter alia, employer announced incentive plan upon learning of union campaign and then threatened to withdraw the plan if the employees selected the union); *America's Best Quality Coatings Corp., supra,* 313 NLRB at 472 ("carrot and stick" approach supported *Gissel* bargaining order).

Upper management's direct participation in the unlawful campaign serves to reinforce the coerciveness of the conduct, and together with the serious and widespread nature of these violations, makes it likely that these violations will have a continuing impact on all employees. *See NLRB v. Anchorage Times Pub. Co.,* 637 F.2d at 1370 (bargaining order warranted where "high level management personnel" committed violations and refused to disavow their coercive conduct); *Electrical Products Division of Midland-Ross v. NLRB,* 617 F.2d 977, 987 (3d Cir. 1980); *Amazing Stores, Inc. v. NLRB,* 887 F.2d 328, 330 (D.C. Cir. 1989).

Moreover, the Company timed the delivery of new chairs -- a highly sought-after benefit which the Union placed in the center of its campaign -- to the start of the election when the employees' decision was fast approaching, thereby intensifying the coercion. *NLRB v. Daybreak Lodge Nursing and Convalescent Home, Inc.,* 585 F.2d 79, 82 (3d Cir. 1978) (bargaining order warranted where "many of the threats came within the couple of weeks prior to the election when they were most likely to be potent"); *NLRB v. WKRG-TV, Inc.,* 470 F.2d 1302, 1319-20 (5th Cir. 1973) (grant of benefits on day election petition filed recognized as especially likely to influence employees to vote against the union by destroying the union's "raison d'etre"). And the fact that every employee received the wage raise and benefit improvements and was subject to SDA's threats and promises further supports the necessity of a bargaining order. *See NLRB v. Maidsville Coal Company, Inc.,* 718 F.2d 658, 660 (4th Cir. 1983) (en banc).

In cases involving analogous conduct, the Board, with the approval of this Court, has held that an employer's misconduct was so serious and substantial as to have a lasting inhibitive effect on the majority of employees, rendering the possibility of holding a fair rerun election slight and requiring issuance of a remedial bargaining order. *See NLRB v. Anchorage Times Publishing Co., supra*; *NLRB v. Tischler,* 615 F.2d at 511 (unlawful solicitation rule, threats, promise of benefits, interrogations, creating impression of discriminatory treatment, and implying that Company would not bargain with the Union).

As the Eighth Circuit observed in an analogous context, with the grant of a wage increase, "[t]he damage had been done and the only fair way to guarantee the employee's rights was [a bargaining order]." *Tipton Electric Co. v. NLRB,* 621 F.2d 890, 898-99 (1980). Indeed, to rule otherwise would ignore the fact that the likely effect of the Company's increase is to destroy the ability of employees "'to fairly appraise the value of unionization.'" *NLRB v. Jamaica Towing, Inc.,* 632 F.2d at 213. *Accord: St. Francis Hospital v. NLRB,* 729 F.2d 844, 849-50, 855-56 (D.C. Cir. 1984) (bargaining order enforced where wage increase was the most serious violation); *Texaco, Inc. v. NLRB*, 436 F.2d 520, 524-25 (7th Cir. 1971) (same).

In sum there is a strong likelihood that the Regional Director will prove that these unfair labor practices are so serious and pervasive as to impede the election process, and that the Board will enter a remedial bargaining order here. Accordingly, the district court erred by failing to reach this conclusion.

B. The District Court Abused Its Discretion by Balancing the Harms in Favor of the Company

The harm to be avoided in Section 10(j) cases is "the probability that declining to issue the injunction will permit the unfair labor practices to reach fruition and thereby render meaningless the Board's remedial authority." *Miller v. California Pacific Medical Center,* 19 F.3d 449, 460-61 (9th Cir. 1994) (en banc). Notwithstanding the district court's implicit conclusion that evidence of irreparable harm is sufficient to warrant some form of injunctive relief, the court refused to order the Company to recognize and bargain with the Union. As we show below, the district court abused its discretion by concluding that the circumstances of this case were not severe enough to warrant an interim bargaining order.

APPENDIX G-2

1. An interim bargaining order is necessary to preserve the effectiveness of the Board's ultimate bargaining order.

Because the district court failed to correctly consider the policies that underlie a final *Gissel* bargaining order, it also failed to properly assess the need for an interim bargaining order to protect that final order. Indeed, the reasons that a final Board *Gissel* bargaining order is necessary to remedy these types of unfair labor practices are among the reasons that Section 10(j) interim relief is necessary. *See Levine v. C & W Mining Co.,* 610 F.2d 432, 436 (6th Cir. 1979).

Although a majority of the employees supported the Union during the organizing campaign, SDA's unfair labor practices clearly undermined that support by the time of the election. As the record evidence demonstrates, and as fully detailed in the Statement of Facts, the Union's organizing efforts precipitated a campaign of serious unfair labor practices by the Company which quickly eroded the Union's support in the bargaining unit. In less than two months after a majority of employees signed Union authorization cards, the Union could obtain only 31 votes in the election, as against 53 negative votes. The Union's severe loss of votes and ultimate election defeat occurred *after* SDA violated its employees' rights and is compelling proof of the chilling success of the Company's anti-union campaign. In addition, once the Company began to commit unfair labor practices against its employees, the Union suffered a sharp decline in attendance at Union meetings and a marked hesitancy among employees to accept Union handbills. Moreover, more than half a dozen employees told caller Marlene Tait and others that they had second thoughts about supporting the Union because they were satisfied with the raise and new chairs and headsets that the Company used to buy their support. Other employees changed their minds and decided to vote against the Union because they were afraid of losing "flexibility" in their hours and on break, just as the Company had unlawfully threatened. Three other employees state that they asked the Union to return

their authorization cards after the Company initiated its unlawful campaign; one of these employees, a former Union organizing committee member, also stopped coming to meetings because she was "scared." This chill brought on by the Company's unlawful campaign will remain in place during the pendency of the Board process and threatens the efficacy of a final Board order. *See e.g., NLRB v. Electro-Voice,* 83 F.3d at 1572 (employees' hesitancy to join in organizing effort relevant to calculate chilling effect of employer's unfair labor practices).

Absent an interim bargaining order, the Union's remaining support likely will continue to deteriorate as "working conditions remain apparently unaffected by the union or collective-bargaining order." *Asseo v. Pan American Grain Co. Inc.,* 805 F.2d 23, 27 (1st Cir. 1986), *quoting Int'l Union of Electrical, Radio & Machine Workers v. NLRB,* 426 F.2d 1243, 1249 (D.C. Cir.), *cert. denied* 400 U.S. 950 (1970). By the time a Board order issues, not only will the Union likely have lost future support, but as a practical matter, it will be seen by employees as an outsider. With the passage of time, the bargaining unit at the time of a Board order may be significantly different from the one at the time the Union attained majority status; the new unit may have significantly different problems. Thus, the Union will be unable to rely on employees to strike or otherwise support the Union's bargaining demand. In such circumstances, the Union is very unlikely to be able to negotiate a collective bargaining agreement on behalf of the unit. *See Int'l Union of Electrical, Radio & Machine Workers v. NLRB,* 426 F.2d at 1249 ("When the company is finally ordered to bargain with the union some years later, the union may find that it represents only a small fraction of the employees"). Thus without appropriate interim relief pending the outcome of litigation, the Company reaps two benefits; it successfully avoids bargaining with the union and enjoys lower labor costs after the order to bargain either because the Union is gone or because it is too weak to bargain effectively. *Id.*

In addition, the absence of an interim bargaining order will irreparably deprive employees of the benefits of union representation while they wait for a Board order. The Board cannot remedy the potential loss in contractual benefits that results from the delay in bargaining. *See Levine v. C&W Mining Co., Inc.,* 465 F.Supp. 690, 694 (N.D. Ohio), *aff'd in rel. part,* 610 F.2d 432, 436-37 (6th Cir. 1979); *Asseo v. Centro Medico de Turabo, Inc.,* 133 LRRM 2722, 2729 (D.P.R. 1989), aff'd 900 F.2d 445 (1st Cir. 1990); *Ex-Cell-O Corp.,* 185 NLRB 107, 110 (1970), mod. 449 F.2d 1046 (D.C. Cir. 1971), *enfd.* 449 F.2d 1058 (D.C. Cir. 1971) (Board will not award damages to unit employees because of employer's unlawful refusal to recognize and bargain with union; Board suggests "full resort" to 10(j) relief). By the time the Board's remedial order issues, the Union's position may be so deteriorated that it could not effectively represent employees. *Asseo v. Pan American Grain Co.,* 805 F.2d at 27; *Seeler v. Trading Port, Inc.,* 517 F.2d 33, 38 (2d Cir. 1975).

Following this reasoning, courts have not hesitated in approving the issuance of interim *Gissel* bargaining orders in cases where, as here, an employer engages in an unlawful anti-union campaign involving hallmark as well as other violations which would nip a union organizing drive in the bud, absent appropriate injunctive relief. *See NLRB v. Electro-Voice, Inc.,* 83 F.3d 1559, 1574-75 (7th Cir. 1996), *cert. denied* 519 U.S. 1055 (1997); *Asseo v. Pan American Grain Co.,* 805 F.2d at 28-29; *Kaynard v. MMIC, Inc.,* 734 F.2d 950, 953-54 (2d Cir. 1984). *Accord: Hombre v. KNZ Construction, Inc.,* 879 F. Supp. 451, 460-63 (E.D. Pa. 1995). In these cases, Courts have acknowledged the necessity for interim *Gissel* bargaining relief to prevent the Board's ultimate remedial bargaining order from becoming a nullity.

In sum, an interim order is necessary to preserve the effectiveness of a final Gissel bargaining order and prevent the further loss of employee support for the Union and lost contractual benefits which cannot be restored by a final bargaining order.

APPENDIX G-2

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 99-8 November 10, 1999

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Fred Feinstein, General Counsel

SUBJECT: Guideline Memorandum Concerning *Gissel*

I. Introduction

In *NLRB v. Gissel Packing Co.,*[1] the Supreme Court upheld the Board's authority to issue a remedial bargaining order based on union authorization cards from a majority of employees rather than an election. Such relief is appropriate when the employer commits unfair labor practices so serious that it is all but impossible to hold a fair election even with traditional Board remedies. Over the years, some of the circuit courts of appeal considering whether to enforce Board *Gissel* orders have differed with the Board's approach. In several recent decisions, the Board has explicated its views regarding the factors, including those factors emphasized by the circuit courts, relevant to determining whether a *Gissel* bargaining order is warranted. In Part II below, we identify and discuss these factors, which the Regions should rely on in determining whether to issue *Gissel* complaints. In Part III, we discuss recent problems with enforcement of Section 8(a)(1) *Gissel* cases. In order to develop a response on these issues, Regions are directed to submit to Advice all cases in which they wish to issue complaint seeking a *Gissel* order based solely on 8(a)(1) violations.

The courts have generally also accepted the propriety of interim *Gissel* bargaining orders under Section 10(j) of the Act. Where an employer's violations have precluded employees' choice regarding representation through the election process, use of Section 10(j) is particularly appropriate to preserve the effectiveness of the Board's final remedy. Accordingly, I have determined that Regions should consider 10(j) relief in all *Gissel* complaint cases and should submit each case to the Injunction Litigation Branch with a recommendation as to whether interim relief should be sought. In Part IV below, we discuss issues, particular to certain circuit courts, which the Regions should take into account in investigating and evaluating the propriety of interim *Gissel* relief.

II. The Factors Relevant to *Gissel*

A. The *Gissel* decision

In *Gissel*, the Supreme Court considered whether the Board had the authority to order an employer to bargain with a non-incumbent union on the basis of a union card

[1] 395 U.S. 575 (1969).

majority. The Court recognized that, in some cases, "an employer has committed independent unfair labor practices which have made the holding of a fair election unlikely or which have in fact undermined a union's majority and caused an election to be set aside."[2] Declaring that "a bargaining order is designed as much to remedy past election damage as it is to deter future misconduct,"[3] the Court rejected employer arguments that such a bargaining order would prejudice employees' Section 7 rights. The Court reasoned that "[a]ny effect will be minimal . . . for there 'is every reason for the union to negotiate a contract that will satisfy the majority, for the union will surely realize that it must win the support of the employees, in the face of a hostile employer, in order to survive the threat of a decertification election after a year has passed.'"[4]

The Court identified two situations (now known as category I and category II *Gissel* cases[5]) in which employer misconduct may warrant the imposition of a card-based bargaining order remedy. Category I cases are those "exceptional" cases involving "outrageous and pervasive unfair labor practices" where the unfair labor practices are of "such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had."[6] Category II cases are "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes."[7] In the latter cases, the Court held, the Board:

> can properly take into consideration the extensiveness of an employer's unfair [labor] practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue. . ."[8]

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[2] 395 U.S. at 610.

[3] Id. at 612 (footnote omitted).

[4] Id. at 612, n. 33 (citation omitted).

[5] See *M.J. Metal Products, Inc.*, 328 NLRB No. 170, slip op. at 1 [1184,1184] (August 10, 1999).

[6] *Gissel*, 395 U.S. at 613-614.

[7] Id. at 614.

[8] Id. at 614-615.

B. The Board's Application of Gissel

1. Category I Cases

The category I *Gissel* case is rare. As stated above, it is confined to cases where an employer's unfair labor practices are "outrageous" and "pervasive" and have made the holding of a fair election impossible even with traditional Board remedies. The Board has found Category I misconduct where an employer, in response to a union request for recognition, discharged all, or a substantial portion, of the entire bargaining unit and made it clear to employees that the reason for the discharges was the employees' support for the union;[9] or where the employer shut down the unit and discharged the employees in retaliation for their union activities.[10]

Although the practical impact of a designation as Category I or II may seem minimal,[11] there may be some benefit to litigating a *Gissel* case as a category I case when the level of employer misconduct appears to be extraordinarily egregious. In this regard, the D.C. Circuit has held that the Board's decision to issue a *Gissel* bargaining order in Category I cases is entitled to greater deference.[12]

2. Category II cases

In Category II cases, which comprise the vast majority of *Gissel* cases, the Board determines that the employer misconduct, though not as extraordinary or pervasive as in a Category I case, is sufficiently serious that it will have a tendency to undermine the union's majority strength and make a fair election unlikely. As the Supreme Court instructed, the Board may "take into consideration the extensiveness of an employer's unfair [labor] practices in terms of their past effect on election conditions and the

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[9] *Cassis Management Corp.*, 323 NLRB 456, 459 (1997), supplemented by 324 NLRB 324 (1997), enfd. mem. 152 F.3d 917 (2d Cir. 1998), cert. denied 160 LRRM 2192 (1998) (discharge of entire unit); *U.S.A. Polymer Corp.*, 328 NLRB No. 177 [1242] (August 24, 1999) numerous independent violations of Section 8(a)(1), unlawful layoff of 45% of the unit employees, including 9 of the 10 members of the employees' organizing committee and retaliatory conduct against employees who testified on behalf of the General Counsel at the unfair labor practice hearing).

[10] *Allied General Services*, 329 NLRB No. 58 [568] (September 30, 1999).

[11] At one time the Board interpreted the *Gissel* decision as authorizing the Board to issue bargaining orders in response to category I level violations even in the absence of a prior union card majority. See *United Dairy Farmers Cooperative Assn.*, 257 NLRB 772 (1981) and *Conair Corp.*, 261 NLRB 1189 (1982). The Board, however, abandoned this approach in *Gourmet Foods,* 270 NLRB 578 (1984).

[12] See *Power, Inc. v. NLRB,* 40 F.3d 409, 422 (D.C. Cir. 1994).

likelihood of their recurrence in the future."[13] A review of recent Board *Gissel* cases demonstrates that the Board examines a number of criteria relevant to these issues in determining whether to impose a *Gissel* bargaining order remedy:

- the presence of "hallmark" violations
- the number of employees affected by the violation -- either directly or by dissemination of knowledge of their occurrence among the workforce
- the size of the bargaining unit
- the identity of the perpetrator of the unfair labor practice
- the timing of the unfair labor practices
- direct evidence of impact of the violations on the union's majority
- the likelihood the violations will recur
- the change in circumstances after the violations

These factors are discussed in more detail below. When investigating a charge containing a potential *Gissel* allegation, the Regions should adduce evidence concerning, and evaluate the warrant for *Gissel* in light of, these factors.[14] Likewise in any litigation of a *Gissel* case, the record should include evidence and argument demonstrating that a *Gissel* remedy is appropriate under these factors.[15]

a. Presence of "hallmark" violations

Certain employer violations are consistently regarded by the Board and the courts as highly coercive of employee Section 7 rights. These violations, sometimes referred to as "hallmark" violations, will support the issuance of a *Gissel* bargaining order unless some significant mitigating circumstance exists.[16] Hallmark violations include plant

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[13] *Gissel,* 395 U.S. at 614.

[14] Of course, the Region must also determine whether the union obtained a valid card majority.

[15] Summary judgment motions containing a *Gissel* allegation should conform to the requirements set forth in *Allied General Services,* 329 NLRB No. 58, slip op. at 3 [at 570] (September 30, 1999).

[16] See, e.g., *NLRB v. Jamaica Towing, Inc.,* 632 F.2d 208, 212-13 (2d Cir. 1980); *Garvey Marine, Inc.,* 328 NLRB No. 147, slip op. at 4 [991, 994] (July 27, 1999).

closure[17] and threats thereof,[18] unlawful discharge of union adherents,[19] threats of job loss[20] or the granting of significant benefits to employees.[21] The gravity of these types of violations makes them likely to have "a lasting inhibitive effect on a substantial percentage of the work force,"[22] thus precluding a fair election even with traditional Board remedies. However, as further discussed in Part III, below, at least two circuit courts have questioned the issuance of *Gissel* bargaining orders based solely on the granting of benefits.

As detailed below, however, even when "hallmark" violations occur, other factors, such as the proportion of the unit directly affected or informed about the

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[17] *NLRB v. Jamaica Towing,* 632 F.2d at 212, citing, inter alia, *Frito-Lay, Inc.,* 232 NLRB 753, 755 (1977), enf'd as modified, 585 F.2d 62 (3d Cir. 1978).

[18] A threat of plant closure "is the one serious threat of economic disadvantage which is wholly beyond the influence of the union or the control of the employees." *NLRB v. Jamaica Towing,* 632 F.2d at 213. Accord: *Indiana Cal-Pro, Inc. v. NLRB,* 863 F.2d 1292, 1301-1302 (6th Cir. 1988) and the cases cited therein. Indeed, in *Gissel,* the Supreme Court noted that threats of plant closure are demonstrably "more effective to destroy election conditions for a longer period of time than others." 395 U.S. at 611, n. 31. Thus, repeated plant closure threats--alone--were held to warrant a remedial bargaining order in one of the cases comprising the *Gissel* decision. See *NLRB v. The Sinclair Glass Co.,* 397 F.2d 157 (1st Cir. 1968), affd. in *Gissel,* 395 U.S. at 615.

[19] The discharge of union activists is conduct which "'goes to the very heart of the Act' and is not likely to be forgotten. . . . Such action can only serve to reinforce employees' fear that they will lose employment if they persist in union activity.'" *M.J. Metal Products, Inc.,* 328 NLRB No. 170, slip op. at 2 [at 1185], citing *NLRB v. Entwistle Mfg. Co.,* 120 F.2d 532, 536 (4th Cir. 1941). See also *NLRB v. Davis,* 642 F.2d 350, 354 (9th Cir. 1981)(employees are unlikely "to miss the point that backpay and offers of reinstatement made some 9 to 11 months after the discharge does not necessarily compensate for the financial hardship and emotional and mental anguish apt to be experienced during an interim period of unemployment.").

[20] *Garney Morris, Inc.,* 313 NLRB 101, 103 (1993), enf'd mem. 47 F.3d 1161 (3d Cir. 1995).

[21] The Board has noted that unlawfully granted benefits "are particularly lasting in their effect on employees and difficult to remedy by traditional means . . . not only because of their significance to the employees, but also because the Board's traditional remedies do not require the Respondent to withdraw the benefits from the employees." *America's Best Quality Coatings Corp.,* 313 NLRB 470, 472 (1993), enfd. 44 F.3d 516 (7th Cir.), cert. denied 515 U.S. 1158 (1995).

[22] *NLRB v. Jamaica Towing, Inc.,* 632 F.2d at 213.

violation, or the size of the unit must also be considered. Moreover, steps that ameliorate the impact of the violations may diminish the need for *Gissel* relief.[23]

b. The number of employees affected by the violations -- either directly or by dissemination of knowledge of their occurrence among the workforce

Central to determining whether violations warrant *Gissel* relief are the number of employees directly affected by the violations. . . .[and] the extent of dissemination among employees."[24] Where a substantial percentage of employees in the bargaining unit is directly affected by an employer's serious unfair labor practices, the possibility of holding a fair election decreases.[25] Thus, discriminatory mass layoffs or discharges of most, if not all, employees in a unit are inherently pervasive.[26] So too are unlawful across-the-board wage increases or other grants of benefits and unlawful threats or promises of benefits made at captive audience meetings.[27] Where only a small portion of a unit is affected, however, even hallmark discharges may be insufficient to warrant *Gissel* relief.[28]

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[23] *Masterform Tool Co., Cylinder Components, Inc.,* 327 NLRB No. 185, slip op. at 3 [1071, 1073] (March 30, 1999) (*Gissel* remedy denied where certain 8(a)(1) violations were dismissed and employer recalled 6 of 7 unlawfully laid off employees after three months).

[24] *Garvey Marine, Inc.,* 328 NLRB No. 147, slip op. at 3 [at 993].

[25] See, e.g., *M.J. Metal Products, Inc.,* 328 NLRB No. 170, slip op. at 1 [1184] (noting that 8(a)(3) discharges constituted more than 25% of the unit); *Bonham Heating & Air Conditioning, Inc.,* 328 NLRB No. 61, slip op. at 2 [432,433] (May 19, 1999) (noting that 4 of 7 unit employees, or 40%, were unlawfully laid off); *General Fabrications Corp.,* 328 NLRB No. 166, slip op. at 2 [1114, 1115] (August 11, 1999) (noting that 7 of 31 unit employees suffered unlawful discrimination).

[26] See, e.g., *Allied General Services, Inc.,* 329 NLRB No. 58, slip op. at 3 [at 570]; *U.S.A. Polymer Corp.,* 328 NLRB No. 177, slip op. at 1[1242]; *Cassis Management Corp.,* 323 NLRB at 459 (1997).

[27] See, e.g., *Skyline Distributors,* 319 NLRB 270, 278-279 (1995), enf. denied in rel. part 99 F.3d 403, 410-412 (D.C. Cir. 1996) (grant of benefit); *Complete Carrier Services, Inc.,* 325 NLRB No. 96, ALJD slip op. at 3 and 5 [565, 567-568] (1998) (promise and grant of benefit, threat of plant closure); *Gerig's Dump Trucking, Inc.,* 320 NLRB 1017 (1996), enfd. 137 F.3d 936 (7th Cir. 1998) (grant of benefits). But as to the propriety of relying solely on Section 8(a)(1) violations for *Gissel* relief, see discussion Part 0, infra.

[28] *Philips Industries, Inc.,* 295 NLRB 717, 718-719 (1989) (large size of unit diluted impact of unlawful discharges); *Pyramid Management Group, Inc.,* 318 NLRB 607, 609 (1995) (discrimination affected only small portion of unit).

Another way of examining pervasiveness is to consider how widely disseminated is knowledge of the violations among the work force.[29] Even discrimination directed toward one employee, if widely disseminated, may support the need for a *Gissel* bargaining order.[30] The manner of carrying out unlawful discrimination may also indicate a greater likelihood that the violation will have an inhibitory effect on other unit employees. Thus, where an employer overtly demonstrates its retaliatory motive for unlawful discrimination, the Board can conclude that the inhibitory impact of such violations is accentuated.[31] Similarly, where an employer carries out discrimination in a public manner, i.e., where it clearly appears that the discrimination is intended to "send a message" to other employees, the Board may conclude that the violation was widely disseminated to other employees.[32]

In contrast, the Board will not issue a *Gissel* bargaining order if the evidence shows that a substantial portion of the bargaining unit was unaware of the employer's unfair labor practices. This situation may arise in the case of threats of discharge or plant closure directed to just a small number of employees,[33] or where the employees were not aware that the discriminatee was a leading union activist.[34]

c. Size of the bargaining unit

The Board will also consider the size of the unit to determine whether an employer's serious misconduct had a pervasive effect on the workforce which precludes the effective use of traditional remedies. The Board assumes that employer unfair labor practices will have a more coercive effect on a smaller unit of employees: widespread knowledge of the violation is more likely and only a few employees can make the

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[29] See *Holly Farms Corp.,* 311 NLRB 273, 282 (1993), enfd. 48 F.3d 1360 (4th Cir. 1995), affd. on other grounds 517 U.S. 392 (1996).

[30] See, e.g., *Traction Wholesale Center Co.,* 328 NLRB No. 148, slip op. at 21 [1058, 1075] (July 28, 1999); *Coil-ACC, Inc.,* 262 NLRB 76, 83 (1982), enfd. 712 F.2d 1074 (6th Cir. 1983).

[31] See, e.g., *U.S.A. Polymer Corp.,* 328 NLRB No. 177, slip op. at 2 at 1243].

[32] See *Garvey Marine, Inc.,* 328 NLRB No. 147, slip op. at 2 and 5 [at 992, 995] ("public and dramatic discharge" of discriminatee); *J.L.M. Inc. d/b/a Sheraton Hotel Waterbury,* 312 NLRB 304, 305 (1993), enf. as mod. 31 F.3d 79 (2d Cir. 1994) (employer posts notice at facility that discriminatee would never work for the employer again).

[33] See *Blue Grass Industries,* 287 NLRB 274, 276 (1987) (bargaining order denied where no evidence that threats of plant closure were widely disseminated among employees in the unit).

[34] See *Munro Enterprises, Inc.,* 210 NLRB 403 (1974).

difference between a union's majority and minority support.[35] In contrast, the Board may deny a *Gissel* in a large unit, even in the face of "hallmark" unfair labor practices.[36]

d. Identity of the perpetrator of the unfair labor practice

The Board will also consider the management level of the perpetrators of the unfair labor practices in evaluating the need for a *Gissel* bargaining order. The Board has stated that "[t]he severity of the misconduct is compounded by the involvement of high-ranking officials."[37] The Board has observed that "[w]hen the antiunion message is so clearly communicated by the words and deeds of the highest levels of management, it is highly coercive and unlikely to be forgotten."[38]

This is not to say that the Board will deny a *Gissel* bargaining order when the unfair labor practices are committed only by first-line supervisors. In this regard, the Board has noted that "the words and actions of immediate supervisors may in some circumstances leave the strongest impression."[39]

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[35] See *Garvey Marine, Inc.,* 328 NLRB No. 147, slip op. at 5 [at 995] (gravity of impact of violations heightened in relatively small unit of 25 employees); *Traction Wholesale,* 328 NLRB No. 148, slip op. at 21 [at 1075] (same, 20 person unit); *NLRB v. Berger Transfer & Storage Co.,* 678 F.2d 679, 694 (7th Cir. 1982) (impact of unfair labor practices increased in "small unit" of 42 employees*); NLRB v. Bighorn Beverage,* 614 F.2d 1238, 1243 (9th Cir. 1980) ("probable impact of unfair labor practices is increased when a small bargaining unit . . is involved and increases the need for a bargaining order").

[36] See *Philips Industries,* 295 NLRB 717, 718-719 (1989) ("the effect of violations is more diluted and more easily dissipated in a larger unit" of 90 employees); *Beverly California Corp.,* 326 NLRB No. 30, slip op. at 4 [232, 235] (1998) (*Gissel* not warranted where unit was "sizeable" (92-103 employees) and violations generally did not affect a significant number of employees).

[37] *M.J. Metal Products, Inc.,* 328 NLRB No. 170, slip op. at 2 [at 1185], citing *Consec Security,* 325 NLRB No. 71, slip op. at 2 [453, 454] (1998). Accord: *NLRB v. Q-1 Motor Express, Inc.,* 25 F.3d 473, 481 (7th Cir. 1994).

[38] *M.J. Metal Products, Inc.,* 328 NLRB No. 170, slip op. at 2 [at 1185]. See also id. at n. 9 and cases cited therein; *Bakers of Paris,* 288 NLRB 991, 992 (1988), enfd. 929 F.2d 1427 (9th Cir. 1991) ("The effect of unfair labor practices is increased when the unlawful conduct is committed by top management officials, who are readily perceived as representing company policy and in positions to carry out their threats . . . .").

[39] *Garvey Marine, Inc.,* 328 NLRB No. 147, slip op. at 4 [at 994]. See also *C & T Manufacturing Co.,* 233 NLRB 1430 (1977) ("Threats from a so-called first-line supervisor, accompanied by use of the names of company officials . . . are as coercive upon the employees as if made by the company officials themselves . . . .").

e. The timing of the unfair labor practices

The Board often highlights the timing of the unfair labor practices to justify the imposition of a *Gissel* bargaining order. An employer's swift reaction to union activity is an indication of the coercive effect of unlawful conduct and the effect of unfair labor practices is increased when the unlawful conduct begins "on the Employer's acquiring knowledge of the advent of the Union. . . ."[40] Similarly, an employer's continued misconduct after the holding of a representation election will further diminish the effectiveness of traditional remedies.[41]

f. Direct evidence of impact of the violations on the union's majority

A *Gissel* remedy may also be supported if the record reveals actual damage to the union's card majority such as a discrepancy between the number of card signers and the number of votes cast for the union in an election.[42] Other evidence of actual loss includes employee revocation of union cards or a marked fall-off of employee participation in union activities such as attendance at union meetings, distribution of literature, wearing union paraphernalia.

On the other hand, the Board has also held that traditional remedies may be insufficient to correct an employer's violations even where a union subsequently obtains a card majority[43] or even where the union might ultimately be certified in an unresolved

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[40] *Bakers of Paris,* 288 NLRB at 992. See also *M.J. Metal Products,* 328 NLRB No. 170, slip op. at 2 [at 1185]; *State Materials, Inc.,* 328 NLRB No. 184, slip op. at 1 [1317, 1317] (August 31, 1999) (unfair labor practices began immediately after union organizing campaign commenced); *Joy Recovery Technology Corp.,* 320 NLRB 356, 368 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998) (employer's "prompt" response); *America's Best Quality Coatings Corp.,* 313 NLRB 470, 472 (1993), enf'd. 44 F.3d 516 (7th Cir.), cert. denied 515 U.S. 1158 (1995) (impact magnified by the fact that it occurred on the day after the union demanded recognition).

[41] *General Fabrications Corp.,* 328 NLRB No. 166, slip op. at 2 [at 1115], citing *Garney Morris, Inc.,* 313 NLRB 101, 103 (1993), enfd. mem. 47 F.3d 1161 (3d Cir. 1995).

[42] See *J.L.M., Inc.,* 312 NLRB 304, 305 (1993), enf. denied on other grounds, 31 F.3d 79 (2d Cir. 1994) ("clear dissipation of union support" revealed by the stark drop from card majority of 128 to only 62 votes in election).

[43] See discussion and cases cited in *Weldun International,* 321 NLRB 733, 735-736 (1996), enf. denied in rel. part 165 F.3d 28, 1998 WL 681252 (6th Cir. 1998) (unpublished decision).

Board election.[44] Regions should be aware, however, that this view is not universally accepted by the courts of appeals (see discussion at 0 below).

g. The likelihood the violations will recur

The *Gissel* determination turns not only on the extensiveness of the past violations but also the likelihood of their recurrence in the future.[45] The Board has held that post-election violations evidence a strong likelihood that unlawful conduct will recur in the event another organizing effort occurs in connection with a Board-ordered re-run election.[46] Moreover, the violations may themselves demonstrate the tenacity of an employer's commitment to thwart the union and permit the inference that violations are likely to recur.[47]

h. Change in circumstances after the violations

Gissel respondents typically move the Board to consider evidence of a change in circumstances since the administrative hearing which, they argue, would support the denial of a bargaining order. The change in circumstances which they believe should obviate the need for a *Gissel* bargaining order includes the passage of time since the violations occurred and the turnover of employees or management.[48] The Board generally denies respondents' motions to reopen the record to consider such evidence.[49] However, while denying the motion, the Board generally discusses the evidence as

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[44] See, *General Fabrications Corp.,* 328 NLRB No. 166, slip op. at 3 [at 1116], n. 17 (and cases cited therein).

[45] Id., slip op. at 1.

[46] Id., slip op. at 2; *Bonham Heating & Air Conditioning, Inc.,* 328 NLRB No. 61, slip op. at 3 [at 434].

[47] *Bonham Heating & Air Conditioning, Inc.,* id., slip op. at 3 [at 434] ("the depth of the Respondent's disregard for employee rights is evidenced by the extreme measures it took to defeat the employees' organizational efforts").

[48] The courts are almost unanimous in requiring that the Board consider the relevance of changed circumstances. See *Flamingo Hilton-Laughlin v. NLRB,* 148 F.3d 1166, 1170-1172 and cases cited at n. 4 (D.C. Cir. 1998). The Ninth Circuit is the only circuit which does not require the Board to consider post-hearing changed circumstances. See *NLRB v. Bakers of Paris,* 929 F.2d 1427, 1448 (9th Cir. 1991).

[49] See *Garvey Marine, Inc.,* 328 NLRB No. 147, slip op. at 5 and 7 [at 995, 997] (employee turnover and passage of time, citing *Salvation Army Residence,* 293 NLRB 944, 945 (1989), enfd. mem. 923 F.2d 846 (2d Cir. 1990)).

proffered and provides a full discussion as to whether such changes would mitigate the need for a *Gissel* bargaining order.[50]

Resort to 10(j) proceedings in *Gissel* cases, as discussed in Part 0 below, may minimize the delay that permits changed circumstances to become an issue in *Gissel* cases. However, in those cases where the issue is raised, the Regions must be prepared to argue, in rejecting a respondent's offer of proof, why the evidence offered would not mitigate the need for a *Gissel* bargaining order.

III. *Gissel* and Section 8(a)(1) violations

Gissel cases that involve only allegations of Section 8(a)(1) present a unique problem and should, henceforth, be submitted to Advice on whether to issue a *Gissel* complaint. These cases generally involve either threats of plant closure, or promises or grants of benefits, or a combination of both. Historically, the Board, with court approval, has considered these violations of the "hallmark" variety which, even in the absence of Section 8(a)(3) misconduct, may be sufficient to warrant the need for a *Gissel* bargaining order.[51] However, the viability of these 8(a)(1) *Gissels* has become less certain in recent years, as several of the courts of appeals have not accepted the Board's view of these violations as "hallmark" and declined to enforce the Board's decisions.

For instance, the Sixth and D.C. Circuits have questioned the notion that an unlawful grant of benefits is a "hallmark" violation which may justify the imposition of a *Gissel* bargaining order. In *DTR Industries, Inc.,*[52] the Sixth Circuit indicated that it does not consider an unlawful wage increase to be a hallmark violation. And, in *Skyline Distributors,* the D.C. Circuit stated that there was "almost no judicial authority supporting a Gissel bargaining order based solely on the grant of economic benefits."[53]

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[50] See, e.g., *Garvey Marine, Inc.,* 328 NLRB No. 147, slip op. at 5-7 [at 995-997] and fn. 14; *State Materials,* 328 NLRB No. 184, slip op. at 1-2 [1317, 1317-1318].

[51] See *NLRB v. So-Lo Foods, Inc.,* 985 F.2d 123, 125-126 (4th Cir. 1992) (*Gissel* bargaining order appropriate where employer accompanied grant of benefits with, inter alia, threats of plant closure); *Indiana Cal-Pro, Inc. v. NLRB,* 863 F.2d 1292 (6th Cir. 1988) (threats of plant closure with minor 8(a)(1)'s); *NLRB v. Ely's Foods,* 656 F.2d 290 (8th Cir. 1981) (threats of closure and promise of wage increase); and *NLRB v. Dadco Fashions,* 632 F.2d 493 (5th Cir. 1980) (threats of plant closure and other 8(a)(1)'s). See also *Tower Records,* 182 NLRB 382, 387 (1970), enfd. mem. 79 LRRM 2736 (9th Cir. 1972) (*Gissel* order based on wage increase: "It is difficult to conceive of conduct more likely to convince employees that with an important part of what they were seeking in hand union representation might no longer be needed.").

[52] 39 F.3d 106, 115 (6th Cir. 1994).

[53] *Skyline Distributors v. NLRB,* 99 F.3d 403, 410 (D.C. Cir. 1996). Apart from the court's refusal to uphold the *Gissel* bargaining order, Judge Edwards, writing for the

In addition, in several cases in which the Board relied on unlawful threats of plant closure to support a *Gissel* order, the Board failed to obtain enforcement of the *Gissel* order because the courts disagreed that the employers' statements were unlawful threats, finding them instead to be protected speech under Section 8(c) of the Act.[54]

In at least one recent case, the Board issued a *Gissel* bargaining order based only on Section 8(a)(1) threats of plant closure and unlawful grants of benefits.[55] The Board has yet to fully address the implications of these decisions, however. In order to develop a coordinated response to the positions taken by the courts, these cases should be submitted for advice on the merits of whether to issue a *Gissel* complaint.

IV. Interim *Gissel* Orders under Section 10(j)

A. The Effectiveness of *Gissels* 10(j)

From FY 1990 through FY 1998, the Board issued decisions in 119 ULP cases involving a request for a *Gissel* bargaining order. In a comparable nine year period, however, the Board sought a Section 10(j) interim *Gissel* bargaining order in only 68 cases. Thus, Regions have issued and litigated dozens of *Gissel* unfair labor practice complaints without the benefit of parallel 10(j) proceedings.

Those benefits can be substantial. In 69% of the 68 10(j) cases (47 out of 68 cases), the injunction case was resolved favorably, either through settlement (28 cases) or a favorable decision by a district court (19 cases).[56] Further, in only two of the favorably resolved 10(j) cases did the underlying ULP case go before a circuit court for Section 10(e)-10(f) enforcement of the Board's order.[57] Thus, in many cases, with 10(j) relief, the

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majority, expressed profound disagreement with the Supreme Court's determination that the grant of a wage increase may constitute an unfair labor practice. See, id. at 408-409, discussing *NLRB v. Exchange Parts, Co.,* 375 U.S. 405 (1964).

[54] See *Be-Lo Stores v. NLRB,* 126 F.3d 268, 285-286 (4th Cir. 1997); *Kinney Drugs, Inc.,* 74 F.3d 1419, 1427-1428 and 1429 (2d Cir. 1996); *DTR Industries, Inc. v. NLRB,* 39 F.3d at 114; and *Crown Cork & Seal Co. v. NLRB,* 36 F.3d 1130, 1133-1136 (D.C. Cir. 1994).

[55] See *Complete Carrier Services, Inc.,* 325 NLRB No. 96 [565] (1998) (*Gissel* bargaining order based on promise and grant of wage increase and threats of plant closure; no 8(a)(3) discharges or layoffs). See, also *Wallace Int'l,* 328 NLRB No. 3 [29] (April 12, 1999) (threats of plant closure and promises of wage increases are "likely to have a pervasive and lasting deleterious effect on the employees' exercise of their Section 7 rights," and Board would "normally consider issuing a *Gissel* bargaining order in these circumstances," but denies *Gissel* based on "unjustified delay" in deciding the case.

[56] The 19 wins were 48% of the *Gissel* 10(j) cases litigated to a court decision in this period.

[57] The Board was successful before the courts in both those cases.

entire underlying labor dispute can be resolved short of the full litigation through circuit court enforcement of a final Board order.

In contrast, absent 10(j) relief, enforcement of a *Gissel* bargaining obligation is often delayed for several years as the case is litigated before the Board and circuit courts. During that time, "the union's position in the plant may have already deteriorated to such a degree that effective representation is no longer possible."[58] Legal commentators have noted that an ultimate *Gissel* bargaining order issued by the Board often does not produce a viable and enduring bargaining relationship.[59] Lengthy enforcement litigation also leaves the Board's *Gissel* order vulnerable to an employer's passage of time and changed circumstances defenses.[60] Thus, it appears that the most effective and successful vehicle for gaining *Gissel* relief includes petitioning a district court for an interim bargaining order under Section 10(j) soon after an administrative complaint issues.[61]

Accordingly, whenever a Region is investigating the propriety of issuing a *Gissel* complaint, it should also investigate and consider the propriety of seeking a 10(j) *Gissel* order. Any case in which a Region issues a *Gissel* complaint should be submitted to the Injunction Litigation Branch, Division of Advice, with a recommendation regarding Section 10(j) *Gissel* relief.[62]

In evaluating the propriety of 10(j) *Gissel* relief, the Regions should consider not only the criteria discussed above relevant to the issuance of a *Gissel* complaint but should also be mindful of the treatment accorded *Gissel* bargaining order remedies by the circuit

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[58] *Seeler v. Trading Port, Inc.,* 517 F.2d 33, 37-38 (2d Cir. 1975).

[59] See Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA,* 96 Harv. L. Rev. 1769, 1795 (1993); see also Bethel, *The Failure of Gissel Bargaining Orders,* 14 Hofstra Lab. L.J. 423 (1997).

[60] Under the Board's Rules and Regulations, Section 102.94(a), whenever a district court grants an injunction under Section 10(j), the Board obligates itself to expedite the underlying unfair labor practice proceeding. Such expedition may further limit the development of changed circumstances in the administrative case.

[61] Such relief preserves the Board's ability to effectively remedy the violations either in the form of a remedial bargaining order or an election. See *Seeler v. Trading Port, Inc.,* 517 F.2d at 38. In one instance involving a decertification petition rather than an initial representation petition, the Board's final order was a re-run election rather than a *Gissel*-type bargaining order where the status quo had previously been restored through the grant of an interim bargaining order under Section 10(j). See *Eby-Brown Co. L.P.,* 328 NLRB No. 75, slip op. at 3-4 [496, 498-499] (May 26, 1999).

[62] The Region's submission may recommend against 10(j) proceedings. Of course, if a case poses a close issue on the merits of the *Gissel* bargaining order remedy, the Region may also submit the case to the Division of Advice on the merit issue.

court in which the 10(j) case would be litigated. Issues specific to the circuit courts are discussed below.

B. Circuit Court Considerations

1. Criticism of the Board's failure to articulate the need for a *Gissel* bargaining order

The Second, Fourth, Sixth and D.C. Circuits have expressed dissatisfaction with the level of the Board's discussion and analysis of the need for a *Gissel* order in lieu of traditional non-bargaining order remedies.[63] Thus, in evaluating and litigating a *Gissel* 10(j) case, the Regions should consider the evidence relevant to the *Gissel* factors discussed in Part II, above, and explain how the evidence supports the need for a *Gissel* bargaining order.

In particular, these courts criticize the Board for failing to consider or explicate why traditional remedies would not suffice to ensure a fair election.[64] The Regions should therefore specifically explain why traditional Board remedies will not suffice to remedy an employer's serious and pervasive unfair labor practices. In this regard, the Regions may focus on the particular nature of the violations, or the circumstances in which they were committed, to demonstrate why traditional remedies will not suffice to allow the Board to conduct a free and fair election untainted by the effects of the employer's unfair labor practices.

2. Requiring proof of a "causal connection"

The Sixth and Fourth Circuits have suggested the necessity in *Gissel* cases for proof of a "causal connection" between the unfair labor practices and the inability to hold a fair election.[65] Thus, in *M.P.C. Plating, Inc. v. NLRB,* the Sixth Circuit held that, to justify a *Gissel* bargaining order, the Board "must make factual findings and must support its conclusion that there is a causal connection between the unfair labor practices and the probability that no fair election could be held."[66]

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[63] See, e.g., *Harpercollins San Francisco v. NLRB,* 79 F.3d 1324, 1333 (2d Cir. 1996); *Be-Lo Stores v. NLRB,* 126 F.3d 268, 282 (4th Cir. 1997); *NLRB v. Taylor Machine Products, Inc.,* 136 F.3d 507, 520 (6th Cir. 1998); *Flamingo Hilton-Laughlin v. NLRB,* 148 F.3d 1166, 1173 (D.C. Cir. 1998).

[64] See cases cited in preceding footnote.

[65] See *M.P.C. Plating, Inc. v. NLRB,* 912 F.2d 883, 888 (6th Cir. 1990); *NLRB v. Taylor Machine Products, Inc.,* 136 F.3d at 519; and *Be-Lo Stores v. NLRB,* 126 F.3d at 282. But, in the Fourth Circuit compare *NLRB v. CWI of Maryland, Inc.,* 127 F.3d 319, 334 (4th Cir. 1997), where the court upheld the bargaining order and made no reference to the requirement of a causal connection.

[66] 912 F.2d at 888.

Although this requirement is arguably inconsistent with the test as enunciated in *Gissel,* which spoke of violations that "have the *tendency* to undermine majority strength and impede the election processes,"[67] it is nevertheless binding on district courts which sit in these circuits. In our view, the type of evidence required to meet this standard is akin to "impact" evidence adduced in typical 10(j) proceedings. Thus, in order to demonstrate that an interim *Gissel* bargaining order under Section 10(j) is "just and proper" and necessary to prevent "irreparable harm," Regions can adduce evidence to prove the adverse effects of the unfair labor practices on employee support for the union, including, where available, the actual loss of majority support.[68] Therefore, where such evidence is available, the Regions should continue to demonstrate the actual adverse impact of the violations upon the union's majority support in both the ULP proceeding and the 10(j) litigation.

3. Whether a union's success in obtaining or holding employee support after an employer's unfair labor practices negates the need for a *Gissel* bargaining order

Some courts have upheld the Board's view that traditional remedies may be insufficient to correct an employer's violations even where a union subsequently obtains a card majority[69] or even wins a representation election.[70] These courts have relied upon the egregiousness of the unfair labor practices, the employer's continued misconduct, the effect of cumulative misconduct and the avoidance of further delay from ordering a rerun election instead of an immediate bargaining order.[71] In contrast, the Fourth, Sixth and Eighth circuits have held that a union's continued success was proof that a fair election could be held.[72] The Regions should continue to adhere to the Board's view when issuing

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[67] 395 U.S. at 614 (emphasis added).

[68] See, e.g., *Seeler v. The Trading Port, Inc.,* 517 F.2d at 37-38. See also Part 0, supra.

[69] See *Davis Supermarkets, Inc. v. NLRB,* 2 F.3d 1162, 1175 (D.C. Cir. 1993), discussing *United Oil Mfg. Co., Inc. v. NLRB,* 672 F.2d at 1212 and *NLRB v. Permanent Label Corp.,* 657 F.2d 512, 519 (3d Cir. 1981) (en banc), cert. denied 455 U.S. 940 (1982).

[70] See *Power, Inc. v. NLRB,* 40 F.3d 409, 423 (D.C. Cir. 1994).

[71] See, e.g., *Power, Inc. v. NLRB, id.*

[72] See *NLRB v. Weldun Int'l, Inc.,* 165 F.3d 28, 1998 WL 681252 (6th Cir. 1998) (unpublished order) (denying enforcement of *Gissel* bargaining order based, in part, on union's obtaining additional signed authorization cards after an unlawful layoff); *NLRB v. Appletree Chevrolet, Inc.,* 608 F.2d 988, 1000-1001 (4th Cir. 1979) (where union received "substantial majority" of unchallenged votes cast in election, no reasonable basis for finding that employer's misconduct made a fair election unlikely); and *Arbie Minerals Feed Co. v. NLRB,* 438 F.2d 940, 945 (8th Cir. 1971)(declining to enforce *Gissel* bargaining order where union obtained 11 of its 14 authorization cards after most of the employer's unfair labor practices).

Gissel complaints which may ultimately be litigated in these courts.[73] However, when evaluating their *Gissel* cases for the propriety of seeking 10(j) relief in any district court which sits in the Fourth, Sixth or Eighth circuit, the Regions should consider this issue and address it in their 10(j) memorandum.

IV. Conclusion

Any questions regarding the implementation of this memorandum should be directed to the Division of Advice; questions regarding issuance of a complaint should be addressed to the Regional Advice Branch; questions regarding Section 10(j) *Gissels* should be addressed to the Injunction Litigation Branch.

/s/
F. F.

[73] See discussion, infra., at Part II.B.2.f.

APPENDIX G-3

Model Reinstatement Argument – Organizing Campaign

[This Appendix has been intentionally withheld]

APPENDIX G-4
Model Reinstatement Argument – Incumbent Union

[This Appendix has been intentionally withheld]

APPENDIX G-5
Additional Reinstatement Arguments

[This Appendix has been intentionally withheld]

APPENDIX G-6
Responses to Employer Arguments Against Reinstatement

[This Appendix has been intentionally withheld]

APPENDIX G-7

Argument to Support Use of Hearsay Evidence in Section 10(J) Proceedings

[This Appendix has been intentionally withheld]

APPENDIX G-8

Model Argument: Successor Employer Refusal to Recognize and Bargain (*Burns)*

[This Appendix has been intentionally withheld]

APPENDIX H

SAMPLE 10(j) PLEADINGS

APPENDIX H

APPENDIX H-1

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT H. MILLER, Regional Director of Region 20 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, Petitioner, vs. RECYCLING INDUSTRIES, INC. Respondent.	Civil No. **ORDER TO SHOW CAUSE**

The Petition and Administrative Complaint of Robert H. Miller, Regional Director of Region 20 of the National Labor Relations Board, herein called the Board, having been filed in this Court pursuant to Section 10(j) of the National Labor Relations Act, as amended [29 U.S.C. § 160(j)], herein called the Act, praying for an order directing Recycling Industries, Inc., herein called Respondent, to show cause why a temporary injunction should not be granted as prayed for in said petition pending the final disposition of the administrative matters involved pending before said Board in Board Case 20-CA-29897-1 and, good cause appearing therefore,

IT IS ORDERED that Respondent appear before this Court at the United States Court house in Sacramento, California, on the _____ day of _____, _____, at _____ ___.m., or as soon thereafter as counsel can be heard, and then and there show cause, if any there be, why, pending the final disposition of the administrative proceedings now pending before the Board in Board Case 20-CA-29897-1, Respondent, its officers, representatives, supervisors, agents, servants, employees, attorneys, and all persons acting on its behalf or in

participation with it, should not be temporarily enjoined and restrained under Section 10(j) of the Act, as prayed in said Petition; and

IT IS FURTHER ORDERED that Respondent file an Answer to the allegations of said Petition, together with any affidavits, declarations, and exhibits in support of said Answer that are limited to the issue of the equitable necessity of injunctive relief, with the Clerk of this Court, and serve copies thereof upon Petitioner at his office located at 901 Market Street, Suite 400, San Francisco, California, to be received on or before _____ p.m., the _____ day of _____, _____, and that Petitioner may file and serve rebuttal affidavits, declarations, and exhibits at least _____ day(s) before the hearing. Pursuant to Rule 220-7 of the Local Rules of this Court and pursuant to the Order of this Court, all evidence shall be presented by the transcript and exhibits in the proceeding before the administrative law judge of the Board in Board Case 20-CA-29897-1, and in affidavits, declarations, and exhibits limited to the issue of the equitable necessity of injunctive relief, and no oral testimony will be heard unless otherwise ordered by the Court; and

IT IS FURTHER ORDERED that service of copies of this Order, together with copies of the Petition, be made forthwith upon Respondent or upon its counsel of record in Board Case 20-CA-29897-1, in any manner provided in the Federal Rules of Civil Procedure, for the United States District Courts, by electronic facsimile transmission or by certified mail, and that proof of such service be filed with the Court.

ORDERED this _____ day of _____, 2001, at Sacramento, California.

_____

UNITED STATES DISTRICT JUDGE

APPENDIX H

APPENDIX H-2

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

ALVIN BLYER, Regional Director of Region 29 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD	*	
Petitioner	*	
	*	__--CV--____
v.	*	
P&W ELECTRIC, INC., d/b/a POLLARI ELECTRIC	*	
Respondent	*	

ORDER TO SHOW CAUSE

The petition of Alvin Blyer, Regional Director of Region 29 of the National Labor Relations Board, having been filed pursuant to Section 10(j) of the National Labor Relations Act, as amended, praying for an order directing Respondent to show cause why a temporary injunction should not issue enjoining and restraining Respondent from engaging in certain acts and conduct in violation of the Act, as prayed for in said petition, the petition being verified, and to be supported by testimony and evidence, and good cause appearing therefor,

IT IS ORDERED that Respondent appear before this Court at the United States Courthouse, Court Room No. ____, 225 Cadman Plaza East, Brooklyn, New York, on the _____ day of January, 2001, at _____, or as soon thereafter as counsel can be heard, and then and there show cause, if any there be, why, pending the final disposition of the matters involved pending before the National Labor Relations Board, in

consolidated Case Nos. 29-CA-23527, 29-CA-23529 and 29-CA-23712, Respondent, its officers, representatives, agents, servants, employees, attorneys, and all members and persons acting in concert or participation with it, should not be enjoined and restrained as prayed in said petition; and

IT IS FURTHER ORDERED that should Respondent file an answer to the allegations of said petition, said answer shall be filed with the Clerk of this Court, and Respondent shall serve a copy thereof upon Petitioner at his office located at One MetroTech Center North, Tenth Floor, Brooklyn, New York 11201, on or before the ____ day of January, 2001, by _____, and deliver courtesy papers to chambers. Should Petitioner file a reply, such reply shall be served and filed by the ____ day of _____, 2001, by _____, and deliver courtesy papers to chambers; and

IT IS FURTHER ORDERED that service of a copy of this Order to Show Cause together with a copy of the petition, transcript and exhibits upon which it is issued, be forthwith made by a United States Marshal or an agent of the Board, 21 years or older, upon Respondent, and upon Local 25, International Brotherhood of Electrical Workers, a Charging Party before the Board, in any manner provided in the Rules of Civil Procedure for the United States District Court, by electronic facsimile transmission or by certified mail on or before the _____ day of _____, 2001, by _____, and that proof of such service be filed with the Court.

ORDERED this _____ day of January, 2001, at Brooklyn, New York.

BY THE COURT,

_____
UNITED STATES DISTRICT JUDGE

APPENDIX H

APPENDIX H-3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

ARTHUR R. DEPALMA, REGIONAL DIRECTOR, OF REGION 27 OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v. Civil No. _____

UNITED STEELWORKERS OF AMERICA, LOCAL NO. 15320 and UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC

Respondents

ORDER TO SHOW CAUSE

The Petition and Administrative Complaint of Arthur R. DePalma, Regional Director for Region 27 of the National Labor Relations Board (herein NLRB or Board), having been filed in this Court pursuant to Section 10(j) of the National Labor Relations Act, as amended, 61 Stat. 149, 29 U.S.C. Sec. 160(j) (herein the Act), praying for a Temporary Restraining Order pursuant to Rule 65(b) of the Federal Rules of Civil Procedure (Fed. R. Civ. P.) against Respondents United Steelworkers of America, Local No. 15320, (hereinafter Respondent Local), United Steelworkers of America, AFL-CIO-CLC, (hereinafter Respondent International) hereinafter collectively called Respondents, and for an order directing said Respondents to show cause why a temporary restraining order and a temporary injunction should not be granted as prayed for in said Petition

pending the final disposition of the administrative matters involved pending before said Board in NLRB Cases 27-CB-3271 and 27-CB-3272 and, good cause appearing therefore,

IT IS ORDERED that Respondents shall appear before this court at the United States Courthouse in Cheyenne, Wyoming, on the _____day of _____, 199 3, at _____ .m., or as soon as thereafter counsel can be heard, and then and there show cause, if any there be, why, pending disposition by the Court of the merits of the instant Petition for a temporary injunction Respondents, their officers, agents, servants, employees, attorneys, and all persons acting in concert or participation with them, should not be temporarily restrained pursuant to Section 10(j) of the Act and Fed. R. Civ. P. 65(b) as prayed for in said Petition; and

IT IS FURTHER ORDERED that Respondents, shall file an Answer to the allegations of said Petition with the Clerk of this Court, and serve a copy thereof upon Petitioner at his office located at 300 South Tower, 600 17th Street, Denver, Colorado 80202, on or before _____ day of _____, 1993; and

IT IS FURTHER ORDERED that Respondents, shall appear before this Court at the United States Courthouse in Cheyenne, Wyoming, on the _____ day of _____, 1993, at _____ .m. or as soon as thereafter counsel can be heard, and then and there show cause, if any there be, why, pending the final disposition of the administrative proceedings now pending before the Board in NLRB Cases 26-CB-3271 and 27-CB-3272, Respondents, their officers, agents, servants, employees, attorney, and all persons acting in concert or participation with them, should not be temporarily enjoined and under Section 10(j) of the Act as prayed for in said Petition; and

APPENDIX H

IT IS FURTHER ORDERED that service of a copy of this Order, together with a copy of the Petition and Administrative Complaint, attached affidavits and exhibits and supporting legal memoranda, be forthwith made by a United States Marshal or an agent of the Board, 21 years of age or older, upon Respondents, United Steelworkers of America, Local No. 15320, and United Steelworkers of America AFL-CIO-CLC, or upon their counsel of record in NLRB Cases 27-CB-3271 and 27-CB-3272, in any manner provided in the Federal Rules of Civil Procedure for the United States District Courts, by electronic facsimile transmission or by certified mail, and that proof of such service be filed with the Court.

ORDERED this ____ day of November, 1993, at Cheyenne, Wyoming.

BY THE COURT:

_____
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

SANDRA DUNBAR, Regional Director of the Third Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD

Petitioner

vs. **CIVIL NO. 00-**

MSK CORP.-MAIN EVENT FOOD SERVICE

Respondent

PETITION FOR INJUNCTION UNDER SECTION 10(j)
OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED

To the Honorable, the Judges of the United States District Court for the Western District of New York:

Comes now Sandra Dunbar, Regional Director of the Third Region of the National Labor Relations Board, herein called the Board, and petitions this Court, for and on behalf of the Board, pursuant to Section 10(j) of the National Labor Relations Act, as amended [61 Stat. 149; 73 Stat. 544; 29 U.S.C. Sec. 160(j)], herein called the Act, for appropriate injunctive relief pending the final disposition of the matters involved herein pending before the Board, based upon the Complaint and Notice of Hearing of the Office of the General Counsel of the Board, alleging that MSK Corp.-Main Event Food Service, herein called Respondent, has engaged in, and is engaging in, acts and conduct in violation of Section 8(a)(1) and (5) of the Act. In support thereof, Petitioner respectfully shows as follows:

APPENDIX H

1. Petitioner is the Regional Director of the Third Region of the Board, an agency of the United States, and files this petition for and on behalf of the Board.

2. Jurisdiction of this Court is invoked pursuant to Section 10(j) of the Act.

3. On February 7, 2001, Local 4, Hotel Employees and Restaurant Employees Union, herein called the Union, pursuant to the provisions of the Act, filed with the Board an unfair labor practice charge in Case 3-CA-22915, alleging that Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act. (A copy of the charge in Case 3-CA-22915 is attached hereto as Exhibit A.)

4. The aforesaid charge was referred to the Petitioner as Regional Director of the Third Region of the Board.

5. On April 9, 2001, based upon the charge filed in the case described above in paragraph 3, the Acting General Counsel of the Board, by the Regional Director of the Third Region of the Board, on behalf of the Board, pursuant to Section 10(b) of the Act, issued a Complaint and Notice of Hearing against Respondent. (A copy of the Complaint is attached hereto as Exhibit B.)

6. There is reasonable cause to believe that the allegations set forth in the Complaint are true and that Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, affecting commerce within the meaning of Section 2(6) and (7) of the Act. More particularly, there is reasonable cause to believe that Respondent is failing and refusing to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of an appropriate unit of Respondent's employees, described below in

paragraph 6(m), and herein called the Unit, in violation of Section 8(a)(1) and (5) of the Act, by refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit. There is reasonable cause to believe that Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act, by interrogating its employees about their Union activities and sympathies. In support thereof, the Petitioner, upon information and belief, shows as follows:

(a) At all material times, Respondent, a corporation, with its principal office and place of business at the New York State Fairgrounds in Solvay, New York, and a branch office located at the Buffalo Raceway in Hamburg, New York, herein called Respondent's Hamburg facility, has been engaged in the operation of a restaurant and food service operation.

(b) Annually, Respondent, in conducting its business operations described above in paragraph II(a), derives gross revenues in excess of $500,000.

(c) Annually, Respondent, in conducting its business operations described above in paragraph II(a), purchases and receives at its Hamburg facility products, goods and materials valued in excess of $5,000 from points directly outside of the State of New York.

(d) At all material times, Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

(e) At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

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(f) At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent, within the meaning of Section 2(11) of the Act, and agents of Respondent within the meaning of Section 2(13) of the Act:

Steven Jankiewicz -- Vice-president

Michael Chemotti -- Secretary-treasurer

(g) On or about February 2 and 3, 2001, Respondent, by Michael Chemotti, herein called Chemotti, at Respondent's Hamburg facility, interrogated employees about their Union activities and sympathies.

(h) At all material times prior to on or about January 1, 2001, the following employees of New York Sportservice, Inc., herein called the Sportservice Unit, constituted a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> [A]ll persons employed in the categories or classifications set forth in the Wage Schedule attached … [to the January 1, 1998 through December 31, 2000 collective-bargaining agreement between the Union and New York Sportservice, Inc.] at Hamburg Raceway regularly working forty (40) hours or more per month; excluding office and clerical employees, guards, professional employees, trainees for management or supervisory positions, managerial employees, purchasing agents, managers, assistant managers, and all supervisors as defined in the National Labor Relations Act, 1947, as amended, and all other employees not specifically included as employees.

(i) At all material times prior to on or about January 1, 2001, the Union was the designated exclusive collective-bargaining representative for the Sportservice Unit for the purposes of collective bargaining with respect to wages, hours of employment and other terms and conditions of employment, and the Union was recognized as the representative by New York Sportservice, Inc. This recognition was embodied in

successive collective-bargaining agreements, the most recent of which was effective from January 1, 1998 through December 31, 2000.

(j) At all material times prior to on or about January 1, 2001, based on Section 9(a) of the Act, the Union was the exclusive collective-bargaining representative of the Sportservice Unit.

(k) On or about January 26, 2001, Respondent commenced to provide the restaurant and food services that were formerly provided by New York Sportservice, Inc. at the Buffalo Raceway in Hamburg, New York, and since January 26, 2001, has continued to operate such business in basically unchanged form, and has employed as a majority of its employees, individuals who were previously employed by New York Sportservice, Inc.

(l) Based on the operations described above in paragraph 6(k), Respondent has continued the employing entity and is a successor to New York Sportservice, Inc.

(m) The following employees employed by Respondent, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> [A]ll persons employed in the categories or classifications set forth in the Wage Schedule attached … [to the January 1, 1998 through December 31, 2000 collective-bargaining agreement between the Union and New York Sportservice, Inc.] at Hamburg Raceway regularly working forty (40) hours or more per month; excluding office and clerical employees, guards, professional employees, trainees for management or supervisory positions, managerial employees, purchasing agents, managers, assistant managers, and all supervisors as defined in the National Labor Relations Act, 1947, as amended, and all other employees not specifically included as employees.

(n) At all times since on or about January 26, 2001, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of Respondent's employees in the Unit.

(o) On or about January 26, 2001, the Union requested that Respondent recognize it as the exclusive collective-bargaining representative of the Unit and bargain collectively with the Union as the exclusive collective-bargaining representative of the Unit.

(p) Since on or about January 26, 2001, Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit at Respondent’s Hamburg facility.

(q) By the conduct described above in paragraph 6(g), Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

(r) By the conduct described above in paragraph 6(p), Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees, in violation of Section 8(a)(1) and (5) of the Act.

(s) The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. Upon information and belief, it may be fairly anticipated that, unless enjoined, Respondent will continue to engage in the said acts and conduct, or similar or related acts and conduct, and will continue to fail and refuse to bargain collectively and in good faith with the Union, in violation of Section 8(a)(1) and (5) of the Act.

8. Upon information and belief, unless the continuation of the aforementioned unfair labor practices is immediately restrained, a serious flouting of the Act and of public policies involved in the Act will continue, with the result that enforcement of important provisions of the Act and of the public policy will be impaired before Respondent can be placed under legal restraint through the regular procedures of a Board order and enforcement decree. Unless injunctive relief is immediately obtained, it may fairly be anticipated that Respondent will continue its unlawful conduct during the proceedings before the Board and during subsequent proceedings before a Court of Appeals for an enforcement decree, with the result that employees will continue to be deprived of their fundamental right to be represented for purposes of collective bargaining as provided for in the Act.

9. Upon information and belief, to avoid the serious consequences set forth above, it is essential, appropriate and just and proper, for the purposes of effectuating the policies of the Act and avoiding substantial, irreparable, and immediate injury to such policies, to the public interest, and to employees of Respondent, and in accordance with the purposes of Section 10(j) of the Act, that, pending the final disposition of the matters involved herein pending before the Board, Respondent be enjoined and restrained from the commission of the acts and conduct alleged above, similar acts and conduct or repetition thereof.

10. No previous application has been made for the relief requested herein.

WHEREFORE, Petitioner prays:

1. That the Court issue an order directing Respondent promptly to file an answer to the allegations of this petition and to appear before this Court, at a time and

place fixed by the Court, and show cause, if any there be, why an injunction should not issue enjoining and restraining Respondent, its officers, agents, representatives, servants, employees, attorneys, and all persons acting in concert or participation with them, pending the final disposition of the matters involved herein, pending before the Board, from:

(a) interrogating its employees concerning their Union activities and sympathies;

(b) refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the following described collective bargaining unit, herein called the Unit:

> [A]ll persons employed in the categories or classifications set forth in the Wage Schedule attached … [to the January 1, 1998 through December 31, 2000 collective bargaining agreement between the Union and New York Sportservice, Inc.] at Hamburg Raceway regularly working forty (40) hours or more per month; excluding office and clerical employees, guards, professional employees, trainees for management or supervisory positions, managerial employees, purchasing agents, managers, assistant managers, and all supervisors as defined in the National Labor Relations Act, 1947, as amended, and all other employees not specifically included as employees.

(c) in any like or related manner failing and refusing to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of its employees in the Unit.

(d) in any like or related manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them under Section 7 of the Act.

2. That the Court issue an affirmative order directing Respondent to:

(a) recognize and, upon request, bargain in good faith with the Union as the exclusive collective bargaining representative of the employees employed in the Unit at the Buffalo Raceway facility;

(b) post copies of the District Court's opinion and order at Buffalo Raceway facility, where Respondent's notices to employees are customarily posted; said posting shall be maintained during the Board's administrative proceedings, free from all obstructions and defacements; and agents of the Board shall be granted reasonable access to the Buffalo Raceway facility to monitor compliance with the posting requirement;

(c) within 20 days of the issuance of the Order, file with the District Court, with a copy submitted to the Regional Director of the Board for Region Three, a sworn affidavit from a responsible official of the Respondent, setting forth with specificity the manner in which the Respondent has complied with the terms of the decree, including how the documents have been posted as required by the order.

3. That the Court grant such further and other relief as may be deemed just and proper.

Dated at Buffalo, New York this 10th day of May 2001.

SANDRA DUNBAR, Regional Director
National Labor Relations Board - Region Three
Thaddeus J. Dulski Federal Building
111 West Huron Street - Room 901
Buffalo, NY 14202-2387

Office of the General Counsel
Barry Kearney, Associate General Counsel
Ellen A. Farrell, Deputy General Counsel
Rhonda P. Aliouat, Regional Attorney

Beth Mattimore, Counsel for Petitioner
National Labor Relations Board - Region Three
Thaddeus J. Dulski Federal Building
111 West Huron Street - Room 901
Buffalo, NY 14202-2387
Telephone: 716/551-4943

APPENDIX H

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Roberto G. Chavarry, Regional Director
of the Twenty-fifth Region of the
National Labor Relations Board,
for and on behalf of the
NATIONAL LABOR RELATIONS BOARD

Petitioner

v. CIVIL NO.

GREAT LAKES DISTRIBUTING & STORAGE, INC. and
GREAT LAKES PACKAGING, INC.

Respondent

**PETITION FOR INJUNCTION UNDER SECTION 10(j)
OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED**

To the Honorable, the Judges of the United States District Court for the Northern District of Indiana:

Comes now Roberto G. Chavarry, Regional Director of the Twenty-fifth Region of the National Labor Relations Board (herein called the Board), and petitions this Court for and on behalf of the Board, pursuant to Section 10(j) of the National Labor Relations Act, as amended (61 Stat. 149; 73 Stat. 544; 29 U.S.C. Sec. 160(j); herein called the Act), for appropriate injunctive relief pending the final disposition of the matters involved herein pending before the Board on a complaint of the Acting General Counsel of the Board, charging that Great Lakes Distributing & Storage, Inc., herein called GLDS, and Great Lakes Packaging, Inc., herein called GLP and herein jointly called

respondent, has engaged in, and is engaging in, acts and conduct in violation of Section 8(a)(1) and (5) of the Act, 29 U.S.C. Sec. 158(a)(1) and (5). In support thereof, petitioner respectfully shows as follows:

1. Petitioner is Regional Director of the Twenty-fifth Region of the Board, an agency of the United States, and files this petition for and on behalf of the Board.

2. Jurisdiction of this proceeding is conferred upon this Court by Section 10(j) of the Act.

3. At all times material herein, respondent has maintained an office and place of business in Valparaiso, Indiana, where it is now and has at all times material herein been engaged in this judicial district in co-packaging, distribution and storage of food products.

4. On November 27, 2000, District No. 90, International Association of Machinists and Aerospace Workers, AFL-CIO, a/w International Association of Machinists and Aerospace Workers, AFL-CIO(herein called the Union), pursuant to the provisions of the Act, filed a charge with the Board against Great Lakes Distributing & Storage, Inc. (herein called GLDS) in Case 25-CA-27340-1, and on January 18, 2001 filed an amended charge in Case 25-CA-27340-1 Amended against GLDS and Great Lakes Packaging, Inc. (herein called GLP and together with GLDS herein called respondent), alleging that respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act. A copy of the original charge is attached hereto as Exhibit A and a copy of the amended charge is attached hereto as Exhibit B.

5. On February 27, 2001, following a field investigation during which all parties had an opportunity to submit evidence upon the said charge as amended in Case 25-CA-27340-1 Amended, the Acting General Counsel of the Board, on behalf of the Board, by the petitioner herein, issued a complaint, pursuant to Section 10(b) of the Act [29 U.S.C. Sec. 160(b)], alleging that respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act. A copy of this complaint is attached hereto as Exhibit C.

6. (a) At all material times GLDS and GLP have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy; have shared common premises and facilities; have provided services for and made sales to each other; have interchanged personnel with each other; and have held themselves out to the public as single-integrated business enterprises.

(b) Based on its operations described above in paragraph 6(a), GLDS and GLP constitute a single-integrated business enterprise and a single employer within the meaning of the Act.

(c) About November 11, 2000, respondent purchased the microwave popcorn packaging portion of the Valparaiso, Indiana facility of the Orville Redenbacher Popcorn Division of ConAgra Grocery Products Company, herein called Orville Redenbacher, and since then has continued to operate the microwave popcorn packaging portion of the business of the Valparaiso, Indiana facility of Orville Redenbacher in basically unchanged form, and has employed as a majority of its employees individuals who were previously employees of Orville Redenbacher.

(d) Based upon the operations described above in paragraph 6(c), respondent has continued the employing entity of and is a successor to Orville Redenbacher.

(e) The following employees of respondent, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act [29 U.S.C. Sec.159(b)]:

> All production and maintenance employees, including all shipping and receiving employees of the Employer at its Valparaiso, Indiana facility, but excluding all office clerical employees, all professional employees, all guards, and all supervisors as defined in the Act.

(f) On April 7, 1978, the Union was certified as the exclusive collective-bargaining representative of the Unit employed by Orville Redenbacher.

(g) Since about November 11, 2000, based on the facts described above in paragraphs 6(c) and 6(d), the Union has been the designated exclusive collective-bargaining representative of the Unit.

(h) From about April 7, 1978, to about June 1, 2000, based on Section 9(a) of the Act, the Union had been the exclusive collective-bargaining representative of the Unit employed by Orville Redenbacher.

(i) At all times since about November 11, 2000, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of respondent's employees in the Unit.

7. Petitioner asserts that there is a likelihood that the Regional Director will, in the underlying administrative proceeding in Case 25-CA-27340-1 Amended, establish that:

(a) At all material times GLDS, a corporation, with an office and place of business in Valparaiso, Indiana, herein called respondent's facility, has been engaged in the distribution and storage of food and other products.

(b) At all material times GLP, a corporation, with an office and place of business in Valparaiso, Indiana, the respondent's facility, has been engaged in the co-packaging of food products.

(c) During the past 12 months respondent, in conducting its business operations described above in paragraphs 7(a) and 7(b), sold and shipped from its Valparaiso, Indiana facility goods valued in excess of $50,000 directly to points outside the State of Indiana.

(d) During the past 12 months respondent, in conducting its business operations described above in paragraphs 7(a) and 7(b), purchased and received at its Valparaiso, Indiana facility goods valued in excess of $50,000 directly from points outside the State of Indiana.

(e) At all material times respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act [29 U.S.C. Sec. 152(2), (6) and (7)].

(f) At all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act [29 U.S.C. Sec. 152(5)].

(g) At all material times the following individuals held the positions set forth opposite their respective names and have been supervisors of respondent within the meaning of Section 2(11) of the Act [29 U.S.C. Sec. 152(11)]and agents of respondent within the meaning of Section 2(13) of the Act [29 U.S.C. Sec. 152(13)]:

Joe Glusak	Owner and President
Bradly Hendrickson	Owner
David Jancosek	Owner

APPENDIX H

William English		Owner
Thomas Adams		Owner
Kim Defries	-	Line Supervisor
John Schlink		Maintenance Manager

(h) By letters dated November 20, 2000 and January 19, 2001, the Union requested that respondent recognize it as the exclusive collective-bargaining representative of the Unit and bargain collectively with the Union as the exclusive collective-bargaining representative of the Unit.

(i) Since about November 20, 2000, respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit.

(j) By the conduct described above in paragraph 7(i), respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

(k) The unfair labor practices of respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

(l) The unfair labor practices of respondent described above in paragraphs 7(i) and 7(j) have taken place within this judicial district.

8. Respondent's unfair labor practices, as described above in paragraph 7, have and are continuing to irreparably harm employees of the respondent in the exercise of the rights guaranteed them by Section 7 of the Act. More particularly, respondent's unfair labor practices have caused and will continue to cause the following harm:

(a) As a result of respondent's failure and refusal to bargain with the Union, the Union's employee support will be irreparably undermined over time as conditions change in the facility without any Union input.

(b) As a result of respondent's failure and refusal to bargain with the Union, the employees will be deprived of the benefits of collective bargaining.

9. An order requiring interim bargaining is necessary to prevent the irreparable erosion of the Union's majority support while the Union is unable to represent employees and affect their working conditions. Additionally, such an order is necessary to prevent irreparable harm to the employees through their loss of the benefits of collective bargaining during Board litigation.

10. Unless injunctive relief is immediately obtained, it can fairly be anticipated that employees will permanently and irreversibly lose the benefits of the Board's processes and the exercise of statutory rights for the entire period required for Board adjudication, a harm which cannot be remedied in due course by the Board.

11. There is no adequate remedy at law for the irreparable harm being caused by respondent's unfair labor practices, as described above in paragraphs 8 and 9.

12. Granting the temporary injunctive relief requested by Petitioner will cause no undue hardship to respondent.

13. In balancing the equities in this matter, the harm to the employees involved herein, to the public interest, and to the purposes and policies of the Act if injunctive relief, as requested, is not granted, outweighs any harm that the grant of such injunctive relief will work on respondent.

14. Upon information and belief, it may be fairly anticipated that unless respondent's conduct of the unfair labor practices described in paragraphs 7(i) and 7(j) above is immediately enjoined and restrained, respondent will continue to engage in those acts and conduct, or similar acts and conduct constituting unfair labor practices.

15. Upon information and belief, to avoid the serious consequences set forth above, it is essential, just, proper, and appropriate for the purposes of effectuating the policies of the Act and avoiding substantial, irreparable and immediate injury to such policies, to the public interest, and the employees involved herein, and in accordance with the purposes of Section 10(j) of the Act, that, pending final disposition of the matters presently pending before the Board, respondent be enjoined and restrained as herein prayed.

WHEREFORE, PETITIONER PRAYS:

1. That the Court issue an Order, directing respondent to appear before this Court, at a time and place fixed by the Court, and show cause, if any there be, why, pending final adjudication by the Board of the matters pending before it in National Labor Relations Board Case 25-CA-27340-1 Amended, a temporary injunction should not issue:

(a) directing and ordering respondent to cease and desist from: (1) failing and refusing to recognize and to bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of its employees in the appropriate collective bargaining unit; and (2) in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed them by Section 7 of the Act;

(b) directing and ordering respondent, pending final Board adjudication, to: (1) recognize and on request bargain in good faith with the Union as the exclusive collective-bargaining representative of its employees in the appropriate collective bargaining unit respecting rates of pay, hours of work, or other terms and conditions of employment; (2) post copies of the district court's opinion and order at its Valparaiso, Indiana facility at all locations where notices to employees customarily are posted, maintain said postings during the pendency of the Board's administrative proceedings free from all obstructions and defacements, and grant agents of the Board reasonable access to respondent's Valparaiso, Indiana facility to monitor compliance with the posting requirement; and (3) within twenty (20) days of the issuance of the district court's order, file with the court, with a copy submitted to the Regional Director of the Board for Region 25, a sworn affidavit from a responsible official of respondent setting forth with specificity the manner in which respondent is complying with the terms of the decree.

2. That upon return of said Order to Show Cause, the Court issue an Order enjoining and restraining respondent in the manner set forth above.

3. That the Court grant such further and other relief as may be just and appropriate.

4. That the Court grant expedited consideration to this petition, consistent with 28 U.S.C. Sec. 1657(a) and the remedial purposes of Section 10(j) of the Act.

DATED at Indianapolis, Indiana, this 23rd day of April, 2001.

_____

Roberto G. Chavarry, Regional Director
National Labor Relations Board
Region Twenty-five
Room 238, Minton-Capehart Building
575 North Pennsylvania Street
Indianapolis, Indiana 46204-1577

Barry J. Kearney
Associate General Counsel

Rik Lineback
Regional Attorney

Joanne C. Mages
Attorney

APPENDIX H

APPENDIX H-6

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

DOROTHY L. MOORE-DUNCAN, Regional Director of the Fourth Region of the NATIONAL LABOR RELATIONS BOARD, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,	*	
Petitioner,	*	
v.	*	Civil No.
ALDWORTH COMPANY, INC. and DUNKIN' DONUTS MID-ATLANTIC DISTRIBUTION CENTER, INC., JOINT EMPLOYERS	*	
Respondents.	*	

PETITION FOR INJUNCTION UNDER SECTION 10(j)
OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED

To the Honorable, the Judges of the United States District Court for the District of New Jersey:

Comes now, Dorothy L. Moore-Duncan, Regional Director of the Fourth Region of the National Labor Relations Board (herein called the Board), and petitions this Court for and on behalf of the Board, pursuant to Section 10(j) of the National Labor Relations Act, as amended (61 Stat. 149; 73 Stat. 544; 29 U.S.C. Sec. 160(j), (herein called the Act), for appropriate injunctive relief pending the final disposition of the matters involved herein pending before the Board on charges alleging that Aldworth Company, Inc. and Dunkin' Donuts Mid-Atlantic Distribution Center, Inc. (herein called Aldworth and Dunkin, respectively, and herein also collectively called Respondents), have

engaged in, and are engaging in, acts and conduct in violation of Section 8(a)(1), (3) and (5) of the Act. In support thereof, the Petitioner respectfully shows as follows:

1. The Petitioner is the Regional Director of the Fourth Region of the Board, an agency of the United States, and files this Petition for and on behalf of the Board.

2. Jurisdiction of this Court is invoked pursuant to Section 10(j) of the Act.

3. (a) On July 7, 1998, United Food and Commercial Workers Union Local 1360 a/w United Food And Commercial Workers International Union, AFL-CIO, herein called the Union), pursuant to provisions of the Act, filed a charge with the Board in Case 4-CA-27274 alleging that Aldworth and Dunkin, employers within the meaning of Section 2(2) of the Act, have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. A copy of the charge in Case 4-CA-27274 is attached hereto as Exhibit 1 and made a part hereof.

(b) On October 22, 1998, the Union, pursuant to provisions of the Act, filed the first amended charge with the Board in Case 4-CA-27274, alleging that Aldworth and Dunkin have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1), (3) and (5) of the Act. A copy of the first amended charge in Case 4-CA-27274 is attached hereto as Exhibit 2 and made a part hereof.

(c) On November 24, 1998, the Union, pursuant to provisions of the Act, filed the second amended charge with the Board in Case 4-CA-27274, alleging that Aldworth and Dunkin have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1), (3) and (5) of the Act. A copy of the second amended charge in Case 4-CA-27274 is attached hereto as Exhibit 3 and made a part hereof.

(d) On April 15, 1999, the Union, pursuant to provisions of the Act, filed the third amended charge with the Board in Case 4-CA-27274, alleging that Aldworth and Dunkin have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1), (3) and (5) of the Act. A copy of the third amended charge in Case 4-CA-27274 is attached hereto as Exhibit 4 and made a part hereof.

(e) On July 10, 1998, William A. McCorry, an individual, pursuant to provisions of the Act, filed a charge with the Board in Case 4-CA-27289 alleging that Aldworth has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. A copy of the charge in Case 4-CA-27289 is attached hereto as Exhibit 5 and made a part hereof.

(f) On December 18, 1998, William A. McCorry, pursuant to provisions of the Act, filed the first amended charge with the Board in Case 4-CA-27289 alleging that Aldworth has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. A copy of the first amended charge in Case 4-CA-27289 is attached hereto as Exhibit 6 and made a part hereof.

(g) On October 27, 1998, the Union, pursuant to provisions of the Act, filed the charge with the Board in Case 4-CA-27603 alleging that Aldworth and Dunkin have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. A copy of the charge in Case 4-CA-27603 is attached hereto as Exhibit 7 and made a part hereof.

(h) On November 24, 1998, the Union, pursuant to provisions of the Act, filed the first amended charge with the Board in Case 4-CA-27603 alleging that Aldworth and Dunkin have engaged in, and are engaging in, unfair labor practices within

the meaning of Section 8(a)(1) and (3) of the Act. A copy of the first amended charge in Case 4-CA-27603 is attached hereto as Exhibit 8 and made a part hereof.

(i) On November 5, 1998, the Union, pursuant to provisions of the Act, filed a charge with the Board in Case 4-CA-27629 alleging that Aldworth, an employer within the meaning of Section 2(2) of the Act, has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. A copy of the charge in Case 4-CA-27629 is attached hereto as Exhibit 9 and made a part hereof.

(j) On November 24, 1998, the Union, pursuant to provisions of the Act, filed the first amended charge with the Board in Case 4-CA-27629, alleging that Aldworth and Dunkin have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. A copy of the first amended charge in Case 4-CA-27629 is attached hereto as Exhibit 10 and made a part hereof.

(k) On April 14, 1999, the Union, pursuant to provisions of the Act, filed the second amended charge with the Board in Case 4-CA-27629, alleging that Aldworth and Dunkin have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1), (3) and (5) of the Act. A copy of the second amended charge in Case 4-CA-27629 is attached hereto as Exhibit 11 and made a part hereof.

(l) On December 2, 1998, the Union, pursuant to provisions of the Act, filed a charge with the Board in Case 4-CA-27707 alleging that Aldworth and Dunkin have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. A copy of the charge in Case 4-CA-27707 is attached hereto as Exhibit 12 and made a part hereof.

(m) On April 15, 1999, the Union, pursuant to provisions of the Act, filed the first amended charge with the Board in Case 4-CA-27707, alleging that Aldworth and Dunkin have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. A copy of the first amended charge in Case 4-CA-27707 is attached hereto as Exhibit 13 and made a part hereof.

(n) On December 9, 1998, the Union, pursuant to provisions of the Act, filed a charge with the Board in Case 4-CA-27725 alleging, inter alia, that Aldworth and Dunkin, employers within the meaning of Section 2(2) of the Act, have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. A copy of the charge in Case 4-CA-27725 is attached hereto as Exhibit 14 and made a part hereof.

(o) On April 14, 1999, the Union, pursuant to provisions of the Act, filed the first amended charge with the Board in Case 4-CA-27725, alleging that Aldworth and Dunkin have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1), (3) and (5) of the Act. A copy of the first amended charge in Case 4-CA-27725 is attached hereto as Exhibit 15 and made a part hereof.

(p) On February 8, 1999, the Union, pursuant to provisions of the Act, filed a charge with the Board in Case 4-CA-27866 alleging, inter alia, that Aldworth has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. A copy of the charge in Case 4-CA-27866 is attached hereto as Exhibit 16 and made a part hereof.

(q) On February 12, 1999, the Union, pursuant to provisions of the Act, filed the first amended charge with the Board in Case 4-CA-27866, alleging that

Aldworth and Dunkin have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act. A copy of the first amended charge in Case 4-CA-27866 is attached hereto as Exhibit 17 and made a part hereof.

(r) On April 14, 1999, the Union, pursuant to provisions of the Act, filed the second amended charge with the Board in Case 4-CA-27866, alleging that Aldworth and Dunkin have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1), (3) and (5) of the Act. A copy of the second amended charge in Case 4-CA-27866 is attached hereto as Exhibit 18 and made a part hereof.

4. On April 15, 1999, and April 22 1999, based upon the charges and amended charges in Cases 4-CA-27274, 4-CA-27289, 4-CA-27603, 4-CA-27629, 4-CA-27707, 4-CA-27725 and 4-CA-27866, the General Counsel of the Board, on behalf of the Board, by the Petitioner, issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, and Amendment to Consolidated Complaint, respectively, in Cases 4-CA-27274, 4-CA-27289, 4-CA-27603, 4-CA-27629, 4-CA-27707, 4-CA-27725 and 4-CA-27866, pursuant to Section 10(b) of the Act, alleging that Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1), (3) and (5) of the Act. Copies of the Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, and Amendment to Consolidated Complaint in Cases 4-CA-27274, 4-CA-27289, 4-CA-27603, 4-CA-27629, 4-CA-27707, 4-CA-27725 and 4-CA-27866 are attached hereto as Exhibits 19 and 20, respectively and made a part hereof.

5. (a) On or about August 11, 1998, the Union filed a representation petition with the Board in Case 4-RC-19492, and an election was conducted on

September 19, 1998. A copy of the representation petition in Case 4-RC-19492 is attached hereto as Exhibit 21 and made a part hereof.

(b) On May 7, 1999, the Petitioner issued a Notice of Hearing on Objections to Election in Case 4-RC-19492, concluding that the Union's Objections to the representation election and other unalleged conduct raised issues in common with the unfair labor practices in Cases 4-CA-27274, 4-CA-27289, 4-CA-27603, 4-CA-27629, 4-CA-27707, 4-CA-27725 and 4-CA-27866, and that, in due course, the Objections would be consolidated for hearing with the unfair labor practie charges. On May 18, 1999, the Petitioner issued issued an Order Consolidating Cases and Scheduling Consolidated Hearing in Cases 4-CA-27274, 4-CA-27289, 4-CA-27603, 4-CA-27629, 4-CA-27707, 4-CA-27725, 4-CA-27866 and 4-RC-19492. Copies of the Notice of Hearing on Objections to Election in Case 4-RC-19492, and of the Order Consolidating Cases and Scheduling Consolidated Hearing in Cases 4-CA-27274, 4-CA-27289, 4-CA-27603, 4-CA-27629, 4-CA-27707, 4-CA-27725, 4-CA-27866 and 4-RC-19492 are attached hereto as Exhibits 22 and 23 and made a part hereof.

6. There is reasonable cause to believe that the allegations set forth in the Consolidated Complaint and Notice of Hearing and in the Amendment to Consolidated Complaint in Cases 4-CA-27274, 4-CA-27289, 4-CA-27603, 4-CA-27629, 4-CA-27707, 4-CA-27725 and 4-CA-27866 are true, and that Respondents have engaged in, and are engaging in, unfair labor practices within the meaning of Section 8(a)(1), (3) and (5) of the Act, affecting commerce within the meaning of Section 2(6) and (7) of the Act. More particularly, in support thereof, and of the request for injunctive relief herein, the Petitioner, upon information and belief, shows as follows:

APPENDIX H

(a) At all material times, Aldworth, a Massachusetts corporation with a principal place of business in Lynnfield, Massachusetts, has been engaged in the business of leasing personnel to enterprises in the transportation industry.

(b) During the past year, Aldworth, in conducting its business operations described above in subparagraph (a), purchased and received goods valued in excess of $50,000 directly from points outside the Commonwealth of Massachusetts.

(c) At all material times, Aldworth has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

(d) At all material times, Dunkin Donuts' has been a Delaware corporation with a facility at 501 Arlington Boulevard, Swedesboro, New Jersey, herein called the Center, where it has been engaged in the distribution of products to donut shops.

(e) During the past year, Dunkin' Donuts, in conducting its business operations described above in subparagraph (d), sold and shipped products valued in excess of $50,000 directly to points outside the States of New Jersey and Delaware.

(f) At all material times, Dunkin' Donuts has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

(g) At all material times, Aldworth and Dunkin' Donuts have been parties to an agreement pursuant to which Aldworth has provided employees to work at, and to deliver products stored within, the Center; Dunkin' Donuts has exercised control over Aldworth's labor relations policy with respect to the employees who were hired and are paid by Aldworth; and Aldworth and Dunkin' Donuts have codetermined the terms and conditions of employment of those employees.

(h) At all material times, based on their operations at the Center described above in subparagraph (g), Aldworth and Dunkin' Donuts have been joint employers of the employees referred to above in subparagraph (g).

(i) At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

(j) At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondents within the meaning of Section 2(11) of the Act and agents of Respondents within the meaning of Section 2(13) of the Act:

Ernest Dunn	-	Aldworth President
Kevin Roy	-	Aldworth Executive Vice President
Wayne Kundrat		Aldworth Assistant to Executive Vice President
Tim Kennedy	-	Aldworth Regional Operations Manager
Frank Fisher	-	Aldworth Operations Manager
Steve Wade	-	Aldworth Dispatcher/Warehouse Supervisor
Mark Kearney	-	Aldworth Warehouse Supervisor
Dave Mann	-	Aldworth Warehouse Supervisor
Keith Cybulski	-	Aldworth Warehouse Supervisor
Scott Henderschott	-	Aldworth Warehouse Supervisor
Juan Rivera	-	Aldworth Floor Supervisor
Kevin Donohue	-	Aldworth Floor Supervisor
Mike Houston	-	Aldworth Driver Supervisor
Craig Setter	-	Dunkin' Donuts President
Mike Shive	-	Dunkin' Donuts Distribution Center Manager
Tom Knoble	-	Dunkin' Donuts Transportation Supervisor
Warren Engard	-	Dunkin' Donuts Warehouse Supervisor

(k) Respondents, by Kevin Roy, engaged in the following conduct:

(1) In early April 1998, a more precise date being presently unknown to the Petitioner, in a meeting with its warehouse employees at the Center: (i) threatened employees with job loss if they sought union representation; and (ii) solicited

employees' complaints and grievances thereby promising them improved terms and conditions of employment in order to discourage them from seeking union representation.

(2) On or about April 11, 1998, in a meeting with employees at the Center: (i) solicited employees' complaints and grievances thereby promising them improved terms and conditions of employment in order to discourage them from seeking union representation; (ii) promised employees he would hire a new Regional Operations Manager in order to discourage them from seeking union representation; and (iii) threatened employees with a loss of benefits by telling them that they would "start out with nothing" if they selected a union to bargain for them.

(3) On or about May 8, 1998, by letter to employees: (i) solicited employees' complaints and grievances thereby promising them improved terms and conditions of employment in order to discourage them from seeking union representation; (ii) announced the creation of an "Issue Report Form" to solicit employees' complaints and grievances in order to discourage them from seeking union representation; and (iii) announced that certain of the grievances raised at the meeting referred to above in subparagraph (b), were being "adjusted" or "corrected" in order to discourage them from seeking union representation.

(4) On or about June 16, 1998, by letter to employees: (i) created the impression among its employees that their Union activities were under surveillance by telling them that he knew that Union representatives were visiting employees at their homes; (ii) solicited employees to report such "harassment" to him in order to discourage them from seeking Union representation; and (iii) solicited

employees' complaints and grievances thereby promising them improved terms and conditions of employment in order to discourage them from seeking Union representation.

(5) On or about June 27, 1998, at a meeting with employees at the Holiday Inn in Bridgeport, New Jersey: (i) threatened employees with loss of their existing benefits by telling them that they would start with a blank piece of paper if they selected the Union as their collective bargaining representative; (ii) created the impression among its employees that their Union activities were under surveillance by telling them he knew that "Union people" were visiting employees at their homes; (iii) interrogated employees concerning their Union activities; (iv) threatened employees that another employee who supported the Union would be discharged, and disparaged the employee; (v) threatened employees with job loss if they selected the Union as their collective bargaining representative; and (vi) promised employees wage increases, new work attire and an improved benefits package in order to discourage them from seeking Union representation.

(6) On or about June 29, 1998, by telephone: (i) told an employee that another employee's termination resulted from that employee's Union activities; (ii) threatened the employee with discharge because the employee supported the Union; and (iii) solicited the employee to campaign against the Union and to tell other employees that the employee's suspension was unrelated to the employee's Union activities.

(7) In August 1998, a more precise date being presently unknown to the Petitioner, in his office at the Center, interrogated an employee concerning the employee's Union activities and the Union activities of other employees.

(8) On or about August 29, 1998, September 1, 1998, September 2, 1998, September 3, 1998, September 8, 1998, September 9, 1998, September 10, 1998, September 15, 1998, and September 17, 1998, in meetings with employees at the Holiday Inn in Bridgeport, New Jersey, solicited employees' complaints and grievances thereby promising them improved terms and conditions of employment in order to discourage them from selecting the Union as their collective bargaining representative.

(9) On or about September 1, 1998, September 3, 1998, and September 10, 1998, in meetings with employees at the Holiday Inn in Bridgeport, New Jersey, announced that Aldworth had responded favorably to complaints and grievances that employees had voiced earlier in order to discourage employees from selecting the Union as their collective bargaining representative.

(10) In certain of the meetings with employees at the Holiday Inn in Bridgeport, New Jersey, indicated to employees that it would be futile for them to select the Union as their collective bargaining representative by telling them: (i) on or about August 29, 1998, "Nobody from outside this room can force that change upon me without me saying so....Nobody has the force here" and that "...somebody else that doesn't belong in this room" can't do "a god damn thing unless I say so"; (ii) on or about September 1, 1998, that "There isn't one person outside this door, outside of our organization that is going to help me make it better"; and (iii) at one of the meetings, the

specific date of which is presently unknown to the Petitioner, by telling employees that he "would not deal with the Union" and that he would "show up at negotiations but did not have to agree to anything."

(11) In certain of the meetings with employees at the Holiday Inn in Bridgeport, New Jersey, on or about August 29, 1998, September 8, 1998, September 15, 1998 and September 16, 1998, threatened employees with a loss of benefits by telling them, that they would start with a blank piece of paper if they selected the Union as their collective bargaining representative.

(l2) In certain of the meetings with employees at the Holiday Inn in Bridgeport, New Jersey, on or about August 29, 1998, September 2, 1998, September 3, 1998, September 8, 1998, September 9, 1998, September 10, 1998, September 15, 1998, September 16, 1998 and September 17, 1998, threatened employees with loss of their jobs if they selected the Union as their collective bargaining representative.

(13) On or about August 29, 1998, after a meeting with employees at the Holiday Inn in Bridgeport, New Jersey, threatened an employee with discharge because the employee engaged in Union activity.

(14) On or about August 29, 1998, at a meeting with employees at the Holiday Inn in Bridgeport, New Jersey: (i) informed employees that Respondents had suspended an employee because the employee spoke in favor of the Union and concertedly complained to Respondent regarding their wages, hours and conditions of employment at a meeting at the Holiday Inn in Bridgeport, New Jersey held in June 1998; and (ii) informed employees that Respondents had discharged an employee

because the employee spoke in favor of the Union at the earlier meeting at the Holiday Inn in Bridgeport, New Jersey.

(15) On or about September 10, 1998, at a meeting with employees at the Holiday Inn in Bridgeport, New Jersey: (i) threatened to discharge employees because the employees spoke in favor of the Union at the meeting; (ii) disparaged an employee because the employee supported the Union; and (iii) ejected an employee from the meeting because the employee supported the Union.

(16) In certain of the meetings with employees at the Holiday Inn in Bridgeport, New Jersey, on or about August 29, 1998, September 10, 1998 and September 17, 1998: (i) promised to create new supervisory positions and promotion opportunities for the employees in order to discourage them from selecting the Union as their collective bargaining representative; and (ii) promised to remove an unpopular supervisor in order to discourage employees from selecting the Union as their collective bargaining representative.

(17) On or about September 1, 1998, in a meeting with employees at the Holiday Inn in Bridgeport, New Jersey, created the impression among its employees that their Union activities were under surveillance by informing employees that he knew the identity of an employee who signed a Union authorization card and he knew the reason for the employee's decision to sign the authorization card.

(18) On or about September 10, 1998, September 15, 1998, September 16, 1998 and September 17, 1998, in meetings with employees at the Holiday Inn in Bridgeport, New Jersey, promised to improve employees medical insurance

benefits in order to discourage them from selecting the Union as their collective bargaining representative.

(19) In certain of the meetings with employees at the Holiday Inn in Bridgeport, New Jersey, on or about September 15, 1998, September 16, 1998 and September 17, 1998, threatened employees with loss of their 401K plan if they selected the Union as their collective bargaining representative.

(20) On or about September 15, 1998, in a meeting with employees at the Holiday Inn in Bridgeport, New Jersey, informed employees that he had ejected an employee from an earlier meeting at the Holiday Inn in Bridgeport, New Jersey because the employee voiced support for the Union.

(21) On or about September 16, 1998, at a meeting with employees at the Holiday Inn in Bridgeport, New Jersey, threatened employees with discipline and other unspecified reprisals in order to discourage them from selecting the Union as their collective bargaining representative.

(l) Respondents, by Frank Fisher, engaged in the following conduct at the Center:

(1) In June 1998, a more precise date being presently unknown to the Petitioner, solicited an employee's complaints and grievances, thereby promising the employee improved terms and conditions of employment in order to discourage the employee from seeking union representation.

(2) In late August or early September 1998, a more precise date being presently unknown to the Petitioner, with Dave Mann, told an employee to take off a Union T-shirt, and directed the employee to turn the T-shirt inside out, while

permitting other employees to wear T-shirts with other logos and messages without interference.

(3) In or about early September 1998, a more precise date being presently unknown to the Petitioner, accused its employees of disloyalty by telling an employee that he wanted to thank employees for making his life a "living hell" by seeking Union representation.

(4) On or about September 17, 1998, threatened employees with less favorable consideration of requests for time off if they selected the Union as their collective bargaining representative.

(5) In October 1998, a more precise date being presently unknown to the Petitioner, threatened to withhold work boot allowance money from an employee because the employee supported the Union.

(6) On or about October 15, 1998, told an employee that the employee's suspension was related to the employee's Union sympathies and activities.

(7) In or about the end of April or early May 1999, a more precise date being presently unknown to the Petitioner, interrogated an employee concerning the unfair labor practice proceedings pending before the Board.

(m) Respondents, by Keith Cybulski, engaged in the following conduct at the Center:

(1) With Kevin Donohue, in late July or early August 1998, a more precise date being presently unknown to the Petitioner, interrogated an employee concerning the employee's Union sympathies.

(2) With Scott Henderschott, during the period between September 1, 1998 and September 17, 1998, threatened employees with job loss if they selected the Union as their collective bargaining representative.

(n) Respondents, by Dave Mann, engaged in the following conduct at the Center:

(1) In mid-August 1998, a more precise date being presently unknown to the Petitioner, threatened employees with job loss if they selected the Union as their collective bargaining representative.

(2) On or about September 17, 1998, threatened employees with more onerous working conditions if they selected the Union as their collective bargaining representative.

(o) In or about the end of October or early November 1998, a more precise date being presently unknown to the Petitioner, Respondents, by Scott Henderschott, at the Center, told an employee to take off a Union T-shirt, while permitting other employees to wear T-shirts with other logos and messages without interference.

(p) During the week beginning September 13, 1998, Respondents, by Kevin Donohue, at the Center, threatened employees with unspecified reprisals if they selected the Union as their collective bargaining representative.

(q) During the week beginning September 6, 1998, Respondents, by Mike Shive and Wayne Kundrat, at the Center, engaged in surveillance of employees engaging in Union activities at the entrances to the Center's property.

(r) On or about September 10, 1998, Respondents, by Warren Engard, at the Center, threatened an employee with closure of the Center if the employees selected the Union as their collective bargaining representative.

(s) In the first part of September 1998, a more precise date being presently unknown to the Petitioner, Respondents, by Mike Shive, at the Center, told an employee to remove a Union pin from the employee's uniform.

(t) In or about mid-June 1999, a more precise date being presently unknown to the Petitioner, Respondents, by Mike Houston, at the Center, interrogated an employee concerning the employee's involvement in unfair labor practice proceedings before the Board.

(u) On or about June 27, 1998, in a meeting with employees at the Holiday Inn in Bridgeport, New Jersey, Respondents' employee William A. McCorry, in order to induce group action, concertedly complained to Respondents regarding the wages, hours and working conditions of Respondents' employees by complaining about the safety and cleanliness of the stores at which Respondents' employees made deliveries.

(v) On or about July 18, 1998, Respondents issued a handbook to employees announcing, *inter alia*, stricter and more onerous policies concerning tardiness, absenteeism and log falsifications.

(w) Respondents engaged in the conduct described above in subparagraph (u): (i) because its employees were seeking Union representation; and (ii) because its employees engaged in the concerted activities described above in subparagraph (u), and to discourage them from engaging in these activities.

(x) On or about June 23, 1998, Respondents conducted a Route Survey on the route assigned to its employee William A. McCorry.

(y) On or about June 29, 1998, Respondents suspended employee William A. McCorry for five (5) days.

(z) Respondents engaged in the conduct described above in subparagraphs (x) and (y), because: (i) William A. McCorry engaged in the conduct described above in subparagraph (u); and (ii) because William A. McCorry supported and assisted the Union and in order to discourage employees from engaging in these or other concerted activities.

(aa) On or about June 29, 1998, Respondents discharged employee Leo Leo.

(bb) Respondents engaged in the conduct described above in subparagraph (aa), because Leo Leo supported and assisted the Union.

(cc) On or about October 14, 1998, Respondents issued five (5) day suspensions to its employees Doug King, Rob Moss, Dave Shipman and Jesse Sellers.

(dd) Respondents engaged in the conduct described above in subparagraph (cc), because Doug King, Rob Moss, Dave Shipman and Jesse Sellers supported and assisted the Union.

(ee) On or about October 21, 1998, Respondents changed the work shifts and job assignments of its employees Doug King, Ken Mitchell, Rob Moss, Dave Shipman and Jesse Sellers.

(ff) Respondents engaged in the conduct described above in subparagraph (ee), because Doug King, Ken Mitchell, Rob Moss, Dave Shipman, and Jesse Sellers supported and assisted the Union.

(gg) In early November 1998, a more precise date being presently unknown to the Petitioner**,** Respondents suspended its employee Jesse Sellers for one day.

(hh) Respondents engaged in the conduct described above in subparagraph (gg), because its employee Jesse Sellers supported and assisted the Union.

(ii) On or about November 19, 1998, Respondents discharged its employee Rob Moss.

(jj) Respondents engaged in the conduct described above in subparagraph (ii), because its employee Rob Moss supported and assisted the Union.

(kk) In early October 1998, a more precise date being presently unknown to the Petitioner, Respondents implemented, and began enforcing, a new "Selection Accuracy Policy."

(ll) Since in or about early October 1998, Respondents, pursuant to the Selection Accuracy Policy referred to above in subparagraph (kk), have discharged its employees Carl Nelson, Ken Mitchell, Jesse Sellers and Doug King and other similarly situated employees whose names are presently unknown to the Petitioner.

(mm) Respondents engaged in the conduct described above in subparagraphs (kk) and (ll) above because its employees supported and assisted the Union.

APPENDIX H

(nn) The following employees of Respondents, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time drivers, warehouse employees, yard jockeys, maintenance employees and warehouse trainees employed by Respondents at the Center, excluding all other employees, guards and supervisors as defined in the Act.

(oo) On or about July 27, 1998, a majority of the Unit designated and selected the Union as their representative for the purposes of collective bargaining with Respondents.

(pp) At all times since on or about July 27, 1998, based on Section 9(a) of the Act, the Union has been the exclusive collective bargaining representative of the Unit.

(qq) By the conduct described above in subparagraphs (k) through (t) and (v) through (z), Respondents have been interfering with, restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

(rr) By the conduct described above in subparagraphs (v) through (mm), Respondents have been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act.

(ss) The conduct described above in subparagraphs (k) through (t), (v) through (mm), (qq) and (rr), is so serious and substantial in character that the possibility of erasing the effects of these unfair labor practices and of conducting a fair rerun

election by the use of traditional remedies is slight, and the employees' sentiments regarding representation, having been expressed through authorization cards, would, on balance, be protected better by issuance of a bargaining order than by traditional remedies alone.

(tt) On or about July 28, 1998, the Union, by letter, requested Respondents to recognize it as the exclusive collective bargaining representative of the Unit and bargain collectively with it as the exclusive collective bargaining representative of the Unit..

(uu) Since on or about July 28, 1998, Respondents have failed and refused to recognize and bargain with the Union as the exclusive collective bargaining representative of the Unit.

(vv) The subjects described above in subparagraphs (kk) and (ll) concern wages, hours and other terms and conditions of employment of the Unit and are mandatory subjects for the purposes of collective bargaining.

(ww) Respondents engaged in the conduct described above in subparagraphs (kk) and (ll), without prior notice to the Union and without having afforded the Union an opportunity to bargain with Respondents concerning this conduct.

(xx) By the conduct described above in subparagraphs (kk), (ll), (uu) and (ww), Respondents have been failing and refusing to bargain collectively with the exclusive collective bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

(yy) The unfair labor practices of Respondents described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. Upon information and belief, it may be fairly anticipated that, unless restrained, Respondents will continue their aforesaid unlawful acts and conduct in violation of Section 8(a)(1), (3) and (5) of the Act.

8. Upon information and belief, unless the continuation or repetition of the above described unfair labor practices is restrained, a serious failure of enforcement of important provisions of the Act, and of the public policy embodied in the Act, will result before an ultimate order of the Board can issue.

9. Upon information and belief, to avoid the serious consequences set forth above, it is essential, appropriate, just and proper, for the purposes of effectuating the policies of the Act and of avoiding substantial, irreparable and immediate injury to such policies, to employees, and to the public interest, and in accordance with Section 10(j) of the Act, that, pending the final disposition of the matters involved herein pending before the Board, Respondents be enjoined and restrained from the commission of the acts and conduct alleged above, similar or related acts or conduct or repetitions thereof.

WHEREFORE, the Petitioner prays:

1. That the Court enter an order directing Respondents, Aldworth Company , Inc. and Dunkin' Donuts Mid-Atlantic Distribution Center, Inc., to appear before this Court, at a time and place fixed by the Court, and show cause, if any there be, why an injunction should not issue enjoining and restraining Respondents, their officers, representatives, agents, servants, employees, attorneys, successors and assigns, and all persons acting in concert or participation with them, pending final disposition of the matters involved herein pending before the Board, from:

(a) threatening employees with job loss if they seek Union representation;

(b) soliciting employee complaints and grievances and promising to improve terms and conditions of employment in order to discourage employees from seeking Union representation;

(c) threatening employees with loss of benefits if they support the Union;

(d) announcing the creation of benefits in order to discourage employees from seeking Union representation;

(e) creating the impression among its employees that their Union activities are under surveillance;

(f) soliciting employees to report on the Union activities of others in order to discourage Union activity;

(g) interrogating employees about their Union activities, the Union activities of other employees, or the employees' involvement in unfair labor practice proceedings before the National Labor Relations Board;

(h) threatening to discharge, suspend or otherwise discipline employees because they support the Union;

(i) promising employees wage increases, new work attire and improved benefits packages in order to discourage them from seeking Union representation;

(j) telling employees that other employees' discharges and suspensions resulted from the employees' Union and other protected activities;

(k) soliciting employees to campaign against the Union and to falsely tell other employees that discipline they have received was unrelated to Union activity;

(l) announcing that employees' complaints have been responded to favorably in order to discourage employees from seeking Union representation;

(m) telling employees that selecting the Union as their bargaining representative will be futile;

(n) disparaging employees because they support and assist the Union and engage in other protected activities;

(o) ejecting employees from employer-held meetings with employees because the employees support the Union;

(p) promising to create new supervisory positions and promotional opportunities for employees in order to discourage them from selecting the Union as their bargaining representative;

(q) promising to remove unpopular supervisors in order to discourage employees from selecting the Union as their collective bargaining representative;

(r) promising to improve employees' medical insurance benefits in order to discourage them from seeking Union representation;

(s) threatening employees with loss of their 401K benefits if they select the Union as their collective bargaining representative;

(t) threatening employees with discipline and other unspecified reprisals in order to discourage them from selecting the Union as their collective bargaining representative;

(u) directing employees to remove Union T-shirts, buttons or other items with the Union logo while permitting other employees to wear T-shirts, buttons, or other items with other logos without interference;

(v) accusing employees of disloyalty because they seek Union representation;

(w) threatening employees with less favorable consideration of requests for time off if they select the Union as their collective bargaining representative;

(x) threatening to withhold boot allowance money from employees because they support the Union;

(y) threatening employees with more onerous working conditions if they select the Union as their collective bargaining representative;

(z) engaging in the surveillance of Union activities;

(aa) threatening employees with closure of the Distribution Center if they select the Union as their collective bargaining representative;

(bb) instituting new policies that establish more onerous conditions of employment because employees seek Union representation;

(cc) discharging, suspending or otherwise disciplining employees because they support the Union or engage in other protected activities;

(dd) failing or refusing to recognize and upon request bargain with the Union as the exclusive collective bargaining representative of employees in the following bargaining unit (Unit):

> All full-time and regular part-time drivers, warehouse employees, yard jockeys, maintenance employees and warehouse trainees employed by Respondents at the

Center, excluding all other employees, guards and supervisors as defined in the Act.

(ee) unilaterally instituting new terms and condition of employment including the new Selection Accuracy Policy

(ff) in any other manner interfering with, restraining or coercing its employees in the exercise of their Section 7 rights.

2. That the Court enter an Order directing Respondents, their officers, representatives, agents, servants, employees, attorneys, successors and assigns, and all persons acting in concert or participation with them, pending final disposition of the matters involved herein pending before the Board, to:

(a) on an interim basis, offer Leo Leo, Carl Nelson, Robert Moss, Kenneth Mitchell, Jesse Sellers, Douglas King, and all other employees who were discharged pursuant to the new Selection Accuracy Policy reinstatement to their former positions, or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights and privileges previously enjoyed, and displacing, if necessary, any employee who has been hired or reassigned to replace them;

(b) on an interim basis, offer employees Robert Moss, Kenneth Mitchell, Jesse Sellers and Douglas King reinstatement to the positions and shifts they held prior to October 13, 1998;

(c) on an interim basis, recognize, and upon request, bargain in good faith with the Union as the exclusive bargaining representative of the Unit;

(d) on an interim basis, rescind and cease giving effect to the "new Selection Accuracy Policy," first implemented in early October 1998;

(e) on an interim basis, restore the terms and conditions of employment as they existed for Unit employees on July 27, 1998;

(f) post copies of the District Court's Opinion and Order in Respondents' Swedesboro, New Jersey facility, in all locations where other notices to employees are customarily posted; maintain these postings during the Board's administrative process free from all obstructions and defacements; and grant to agents of the Board reasonable access to these facilities in order to monitor compliance with the posting requirement; and

(g) within twenty (20) days of the issuance of the District Court's Order, file with the District Court, and serve a copy to Petitioner, a sworn affidavit from a responsible official of Respondents, setting forth with specificity the manner in which Respondents have complied with the Court's Order including where exactly Respondents have posted the documents required by the Order.

3. That upon return of the order to show cause, the Court issue an order enjoining and restraining Respondent in the manner set forth above.

4. That the Court grant such further and other relief as may be just and proper.

Signed at Philadelphia, Pennsylvania this 28th day of July, 1999.

_____
DOROTHY L. MOORE-DUNCAN
Regional Director, Region Four
National Labor Relations Board

FREDERICK L. FEINSTEIN
General Counsel

BARRY J. KEARNEY
Associate General Counsel

DANIEL E. HALEVY,
Regional Attorney, Region Four

SCOTT C. THOMPSON,
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_____
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APPENDIX H

APPENDIX H-7

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT H. MILLER, Regional Director of Region 20 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, Petitioner, vs. RECYCLING INDUSTRIES, INC., Respondent.	Civil No. PETITION FOR INJUNCTION UNDER SECTION 10(j) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED [29 U.S.C. SECTION 160(j)]

To the Honorable, the Judges of the United States District Court,
Eastern District of California

Comes now Robert H. Miller, Regional Director of Region 20 of the National Labor Relations Board, herein called the Board, and petitions this Court, for and on behalf of the Board, pursuant to Section 10(j) of the National Labor Relations Act, as amended [61 Stat. 149; 73 Stat. 544; 29 U.S.C. § 160 (j)], herein called the Act, for appropriate injunctive relief pending the final disposition of the matters involved herein pending before the Board on a Complaint of the Acting General Counsel of the Board charging that Recycling Industries, Inc., herein called Respondent, is engaging in unfair labor practices in violation of Sections 8(a)(1) and (3) of the Act [29 U.S.C. § 158(1) and (3)]. In support thereof, Petitioner respectfully shows as follows:

1. Petitioner is the Regional Director of Region 20 of the Board, an agency of the United States Government, and files this petition for and on behalf of the Board, which has authorized the filing of this petition.

2. Jurisdiction of the Court is invoked pursuant to Section 10(j) of the Act, which provides, inter alia, that the Board shall have power, upon issuance of a complaint charging that any person has engaged in unfair labor practices, to petition any

United States district court within any district wherein the unfair labor practices in question are alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary injunctive relief or restraining order pending final disposition of the matter by the Board.

3. On November 15, 2000, the International Longshore and Warehouse Union, Local 17, herein called the Union, filed with the Board an original charge in Board Case 20-CA-29897-1 alleging that Respondent is engaged in unfair labor practices in violation of Section 8(1), (3), (4) and (5) of the Act. On December 14, 2000, a first-amended charge was filed by the Union in Board Case 20-CA-29897-1 alleging that Respondent engaged in unfair labor practices in violation of Section 8(a)(1), (3) and (4) of the Act. On January 11, 2001, a second-amended charge was filed by the Union in Board Case 20-CA-29897-1 alleging that Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3). On January 31, 2001, a third-amended charge was filed by the Union in Board Case 20-CA-29897-1 alleging that Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3).

4. The aforesaid charges were referred to Petitioner as Regional Director of Region 20 of the Board.

5. Upon investigation, Petitioner determined that there is reasonable cause to believe, as alleged in the aforesaid charges, that Respondent is engaging in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.

6. On February 28, 2001, the Regional Director of Region 20 of the Board, upon such charges and pursuant to Section 10(b) of the Act [29 U.S.C. § 160(b)], issued a Complaint against Respondent alleging that Respondent is engaging in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.

7. Pursuant to Rule 10(c) of the Federal Rules of Civil Procedure, true copies of the aforesaid Complaint and charges in Board Case 20-CA-29897-1 are

attached hereto and marked as Exhibits 1-5, respectively, and are incorporated herein as though fully set forth.

8. There is a likelihood that the allegations set forth in the Complaint are true and that Respondent engaged in, and is engaging in, unfair labor practices in violation of Section 8(a)(1) and (3) of the Act. More specifically, and as more particularly described in the Complaint attached hereto as Exhibit 1, Petitioner alleges that there is a likelihood that Petitioner will establish the following:

(1) (a) At all material times, Respondent, a corporation with an office and place of business in Sacramento, California, has been engaged in the business of processing recyclable materials.

(b) During the twelve-month period ending May 31, 2000, Respondent, in conducting its business operations described above in 1(a), sold and shipped goods valued in excess of $50,000 directly to customers located outside the State of California.

(2) At all material times, Respondent has been an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act [29 U.S.C. §§ 152(2), (6), and (7)].

(3) At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act [29 U.S.C. § 152(5)].

(4) (a) At all material times, the following individuals have held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Scott Kuhnen	-	General Manager
David Kuhnen	-	Treasurer
Jose Sanchez	-	Labor Consultant

(b) At all material times, prior to an unknown date in October 2000, Antonio Cortes occupied the position of leadman for Respondent and was an agent of Respondent within the meaning of Section 2(13) of the Act.

(c) At all material times, after an unknown date in October 2000, Antonio Cortes has occupied the position of Supervisor for Respondent and has been a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

(5) (a) The following employees of Respondent, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a) of the Act:

> All full-time and regular part-time machine operators, forklift operators, baler operators, buyers, clerical/cashier-weigh masters, drivers, welders, mechanics, and sorter/laborers employed by the Employer at its 3300 Power Inn Road, Sacramento, California location; excluding all other employees, guards and supervisors as defined in the Act.

(b) During the period from about May 17 to June 3, 2000, a majority of the Unit designated and selected the Union as their representative for the purposes of collective bargaining with Respondent.

(c) At all times since June 3, 2000, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

(6) Respondent, by Jose Sanchez, at Respondent's facility:

(a) On various unknown dates in about June 2000, told employees that Respondent would never accept the Union as their collective-bargaining

representative thereby informing employees it would be futile for them to select the Union as their representative.

(b) On an unknown date in about June 2000, threatened employees that Respondent would go bankrupt and lay off all its employees if they selected the Union as their collective-bargaining representative.

(7) (a) On an unknown date in about June 2000, Respondent, by Antonio Cortes, at Respondent's facility, announced that effective July 2000, employees would receive a wage increase as an inducement for them to abandon their support for the Union.

(b) On unknown dates in July 2000, Respondent granted a wage increase to its Unit employees in order to induce them to abandon their support for the Union.

(c) On an unknown date in November or December 2000, Respondent, by Antonio Cortes, at Respondent's facility, solicited employees to sign a petition stating that they no longer want the Union as their collective-bargaining representative.

(8) (a) About July 4 and 5, 2000, Respondent held a raffle with substantial cash prizes for its Unit employees.

(b) As a condition of participating in the raffle described above in subparagraph 8(a), Respondent required its employees to complete and give to Respondent for review, a questionnaire containing questions calculated to determine their union sympathies.

(9) (a) About May 31, 2000, Respondent suspended its employee Jorge Ontiveros for one day without pay.

(b) About October 12, 2000, Respondent suspended its employee Jose Hernandez for two days without pay.

(c) About October 27, 2000, Respondent suspended its employee Juan Orozco for one day without pay.

(d) About October 27, 2000, Respondent discharged its employee Jorge Ontiveros.

(e) About January 19, 2001, Respondent suspended its employee Juan Orozco for five days without pay.

(f) Respondent engaged in the conduct described above in subparagraph 9(a) through (e) because the employees named therein joined and/or assisted the Union and engaged in union and/or concerted activities and to discourage employees from engaging in these activities.

(10) The conduct described above in paragraphs 6 through 9 is so serious and substantial in character that the possibility of erasing the effects of these unfair labor practices and of conducting a fair election by the use of traditional remedies is slight, and the employees' sentiments regarding representation, having been expressed through authorization cards would, on balance, be protected better by issuance of a bargaining order than by traditional remedies alone.

(11) By the conduct described above in paragraphs 6 through 8, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

(12) By the conduct described above in paragraph 9, Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization, in violation of Section 8(a)(1) and (3) of the Act.

(13) The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and 2(7) of the Act.

9. It may fairly be anticipated that, unless enjoined, Respondent will continue to repeat the acts and conduct set forth in paragraph 8 or similar or like acts in violation of Section 8(a)(1) and (3) of the Act.

10. It is likely that substantial and irreparable harm will result to Respondent's employees and their statutorily protected right to organize unless the aforesaid unfair labor practices are immediately enjoined and appropriate relief granted. By its unlawful conduct, including its termination of union adherent Jorge Ontiveros, its threats not to accept the Union as the collective-bargaining representative of its employees, its threat to go bankrupt and lay off all its employees, and granting a unit-wide wage increase, Respondent has, for now, succeeded in nipping that campaign "in the bud." That blow to the organizing campaign is not likely to be remedied through the regular administrative procedures of a Board Order and an Enforcement Decree of the Court of Appeals, which could take years to conclude. By then, the momentum of the organizing campaign likely will have dissipated, with the result that Respondent will have achieved its ultimate objective of thwarting the organizing campaign, with little likelihood of that damage being undone by remedies imposed at the conclusion of the administrative and appellate process. Moreover, studies show that, as time goes by, the probability increases that employees who have been discharged will obtain work elsewhere and will be more reluctant to return to work for the employer that unlawfully terminated them, thereby further dissipating an organizing union's base of support and

correspondingly further enabling an employer, such as Respondent, to reap irreversible benefits from its unlawful conduct, all in disregard of the policies of the Act and the public interest.

11. Upon information and belief, it is submitted that, in balancing the equities in this matter, the harm that will be suffered by the Union, the employees, and the public interest, and the purposes and policies of the Act if injunctive relief is not granted greatly outweighs any harm that Respondent may suffer if such injunctive relief is granted.

12. Upon information and belief, to avoid the serious consequences referred to above, it is essential, just and proper, and appropriate for the purposes of effectuating the remedial purposes of the Act and avoiding substantial and irreparable injury to such policies, the public interest, the employees, and the Union, and in accordance with the purposes of Section 10(j) of the Act that, pending final disposition by the Board, Respondent be enjoined and restrained as herein prayed.

WHEREFORE, Petitioner respectfully requests the following:

(1) That the Court issue an order directing Respondent to file an answer to each of the allegations set forth and referenced in the said Petition and to appear before the Court, at a time and place fixed by the Court, and show cause, if any there be, why, pending final disposition of the matters herein involved now pending before the Board, Respondent, its officers, representatives, supervisors, agents, servants, employees, attorneys and all persons acting on its behalf or in participation with it, should not be enjoined and restrained from the acts and conduct described above, similar or like acts, or other conduct in violation of Section 8(a)(1) and (3) of the Act, or repetitions thereof, and that the instant Petition be disposed of on the basis of affidavit and documentary evidence, without oral testimony, absent further order of the Court.

(2) That the Court issue an order directing Respondent, its officers, representatives, supervisors, agents, servants, employees, attorneys and all persons

acting on its behalf or in participation with it, to cease and desist from the following acts and conduct, pending the final disposition of the matters involved now pending before the National Labor Relations Board:

(a) telling employees that it would be futile for them to select the Union as their representative;

(b) threatening to file bankruptcy and lay off its employees if they select the Union as their collective-bargaining representative;

(c) announcing and subsequently granting wage increases to employees as an inducement for them to abandon their support for the Union;

(d) soliciting employees to sign a petition stating that they no longer want the Union as their collective-bargaining representative;

(e) requiring employees to complete a questionnaire containing questions calculated to determine their union sympathies as a condition of participating in a raffle with substantial cash prizes;

(f) disciplining, suspending or discharging employees because of their Union and/or other protected concerted activity.

(h) in any other manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act;

(3) That the Court further order Respondent, its officers, representatives, supervisors, agents, servants, employees, attorneys and all persons acting on its behalf or in participation with it, to take the following steps pending the final disposition of the matters herein involved now pending before the National Labor Relations Board:

(a) offer interim employment to Jorge Ontiveros to his former job position and working conditions, or if that position no longer exists, to a

substantially equivalent position without prejudice to his seniority or rights and privileges, displacing, if necessary, any newly hired or reassigned worker;

(b) recognize and bargain with International Longshore and Warehouse Union, Local 17, AFL-CIO, as the collective-bargaining representative of its employees in the following unit:

> All full-time and regular part-time machine operators, forklift operators, baler operators, buyers, clerical/cashier-weigh masters, drivers, welders, mechanics, and sorter/laborers employed by Respondent at its 3300 Power Inn Road, Sacramento, California location; excluding all other employees, guards and supervisors as defined in the Act.

(c) rescind and remove from employees' personnel files any reference to unlawful disciplinary actions/warnings and refrain from relying upon such discipline in the future;

(d) post copies of the District Court's Temporary Injunction and Findings of Fact and Conclusions of Law, in English and Spanish, at Respondent's 3300 Power Inn Road, Sacramento, California facility, in all locations where notices to its employees are normally posted; maintain these postings during the Board's administrative proceeding free from all obstructions and defacement; grant all employees free and unrestricted access to said postings; and grant to agents of the Board reasonable access to its Sacramento, California facility to monitor compliance with the posting requirement; and

(e) within twenty (20) days of the issuance of the Court's order, file with the Court, with a copy submitted to the Regional Director of the Board for Region 20, a sworn affidavit from a responsible official of Respondent, setting forth with specificity the manner in which Respondent is complying with the terms of the decree, including the locations of the posted documents.

(4) That upon return of said Order to Show Cause, the Court issue an order enjoining and restraining Respondent as prayed and in the manner set forth in Petitioner's proposed temporary injunction lodged herewith.

(5) That the Court grant such other and further temporary relief that may be deemed just and proper.

DATED AT San Francisco, California, this 14th day of May, 2001.

Robert H. Miller, Regional Director
National Labor Relations Board
Region 20
901 Market Street, Suite 400
San Francisco, California 94103-1735

JOSEPH P. NORELLI
Regional Attorney, Region 20
WILLIAM A. BAUDLER
Supervisory Attorney, Region 20
KAHTLEEN C. SCHNEIDER
Attorney, Region 20

APPENDIX H

APPENDIX H-8

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
AT ASHLAND

D. RANDALL FRYE, Regional Director of the Ninth Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD

Petitioner

v. Civil No.

DISTRICT 1199, THE HEALTH CARE AND SOCIAL SERVICE UNION, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO-CLC

Respondent

MOTION FOR TEMPORARY RESTRAINING ORDER UNDER SECTION 10(j) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED

To the Honorable Judges of the United States District Court for the Eastern District of Kentucky at Ashland:

The petition of D. Randall Frye, Regional Director of the Ninth Region of the National Labor Relations Board, herein called the Board, having been filed pursuant to Section 10(j) of the National Labor Relations Act, as amended, praying for appropriate injunctive relief against District 1199, The Health Care and Social Service Union, Service Employees International Union, AFL-CIO-CLC, herein called respondent, pending final disposition of the matters involved herein pending before the Board, now comes petitioner and respectfully avers as follows:

APPENDIX H

Upon information and belief as more fully appears from the affidavits attached hereto, and made a part hereof, substantial and irreparable injury will unavoidably result to the policies of the Act and to M.E.B. Incorporated d/b/a J.J. Jordan Geriatric Center, herein called J.J. Jordan Geriatric Center, the charging party before the Board, its employees, and the patients for whom it provides care**,** from a continuation of respondent's unlawful conduct.

WHEREFORE, petitioner moves;

1. That the Court issue a temporary restraining order forthwith enjoining and restraining respondent, its officers, agent's, representatives, servants, employees, attorneys, and all members and persons acting in concert or participation with them, for a period of ten (10) days duration as provided for in Rule 65(b) of the Federal Rules of Civil Procedure, from: restraining or coercing the employees of J.J. Jordan Geriatric Center, or of any other person doing business with J.J. Jordan Geriatric Center, by:

(a) Engaging in mass picketing thereby blocking ingress to and egress from, or in any other manner, preventing, attempting to prevent or hindering employees, customers, suppliers or other persons from entering or leaving the Louisa, Kentucky facility of J.J. Jordan Geriatric Center.

(b) Inflicting, or attempting to inflict injury or damage to the persons or property, including motor vehicles, of any employees or any persons doing business with J.J. Jordan Geriatric Center.

(c) Threatening nonstriking employees or others with injury to their person, their families, or damage to property.

(d) Possessing weapons on the picket line or taking pictures of nonstriking employees or other persons crossing its picket line.

(e) In any other manner, or by any other means. restraining or coercing the employees of J.J. Jordan Geriatric Center or of any person doing business with J.J. Jordan Geriatric Center, in the exercise of their rights guaranteed under Section 7 of the Act.

2. That the Court issue an order directing respondent to appear before this Court, at a time and place to be fixed by the Court, and show cause, if any there be, why an injunction should not issue enjoining and restraining respondent, its officers, agents, representatives, servants, employees, attorneys, and all members and persons acting in concert or participation with them, pending the final disposition of the matters involved, pending before the Board, in the manner set forth above and in the petition.

3. That upon the return of the order to show cause, this Court issue an order enjoining and restraining respondent in the manner set forth above and in the petition.

4. That this Court grant such other and further relief as may be deemed just and proper.

Dated at Cincinnati, 0hio this 15th day of July 1992.

D. Randall Frye. Regional Director
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

JERRY M. HUNTER
General Counsel
ROBERT E. ALLEN
Associate General Counsel
EARL L. LEDFORD

APPENDIX H

Acting Regional Attorney

_____

Carol. L. Shore, Trial Attorney
Region 9, National Labor Relations Board

APPENDIX H

APPENDIX H-9

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DOROTHY L. MOORE-DUNCAN, Regional Director of the Fourth Region of the NATIONAL LABOR RELATIONS BOARD, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,	*	
Petitioner,	*	
v.	*	Civil No.
HORIZON HOUSE DEVELOPMENTAL SERVICES, INCORPORATED	*	
Respondent.	*	

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This cause came to be heard upon the verified petition and amended petition of Dorothy L. Moore-Duncan, Regional Director of the Fourth Region of the National Labor Relations Board (herein called the Board), for a temporary injunction pursuant to Section 10(j) of the National Labor Relations Act, as amended (61 Stat. 149; 73 Stat. 544; 29 U.S.C. Sec. 160 (j); (herein called the Act), pending the final disposition of the matters involved herein pending before the Board, and upon the issuance of an order to show cause why injunctive relief should not be granted as prayed for in said petition and amended petition. The Court has fully considered the petition, evidence and arguments of counsel and upon the entire record, the Court makes the following:

APPENDIX H

FINDINGS OF FACT

1. Petitioner is Regional Director for the Fourth Region of the Board, an agency of the United States, and files this Petition for and on behalf of the Board.

2. Jurisdiction of this Court is invoked pursuant to Section 10(j) of the Act.

3. On October 2, 2000, District 1199C, National Union of Hospital and Health Care Employees, AFSCME, AFL-CIO, (herein called the Union), pursuant to provisions of the Act, filed a charge with the Board in Case 4-CA-29830 alleging that Respondent, an employer within the meaning of Section 2(2) of the Act, has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

4. On February 23, 2001, based upon the charge in Cases 4-CA-29830, the Acting General Counsel of the Board, on behalf of the Board, by the Petitioner, issued a Complaint and Notice of Hearing in Case 4-CA-29830, pursuant to Section 10(b) of the Act, alleging that Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

5. There is, and Petitioner has reasonable cause to believe, that the allegations set forth in the Complaint and Notice of Hearing in Case 4-CA-29830 are true, and that Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, affecting commerce within the meaning of Section 2(6) and (7) of the Act. More particularly:

(a) At all material times, Respondent, a Pennsylvania corporation with an office at 120 South 30th Street, Philadelphia, Pennsylvania, has been engaged in providing health care and related services to the mentally disabled.

(b) During the past year, Respondent, in conducting its business operations described above in subparagraph (a), received gross revenues in excess of $250,000 and purchased and received at its Philadelphia, Pennsylvania office goods valued in excess of $5,000 directly from points outside the Commonwealth of Pennsylvania.

(c) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and has been a health care institution within the meaning of Section 2(14) of the Act.

(d) At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

(e) At all material times, Robert Lindsey and Rita Kucsan held the positions of Respondent's Human Resources Manager and Director of Human Resources, respectively, and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act.

(f) At all material times, since at least July 27, 2000, Respondent has designated its attorney Guy Vilim as its negotiator for bargaining with the Union and, in that capacity, he has been an agent of Respondent within the meaning of Section 2(13) of the Act.

(g) The following employees of Respondent constitute a unit, herein called the Unit, appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time, regular part-time and substitute Resident Advisors II and III employed in the Bucks County,

> Pennsylvania Division of Respondent, excluding all other employees, including home coordinators, team coordinators, program specialists guards and supervisors as defined in the Act.

(h) On July 3, 1997, the Union was certified as the exclusive collective bargaining representative of the Unit.

(i) At all material times, since July 3, 1997, based on Section 9(a) of the Act, the Union has been the exclusive collective bargaining representative of the Unit.

(j) In July 1999, a more precise date being presently unknown to the General Counsel, date being presently unknown to the Petitioner, Respondent and the Union entered into their first collective bargaining agreement, herein called the Agreement, effective by its terms from December 21, 1998 through September 30, 2000.

(k) On or about July 1, 2000, the Union, by letter, requested Respondent to begin negotiations for a new collective bargaining agreement.

(l) From on or about August 14, 2000 until on or about September 30, 2000, the Union, by several telephone calls from its negotiator Vivian Gioia to Guy Vilim, attempted to schedule negotiations for a new collective bargaining agreement.

(m) Since, on or about July 1, 2000, Respondent has failed and refused to bargain with the Union for a new collective bargaining agreement.

(n) Respondent did not respond to the telephone calls described above in subparagraph (b).

(o) On or about August 14, 2000, the Union, by letter to Rita Kucsan requested the following information: (1) recent payroll run; (2) medical benefit

information that included the amount paid by the employees, the amount paid by the employer, and the actual premium cost; and (3) the number of regular and overtime hours worked by each employee during the past 12 months per pay period.

(p) On or about August 30, 2000, the Union, by facsimile transmission to Robert Lindsey, requested the "Leave/Bank" policy referred to in Article 19 of the Agreement.

(q) The information described above in subparagraphs (o) and (p), is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the Unit.

(r) Since, on or about August 14, 2000, Respondent has failed and refused to furnish to the Union the information described above in subparagraph (o).

(s) Since, on or about August 30, 2000, Respondent has failed and refused to furnish to the Union the information described above in subparagraph (p).

(t) On or about August 30, 2000, the Union filed grievances protesting the following terms and conditions of employment of the Unit: (1) supervisors performing bargaining unit work; (2) employees not being paid overtime; and (3) failure to post work schedules.

(u) The subjects set forth above in subparagraph (a), relate to wages, hours and other terms and conditions of employment of the Unit and are mandatory subjects for the purposes of collective bargaining.

(v) Since, on or about August 30, 2000, Respondent has failed and refused to process the grievances described above in subparagraph (t).

(w) Petitioner has reasonable cause to believe that, by the conduct described above in subparagraphs (m), (n), (r), (s) and (v), Respondent has been failing and refusing to bargain with the exclusive collective bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act and that the unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. It may be fairly anticipated that, unless enjoined and restrained, Respondent will continue its aforesaid unlawful acts and conduct in violation of Section 8(a)(1) and (5) of the Act.

7. Unless the continuation or repetition of the above described unfair labor practices is restrained, a serious failure of enforcement of important provisions of the Act, and of the public policy embodied in the Act, will result before an ultimate order of the Board can issue.

8. To avoid the serious consequences set forth above, it is essential, appropriate, just and proper, for the purposes of effectuating the policies of the Act and of avoiding substantial, irreparable and immediate injury to such policies, to employees, and to the public interest, and in accordance with Section 10(j) of the Act, that, pending the final disposition of the matters involved herein pending before the Board, Respondent be enjoined and restrained from the commission of the acts and conduct described, similar or related acts or conduct or repetitions thereof.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and of the subject matter of the proceeding, and under Section 10(j) of the Act, is empowered to grant injunctive relief.

2. There is, and Petitioner has reasonable cause to believe that:

(a) Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

(b) The Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

(c) Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Sections 8(a)(1) and (5) of the Act, affecting commerce within the meaning of Section 2(6) and (7) of the Act, and a continuation of these unfair labor practices will impair the policies of the Act as set forth in Section 1(b) thereof.

3. To preserve the issues for the orderly determination as provided in the Act, it is appropriate, just, and proper that, pending the final disposition of the matters herein involved pending before the Board, Respondent, its officers, representatives, agents, servants, employees, attorneys, and all members and persons acting in concert or participation with them, be enjoined and restrained from the commission, continuation, or repetition, of the acts and conduct set forth in Finding of Facts paragraph 5, subparagraphs (m), (n), (r), (s), (v) and (w) above, acts or conduct in furtherance or support thereof, or like or related acts or conduct, the commission of which in the future is likely or may fairly be anticipated from Respondent's acts and conduct in the past.

Done at Philadelphia, Pennsylvania this _____ day of _____, 2001.

APPENDIX H

_____

Harvey Bartle, III,
U.S. District Court Judge

APPENDIX H-10

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Roberto G. Chavarry, Regional Director
of the Twenty-fifth Region of the
National Labor Relations Board,
for and on behalf of the
NATIONAL LABOR RELATIONS BOARD

Petitioner

v. CIVIL NO.

GREAT LAKES DISTRIBUTING & STORAGE, INC. and
GREAT LAKES PACKAGING, INC.

Respondent

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on to be heard upon the verified petition of Roberto G. Chavarry, Regional Director of the Twenty-fifth Region of the National Labor Relations Board, herein called the Board, for preliminary injunction pursuant to Section 10(j) of the National Labor Relations Act, as amended [61 Stat. 149; 73 Stat. 544; 29 U.S.C. Sec. 160(j)], herein called the Act, pending the final disposition of the matters involved pending before the Board, and upon the issuance of an order to show cause why injunctive relief should not be granted as prayed for in said petition. The Court has fully

considered the petition, evidence and arguments of counsel and upon the entire record, the Court makes the following:

I. FINDINGS OF FACT:

1. Petitioner is the Regional Director of the Twenty-fifth Region of the Board, an agency of the United States, and filed this petition for and on behalf of the Board.

2. On or about November 27, 2000, District No. 90, International Association of Machinists and Aerospace Workers, AFL-CIO, a/w International Association of Machinists and Aerospace Workers, AFL-CIO, herein called the Union, filed a charge with the Board, and on January 18, 2001 filed an amended charge with the Board alleging, inter alia, that Great Lakes Distributing & Storage, Inc., herein called GLDS, and Great Lakes Packaging, Inc., herein called GLP and herein jointly called respondent, has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

3. The aforesaid charges were referred the Regional Director of the Twenty-fifth Region of the Board.

4. On February 27, 2001, upon the charges filed against respondent by the Union, the Acting General Counsel of the Board, on behalf of the Board, by the Regional Director, pursuant to Section 10(b) of the Act, issued a complaint and notice of hearing against respondent alleging that respondent engaged in violations of Section 8(a)(1) and (5) of the Act.

5. There is a substantial likelihood that the Petitioner will, in the underlying administrative proceeding in Case 25-CA-27340-1 Amended, establish that:

APPENDIX H

(a) At all material times GLDS and GLP have been affiliated business enterprises with common officers, ownership, directors, management, and supervision; have formulated and administered a common labor policy; have shared common premises and facilities; have provided services for and made sales to each other; have interchanged personnel with each other; and have held themselves out to the public as single-integrated business enterprises.

(b) Based on its operations described above in Findings of Fact 5(a), GLDS and GLP constitute a single-integrated business enterprise and a single employer within the meaning of the Act.

` (c) About November 11, 2000, respondent purchased the microwave popcorn packaging portion of the Valparaiso, Indiana facility of the Orville Redenbacher Popcorn Division of ConAgra Grocery Products Company, herein called Orville Redenbacher, and since then has continued to operate the microwave popcorn packaging portion of the business of the Valparaiso, Indiana facility of Orville Redenbacher in basically unchanged form, and has employed as a majority of its employees individuals who were previously employees of Orville Redenbacher.

(d) Based upon the operations described above in Findings of Fact 5(c), respondent has continued the employing entity of and is a successor to Orville Redenbacher.

(e) At all material times respondent, with an office and place of business in Valparaiso, Indiana, herein called respondent's facility, has been engaged within this judicial district in the co-packaging, distribution and storage of food products. During the past twelve months, respondent, in conducting its business

operations described above, purchased and received at its Valparaiso, Indiana facility goods valued in excess of $50,000 directly from points outside the State of Indiana. During the past twelve months, respondent, in conducting its business operations described above, sold and shipped from its Valparaiso, Indiana, facility goods valued in excess of $50,000 directly to points outside the State of Indiana. At all material times respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

(f) The Union, an unincorporated association, is an organization in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, and conditions of employment, and is a labor organization within the meaning of Section 2(5) of the Act.

(g) The following employees of respondent, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act [29 U.S.C. Sec.159(b)]:

> All production and maintenance employees, including all shipping and receiving employees of the Employer at its Valparaiso, Indiana facility, but excluding all office clerical employees, all professional employees, all guards, and all supervisors as defined in the Act.

(h) On April 7, 1978, the Union was certified as the exclusive collective-bargaining representative of the unit described above in Findings of Fact 5(g), herein also called the Unit.

(i) At all times since November 11, 2000, and continuing to date, based on the Findings of Fact 5(c) and 5(d), the Union has been the designated exclusive

collective-bargaining representative for the purpose of collective bargaining of the employees in the Unit.

(j) From about April 7, 1978 to about June 1, 2000 the Union had been the representative for the purpose of collective bargaining of the employees in the Unit described above in Findings of Fact 5(g) and, by virtue of Section 9(a) of the Act, has been and is now, the exclusive representative of all the employees in said Unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

(k) At all times since November 11, 2000, and continuing to date, the Union has been the representative for the purpose of collective bargaining of the employees in the Unit described above in Findings of Fact 5(g), and, by virtue of Section 9(a) of the Act, has been and is now, the exclusive representative of all the employees in said Unit for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

(l) At all material times the following individuals held the positions set forth opposite their respective names and have been supervisors of respondent within the meaning of Section 2(11) of the Act [29 U.S.C. Sec. 152(11)] and agents of respondent within the meaning of Section 2(13) of the Act[29 U.S.C. Sec. 152(13)]:

Joe Glusak	-	Owner and President
Bradly Hendrickson		Owner
David Jancosek		Owner
William English		Owner
Thomas Adams		Owner

Kim Defries	-	Line Supervisor
John Schlink		Maintenance Manager

(m) By letters dated November 20, 2000 and January 19, 2001, the Union requested that respondent recognize it as the exclusive collective-bargaining representative of the Unit and bargain collectively with the Union as the exclusive collective-bargaining representative of the Unit.

(n) Since about November 20, 2000, respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the Unit.

6. By the acts and conduct set forth above there is a substantial likelihood that the Regional Director will establish in the underlying administrative proceeding before the Board that respondent has interfered with, restrained and coerced its employees, and is interfering with, restraining and coercing its employees, in the exercise of their rights guaranteed to them by Section 7 of the Act; that respondent has failed and refused, and continues to fail and refuse to bargain collectively with the Union as the collective bargaining representative of its employees; and that by all of said conduct respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act and affecting commerce within the meaning of Section 2(6) and (7) of the Act.

7. Unless the interim relief requested is granted and respondent is enjoined and restrained from engaging in the unfair labor practices referred to above, a serious flouting of the Act will continue with the result that enforcement of important provisions of the Act and of public policy will be thwarted because of the reduction of the

possibility of fully restoring the status quo ante is provided. It may be fairly anticipated that, unless enjoined, respondent will continue to repeat the acts and conduct described above in Findings of Fact 5(n), or similar or like acts and conduct, in violation of Section 8(a)(1) and (5) of the Act, with the result that employees will be deprived of the rights guaranteed to them by the Act because of the improbability of being able to restore them to the status quo ante. Such harm clearly outweighs any harm respondent will suffer if the requested injunctive relief is granted.

It is, therefore, essential, appropriate, just and proper, for the purposes of effectuating the policies of the Act, and in accordance with the provisions of Section 10(j) thereof, that pending final disposition of the matters involved herein pending before the Board, respondent be enjoined and restrained from the commission of the acts and conduct set forth in the order granting preliminary injunction in this case.

CONCLUSIONS OF LAW:

1. This Court has jurisdiction of the parties and of the subject matter of this proceeding and, under Section 10(j) of the Act, is empowered to grant injunctive relief.

2. There is a substantial likelihood that Petitioner will, in the underlying administrative proceeding in Case 25-CA-27340-1 Amended establish that:

(a) The Union is a labor organization within the meaning of Sections 2(5), 8(b) and 10(j) of the Act.

(b) Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

(c) Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, affecting commerce within the meaning of Section 2(6) and (7) of the Act, and a continuation of these practices will impair the policies of the Act, as set forth in Section 1(b) thereof.

3. To preserve the issues for the orderly determination as provided in the Act, it is appropriate, just and proper, that pending the final disposition of the matters herein involved pending before the Board, respondent, its officers, representatives, agents, servants, employees, and all members and persons acting in concert or participation with them, be enjoined as set forth hereinafter in the order granting preliminary injunction in this case.

Entered: , 2001

_____

U. S. District Court Judge

APPENDIX H

APPENDIX H-11

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN KOLLAR, ACTING REGIONAL DIRECTOR FOR. REGION 8 OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

CIVIL NO. 4:99 CV 0392
JUDGE PETER C. ECONOMUS

UNITED STEELWORKERS OF AMERICA, LOCAL No.2155

and

UNITED STEELWORKERS OF AMERICA, LOCAL No. 2155-7

Respondents

ORDER GRANTING PRELIMINARY INJUNCTION

This cause came to be heard upon the verified petition of John Kollar, Acting Regional Director of the Eighth Region of the National Labor Relations Board, herein called the Board, for a preliminary injunction pursuant to Section 10(j) of the National Labor Relations Act, as amended, [61 Stat. 149; 73 Stat. 544; 29 U.S.C. Sec. 160(j)], herein called the Act, pending the final disposition of the matters involved pending before the Board, and upon issuance of an order to show cause why injunctive relief should not be granted as prayed for in said petition. The Court, upon consideration of the pleadings,

evidence, briefs, arguments of counsel, and the entire record in the case, has made and filed its findings of fact and conclusions of law finding and concluding that there is reasonable cause to believe that Respondents have engaged in, and are engaging in, acts and conduct in violation of Section 8(b)(1)(A) of the Act, affecting commerce within unless enjoined.

Now, therefore, upon the entire record, it is,

ORDERED, ADJUDGED AND DECREED, pending the final disposition of the matters involved pending before the Board:

1. That Respondents, United Steelworkers of America Locals No. 2155 and 2155-7, their officers, agents, representatives, servants, employees, and all members and persons acting in concert or participation with them be, and they hereby are, enjoined and restrained from restraining and coercing the employees, or supervisors, or management personnel in the presence of employees of RMI Titanium Company, herein called RMI, or any other person doing business with RMI, by:

(a) Engaging in mass picketing thereby blocking ingress to and egress from, or in any other manner preventing, attempting to prevent or hindering employees, customers, or suppliers from entering or leaving the RMI Titanium facility located in Niles, Ohio.

(b) Inflicting or attempting to inflict injury or damage to the person or property, including motor vehicles, of any employees or any persons doing business with RMI Titanium.

(c) Threatening non-striking employees or others with injury to their person, their families or damage to their property.

(d) Possessing any rocks, bricks projectiles, sticks, clubs, jack-rocks, nails, explosive devices or any other dangerous weapons at the Respondents' picket lines maintained at RMI's Niles, Ohio facility, or within one mile of such facility.

(e) Surveilling employees and/or persons doing business with RMI at RMI's Niles, Ohio facility by the use of video cameras, film or digital cameras and/or the written recording of automobile license plate numbers.

(f) Engaging in any mass picketing, blocking of ingress and egress into or out of RMI's Niles, Ohio facility and/or by engaging in oral threats and/or physical assaults against property or persons along Warren Avenue for a distance of one mile in both directions from RMI's Niles, Ohio facility, which creates a "gauntlet" to persons either entering or leaving the Niles facility

(g) In any other manner, or by any other means, restraining or coercing the employees or supervisors or management personnel in the presence of employees of RMI Titanium or any other person doing business with RMI Titanium, in the exercise of their rights guaranteed under Section 7 of the Act.

2. (a) That Respondents provide each of their officers, representatives, agents, members and picketers with a copy of this Order and a clear written directive to refrain from engaging in any picket line misconduct enjoined by this Court, or any other similar conduct.

(b) That Respondents post in their business offices and local meeting halls the Court's Opinion and Order In this case.

(c) That Respondents provide to this Court, with copies submitted to the Regional Director of the Eighth Region of the Board within ten (10) days of the issuance

of this Order, sworn affidavits describing with specificity what steps they have taken to comply with the terms of this injunction, including proof of service of the above document.

(d) That Respondents designate a picket line captain at all times they maintain a picket line at RMI's Niles, Ohio facility, who will be present at the picket line and who will control the conduct of all pickets, and the schedule of identified picket captains shall at all times be given beforehand to the National Labor Relations Board

(e) That Respondents shall, before each employee shift change at RMI's Niles, Ohio facility, police and remove any and all debris in the entranceways and roadways at the entrances to Gates 1 and 3 at the Niles facility.

3. That the United States Marshals take all actions deemed necessary to enforce the provisions and prohibitions set forth in this Order.

4. That this case shall remain on the docket of this Court and on compliance by Repondents with their obligations undertaken hereto, and upon disposition of the matters pending before the Board, the Petitioner shall cause this proceeding to be dismissed.

Dated at Youngstown, Ohio this 10th day of March 1999.

_____

Peter C. Economus
United States District Judge

APPENDIX H

APPENDIX H-12

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

Roberto G. Chavarry, Regional Director
of the Twenty-fifth Region of the
National Labor Relations Board,
for and on behalf of the
NATIONAL LABOR RELATIONS BOARD

Petitioner

v. CIVIL NO.

GREAT LAKES DISTRIBUTING & STORAGE, INC. and
GREAT LAKES PACKAGING, INC.

Respondent

ORDER GRANTING PRELIMINARY INJUNCTION

This cause came to be heard upon the verified petition of Roberto G. Chavarry, Regional Director of the Twenty-fifth Region of the National Labor Relations Board, herein called the Board, for preliminary injunction pursuant to Section 10(j) of the National Labor Relations Act, as amended [61 Stat. 149; 73 Stat. 544; 29 U.S.C. Sec. 160(j)], herein called the Act, pending the final disposition of the matters involved pending before the Board, and upon the issuance of an order to show cause why injunctive relief should not be granted as prayed for in said petition. The Court, upon consideration of the pleadings, evidence, briefs, arguments of counsel, and the entire record in this case, has made and filed its findings of fact and conclusions of law finding and concluding that there is a likelihood that the Regional Director will, in the

underlying Board proceeding, establish that respondent has engaged in, and is engaging in, acts and conduct in violation of Section 8(a)(1) and (5) of the Act, affecting commerce within the meaning of Section 2(6) and (7) of the Act, and that such acts and conduct will likely be repeated or continued unless enjoined.

Now, therefore, upon the entire record, it is

ORDERED, ADJUDGED AND DECREED that, pending final disposition of the matters involved pending before the National Labor Relations Board, herein called the Board, an injunction issue enjoining and restraining and ordering and directing respondent Great Lakes Distributing & Storage, Inc, and Great Lakes Packaging, Inc., its officers, agents, servants, employees, attorneys, and all persons acting in concert or participation with it or them, as follows:

A. Enjoining and restraining respondent Great Lakes Distributing & Storage, Inc, and Great Lakes Packaging, Inc., from:

(i) failing and refusing to recognize and to bargain collectively in good faith with the Union as the exclusive collective-bargaining representative of its employees in the appropriate collective bargaining unit;

(ii) in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed them by Section 7 of the Act;

B. Ordering and directing respondent Great Lakes Distributing & Storage, Inc, and Great Lakes Packaging, Inc., pending final Board adjudication, to:

(i) recognize and on request bargain in good faith with the Union as the exclusive collective-bargaining representative of its employees in the appropriate

collective bargaining unit respecting rates of pay, hours of work, or other terms and conditions of employment; (ii) post copies of the district court's opinion and order at its Valparaiso, Indiana facility at all locations where notices to employees customarily are posted, maintain said postings during the pendency of the Board's administrative proceedings free from all obstructions and defacements, and grant agents of the Board reasonable access to respondent's Valparaiso, Indiana facility to monitor compliance with the posting requirement; and (iii) within twenty (20) days of the issuance of the district court's order, file with the court, with a copy submitted to the Regional Director of the Board for Region 25, a sworn affidavit from a responsible official of respondent setting forth with specificity the manner in which respondent is complying with the terms of the decree.

IT IS FURTHER ORDERED that this case shall remain on the docket of this Court and on compliance by respondent with its obligations undertaken hereto, and upon disposition of the matters pending before the Board, the petitioner shall cause this proceeding to be dismissed.

Dated at Hammond, Indiana, this _____ day of _____, 2001.

_____
United States District Judge

APPENDIX H

APPENDIX H-13

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

****

LEONARD P. BERNSTEIN, Acting Regional	*	
Director for Region Seventeen of the	*	
National Labor Relations Board,	*	
for and on behalf of the	*	
NATIONAL LABOR RELATIONS BOARD	*	
	*	
Petitioner	*	
v.	*	Civil No.
	*	
CARTER & SONS FREIGHTWAYS, INC.	*	
	*	
Respondent	*	

****

ORDER GRANTING TEMPORARY INJUNCTION

This cause came on to be heard upon the verified petition of Leonard P. Bernstein, Acting Regional Director of the Seventeenth Region of the National Labor Relations Board, for and on behalf of said Board, for a temporary injunction pursuant to Section 10(j) of the National Labor Relations Act, as amended, pending the final disposition of the matters involved pending before said Board, and upon the issuance of an order to show cause why injunctive relief should not be granted as prayed in said

petition. The Court, upon consideration of the pleadings, evidence, memoranda, argument of counsel, and the entire record in the case, has made and filed its Findings of Fact and Conclusions of Law, finding and concluding that there is reasonable cause to believe that Respondent has engaged in, and is engaging in, acts and conduct in violation of Section 8(a)(1) and (3) of said Act, affecting commerce within the meaning of Section 2(6) and (7) of said Act, and that such acts and conduct will likely be repeated or continued unless enjoined.

Now, therefore, upon the entire record, it is

ORDERED, ADJUDGED AND DECREED that, pending the final disposition of the matters involved pending before the National Labor Relations Board, Respondent Carter & Sons Freightways, Inc., its officers, representatives, agents, servants, employees, attorneys, successors and assigns, and all persons acting in concert or participation with it or with them, be and they hereby are enjoined and restrained from:

(a) Terminating its employees because of their support for and activities on behalf of the International Brotherhood of Teamsters, Local Union No. 795, AFL-CIO (the Union);

(b) Subcontracting its work to other companies in order to avoid unionization or bargaining with the Union;

(c) Threatening to close its facility and to discharge employees if employees continue to support the union, or its employees select the Union as their collective-bargaining representative;

(d) Ordering employees to retrieve union authorization cards they have signed on behalf of the Union;

(e) Threatening employees with unspecified reprisals because employees continued their support for and activities on behalf of the Union;

(f) Interrogating employees about their union activities and support and the union activities and support of other employees;

(g) In any other manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, pending the final disposition of the matters pending before the National Labor Relations Board, Respondent Carter & Sons Freightways, Inc. its officers, representatives, agents, servants, employees, attorneys, successors and assigns, and all persons acting in concert or participation with it or them, shall take the following affirmative action:

(a) Restore and reinstitute the operations at the Wichita, Kansas facility to their status as of June 19, 1997;

(b) Offer interim reinstatement at the Wichita, Kansas facility, to employees Bill Casselman, Steve Hoelscher, Ed Newman, and Glen Tucker at their previous wage rates and working conditions;

(c) Recognize and, upon request, bargain in good faith with the International Brotherhood of Teamsters, Local Union No. 795, AFL-CIO, as the exclusive collective-bargaining representative of the Unit described below at Respondent's Wichita, Kansas facility, concerning their wages, hours, and other terms and conditions of employment. This bargaining obligation is effective retroactive to June 19, 1997. The unit is:

> All full-time and regular part-time city pickup and delivery drivers and road drivers employed by Respondent at its facility located in Wichita, Kansas, but excluding office

clerical employees, dispatchers, professional employees, guards, and supervisors as defined in the Act.

(d) Post copies of the District Court's Opinion and Order, at Respondent's Wichita, Kansas facility where notices to employees are customarily posted, said postings to be maintained during the pendency of the Board's administrative proceedings free from all obstructions and defacements; and grant to agents of the National Labor Relations Board reasonable access to Respondent's Wichita, Kansas facility to monitor compliance with this posting requirement;

(e) File within twenty days of the issuance of the District Court's Opinion and Order, with a copy submitted to the Regional Director of Region 17 of the National Labor Relations Board, a sworn affidavit from a responsible official of Carter & Sons Freightways, Inc., setting forth with specificity the manner in which Respondent has complied with the terms of this Order.

Done at Wichita, Kansas this _____day of _____, 1997.

_____
UNITED STATES DISTRICT JUDGE

APPENDIX H

APPENDIX H-14

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT H. MILLER, Regional Director of Region 20 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, Petitioner, vs. RECYCLING INDUSTRIES, INC. Respondent.	Civil No. TEMPORARY INJUNCTION

This case came to be heard upon the verified Petition of Robert H. Miller, Regional Director of Region 20 of the National Labor Relations Board, herein called the Board, for and on behalf of the Board, for a temporary injunction pursuant to Section 10(j) of the National Labor Relations Act, as amended [29 U.S.C. § 160(j)], herein called the Act, pending the final disposition of the matters herein involved now pending before said Board, and upon the issuance of an Order to Show Cause why injunctive relief should not be granted as prayed in said Petition. All parties were afforded full opportunity to be heard, and the Court, upon consideration of the pleadings, the affidavits, declarations, and exhibits, the briefs and arguments of counsel, and the entire record in the case, has made its Findings of Fact and Conclusions of Law, finding and concluding that, in the underlying administrative proceeding in Board Case 20-ca-29897-1, there is a likelihood that Petitioner will establish that Recycling Industries, Inc., herein called Respondent, has engaged in, and is engaging in, acts and conduct in violation of Section 8(a)(1) and (3) of the Act [29 U.S.C. § 158(a)(1) and (3)] affecting commerce within the meaning of Section 2, subsections (6) and (7) of the Act [29 U.S.C.

§ 152(6) and (7)], and that in balancing the equities in this matter, the said violations of the Act will likely be repeated or continued and will irreparably harm the employees and the Union and the public interest, and will thwart the purposes and policies of the Act, unless enjoined.

Now, therefore, upon the entire record, it is hereby

ORDERED, ADJUDGED AND DECREED that, pending the final disposition of the matters now pending before the National Labor Relations Board, Respondent, its officers, representatives, supervisors, agents, servants, employees, attorneys and all persons acting on its behalf or in participation with it, be, and they hereby are, enjoined and restrained from:

(a) telling employees it would be futile for them to select International Longshore and Warehouse Union, Local 17, AFL-CIO, herein referred to as the Union, as their representative;

(b) threatening to file bankruptcy and lay off its employees if they select the Union as their collective bargaining representative;

(c) announcing and subsequently granting wage increases to employees as an inducement for them to abandon their support for the Union;

(d) soliciting employees to sign a petition stating that they no longer want the Union as their collective-bargaining representative;

(e) requiring employees to complete a questionnaire containing questions calculated to determine their union sympathies as a condition of participating in a raffle with substantial cash prizes;

(f) disciplining, suspending or discharging employees because of their Union and/or protected concerted activity.

(g) in any other manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

It is further

ORDERED, ADJUDGED AND DECREED that, pending the final disposition of the matters herein now pending before the National Labor Relations Board, Respondent, its officers, representatives, supervisors, agents, servants, employees, attorneys and all persons acting on its behalf or in participation with it, shall within five (5) days hereof, take the following steps:

(a) offer interim employment to Jorge Ontiveros to his former job position and working conditions, or if that job position no longer exists, to a substantially equivalent position without prejudice to his seniority or rights and privileges, displacing, if necessary, any newly-hired or reassigned worker;

(b) recognize and bargain with the Union as the collective bargaining representative of its employees in the bargaining unit concerning their wages, hours and other terms and conditions of employment, including providing the Union with advance notice and an opportunity to bargain over any intended changes to their wages, hours and other terms and conditions of employment;

The appropriate bargaining unit is:

> All full-time and regular part-time machine operators, forklift operators, baler operators, buyers, clerical/cashier-weigh masters, drivers, welders, mechanics, and sorter/laborers employed by Respondent at its 3300 Power Inn road, Sacramento, California location; excluding all other employees, guards and supervisors as defined in the Act.

(c) rescind and remove from employees' personnel files any reference to unlawful disciplinary actions/warnings and refrain from relying upon such discipline in the future;

(d) post copies of the Court's Temporary Injunction and Findings of Fact and Conclusions of Law, in both Spanish and English, at Respondent's 3300 Power Inn Road, Sacramento, California facility, in all locations where notices to its employees are normally posted; maintain these postings during the Board's

administrative proceeding free from all obstructions and defacement; grant all employees free and unrestricted access to said postings; and grant to agents of the Board reasonable access to the facility to monitor compliance with the posting requirement; and

(e) within twenty (20) days of the issuance of the Court's order, file with the Court, with a copy submitted to the Regional Director of the Board for Region 20, a sworn affidavit from a responsible official of Respondent, setting forth with specificity the manner in which Respondent is complying with the terms of the decree.

DATED AT San Francisco, California, this _____ day of _____, 2001.

_____
United States District Judge

APPENDIX H

APPENDIX H-15

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN KOLLAR, Acting Regional Director for Region 8 of the National Labor Relations Board, for and on Behalf of the National Labor Relations Board,	)	**CASE NO. 4:99 CV 0392**
Petitioner	)	**JUDGE PETER C. ECONOMUS**
vs.	)	
UNITED STEEL WORKERS OF AMERICA, LOCAL NO. 2155 and UNITED STEELWORKERS OF AMERICA, LOCAL NO. 2155-7,	)	
Respondents	)	

TEMPORARY RESTRAINING ORDER

The petition of John Kollar, Acting Regional Director for Region 8 of the National Labor Relations Board, herein the Board, for and on behalf of the Board, having been filed and properly served on United Steelworkers of America Local No. 2155 and Local No. 2155-7, herein jointly referred to as the Respondents, pursuant to Section 10(j) of the National Labor Relations Act, as amended, 29 U.S.C. Section 160(j), herein the Act, following the issuance of the unfair labor practice complaint in Case 8-CA-_____, praying for a temporary injunction order against the Respondents, pending final disposition of the matters involved herein pending before the Board, and Petitioner having filed a motion for a temporary restraining order, pursuant to Fed. R. Civ. P.

65(b), the petition and motion being verified and supported by affidavits and exhibits; and

IT APPEARING to the Court from the verified petition, motion, other pleadings, affidavits, exhibits, argument of counsel, the hearing held before the Court on _____, and the entire record in this matter, that:

1. There is reasonable cause to believe [in traditional equity circuits, use the "likelihood of success on the merits" standard] that Respondents are statutory labor organizations within the meaning of Section 2(5) of the Act;

2. There is reasonable cause to believe that the Respondents through their agents have engaged, inter alia, in picket line violence, threats and property damage, mass picketing and blocking of ingress and egress at the facility of RMI Titanium located in Niles, Ohio;

3. There is reasonable cause to believe that the above-described conduct of the Respondents violates Section 8(b)(1)(A) of the Act and that said unfair labor practices affect commerce or an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act;

4. There is substantial evidence that local police authorities and state courts are unable to control and abate the misconduct of the Respondents;

5. There is imminent danger that, absent immediate injunctive relief, substantial and irreparable injury to the statutory rights of employees under the Act will be inflicted by the Respondents and that the final administrative order of the Board will be frustrated or nullified if interim relief is not granted; and

6. It is appropriate and just and proper, within the meaning of Section 10(j) and Fed. R. Civ. P. 65(b) that, pending completion of the hearing before the Court on the merits of the petition, and for a period of ten (10) days from the entry of this Order, that the Respondents be temporarily enjoined and restrained from the commission of further acts and misconduct in violation of the Act as described in the petition.

WHEREFORE, IT IS HEREBY ORDERED that United Steelworkers of America Local No. 2155 and Local No. 2155-7, herein jointly referred to as the Respondents, their officers, agents, servants, employees, attorneys, and all members and persons acting in concert or participation with them, for a period of ten (10) days' duration from the date of this Order, as provided for in Rule 65(b) of the Federal Rules of Civil Procedure and pursuant to Section 10(j) of the Act, are **ENJOINED AND RESTRAINED** from:

1. Engaging in any mass picketing or blocking ingress to or egress from the RMI Titanium facility located in Niles, Ohio;

2. Inflicting or attempting to inflict injury or damage to persons or property, including motor vehicles, of any employees of RMI Titanium or of any persons doing business with RMI Titanium;

3. Threatening non-striking employees or other individuals with injury to their person or their families, or with damage to their property;

4. Possessing any rocks, bricks, projectiles, sticks, clubs, jackrocks, nails, explosive devices or any other dangerous weapons at the Respondents' picket lines maintained at the Niles, Ohio facility of RMI Titanium, or within one mile of such facility;

5. Surveilling employees and/or persons doing business with RMI Titanium at its Niles, Ohio facility by the use of video cameras, film, or digital cameras and/or the written recording of automobile/truck license plate numbers;

6. Engaging in any mass picketing, blocking of ingress or egress into or out of the Niles, Ohio facility of RMI Titanium by engaging in any oral threats and/or physical assaults against property or persons along Warren Avenue for a distance of one mile in both directions from the Niles, Ohio facility, which creates a "gauntlet" to persons either entering or leaving the Niles facility;

7. In any other manner, or by any other means, restraining or coercing the employees of RMI Titanium or any other person doing business with RMI Titanium in the exercise of their rights guaranteed under Section 7 of the Act.

IT IS FURTHER ORDERED that, to assure compliance with the Court's temporary restraining order and because of the local authorities' inability to deal with the situation, the United States Marshals Service **IS DIRECTED** to take those actions deemed necessary to enforce the provisions and prohibitions set forth in this Order. A copy of this Order shall be served upon the United States Marshal for the Northern District of Ohio.

IT IS FURTHER ORDERED that service of a copy of this Order be made forthwith by a United States Marshal upon the Respondents, United Steelworkers of America Local No. 2155 and Local No. 2155-7, in any manner provided in the Federal Rules of Civil Procedure for the United States District Courts and that proof of such service be filed with the Court.

SO ORDERED this ___ day of _____, at _____am/pm at Cleveland, Ohio.

APPENDIX H

_____
PETER C. ECONOMUS
UNITED STATES DISTRICT JUDGE

APPENDIX I

SAMPLE PLEADINGS AND ARGUMENTS FOR 10(j) PROTECTIVE ORDER OR SEQUESTRATION OF ASSETS

APPENDIX I

APPENDIX I-1

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

****

ALVIN BLYER, Regional Director
of Region 29 of the National Labor
Relations Board, for and on behalf of
the NATIONAL LABOR RELATIONS BOARD

Petitioner

v. Civil No.

UNITRON COLOR GRAPHICS OF
NEW YORK, INCORPORATED

Respondent

****

ORDER TO SHOW CAUSE

The Motion for Temporary Restraining Order and the Petition of Alvin Blyer, Regional Director for Region Twenty-Nine of the National Labor Relations Board (herein called the NLRB or Board), having been filed in this Court pursuant to Section 10(j) of the National Labor Relations Act, as amended, 61 Stat. 149, 29 U.S.C. Sec. 160 (j) (herein called the Act), praying for a Temporary Restraining Order pursuant to Rule 65(b) of the Federal Rules of Civil Procedure (Fed. R. Civ. P) against Respondent Unitron Color Graphics of New York, Incorporated also known as LIC Group, Inc. (hereinafter Respondent) and praying for issuance of an order directing said Respondent to show cause why a temporary injunction should not be granted as prayed for in said Petition for Temporary Injunction pending the final disposition of the administrative

matters involved pending before said Board in NLRB Case Nos. 29-CA-18119, 29-CA-18381, 29-CA-18421 and 29-CA-20680 and, good cause appearing therefore,

IT IS ORDERED that Respondent shall appear before this Court at the United States Courthouse, Court Room , 225 Cadman Plaza East, Brooklyn, New York, on the 10th day of March 1998, at 2:00 p.m., or as soon as thereafter counsel can be heard, and then and there show cause, if any there be, why, pending disposition by the Court of the merits of the instant Petition for a temporary injunction, a temporary restraining order should not issue, enjoining and restraining Respondent, its representatives, agents, servants, employees, attorneys, and all persons acting in concert or participation with it, pursuant to Section 10(j) of the Act and Fed. R. Civ. P. 65(b) as prayed for in the aforesaid Petition; and

IT IS FURTHER ORDERED that Respondent shall file an Answer to the allegations of said Petition with the Clerk of this Court, and serve a copy thereof upon Petitioner at his office located at National Labor Relations Board, Twenty-Ninth Region, One MetroTech Center North, 10th Floor, Brooklyn, New York 11201, on or before the _____ day of _____ 1998, at _____; and

IT IS FURTHER ORDERED that upon issuance of any temporary restraining order in this matter, Respondent shall appear before this Court at the United States Courthouse in Brooklyn, New York, on the _____ day of _____1998, at ____.m., or as soon as thereafter counsel can be heard, and then and there show cause, if any there be, why, pending the final disposition of the administrative proceedings now pending before the Board in NLRB Case Nos. 29-CA-18119, 29-CA-18381, 29-CA-18421 and 29-CA-20680, a temporary injunction should not issue enjoining and restraining Respondent, its

representatives, officers, agents, servants, employees, attorneys and all persons acting in concert or participation with it, under Section 10(j) of the Act as prayed for in said Petition; and

IT IS FURTHER ORDERED that service of a copy of this Order, together with a copy of the Petition and Administrative Complaint, attached affidavits and exhibits and supporting legal memoranda, be forthwith made by an United States Marshal or an agent of the Board, 21 years age or older, upon Respondent, and Applied Graphics Technologies, L.P. or its counsel, Marc Kramer, Esq., in any manner provided in the Federal Rules and of Civil Procedure for the United States District Courts, by electronic facsimile transmission or by certified mail, and that proof of such service be filed with the Court.

I find that based on the affidavit of service of Robert Califf, that effective notice of this matter has been provided to Respondent and that the Court has jurisdiction herein under 10(j) of the Act.

ORDERED this day of , 1998, at Brooklyn, New York.

BY THE COURT;

_____

UNITED STATES DISTRICT JUDGE

APPENDIX I

APPENDIX I-2

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

****

ALVIN BLYER, Regional Director
of the Twenty-Ninth Region
of the National Labor Relations Board,
for and on behalf of the
NATIONAL LABOR RELATIONS BOARD,

Petitioner

v. Civil No.

UNITRON COLOR GRAPHICS OF
NEW YORK INCORPORATED

Respondent

****

STATE OF NEW YORK)
) s.s.:
COUNTY OF KINGS)

I, Alvin Blyer, being duly sworn, depose and say:

1. I am the Regional Director for Region 29 of the National Labor Relations Board. I have read the foregoing Motion for Temporary Restraining Order and Petition for Temporary Injunction and know the contents thereof and the statements therein made as upon personal knowledge are true and those made as upon information and belief I believe to be true.

2. Pursuant to Rule 3(c)(4) of the General Rules of the United States District Court For the Eastern District of New York and 28 U.S.C., Sec. 1657, this proceeding was brought on by application for Order to Show Cause, rather than by Notice of Motion, for the following reasons:

APPENDIX I

(a) I have reasonable cause to believe that the activities of Respondent, Unitron Color Graphics of New York, Incorporated, described in the Petition and exhibits, occurring in connection with the business operations of other employers engaged in commerce or in industries affecting commerce, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to and do lead to labor disputes burdening and obstructing commerce and the free flow of commerce, and it may fairly be anticipated that, unless appropriate injunctive relief, including a temporary restraining order is immediately obtained, that Respondent will dissipate or disperse its present income and assets, as well as the assets and income it will derive in the future, with the result that the affected employees will be denied their statutory rights to the detriment of the policies of the Act, the public interest, the interest of the individuals, and the interests of the parties involved.

(b) Section 10(j) of the National Labor Relations Act reflects the Congressional determination that because of the sometimes necessarily protracted and time-consuming legal procedures, Congress gave the Board power in the public interest to seek injunctive relief to prevent persons who are violating the Act from accomplishing their unlawful purpose. In Section 10(j), therefore, Congress gave the Board power to petition any District Court of the United States for appropriate temporary relief. The legislative history of the Act shows that Congress intended such power to be exercised by the Court. S. Rep. No. 105, 80th Cong., 1st Sess. 8, 27 (1947).

3. Accordingly, I respectfully submit that the Congressional mandate referred to above indicates that the most expeditious procedures available should be utilized in proceedings of this nature, and that, therefore, good and sufficient reason exists within the meaning of General Rule 3(c)(4) to bring this matter on by Order to Show Cause, rather than by Notice of Motion. This action for Injunction Under Section 10(j) of the Act, seeks to restrain conduct which is currently obstructing or leading to the obstruction of interstate commerce. Therefore, good cause exists within the meaning of 28 U.S.C.

APPENDIX I

Sec. 1657 to expedite consideration of this case by allowing it to be heard upon an Order to Show Cause rather than upon a Notice of Motion.

(c) No previous application has been made for the order or relief sought herein.

4. On March 9, 1998, Respondent was notified that the Board would be making application for a temporary injunction order on this date. No attorney has appeared in this matter for Respondent.

_____

Alvin Blyer
Regional Director, Region 29
National Labor Relations Board
One MetroTech Center North, 10th Floor
Brooklyn, New York 11201

Subscribed and sworn to before me this
th day of March, 1998

_____

Anthony A. Ambrosio
Notary Public, State of New York
No. 30-5066035
Qualified in Nassau County
Commission Expires on , 19

APPENDIX I

APPENDIX I-3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

****

RONALD S. COHEN, Acting Regional Director
of the First Region
of the National Labor Relations Board,
for and on behalf of the
NATIONAL LABOR RELATIONS BOARD,

Petitioner

v. Civil No.

ESTORIL CLEANING CO., INC.,

Respondent

and

POLAROID CORPORATION,

Party-in-Interest

****

PETITION FOR TEMPORARY INJUNCTION PURSUANT TO SECTION 10(J) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED [29 U.S.C. SECTION 160 (J)]
[AND THE ALL WRITS ACT [28 U.S.C. SECTION 1651(A)]][1]

To the Honorable, the Judges of the United States District Court, District of Massachusetts:

Comes now Ronald S. Cohen, Acting Regional Director of the First Region of the National Labor Relations Board (herein called the Board), and petitions this Court for and on behalf of the Board, pursuant to Section 10(j) of the National Labor Relations Act, as amended (61 Stat. 149; 29 U.S.C. Sec. 160 (j); herein called the Act), for appropriate injunctive relief, pending the final disposition of the matters involved herein pending

1 [redacted]

before the Board on an administrative consolidated complaint of the General Counsel of the Board charging that Estoril Cleaning Co., Inc. (herein called Respondent or Estoril) has engaged in, and is engaging in, acts and conduct in violation of Section 8(a)(1) and (5) of the Act (29 U.S.C. Sec. 158 (a)(1) and (5). In support thereof, Petitioner respectfully shows as follows:

1.

Petitioner is the Acting Regional Director of the First Region of the Board, an agency of the United States Government, and files this petition for and on behalf of the Board, which has authorized the filing of this petition.

2.

Statutory jurisdiction by this Court over this cause of action and over the Respondent is invoked pursuant to Section 10(j) of the Act.

3.

(A) On or about the dates set forth below in subparagraphs (1)-(4), Service Employees International Union, Local 254, AFL-CIO, CLC (herein called the Union or Charging Party), pursuant to the provisions of the Act, filed with the Board charges and amended charges, as follows:

(1) The charge in Case 1-CA-37811 was filed by the Union on January 6, 2000, alleging that Respondent had engaged in violations of Section 8(a)(1) and (5) of the Act.

(2) A charge and a first amended charge in Case 1-CA-37828 were filed by the Union on January 14, 2000 and February 17, 2000, respectively, alleging that Respondent had engaged in further violations of Section 8(a)(1) and (5) of the Act.

(3) The charge in Case 1-CA-37875 was filed by the Union on February 8, 2000, alleging that Respondent had engaged in further violations of Section 8(a)(1) and (5) of the Act.

(4) The charge in Case 1-CA-37931 was filed by the Union on February 24, 2000, alleging that Respondent had engaged in further violations of Section 8(a)(1) and (5).

(B) Based upon the charges filed in Cases 1-CA-37811, 1-CA-37828 and 1-CA-37875, and after investigation of the aforesaid charges in which Respondent was given the opportunity to present evidence and legal argument, the General Counsel of the Board, on behalf of the Board, pursuant to Section 3(d) of the Act, 29 U.S.C. Sec. 153(d), by the Regional Director for the Board's First Region, pursuant to Section 10(b) of the Act, 29 U.S.C. Sec. 160(b), issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (herein called the Consolidated Complaint) against Estoril on February 28, 2000. The Consolidated Complaint alleges that Respondent violated Sections 8(a)(1) and (5) of the Act by engaging in certain conduct including, *inter alia*, refusing to execute an agreed upon collective-bargaining agreement; failing and refusing to provide relevant information which was requested by the Union; and failing and refusing to bargain over the effects on unit employees of Respondent's decision to close its operations. (Copies of the foregoing charges and the Consolidated Complaint are attached hereto and are made a part hereof as Exhibits Nos. (1) (a)-(d) and (2), respectively.)

(C) Based upon the charge filed in Case 1-CA-37931, and after investigation of aforesaid charge in which Respondent was given the opportunity to present evidence and

legal argument, the General Counsel of the Board, on behalf of the Board, pursuant to Section 3(d) of the Act, 29 U.S.C. Sec. 153(d), by the Regional Director for the Board's First Region, pursuant to Section 10(b) of the Act, 29 U.S.C. Sec. 160(b), issued a Complaint and Notice of Hearing (herein called the Complaint) and a Second Order Consolidating Cases against Estoril on March 7, 2000. The Complaint alleges that Respondent violated Sections 8(a)(1) and (5) of the Act by failing to pay employees for hours worked in January 2000. (Copies of the foregoing Charge, the Complaint and the Second Order Consolidating Cases are attached hereto and are made a part hereof as Exhibits Nos. (3), (4), and (5) respectively.)

4.

(A) A hearing on the allegations in the Consolidated Complaint and the Complaint described in paragraphs 3(B) and 3(C) above is scheduled to be held before an Administrative Law Judge of the Board on April 3, 2000.

(B) Counsel for the General Counsel seeks in this pending administrative proceeding an order against the Respondent from the Board, pursuant to Section 10(c) of the Act, 29 U.S.C. Sec. 160(c), which will include a monetary remedy of backpay as set forth in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), as well as wages due for work performed by the bargaining unit employees described in paragraph 5(F) below in January 2000.

5.

Upon the basis of the following, Petitioner has reasonable cause to believe that the allegations of the aforesaid Consolidated Complaint and Complaint, and more specifically, those allegations upon which the monetary remedy may be based, are true

and that Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act for which a monetary remedy will be ordered by the Board, but that the Board's order for such remedy will be frustrated without the temporary injunctive relief sought herein. In support thereof, and of the request for a temporary injunctive relief, Petitioner, upon information and belief, shows as follows:

(A) During the 12-month period ending January 31, 2000, Respondent, a corporation with an office and place of business in Waltham, Massachusetts, herein called Respondent's Waltham facility, was engaged in the business of providing cleaning services for Party-in-Interest Polaroid Corporation (herein called Polaroid) in Waltham, Massachusetts.

(B) During the 12-month period ending January 31, 2000, Respondent, in conducting its business operations described above in paragraph A, performed services valued in excess of $50,000 for Polaroid, an enterprise directly engaged in interstate commerce.

(C) During the 12-month period ending January 31, 2000, Respondent was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

(D) At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

(E) During the 12-month period ending January 31, 2000, the following individuals held the positions set forth opposite their respective names and were

supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Emilia Delgado	Owner
Marco A. Delgado	Senior Vice President
Mayra Martínez	Personnel Manager

(F) The following employees of Respondent, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time cleaning employees, maintenance employees, utility employees and foremen employed by Respondent at its 1277 Main Street, Waltham, Massachusetts facility, but excluding office clerical employees, managerial employees, casual employees, confidential employees, guards, and supervisors as defined in the Act.

(G)(1) On November 24, 1998, the Union was certified as the exclusive collective-bargaining representative of the Unit.

(2) At all times since November 24, 1998, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

(H)(1) About September 29, 1999, the Union and Respondent reached complete agreement on terms and conditions of employment of the Unit to be incorporated in a collective-bargaining agreement.

(2) Since about November 15, 1999, the Union has requested that the Respondent execute a written contract containing the agreement described above in subparagraph H(1).

(3) Since about November 15, 1999, Respondent, by Emilia Delgado and Marco Delgado, has failed and refused to execute the agreement described above in subparagraph H(1).

(I)(1) Since about January 7, 2000, the Union, by letter, has requested that Respondent furnish the Union with the following information about Unit employees:

(a) names;

(b) dates of hire;

(c) schedules of work; and

(d) addresses.

(2) The information requested by the Union, as described above in subparagraph I(1) is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the Unit.

(3) Since about January 7, 2000, Respondent, by Marco Delgado, has failed and refused to furnish the Union with the information requested by it as described above in subparagraph I(1).

(J)(1) On about January 31, 2000, Respondent ceased operations.

(2) The subject set forth in subparagraph J(1) relates to wages, hours, and other terms and conditions of employment of the Unit, and the effects of that conduct are mandatory subjects for the purposes of collective bargaining.

(3) Respondent engaged in the conduct described above in subparagraph J(1), without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to the effects of this conduct.

APPENDIX I

(K)(1) Since about mid-January, 2000, Respondent has failed to pay employees their wages.

(2) The subject set forth in subparagraph K(1) relates to wages, hours, and other terms and conditions of employment of the Unit, and the effects of that conduct are mandatory subjects for the purposes of collective bargaining.

(3) Respondent engaged in the conduct described above in subparagraph K(1), without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to the effects of this conduct.

(L) By its overall conduct, including the conduct described above in paragraphs H, I, J and K, Respondent has failed and refused to bargain collectively with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(5) and (1) of the Act.

(M) The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

6.

As part of the remedy for the unfair labor practices described above, pursuant to the Board's decision in *Transmarine Navigation Corp*., 170 NLRB 389 (1968), at a minimum, the bargaining unit employees will be entitled to two weeks of backpay, or approximately $15,700. Additionally, the bargaining unit employees will be entitled to wages earned in January 2000, or approximately $10,300. The verified affidavit of Compliance Officer Elizabeth Gemperline, explaining said calculation, is attached hereto as Exhibit 6.

7.

(A) **[if applicable:** Polaroid Corporation, (herein called Polaroid) was the Respondent's sole customer. Polaroid currently owes Respondent $54,331.52 for services rendered. Polaroid is scheduled to pay this money to Respondent on March 10, 2000.**]**

(B) On about January 31, 2000, Respondent closed its operations.

(C) The remaining assets of Respondent are uncertain. The Respondent owns no real property, has closed its only office, and has no other customers.

(D) The Respondent recently has: moved its office without informing the Union; disconnected its business telephone without providing the Union with a new telephone number; failed to return numerous telephone calls both from the Union and from the Region; refused to accept certified letters from the Region; issued checks to employees that have bounced; allegedly failed to pay employees for their last eleven working days, and paid the Respondent's indebtedness for an earlier unfair labor practice charge from a different corporation's bank account.

(E) Since the hearing before an administrative law judge is not scheduled to begin until April 3, 2000, it is highly likely that Respondent will have disbursed of or dissipated all assets before a Board decision and order could be enforced by an appropriate circuit court of appeals.

8.

(A) Based on the circumstances described above in paragraph 7, there is imminent danger that substantial and irreparable injury will result to the Unit employees and to the

Board's administrative proceedings if Respondent disperses or dissipates its income in an attempt to avoid its backpay liability under the Act.

(B) Since Respondent has ceased operations, if it disperses the money that it receives from Polaroid, it appears that the Board will have no adequate remedy at law to enforce its remedial order once it becomes final and the amounts of backpay to employees, as specified above, become due and owing. Such actions by Respondent, which may fairly be anticipated, would act to irreparably harm the employee beneficiaries of the prospective Board order, and would thereby nullify or frustrate the remedial order of the Board. A final and binding Board and/or Court order rendered months or years from now will be ineffective to remedy Respondent's unfair labor practices, particularly since Respondent has ceased operations and its only known asset is that money owed to it by Polaroid.

9.

(A) Section 10(j) of the Act, which authorizes the Board to file petitions for temporary injunctive relief, also authorizes this Court to grant such temporary relief, upon the Board's application, as the Court deems just and proper. It appears clear from the circumstances set forth above that unless Respondent and its agents are restrained from dissipating or dispersing its present assets, and any income or assets it may receive in the future, unless and until they discharge any backpay liability caused by their unfair labor practices, pending the Court's disposition of the merits of the Petition, any prospective Board order and court judgment thereon may well be frustrated and rendered impossible of compliance.

(B) Upon information and belief it may be fairly anticipated that unless enjoined and restrained in the manner requested herein, Respondent will dissipate any assets which it presently has and will receive in the future, and, thereby, deprive the individual employees, as beneficiaries of the Board's ultimate remedial order, of the money to which they will be entitled and which constitutes backpay.

(C) Upon information and belief, unless Respondent and its agents **[**and Polaroid**]** are immediately enjoined as requested herein, a serious flouting of the Act will continue with the result that enforcement of important provisions of the Act and of public policy embodied therein will be thwarted before Respondent can be placed under legal restraint through regular administrative procedures leading to a Board Order and a Decree of a Court of Appeals pursuant to Section 10(e) or (f) of the Act, 29 U.S.C. Sec. 160(e) or (f). Unless injunctive relief is immediately obtained, it may be fairly anticipated that Respondent will dissipate or disperse its present income and assets as well as any future income and assets it receives, with the result that the affected employees will be denied their statutory rights to the detriment of the policies of the Act, the public interest, the interest of the individuals, and the interests of the parties involved.

(D) Respondent **[**and Party-in-Interest Polaroid**]** were informed by Petitioner at 2:00 p.m. and 1:45 p.m., respectively, on March 7, 2000, that this Petition for Temporary Injunction and the Motion For Temporary Restraining Order in this matter would be filed on March 8, 2000, and that Petitioner was seeking the Court to order Respondent to deposit $32,202.80, an amount sufficient to cover the minimum backpay liability, plus estimated interest, into the registry of the Court pending the final disposition of the

matters involved herein before the Board. As of the filing of the Petition herein, Respondent has not contacted Petitioner.

(E) Upon information and belief, to avoid the serious results referred to in paragraphs 8 and 9 (A) through (C), it is essential, just and proper, and appropriate for the purposes of effectuating the remedial purposes of the Act and avoiding substantial and irreparable injury to such policies, and in accordance with the purposes of Section 10(j) of the Act, that pending final disposition of the administrative matters involved pending before the Board, Respondent be enjoined and restrained from the dissipation or dispersal of assets, as described above, and that the Court grant such other and further injunctive relief as it may deem appropriate.

10.

The relief prayed for herein has not been previously requested.

WHEREFORE, Petitioner respectfully requests the following:

(1) That the Court issue an order directing Respondent to promptly file an answer to the allegations of this Petition and to appear before this Court, at a time and place designated by this Court, and show cause, if any there be, why a temporary injunction should not issue, enjoining and restraining Respondent, its agents, servants, employees, attorneys, and all persons acting in concert or participation with Respondent, pending final disposition of the administrative matters before the Board and any judicial review thereof from:

(a) in any manner or by any means distributing, transferring or otherwise disposing of assets or funds of Respondent including any income or assets which may be received in the future, except that Respondent may sell or transfer said assets for full, fair,

present consideration, provided that the receipts from any such sale or transfer shall, immediately upon receipt, be deposited in the registry of the United States District Court for the District of Massachusetts until the total amount deposited in that Court's registry in connection with this case shall equal $32,202.80, to protect the backpay claims created by the unfair labor practices which may be found by the Board and the Court of Appeals;

(b) unless and until the sum of $32,202.80 is set aside and retained, in any manner or by any means entering into any arrangement or agreement providing for, or which would result in, a lien on any of Respondent's current assets or income, or pledging as security or encumbering any of its current assets or income;

(c) unless and until the sum of $32,202.80 is set aside and retained, distributing any of the Respondent's assets, or income, or divestment thereof, to shareholders, officers or directors of Respondent, or to any other person, enterprise or entity controlled by, or related to or affiliated with Respondent without further order of this Court;

(d) concealing, altering or destroying any of Respondent's financial documents.

(2) That the Court further order Respondent and any person, natural or corporate, having notice of this order and holding funds or proceeds for Respondent's credit, **[**including Polaroid,**]** to deposit said funds in the registry of the United States District Court, until the total amount deposited in the registry of the Court in connection with this case shall equal $32,202.80, pending the Court's ruling on the merits of Petitioner's request for an injunction and further directs that they stop payment on any checks issued to Respondent as of February 15, 2000.

(3) That the Court further order Respondent, its agents, servants, employees, attorneys, and all persons acting in concert or participation with Respondent, pending final disposition of the administrative matters before the Board and any judicial review thereof, to:

(a) immediately based on the income and assets it presently has and from any income and assets it receives in the future, deposit in the registry of the Court, the total amount of $32,202.80, or whatever amount less than that it presently has or receives in the future, pending final disposition of the administrative matters before the Board and any judicial review thereof;

(b) serve a copy of the temporary injunction upon any person, natural or corporate, to whom Respondent proposes to sell, lease, transfer or otherwise disperse any of its assets, and upon any person, natural or corporate, holding for Respondent's credit, funds, income or proceeds of any sale of Respondent's assets;

(c) keep, and make available to Petitioner, upon request, for inspection and copying, written records of each and every transaction involving receipts or expenditures in excess of $250.00 by Respondent;

(d) keep and make available to the Petitioner, upon request, for inspection and copying, all financial records and all records kept in the normal course of business by any corporation or entity under Respondent's control;

(e) within 21 days of the issuance of a temporary injunction, file with the Court a sworn and notarized affidavit setting forth the actions Respondent has taken to comply with the Court's Order, and serve a copy of said affidavit upon the Petitioner.

(4) That upon return of said order to show cause, the Court issue an order temporarily enjoining and restraining Respondent in the manner set forth above pending final disposition of the administrative proceedings now pending before the Board in NLRB Cases 1-CA-37811, 1-CA-37828, 1-CA-37875 and 1-CA-37931.

(5) That the Court grant such other and further temporary relief that may be deemed just and proper.

(6) That the Court grant expedited consideration to this Petition, in accordance with 28 U.S.C. 1657(a) and the remedial purposes of Section 10(j) of the Act.

Dated this 8th day of March, 2000 at Boston, Massachusetts.

_____

Acting Regional Director, Region 1
National Labor Relations Board
10 Causeway Street, 6th Floor
Boston, Massachusetts 02222

LEONARD PAGE, General Counsel
BARRY J. KEARNEY, Associate General Counsel
ELLEN A. FARRELL, Assistant General Counsel
ROSEMARY PYE, Regional Director
PAUL J. RICKARD, Assistant to the Regional Director
SARA R. LEWENBERG, Counsel for Petitioner

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

****

RONALD S. COHEN, Acting Regional Director
of the First Region
of the National Labor Relations Board,
for and on behalf of the
NATIONAL LABOR RELATIONS BOARD,

Petitioner

v. Civil No.

ESTORIL CLEANING CO., INC.,

Respondent

and

POLAROID CORPORATION,

Party-in-Interest

****

MOTION FOR TEMPORARY RESTRAINING ORDER PURSUANT TO SECTION 10(J) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED [29 U.S.C. SECTION 160 (J)] [, AND THE ALL WRITS ACT [28 U.S.C. SECTION 1651(A)]][1]

To the Honorable, the Judges of the United States District Court, District of Massachusetts:

Comes now Ronald S. Cohen, Acting Regional Director of the First Region of the National Labor Relations Board (herein called the Board), and petitions this Court for and on behalf of the Board, pursuant to Section 10(j) of the National Labor Relations Act, as amended (61 Stat. 149; 29 U.S.C. Sec. 160 (j); herein called the Act) **[**, and the All Writs Act, 28 U.S.C. Section 1651(a),**]** for a temporary restraining order, pursuant to Fed. R. Civ. P. 65(b) pending the final disposition of the matters involved herein pending before

1 [redacted]

the Board on an administrative consolidated complaint of the General Counsel of the Board charging that Estoril Cleaning Co., Inc., (herein called Respondent or Estoril) has engaged in, and is engaging in, acts and conduct in violation of Section 8(a)(1) and (5) of the Act (29 U.S.C. Sec. 158 (a)(1) and (5). In support thereof, Petitioner respectfully shows as follows:

1.

Petitioner is the Acting Regional Director of the First Region of the Board, an agency of the United States Government, and files this petition for and on behalf of the Board, which has authorized the filing of this petition.

2.

Statutory jurisdiction by this Court over this cause of action and over the Respondent is invoked pursuant to Section 10(j) of the Act.

3.

(A) On or about the dates set forth below in subparagraphs (1)-(4), Service Employees International Union, Local 254, AFL-CIO, CLC (herein called the Union or Charging Party), pursuant to the provisions of the Act, filed with the Board charges and amended charges, as follows:

(1) The charge in Case 1-CA-37811 was filed by the Union on January 6, 2000, alleging that Respondent had engaged in violations of Section 8(a)(1) and (5) of the Act.

(2) A charge and a first amended charge in Case 1-CA-37828 were filed by the Union on January 14, 2000 and February 17, 2000, respectively, alleging that Respondent had engaged in further violations of Section 8(a)(1) and (5) of the Act.

(3) The charge in Case 1-CA-37875 was filed by the Union on February 8, 2000, alleging that Respondent had engaged in further violations of Section 8(a)(1) and (5) of the Act.

(4) The charge in Case 1-CA-37931 was filed by the Union on February 24, 2000, alleging that Respondent had engaged in further violations of Section 8(a)(1) and (5).

(B) Based upon the charges filed in Cases 1-CA-37811, 1-CA-37828 and 1-CA-37875, and after investigation of the aforesaid charges in which Respondent was given the opportunity to present evidence and legal argument, the General Counsel of the Board, on behalf of the Board, pursuant to Section 3(d) of the Act, 29 U.S.C. Sec. 153(d), by the Regional Director for the Board's First Region, pursuant to Section 10(b) of the Act, 29 U.S.C. Sec. 160(b), issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (herein called the Consolidated Complaint) against Estoril on February 28, 2000. The Consolidated Complaint alleges that Respondent violated Sections 8(a)(1) and (5) of the Act by engaging in certain conduct including, *inter alia*, refusing to execute an agreed upon collective-bargaining agreement; failing and refusing to provide relevant information which was requested by the Union; and failing and refusing to bargain over the effects on unit employees of Respondent's decision to close its operations. (Copies of the foregoing charges and the Consolidated Complaint are attached hereto and are made a part hereof as Exhibits Nos. (1) (a)-(d) and (2), respectively.)

(C) Based upon the charge filed in Case 1-CA-37931, and after investigation of aforesaid charge in which Respondent was given the opportunity to present evidence and

legal argument, the General Counsel of the Board, on behalf of the Board, pursuant to Section 3(d) of the Act, 29 U.S.C. Sec. 153(d), by the Regional Director for the Board's First Region, pursuant to Section 10(b) of the Act, 29 U.S.C. Sec. 160(b), issued a Complaint and Notice of Hearing (herein called the Complaint) and a Second Order Consolidating Cases against Estoril on March 7, 2000. The Complaint alleges that Respondent violated Sections 8(a)(1) and (5) of the Act by failing to pay employees for hours worked in January 2000. (Copies of the foregoing Charge, the Complaint, and the Second Order Consolidating Cases are attached hereto and are made a part hereof as Exhibits Nos. (3), (4), and (5) respectively.)

4.

(A) A hearing on the allegations in the Consolidated Complaint and the Complaint described in paragraphs 3(B) and 3(C) above is scheduled to be held before an administrative law judge of the Board on April 3, 2000.

(B) Counsel for the General Counsel seeks in this pending administrative proceeding an order against the Respondent from the Board, pursuant to Section 10(c) of the Act, 29 U.S.C. Sec. 160(c), which will include a monetary remedy of backpay as set forth in *Transmarine Navigation Corp.,* 170 NLRB 389 (1968), as well as wages due for work performed by the bargaining unit employees described in paragraph 5(F) below in January 2000.

5.

Upon the basis of the following, Petitioner has reasonable cause to believe that the allegations of the aforesaid Consolidated Complaint and Complaint, and more specifically, those allegations upon which the monetary remedy may be based, are true

and that Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act for which a monetary remedy will be ordered by the Board, but that the Board's order for such remedy will be frustrated without the temporary restraining order sought herein. In support thereof, and of the request for a temporary restraining order, Petitioner, upon information and belief, shows as follows:

(A) During the 12-month period ending January 31, 2000, Respondent, a corporation with an office and place of business in Waltham, Massachusetts, herein called Respondent's Waltham facility, was engaged in the business of providing cleaning services **[**for Party-in-Interest Polaroid Corporation (herein called Polaroid)**]** in Waltham, Massachusetts.

(B) During the 12-month period ending January 31, 2000, Respondent, in conducting its business operations described above in paragraph A, performed services valued in excess of $50,000 for Polaroid, an enterprise directly engaged in interstate commerce.

(C) During the 12-month period ending January 31, 2000, Respondent was an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

(D) At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

(E) During the 12-month period ending January 31, 2000, the following individuals held the positions set forth opposite their respective names and were

supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Emilia Delgado	Owner
Marco A. Delgado	Senior Vice President
Mayra Martínez	Personnel Manager

(F) The following employees of Respondent, herein called the Unit, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time cleaning employees, maintenance employees, utility employees and foremen employed by Respondent at its 1277 Main Street, Waltham, Massachusetts facility, but excluding office clerical employees, managerial employees, casual employees, confidential employees, guards, and supervisors as defined in the Act.

(G)(1) On November 24, 1998, the Union was certified as the exclusive collective-bargaining representative of the Unit.

(2) At all times since November 24, 1998, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the Unit.

(H)(1) About September 29, 1999, the Union and Respondent reached complete agreement on terms and conditions of employment of the Unit to be incorporated in a collective-bargaining agreement.

(2) Since about November 15, 1999, the Union has requested that the Respondent execute a written contract containing the agreement described above in subparagraph H(1).

(3) Since about November 15, 1999, Respondent, by Emilia Delgado and Marco Delgado, has failed and refused to execute the agreement described above in subparagraph H(1).

(I)(1) Since about January 7, 2000, the Union, by letter, has requested that Respondent furnish the Union with the following information about Unit employees:

(a) names;

(b) dates of hire;

(c) schedules of work; and

(d) addresses.

(3) The information requested by the Union, as described above in subparagraph I(1) is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the Unit.

(3) Since about January 7, 2000, Respondent, by Marco Delgado, has failed and refused to furnish the Union with the information requested by it as described above in subparagraph I(1).

(J)(1) On about January 31, 2000, Respondent ceased operations.

(2) The subject set forth in subparagraph J(1) relates to wages, hours, and other terms and conditions of employment of the Unit, and the effects of that conduct are mandatory subjects for the purposes of collective bargaining.

(3) Respondent engaged in the conduct described above in subparagraph J(1), without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to the effects of this conduct.

(K)(1) Since about mid-January, 2000, Respondent has failed to pay employees their wages.

(2) The subject set forth in subparagraph K(1) relates to wages, hours, and other terms and conditions of employment of the Unit, and the effects of that conduct are mandatory subjects for the purposes of collective bargaining.

(3) Respondent engaged in the conduct described above in subparagraph K(1), without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to the effects of this conduct.

(L) By its overall conduct, including the conduct described above in paragraphs H, I, J and K, Respondent has failed and refused to bargain collectively with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(5) and (1) of the Act. (M) The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

6.

As part of the remedy for the unfair labor practices described above, pursuant to the Board's decision in *Transmarine Navigation Corp*., 170 NLRB 389 (1968), at a minimum, the bargaining unit employees will be entitled to two weeks of backpay, or approximately $15,700. Additionally, the bargaining unit employees will be entitled to wages earned in January 2000, or approximately $10,300. The verified affidavit of Compliance Officer Elizabeth Gemperline, explaining said calculation, is attached hereto as Exhibit 6.

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7.

(A) **[if applicable:** Party-in-Interest Polaroid Corporation, (herein called Polaroid) was the Respondent's sole customer. Polaroid currently owes Respondent $54,331.52 for services rendered. Polaroid is scheduled to pay this money to Respondent on March 10, 2000.**]**

(B) On about January 31, 2000, Respondent closed its operations.

(C) The remaining assets of Respondent are uncertain. The Respondent owns no real property, has closed its only office, and has no other customers.

(D) The Respondent recently has: moved its office without informing the Union; disconnected its business telephone without providing the Union with a new telephone number; failed to return numerous telephone calls both from the Union and from the Region; refused to accept certified letters from the Region; issued checks to employees that have bounced; allegedly failed to pay employees for their last eleven working days, and paid the Respondent's indebtedness for an earlier unfair labor practice charge from a different corporation's bank account.

(E) Since the hearing before an administrative law judge is not scheduled to begin until April 3, 2000, it is highly likely that Respondent will have disbursed of or dissipated all assets before a Board decision and order could be enforced by an appropriate circuit court of appeals.

8.

(A) Based on the circumstances described above in paragraph 7, there is imminent danger that substantial and irreparable injury will result to the unit employees and to the

Board's administrative proceedings if Respondent disperses or dissipates its income in an attempt to avoid its backpay liability under the Act.

(B) Since Respondent has ceased operations, if it disperses the money that it receives **[**from Polaroid**]**, it appears that the Board will have no adequate remedy at law to enforce its remedial order once it becomes final and the amounts of backpay to employees, as specified above, become due and owing. Such actions by Respondent, which may fairly be anticipated, would act to irreparably harm the employee beneficiaries of the prospective Board order, and would thereby nullify or frustrate the remedial order of the Board. A final and binding Board and/or Court order rendered months or years from now will be ineffective to remedy Respondent's unfair labor practices, particularly since Respondent has ceased operations and its only assets being **[**that money owed to it by Polaroid.**]**

9.

(A) Section 10(j) of the Act, which authorizes the Board to file petitions for temporary injunctive relief, also authorizes this Court to grant such temporary relief, upon the Board's application, as the Court deems just and proper. It appears clear from the circumstances set forth above that unless Respondent and its agents are restrained from dissipating or dispersing its present assets, and any income or assets it may receive in the future, unless and until they discharge any backpay liability caused by their unfair labor practices, pending the Court's disposition of the merits of the Petition, any prospective Board order and court judgment thereon may well be frustrated and rendered impossible of compliance.

(B) Upon information and belief it may be fairly anticipated that unless enjoined and restrained in the manner requested herein, Respondent will dissipate any assets which it presently has and will receive in the future and thereby deprive the individual employees, as beneficiaries of the Board's ultimate remedial order, of the money to which they will be entitled and which constitutes backpay.

(C) Upon information and belief, unless Respondent and its agents **[**and Polaroid**]** are immediately enjoined as requested herein, a serious flouting of the Act will continue, with the result that enforcement of important provisions of the Act and of public policy embodied therein will be thwarted before Respondent can be placed under legal restraint through regular administrative procedures leading to a Board Order and a Decree of a Court of Appeals pursuant to Section 10(e) or (f) of the Act, 29 U.S.C. Sec. 160(e) or (f). Unless injunctive relief is immediately obtained, it may be fairly anticipated that Respondent will dissipate or disperse its present income and assets as well as any future income and assets it receives, with the result that the affected employees will be denied their statutory rights, to the detriment of the policies of the Act, the public interest, the interest of the individuals, and the interests of the parties involved.

(D) Respondent **[**and Polaroid**]** was **[**were**]** informed by Petitioner at 2:00 p.m. and 1:45 p.m., respectively, on March 7, 2000, that this Motion For Temporary Restraining Order and the Petition for Temporary Injunction in this matter would be filed on March 8, 2000, and that Petitioner was seeking the Court to order Respondent to deposit $32,202.80, an amount sufficient to cover the minimum backpay liability, plus estimated interest, into the registry of the Court pending the final disposition of the matters involved herein before the Board. As of the filing of the Motion herein,

Respondent has not contacted Petitioner. **[**Polaroid has been notified that Petitioner is seeking a Temporary Restraining Order requiring Polaroid to hold all monies due and owing to Respondent pending this Court's hearing on the merits of Petitioner's request for a temporary injunction.**]**

(E) Upon information and belief, to avoid the serious results referred to in paragraphs 8 and 9 (A) through (C), it is essential, just and proper, and appropriate for the purposes of effectuating the remedial purposes of the Act and avoiding substantial and irreparable injury to such policies, and in accordance with the purposes of Section 10(j) of the Act, that pending final disposition of the administrative matters involved pending before the Board, Respondent be enjoined and restrained from the dissipation or dispersal of assets, as described above, and that the Court grant such other and further injunctive relief as it may deem appropriate.

10.

The relief prayed for herein has not been previously requested.

WHEREFORE, Petitioner respectfully requests the following:

(1) That the Court immediately execute Petitioner's proposed Order to Show Cause and thereby cause notice of this Petition to be served upon Respondent **[**and Polaroid**]** consistent with the provisions of Section 10(j);

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REQUEST FOR ORAL ARGUMENT

(2) That the Court hold a hearing on Petitioner's request for a temporary restraining order on March 8, 2000, or as soon thereafter as counsel may be heard, and thereupon, pending its consideration of the merits of this Petition, issue a temporary restraining order forthwith enjoining and restraining Respondent, its officers, agents, representatives, servants, employees, attorneys, and all members and persons acting in concert or participation with them, for a period of ten (10) days duration as provided for in Rule 65(b) of the Federal Rules of Civil Procedure, from:

(A) in any manner or by any means, selling, transferring, dissipating, distributing, dispersing or otherwise disposing of any of Respondent’s assets or funds, in the disposition of its business, including, but not limited to, equipment used to carry out Respondent’s business, finished products, accounts receivable, and monies deposited in Respondent’s bank accounts, any income or assets which may be received in the future, or incurring any liens on its assets, except as they may be required to do so pursuant to any lien of record recorded prior to the filing of the charges herein, and further provided that Respondent may sell or transfer assets for a full, fair, and present consideration actually paid Respondent, provided that the proceeds for any such sale or transfer shall immediately upon receipt be deposited intact and not disbursed except to the extent that it is necessary to do so to pay bona fide current business expenses such as rent, utilities, maintenance, insurance, legal fees and expenses, or to satisfy bona fide liens of records and judgments of record which were recorded prior to the filing of the charges herein, in the registry of the United States District Court for the District of Massachusetts until the total amount deposited in the Court's registry in connection with this case shall equal

$32,202.80; provided further that Respondent shall keep, and make available to the Board upon request for inspection and copying, written records of each and every transaction involving expenditures or receipts by Respondent in excess of $250.

(B) distributing its assets or the proceeds from the sale or divestment thereof, to officers, principals, shareholders or directors of Respondent, or to any other person, entity or enterprise controlled by or related to or affiliated with, Respondent or its shareholders, officers or directors, including the repayment of loans to Respondent, or for the payment of unreasonable salaries to Respondent's officers, shareholders, or directors or their relatives, without further order of the Court.

(C) concealing, altering or destroying any of its financial documents.

(3) That the Court further order Respondent to deposit said funds in the registry of the United States District Court, until the total amount deposited in the registry of the Court in connection with this case shall equal $32,202.80, pending the Court's ruling on the merits of Petitioner's request for an injunction.

(4) That the Court further order Respondent, its agents, servants, employees, attorneys, and all persons acting in concert or participation with Respondent, pending final disposition of the administrative matters before the Board and any judicial review thereof, to:

(A) Immediately, based on the income and assets it presently has and from any income and assets it receives in the future, deposit in the registry of the Court, the amount of $32,202.80, or whatever amount less than that it presently has or receives in the future, pending final disposition of the administrative matters before the Board and any judicial review thereof.

(B) Serve a copy of the temporary injunction upon any person, natural or corporate, to whom Respondent proposes to sell, lease, transfer or otherwise disperse any of its assets, and upon any person, natural or corporate, holding for Respondent's credit, funds, income or proceeds of any sale of Respondent's assets.

(5) **[if applicable:** That the Court enjoin Polaroid from disbursing any sums or money owed Respondent, and further that the Court order Polaroid to stop payment on any unpaid checks issued to Respondent on or after February 15, 2000, pending the Court's ruling on the merits of Petitioner's request for a temporary injunction.**]**

(6) That the Court issue an order directing Respondent to promptly file an answer to the allegations of the Petition for Temporary Injunction and to appear before this Court, at a time and place designated by this Court, and show cause, if any there be, why a temporary injunction should not issue, extending and incorporating the terms of the temporary restraining order and further enjoining and restraining Respondent, its agents, servants, employees, attorneys, and all persons acting in concert or participation with Respondent, pending final disposition of the administrative matters before the Board and any judicial review thereof as prayed for in said Petition.

(7) That upon return of said order to show cause, the Court issue an order temporarily enjoining and restraining Respondent in the manner set forth above and in the Petition for Temporary Injunction pending final disposition of the administrative proceedings now pending before the Board in NLRB Cases 1-CA-37811, 1-CA-37828, 1-CA-37875 and 1-CA-37931.

(8) That the Court grant such other and further temporary relief that may be deemed just and proper.

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(9) That the Court grant expedited consideration to this Petition, in accordance with 28 U.S.C. 1657(a) and the remedial purposes of Section 10(j) of the Act.

Dated this 8th day of March, 2000 at Boston, Massachusetts.

_____
Acting Regional Director, Region One
National Labor Relations Board
10 Causeway Street, 6th Floor
Boston, Massachusetts 02222

LEONARD PAGE, General Counsel
BARRY J. KEARNEY, Associate General Counsel
ELLEN A. FARRELL, Assistant General Counsel
ROSEMARY PYE, Regional Director
PAUL J. RICKARD, Assistant to the Regional Director
SARA R. LEWENBERG, Counsel for Petitioner

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

****

ALVIN BLYER, Regional Director
of the Twenty-Ninth Region
of the National Labor Relations Board,
for and on behalf of the NATIONAL
LABOR RELATIONS BOARD,

Petitioner

v. Civil No.

UNITRON COLOR GRAPHICS OF
NEW YORK, INCORPORATED

Respondent

****

ORDER GRANTING TEMPORARY RESTRAINING ORDER PURSUANT TO 10(j) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED [29 U.S.C. SECTION 160(j)] AND FED.R.CIV.P. 65(b)

The Petition of Alvin Blyer, Regional Director of the Twenty-Ninth Region of the National Labor Relations Board, having been filed pursuant to Section 10(j) of the National Labor Relations Act, as amended, praying for a temporary restraining order against Unitron Color Graphics of New York, Incorporated, also known as LIC Group, Inc. (herein called Respondent) and for an order directing said Respondent to show cause why a temporary injunction should not be granted as prayed for in said petition; the petition being verified and supported by an affidavit and exhibits; and after said Petition was duly served upon the Respondent and Respondent having had an opportunity to be present at a hearing on Petitioner's request for a temporary restraining order,

IT APPEARING to the Court from said verified Petition, affidavits, exhibits, and legal memoranda as well as the evidence and argument presented by Respondent that:

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1.

Petitioner is the Regional Director of the Twenty-Ninth Region of the Board, an agency of the United States Government, and has filed this petition for and on behalf of the Board which has authorized the filing of this petition.

2.

Statutory jurisdiction by this Court over this cause of action and over the parties has been properly invoked by Petitioner pursuant to Section 10(j) of the Act, and Fed.R.Civ.P. 65(b).

3.

(A) On or about the dates set forth below in subparagraphs (1)-(3), Technical, Office and Professional Union, Local 2110, United Automobile Agricultural Implement and Aerospace Workers, AFL-CIO, CLC (herein called the Union or Charging Party), pursuant to the provisions of the Act, filed with the Board charges and amended charges, as follows:

(1) A charge and a first amended charge in Case No. 29-CA-18119 were filed by the Union on April 11, 1994 and May 26, 1994, respectively, alleging that Respondent had engaged in violations of Section 8(a)(1) and (3) of the Act.

(2) The charge in Case No. 29-CA-18381 was filed by the Union on July 6, 1994, alleging that Respondent had engaged in violations of Section 8(a)(1) and (5) of the Act.

(3) The charge in Case No. 29-CA-18421 was filed by the Union on July 18, 1994, alleging that Respondent had engaged in further violations of Section 8(a)(1) and (5) of the Act.

4.

The charges and amended charges were referred for investigation to the Regional Director of the Twenty-Ninth Region of the Board.

5.

(A) After investigation by the Regional Office in which Respondent was afforded the opportunity to present evidence and legal argument on the merits of the charges described above in paragraphs 3 and 4, the Regional Director, for the Board's Twenty-Ninth Region, pursuant to Section 10(b) of the Act, 29 U.S.C. Sec. 160(b), issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (herein called the Consolidated Complaint) against Unitron Color Graphics of New York Incorporated (herein called Respondent) on August 31, 1994 in Case Nos. 29-CA-18119, 29-CA-18381 and 29-CA-18421. The Consolidated Complaint alleges that Respondent violated Sections 8(a)(1), (3) and (5) of the Act by engaging in certain conduct including, *inter alia*, circulating among its employees a petition to decertify the Union and urging said employees to sign the petition; promising employees better benefits if they signed the petition, abandoned their membership in the Union and refrained from engaging in union activities; threatening employees with a reduction in hours and layoffs and issuing disciplinary warning letters to its employee/shop steward Adonica Hull because they engaged in Union activities; failing and refusing to provide relevant information which was requested by the Union and failing and refusing to bargain in good faith over the effects on unit employees of Respondent's decision to close its facility.

(B) In disposition of Case Nos. 29-CA-18119, 29-CA-18381 and 29-CA-18421, Respondent and the Union entered into an informal settlement agreement, which was

approved by the Regional Director for Region 29 on June 26, 1996. The settlement agreement provided that Respondent would, *inter alia*, bargain over the effects upon its bargaining unit employees of its decision to close its facility.

6.

(A) A charge and a first amended charge in Case No. 29-CA-20680 were filed by the Union on January 31, 1997, and April 28, 1997, respectively, alleging that Respondent had engaged in further violations of Section 8(a)(1) and (5) of the Act.

(B)The charges and amended charges were referred for investigation to the Regional Director of the Twenty-Ninth Region of the Board.

(C) After investigation by the Regional Office in which Respondent was afforded the opportunity to present evidence and legal argument on the merits of the charges described above in paragraphs 6(A) and (B), an Acting Regional Director, for the Board's Twenty-Ninth Region, pursuant to Section 10(b) of the Act, 29 U.S.C. Sec. 160(b), issued an Order Revoking Informal Settlement Agreement, Order Further Consolidating Cases, Amended Consolidated Complaint and Notice of Hearing (herein called the Amended Consolidated Complaint) in Case Nos. 29-CA-18119, 29-CA-18381, 29-CA-18421 and 29-CA-20680, alleging as violations of the Act, the pre-settlement conduct set forth in the Consolidated Complaint, as described above in paragraph 5(A), and additionally alleging that Respondent failed and refused to furnish the Union with certain requested information, and that Respondent bargained in bad faith by (1) expressing strong disdain for the Union representative and the Union's effects bargaining proposals; (2) evidencing a closed-mindedness to the Union's proposals; (3) failing or refusing to respond or make any counterproposals to the Union's effects bargaining proposals; and (4) failing and

refusing to provide certain information, and that by such conduct it failed to comply with and violated the terms of the settlement agreement described above in paragraph 5(B) above.

(D) The Regional Director seeks, in the administrative complaint proceeding described in paragraph 6(C) above, as part of a final remedial order against the Respondent, that the Board order, under Section 10(c) of the Act, 29 U.S.C. Section 160(c), a make-whole remedy for the affected employees who were the victims of Respondent's alleged violations, which order shall require, as a minimum, two weeks of pay for all of Respondent's employees previously represented by the Union.

7.

(A) At all material times, Respondent was a New York corporation, with its principal office and place of business located at 47-10 32nd Place, Long Island City, New York, where it was engaged in performing pre-press color graphics production services for magazines, and related services.

(B) During the past year, a period representative of all times material herein, Respondent, in the course and conduct of its business operations described above in paragraph 7(A), performed services valued in excess of $50,000 for various enterprises located in the State of New York, each of which enterprises, in turn, is directly engaged in interstate commerce and satisfies a Board standard for the assertion of jurisdiction, exclusive of indirect inflow or indirect outflow.

(C) Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act, 29 U.S.C. Sec. 152(2), (6) and (7).

(D) The Union, is now, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act, 29 U.S.C. Sec. 152(5).

(E) There is and Petitioner has demonstrated reasonable cause to believe that:

(1) Since on or about April 13, 1994, May 16 and June 29, 1994 Respondent failed and refused to bargain collectively in a timely manner with the Union regarding the effects upon unit employees of Respondent's decision to sell its business.

(2) The subject set forth in paragraph (E)(1) relates to the wages, hours and other terms and conditions of employment of the unit employees and is a mandatory subject for the purposes of collective bargaining.

(3) Since on or about May 16, 1994 and May 31, 1994, Respondent failed and refused to furnish, or delayed in furnishing, the Union with certain relevant information requested by the Union.

(4) By the acts described above in paragraphs E(1)-(3), Respondent has failed and refused to bargain collectively, and in good faith with the exclusive collective bargaining representative of its employees, in violation of Section 8(a)(1) and (5) of the Act.

8.

There is and Petitioner has reasonable cause to believe that Respondent, in violation of the terms of the settlement agreement described above in paragraph 5(B) above, engaged in the following conduct:

(1) Respondent failed and refused to furnish the Union with certain relevant information requested by the Union in letters dated November 15, 1996, January 7, 1997, February 25, 1997 and April 22, 1997.

(2) Respondent negotiated in bad faith with the Union regarding the effects of its decision to close its Long Island City, New York facility upon its bargaining unit employees by its overall conduct including:

(a) on or about September 12, 1996, expressing strong disdain for the Union representative and the Union's effects bargaining proposals, evidencing a closed-mindedness to the Union's proposals;

(b) since on or about September 12, 1996, failing or refusing to respond or make any counterproposals to the Union's effects bargaining proposals; and

(c) since on or about November 15, 1996, January 7, 1997, February 25, 1997 and April 22, 1997, failing and refusing to provide and delaying in providing certain information described above.

9.

There is and Petitioner has reasonable cause to believe that Respondent's asset purchaser, Applied Graphics Technologies, L.P., herein called AGT, makes monthly commission payments to Respondent pursuant to a May 10, 1994 Asset Purchase Agreement, but that these commissions will end in May 1998.

10.

There is and Petitioner has reasonable cause to believe that since Respondent discontinued its operations in May of 1994, was dissolved by proclamation on September 24, 1997, because of non-payment of taxes and has not responded to the request of the Regional Office that it voluntarily sequester an amount sufficient to cover the backpay remedy as set forth in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), that

Respondent will dissipate any income earned from AGT and any other sources pending final disposition of the matters involved herein before the Board.

11.

(A) Unless immediate protection is granted to Petitioner pursuant to Fed.R.Civ.P. 65(b) requiring Respondent to set aside sufficient assets and income so as to prevent the imminent dissipation or dispersal of Respondent's assets and income, a frustration to the ultimate administrative order of the Board in NLRB Case Nos. 29-CA-18119, 29-CA-18381, 29-CA-18421 and 29-CA-20680 will result.

(B) There is imminent danger that substantial and irreparable injury will unavoidably result to Petitioner's enforcement of the Act in NLRB Case Nos. 29-CA-18119, 29-CA-18381, 29-CA-18421 and 29-CA-20680 and that the Board's administrative order will be frustrated if protection is not granted with a temporary restraining order pending a final adjudication by the Court of the merits of the Board's Petition for a temporary injunction.

NOW, THEREFORE, BASED UPON THE ABOVE, IT IS HEREBY ORDERED, that effective the _____ day of March, 1998, at ____.m., Respondent, its principals, officers, agents, attorneys, servants, employees, successors and assigns, and all persons natural or corporate acting in concert or participation with Respondent be, and they hereby are,

(A) ENJOINED AND RESTRAINED until , 1998, at , and no longer without further order of this Court from:

(1) In any manner selling, leasing, transferring, assigning, paying over, alienating, dissipating or otherwise disposing of any and all of Respondent's assets, including but not limited to real property, buildings and fixtures, leasehold interests,

equipment or vehicles used to carry out Respondent's business, accounts receivable, monies on hand, monies that will be received in the future, or monies presently deposited in Respondent's bank or brokerage accounts, unless and until Respondent first furnish security in the amount of $23,046.40 by depositing the sum of $23,046.40 in the registry of the United States District Court for the Eastern District of New York to protect the claims created by their alleged unfair labor practices as set forth in the Acting Regional Director's Amended Consolidated Complaint in NLRB Cases 29-CA-18119; 29-CA-18381; 29-CA-18421; 29-CA-20680, *PROVIDED HOWEVER,* Respondent may sell, transfer or lease assets in bona fide arms length transactions for a full, fair and present consideration or rental value actually paid to Respondent, provided that the receipts from any such sale or transfer, and the rents due pursuant to any such lease shall immediately upon receipt be deposited in the registry of the United States District Court for the Eastern District of New York until the total amount deposited in that Court's registry in connection with this case shall equal $23,046.40; *PROVIDED FURTHER,* that Respondent shall keep, and make available to the Board upon request, for inspection and copying, written records of each and every transaction involving expenditures or receipts by Respondent in excess of $100.

(2) Unless and until the sum of $23,046.40 is set aside and retained in the manner set forth above, in any manner or by any means entering into any arrangement or agreement providing for or which would result in, a lien on any of Respondent's current assets or income or pledging any of its current assets or income as security or encumbering any of its other current assets without further order of this Court.

(3) Unless and until the sum of $23,046.40 is set aside and retained in the manner set forth above, distributing any of Respondent's income or assets, or the proceeds from the sale, lease or divestment thereof, to the officers, principals, shareholders or directors of Respondent, or to any other person, enterprise or entity controlled by, or related to or affiliated with, Respondent or its shareholders, officers or directors, including the repayment of loans to Respondent or for the payment of unreasonable salaries to Respondent's officers, shareholders or directors or their relatives, without further order of this Court;

(4) In any manner of by any means concealing, misplacing, altering or destroying any of Respondent's financial correspondence, books, records, federal, state and local tax returns, bank or brokerage house statements, or other financial documents.

(B) Affirmatively Ordered and Directed to:

(1) immediately, based on the income and assets it presently has, and from any income and assets it receives in the future, deposit in the registry of the Court, the total amount of $23,046.40, or whatever amount less than that it presently has or receives in the future, pending final disposition of the administrative matters before the Board and any judicial review thereof.

(2) notwithstanding any other provision of this order, proceeds of the sale, transfer, lease or other disposition of Respondent's assets for a full fair and present consideration or rental value, may be applied to bona fide current expenses including federal, state, county and local taxes, and the satisfaction of bona fide liens of record recorded prior to the entry of this order, provided however, that in no event shall any payment be made to any officer, principal, shareholder or director of Respondent, or to

any other person, enterprise or entity controlled by, or related to or affiliated with, Respondent or its shareholders, officers or directors, absent further order of this Court.

(3) provide notice of this order, in writing, to any person natural or corporate to whom Respondent proposes to sell, lease, transfer or otherwise disperse of any of its assets or to any person, natural or corporate holding for Respondent's credit, funds, income or proceeds of any sale of Respondent's assets; copies of such notices shall be promptly provided to the Board.

II. IT IS FURTHER ORDERED that any person, natural or corporate, having notice of this order and holding funds for credit of Respondent, including Applied Graphics Technologies, L.P., is directed to deposit said funds in the registry of the United States District Court for the Eastern District of New York, until the total amount deposited in that Court's registry in connection with this case shall equal $23,046.40; and it is further directed that they stop payment on any checks issued to Respondent as of _March 6 , 1998.

III. IT IS FURTHER ORDERED that service of a copy of this order, when it is issued, be made forthwith by the United States Marshal or an agent of the Board, 21 years of age or older, in any manner provided in the Federal Rules of Civil Procedure for the United States District Courts, or by registered mail, upon Respondent, Applied Graphics Technologies, L.P. and the Charging Party before the Board, and that such proof of such service be filed with the Court.

ORDERED this _____ day of _____, 1998, at Brooklyn, New York.

BY THE COURT:

_____
United States District Judge

APPENDIX I

APPENDIX I-6

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

WILLIAM A. PASCARELL, Regional Director of Region 22 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,	*	
Petitioner,	*	
v.	*	Civil No.
ALPINE FASHIONS, INC.,	*	
Respondents.	*	

FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR ISSUANCE OF TEMPORARY INJUNCTION PURSUANT TO 29 U.S.C. Section 160(j)

This case was heard upon the verified petition, as amended, of William A. Pascarell, Regional Director of Region 22 of the National Labor Relations Board ("the Board"), for a temporary [restraining order and] injunction against Alpine Fashions, Inc. ("the Respondent") pursuant to Section 10(j) of the National Labor Relations Act as amended ("the Act"), 61 Stat. 149, 29 U.S.C. Section 160(j), pending the final disposition of the matters which are now before the Board in NLRB Case 22-CA-14948, and upon the issuance of an order to show cause why injunctive relief should not be granted as prayed for in the petition. [No answer was filed by the Respondent.] In a hearing on the issues raised by the petition, the Court has received and fully considered the testimony of witnesses and evidence presented by the parties. Based upon the petition, testimony of

witnesses, exhibits of the parties, the briefs and argument of counsel and the entire record, the Court makes the following:

FINDINGS OF FACT

1.

Petitioner is the Regional Director for Region 22 of the Board, an agency of the United States, and properly filed the petition for and on behalf of the Board.

2.

On or about March 26, 1987 Local 162, International Ladies Garment Workers Union, AFL-CIO, ("the Union"), pursuant to the provisions of the Act, filed with the Board a charge in Case 22-CA-14948 alleging that Respondent had engaged in violations of Section 8(a) (1) and (5) of the Act.

3.

That charge was referred to the Petitioner for investigation.

4.

Based upon the charge, and after an impartial investigation, the General Counsel of the Board, on behalf of the Board, by the Regional Director for the Board's Region 22, pursuant to Section 10(b) of the Act, on or about May 22 and May 28, 1987 issued a complaint and amended complaint as described below, alleging that Respondent had engaged in, and is engaging in, unfair labor practices in violation of Section 8(a)(1) and (5) of the Act by failing to transmit to the Union dues withheld from the wages of its employees, failing to make pension and welfare contributions required by its collective-bargaining agreement with the Union, failing to furnish the Union with information about

its imminent cessation of operations, and failing and refusing to bargain with the Union with respect to the effect upon its employees of its cessation of its operations.

5.

On June 4, 1987, after securing authorization from the Board, Petitioner filed a petition with this Court pursuant to Section 10(j) of the Act, 29 U.S.C. Section 160(j), seeking a temporary restraining order and injunction against Respondent. The Court caused the petition, its attachments and exhibits to be duly served on the Respondent.

6.

There is, and Petitioner has, reasonable cause to believe that:

(A) At all material times Respondent is, and has been, a corporation with a facility located in North Bergen, New Jersey ("the facility"), where it is engaged in the manufacture of clothing.

(B) During the past 12 months, which period is representative of all material times, Respondent, in the course and conduct of its business operations as described in Findings of Fact, paragraph 9(A) above, purchased and received goods and materials valued in excess of $50,000 which were shipped to Respondent's facility directly from points outside the State of New Jersey,

(C) Respondent is, and has been at all material times, an employer within the meaning of Section 2(2) of the Act, engaged in commerce or an industry affecting commerce within the meaning of Section 2(2) and (7) of the Act.

(D) At all material times, John Pandolfi has been and is a supervisor of Respondent within the meaning of Section 2(11) of the Act, and/or an agent of Respondent within the meaning of Section 2(13) of the Act.

(E) 1) The Union is a labor organization within the meaning of Section 2(5) of the Act.

2) About October, 1986, a majority of Respondent's production and maintenance employees designated and selected the Union as their exclusive representative for the purposes of collective bargaining.

(F) Since on or about October 20, 1986, and at all material times, the Union, by virtue of Section 9(a) of the Act, has been the designated exclusive collective-bargaining representative of Respondent's production and maintenance employees and, since that date, the Union has been recognized as such representative by Respondent.

(G) Since October 20, 1986, Respondent has been an employer-member of the Association of Rain Apparel Contractors, Inc. ("the Association"), and has authorized the Association to bargain collectively on its behalf with the Union and enter into a collective-bargaining agreement concerning wages, hours, and other terms and conditions of employment of its employees.

(H) On or about November 17, 1986, the Association and the Union entered into a collective-bargaining agreement covering Respondent's production and maintenance employees for the period October 20, 1986 to June 30, 1990.

(I) Since on or about January 1, 1987, and continuously thereafter, Respondent has failed and refused to abide by the terms of its collective-bargaining agreement with the Union by failing and refusing to remit to the Union union dues deducted from its employees' wages.

(J) Since on or about February 1, 1987, and continuously thereafter, Respondent has failed and refused to abide by the terms of its collective-bargaining agreement with

the Union by failing and refusing to make scheduled pension and welfare contributions on behalf of its employees.

(K) Since on or about March 2, 1987, and continuously thereafter, Respondent has failed and refused to furnish the Union with information concerning its imminent cessation of operations information which is necessary for, and relevant to, the Union's performance of its function as the exclusive collective-bargaining representative of Respondent's employees.

(L) Since on or about March 2, 1987, and continuously thereafter, Respondent has refused to bargain with the Union as the exclusive collective-bargaining representative of its employees with respect to the effects on its employees of Respondent's cessation of its operations.

(M) By each of the acts and conduct described in the Finding of Fact, paragraphs 6(I), (J), (K) and (L) above, Respondent has engaged in, and is engaging in, unfair labor practices affecting commerce as set forth and defined in Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

(N) The acts and conduct of Respondent set forth in the Findings of Fact, paragraphs 6(I), (J), (K) and (L) above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states and tend to lead to labor disputes, burdening and obstructing interstate commerce and the free flow of commerce.

(0) The acts and conduct of Respondent described in the Findings of Fact, paragraphs 6(I), (J), (K) and (L), give rise to potential financial liability under the Act and make Respondent potentially liable for backpay to its employees referred to in the Findings of Fact, paragraphs 6(E)(2) and (F), and for dues, pension, and welfare fund

payments to the Union, referred to in the Findings of Fact, paragraph 6(E), (F), (G) and (H).

7.

On May 4, 12 and 20, 1987, Respondent, through its agent, John Pandolfi, advised Board Agent Donna Tribel that the facility would be closing on or about March 22, 1987, and that an auction would be held shortly thereafter to liquidate any assets. When Tribel asked if Respondent would be willing to set aside an amount of money to cover the monetary liability described in the Findings of Fact, paragraph 6(0) above, Pandolfi agreed to appear in the Board's offices with a certified check on March 22, 1987. However, he failed to keep the appointment. Tribel called Pandolfi on May 26, 1987, at which time Pandolfi told her that the facility had closed on May 22, 1987 and that he had paid the employees any money due them. He refused to answer any further questions. On June 2, 1987, Tribel visited the shop and observed that the operation was continuing. Supervisor Hilda Torres informed Tribel that Respondent was finishing what work it had and that she believed the shop would be closing by the end of the week.. On or about June 5, 1987, by order of the New Jersey Superior Court, possession of the facility was returned to the lessor who then bolted the premises.

8.

It may fairly be anticipated, based upon the circumstances and conduct of Respondent described in paragraph 7 of the Findings of Fact, that Respondent will in fact dissipate or disperse its assets without adequately providing for its potential monetary liability as described in paragraph 6(0) of the Findings of Fact, and thus unjustifiably

deny its employees and the Union any opportunity for backpay, back dues and fund contributions to which they are entitled under the Act.

9.

Unless a temporary sequestration of assets injunction is issued by this Court as requested by Petitioner, Respondent's unfair labor practices will go unremedied, and thus any final order of the Board will be rendered void or meaningless, frustrating the policies and the remedial purposes of the Act.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and of the subject matter of this proceeding, and under Section 10(j) of the Act is empowered to grant temporary injunctive relief.

2. There is, and Petitioner has, reasonable cause to believe that:

(a) Respondent is, and has been at all material times, an employer engaged in commerce or an industry affecting commerce within the meaning of Section 2(2), 2(6) and (7) of the Act.

(b) Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act, affecting commerce within the meaning of Section 2(6) and (7) of the Act, and a continuation of these practices will impair the fundamental policies of the Act, as set forth in Section 1(b) thereof.

(c) The unfair labor practices give rise to and make Respondent liable for backpay to its employees and back dues and pension and welfare fund payments to the Union.

3. Based upon Respondent's conduct described in paragraph 7 of the Findings of Fact, and the circumstances described in paragraphs 8 and 9 of the Findings

of Fact, it is appropriate, just and proper within the meaning of Section 10(j) of the Act that, pending the final disposition of the matters now pending before the Board, Respondent, its officers, agents, servants, employees and attorneys and all persons acting in concert or participation with it or them are hereby enjoined and restrained from dissipating, transferring or dispersing any assets or funds Respondent may have, as set forth in the Order Granting Temporary Injunction, unless and until Respondent discharges any backpay liability caused by its unfair labor practices or, in the alternative, Respondent furnishes security in the amount of $____ by depositing the sum of $_____ in the registry of the United States District Court for the District of New Jersey as described in the Order Granting Temporary Injunction, and is further enjoined and restrained from concealing or destroying Respondent's financial or other business records.

4. In order to ensure compliance with the Court's temporary injunction Order, Respondent is further directed: (a) to provide reasonable access to agents of Petitioner, upon request, for inspection and copying, all its financial correspondence, books, records, federal, state and local tax returns, bank or brokerage house statements, and other business documents set forth in the temporary injunction Order; (b) to grant reasonable access to agents of Petitioner to Respondent's North Bergen, New Jersey facility; and (c) within ten (10) days of the issuance of the Court's temporary injunction Order, to file an affidavit with the Court, serving a copy on the Petitioner, (i) listing and describing all present business assets valued in excess of $250, including their

descriptions, locations, estimated fair market value, and the identities and addresses of all secured creditors having an interest in any such assets, and (ii) stating with specificity what steps Respondent has taken to comply with the terms of the Court's temporary injunction Order.

BY THE COURT:

DATE:

APPENDIX I

APPENDIX I-7

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

****

ALVIN BLYER, Regional Director
of the Twenty-Ninth Region
of the National Labor Relations Board,
for and on behalf of the NATIONAL
LABOR RELATIONS BOARD,

Petitioner

v. Civil No.

UNITRON COLOR GRAPHICS OF
NEW YORK, INCORPORATED

Respondent

****

ORDER GRANTING TEMPORARY RESTRAINING ORDER PURSUANT TO 10(j) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED [29 U.S.C. SECTION 160(j)] AND FED.R.CIV.P. 65(b)

The Petition of Alvin Blyer, Regional Director of the Twenty-Ninth Region of the National Labor Relations Board, having been filed pursuant to Section 10(j) of the National Labor Relations Act, as amended, praying for a temporary restraining order against Unitron Color Graphics of New York, Incorporated, also known as LIC Group, Inc. (herein called Respondent) and for an order directing said Respondent to show cause why a temporary injunction should not be granted as prayed for in said petition; the petition being verified and supported by an affidavit and exhibits; and after said Petition was duly served upon the Respondent and Respondent having had an opportunity to be present at a hearing on Petitioner's request for a temporary restraining order,

IT APPEARING to the Court from said verified Petition, affidavits, exhibits, and legal memoranda as well as the evidence and argument presented by Respondent that:

APPENDIX I

1.

Petitioner is the Regional Director of the Twenty-Ninth Region of the Board, an agency of the United States Government, and has filed this petition for and on behalf of the Board which has authorized the filing of this petition.

2.

Statutory jurisdiction by this Court over this cause of action and over the parties has been properly invoked by Petitioner pursuant to Section 10(j) of the Act, and Fed.R.Civ.P. 65(b).

3.

(A) On or about the dates set forth below in subparagraphs (1)-(3), Technical, Office and Professional Union, Local 2110, United Automobile Agricultural Implement and Aerospace Workers, AFL-CIO, CLC (herein called the Union or Charging Party), pursuant to the provisions of the Act, filed with the Board charges and amended charges, as follows:

(1) A charge and a first amended charge in Case No. 29-CA-18119 were filed by the Union on April 11, 1994 and May 26, 1994, respectively, alleging that Respondent had engaged in violations of Section 8(a)(1) and (3) of the Act.

(2) The charge in Case No. 29-CA-18381 was filed by the Union on July 6, 1994, alleging that Respondent had engaged in violations of Section 8(a)(1) and (5) of the Act.

(3) The charge in Case No. 29-CA-18421 was filed by the Union on July 18, 1994, alleging that Respondent had engaged in further violations of Section 8(a)(1) and (5) of the Act.

4.

The charges and amended charges were referred for investigation to the Regional Director of the Twenty-Ninth Region of the Board.

5.

(A) After investigation by the Regional Office in which Respondent was afforded the opportunity to present evidence and legal argument on the merits of the charges described above in paragraphs 3 and 4, the Regional Director, for the Board's Twenty-Ninth Region, pursuant to Section 10(b) of the Act, 29 U.S.C. Sec. 160(b), issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (herein called the Consolidated Complaint) against Unitron Color Graphics of New York Incorporated (herein called Respondent) on August 31, 1994 in Case Nos. 29-CA-18119, 29-CA-18381 and 29-CA-18421. The Consolidated Complaint alleges that Respondent violated Sections 8(a)(1), (3) and (5) of the Act by engaging in certain conduct including, *inter alia*, circulating among its employees a petition to decertify the Union and urging said employees to sign the petition; promising employees better benefits if they signed the petition, abandoned their membership in the Union and refrained from engaging in union activities; threatening employees with a reduction in hours and layoffs and issuing disciplinary warning letters to its employee/shop steward Adonica Hull because they engaged in Union activities; failing and refusing to provide relevant information which was requested by the Union and failing and refusing to bargain in good faith over the effects on unit employees of Respondent's decision to close its facility.

(B) In disposition of Case Nos. 29-CA-18119, 29-CA-18381 and 29-CA-18421, Respondent and the Union entered into an informal settlement agreement, which was

approved by the Regional Director for Region 29 on June 26, 1996. The settlement agreement provided that Respondent would, *inter alia*, bargain over the effects upon its bargaining unit employees of its decision to close its facility.

6.

(A) A charge and a first amended charge in Case No. 29-CA-20680 were filed by the Union on January 31, 1997, and April 28, 1997, respectively, alleging that Respondent had engaged in further violations of Section 8(a)(1) and (5) of the Act.

(B)The charges and amended charges were referred for investigation to the Regional Director of the Twenty-Ninth Region of the Board.

(C) After investigation by the Regional Office in which Respondent was afforded the opportunity to present evidence and legal argument on the merits of the charges described above in paragraphs 6(A) and (B), an Acting Regional Director, for the Board's Twenty-Ninth Region, pursuant to Section 10(b) of the Act, 29 U.S.C. Sec. 160(b), issued an Order Revoking Informal Settlement Agreement, Order Further Consolidating Cases, Amended Consolidated Complaint and Notice of Hearing (herein called the Amended Consolidated Complaint) in Case Nos. 29-CA-18119, 29-CA-18381, 29-CA-18421 and 29-CA-20680, alleging as violations of the Act, the pre-settlement conduct set forth in the Consolidated Complaint, as described above in paragraph 5(A), and additionally alleging that Respondent failed and refused to furnish the Union with certain requested information, and that Respondent bargained in bad faith by (1) expressing strong disdain for the Union representative and the Union's effects bargaining proposals; (2) evidencing a closed-mindedness to the Union's proposals; (3) failing or refusing to respond or make any counterproposals to the Union's effects bargaining proposals; and (4) failing and

refusing to provide certain information, and that by such conduct it failed to comply with and violated the terms of the settlement agreement described above in paragraph 5(B) above.

(D) The Regional Director seeks, in the administrative complaint proceeding described in paragraph 6(C) above, as part of a final remedial order against the Respondent, that the Board order, under Section 10(c) of the Act, 29 U.S.C. Section 160(c), a make-whole remedy for the affected employees who were the victims of Respondent's alleged violations, which order shall require, as a minimum, two weeks of pay for all of Respondent's employees previously represented by the Union.

7.

(A) At all material times, Respondent was a New York corporation, with its principal office and place of business located at 47-10 32nd Place, Long Island City, New York, where it was engaged in performing pre-press color graphics production services for magazines, and related services.

(B) During the past year, a period representative of all times material herein, Respondent, in the course and conduct of its business operations described above in paragraph 7(A), performed services valued in excess of $50,000 for various enterprises located in the State of New York, each of which enterprises, in turn, is directly engaged in interstate commerce and satisfies a Board standard for the assertion of jurisdiction, exclusive of indirect inflow or indirect outflow.

(C) Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act, 29 U.S.C. Sec. 152(2), (6) and (7).

(D) The Union, is now, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act, 29 U.S.C. Sec. 152(5).

(E) There is and Petitioner has demonstrated reasonable cause to believe that:

(1) Since on or about April 13, 1994, May 16 and June 29, 1994 Respondent failed and refused to bargain collectively in a timely manner with the Union regarding the effects upon unit employees of Respondent's decision to sell its business.

(2) The subject set forth in paragraph (E)(1) relates to the wages, hours and other terms and conditions of employment of the unit employees and is a mandatory subject for the purposes of collective bargaining.

(3) Since on or about May 16, 1994 and May 31, 1994, Respondent failed and refused to furnish, or delayed in furnishing, the Union with certain relevant information requested by the Union.

(4) By the acts described above in paragraphs E(1)-(3), Respondent has failed and refused to bargain collectively, and in good faith with the exclusive collective bargaining representative of its employees, in violation of Section 8(a)(1) and (5) of the Act.

8.

There is and Petitioner has reasonable cause to believe that Respondent, in violation of the terms of the settlement agreement described above in paragraph 5(B) above, engaged in the following conduct:

(1) Respondent failed and refused to furnish the Union with certain relevant information requested by the Union in letters dated November 15, 1996, January 7, 1997, February 25, 1997 and April 22, 1997.

(2) Respondent negotiated in bad faith with the Union regarding the effects of its decision to close its Long Island City, New York facility upon its bargaining unit employees by its overall conduct including:

(a) on or about September 12, 1996, expressing strong disdain for the Union representative and the Union's effects bargaining proposals, evidencing a closed-mindedness to the Union's proposals;

(b) since on or about September 12, 1996, failing or refusing to respond or make any counterproposals to the Union's effects bargaining proposals; and

(c) since on or about November 15, 1996, January 7, 1997, February 25, 1997 and April 22, 1997, failing and refusing to provide and delaying in providing certain information described above.

9.

There is and Petitioner has reasonable cause to believe that Respondent's asset purchaser, Applied Graphics Technologies, L.P., herein called AGT, makes monthly commission payments to Respondent pursuant to a May 10, 1994 Asset Purchase Agreement, but that these commissions will end in May 1998.

10.

There is and Petitioner has reasonable cause to believe that since Respondent discontinued its operations in May of 1994, was dissolved by proclamation on September 24, 1997, because of non-payment of taxes and has not responded to the request of the Regional Office that it voluntarily sequester an amount sufficient to cover the backpay remedy as set forth in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), that

Respondent will dissipate any income earned from AGT and any other sources pending final disposition of the matters involved herein before the Board.

11.

(A) Unless immediate protection is granted to Petitioner pursuant to Fed.R.Civ.P. 65(b) requiring Respondent to set aside sufficient assets and income so as to prevent the imminent dissipation or dispersal of Respondent's assets and income, a frustration to the ultimate administrative order of the Board in NLRB Case Nos. 29-CA-18119, 29-CA-18381, 29-CA-18421 and 29-CA-20680 will result.

(B) There is imminent danger that substantial and irreparable injury will unavoidably result to Petitioner's enforcement of the Act in NLRB Case Nos. 29-CA-18119, 29-CA-18381, 29-CA-18421 and 29-CA-20680 and that the Board's administrative order will be frustrated if protection is not granted with a temporary restraining order pending a final adjudication by the Court of the merits of the Board's Petition for a temporary injunction.

NOW, THEREFORE, BASED UPON THE ABOVE, IT IS HEREBY ORDERED, that effective the _____ day of March, 1998, at ____.m., Respondent, its principals, officers, agents, attorneys, servants, employees, successors and assigns, and all persons natural or corporate acting in concert or participation with Respondent be, and they hereby are,

(A) ENJOINED AND RESTRAINED until , 1998, at , and no longer without further order of this Court from:

(1) In any manner selling, leasing, transferring, assigning, paying over, alienating, dissipating or otherwise disposing of any and all of Respondent's assets, including but not limited to real property, buildings and fixtures, leasehold interests,

equipment or vehicles used to carry out Respondent's business, accounts receivable, monies on hand, monies that will be received in the future, or monies presently deposited in Respondent's bank or brokerage accounts, unless and until Respondent first furnish security in the amount of $23,046.40 by depositing the sum of $23,046.40 in the registry of the United States District Court for the Eastern District of New York to protect the claims created by their alleged unfair labor practices as set forth in the Acting Regional Director's Amended Consolidated Complaint in NLRB Cases 29-CA-18119; 29-CA-18381; 29-CA-18421; 29-CA-20680, *PROVIDED HOWEVER,* Respondent may sell, transfer or lease assets in bona fide arms length transactions for a full, fair and present consideration or rental value actually paid to Respondent, provided that the receipts from any such sale or transfer, and the rents due pursuant to any such lease shall immediately upon receipt be deposited in the registry of the United States District Court for the Eastern District of New York until the total amount deposited in that Court's registry in connection with this case shall equal $23,046.40; *PROVIDED FURTHER,* that Respondent shall keep, and make available to the Board upon request, for inspection and copying, written records of each and every transaction involving expenditures or receipts by Respondent in excess of $100.

(2) Unless and until the sum of $23,046.40 is set aside and retained in the manner set forth above, in any manner or by any means entering into any arrangement or agreement providing for or which would result in, a lien on any of Respondent's current assets or income or pledging any of its current assets or income as security or encumbering any of its other current assets without further order of this Court.

(3) Unless and until the sum of $23,046.40 is set aside and retained in the manner set forth above, distributing any of Respondent's income or assets, or the proceeds from the sale, lease or divestment thereof, to the officers, principals, shareholders or directors of Respondent, or to any other person, enterprise or entity controlled by, or related to or affiliated with, Respondent or its shareholders, officers or directors, including the repayment of loans to Respondent or for the payment of unreasonable salaries to Respondent's officers, shareholders or directors or their relatives, without further order of this Court;

(4) In any manner of by any means concealing, misplacing, altering or destroying any of Respondent's financial correspondence, books, records, federal, state and local tax returns, bank or brokerage house statements, or other financial documents.

(B) Affirmatively Ordered and Directed to:

(1) immediately, based on the income and assets it presently has, and from any income and assets it receives in the future, deposit in the registry of the Court, the total amount of $23,046.40, or whatever amount less than that it presently has or receives in the future, pending final disposition of the administrative matters before the Board and any judicial review thereof.

(2) notwithstanding any other provision of this order, proceeds of the sale, transfer, lease or other disposition of Respondent's assets for a full fair and present consideration or rental value, may be applied to bona fide current expenses including federal, state, county and local taxes, and the satisfaction of bona fide liens of record recorded prior to the entry of this order, provided however, that in no event shall any payment be made to any officer, principal, shareholder or director of Respondent, or to

any other person, enterprise or entity controlled by, or related to or affiliated with, Respondent or its shareholders, officers or directors, absent further order of this Court.

(3) provide notice of this order, in writing, to any person natural or corporate to whom Respondent proposes to sell, lease, transfer or otherwise disperse of any of its assets or to any person, natural or corporate holding for Respondent's credit, funds, income or proceeds of any sale of Respondent's assets; copies of such notices shall be promptly provided to the Board.

II. IT IS FURTHER ORDERED that any person, natural or corporate, having notice of this order and holding funds for credit of Respondent, including Applied Graphics Technologies, L.P., is directed to deposit said funds in the registry of the United States District Court for the Eastern District of New York, until the total amount deposited in that Court's registry in connection with this case shall equal $23,046.40; and it is further directed that they stop payment on any checks issued to Respondent as of March 6, 1998.

III. IT IS FURTHER ORDERED that service of a copy of this order, when it is issued, be made forthwith by the United States Marshal or an agent of the Board, 21 years of age or older, in any manner provided in the Federal Rules of Civil Procedure for the United States District Courts, or by registered mail, upon Respondent, Applied Graphics Technologies, L.P. and the Charging Party before the Board, and that such proof of such service be filed with the Court.

ORDERED this _____ day of _____, 1998, at Brooklyn, New York.

BY THE COURT:

_____
United States District Judge

APPENDIX I

APPENDIX I-8

Outline of Short Memo of Points in Support of T.R.O. Request for Protective Order

Note: [redacted]

1. Nature of 10(j) proceedings:

Use language from the 10(j) Standards in your circuit. If appropriate, set forth Region's attempts to give prior notice to and official service of petition/exhibits upon the respondent and/or its counsel. It may be necessary to attach an affidavit of a Board agent re notice and service.

2. Summary of Facts

a) short summary of facts, including issuance of Board's administrative complaint.

3. "Reasonable Cause"/"Likelihood of Success on Merits"

a) describe basis for legal conclusion that facts give rise to violations that entail backpay liability under Act, cite one or two key cases on each of merit allegations.

b) note attached affidavit of Regional officer estimating backpay in this case.

4. "Just and Proper" Relief; Need for T.R.O.

a) describe the circumstances that indicate a need to protect the Board's backpay, i.e., a cessation of Respondent's operations and ongoing/imminent liquidation of assets without Respondent's making any provision for the satisfaction of its backpay liability, cite to any attached affidavit or notice of auction, etc.

b) Need to protect potential backpay remedy of Board - Section 10(c) of Act; importance of backpay as remedial device to restore lawful status quo, see *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 197 (1941), *NLRB v. J.H. Rutter-Rex Mfg. Co.,* 396 U.S. 258, 265 (1969).

c) Federal courts have often granted extraordinary injunctions to preserve a defendant's assets that appeared to be in danger of dissipation during a federal administrative proceeding, including the use of Section 10(j) under the NLRA. See, e.g., *Hirsch v. Dorsey Trailers, Inc.,* 147 F.3d 243 (3rd Cir. 1997); *Schaub v. Brewery Products. Inc.,* 7I5 F. Supp. 829 (E.D. Mich. 1989) (Section 10(j)); *Kobel1 v. Menard Fiberglass Products, Inc.,* 678 F. Supp. 1155 (W.D. Pa. 1988) (Section 10(j)); *NLRB v.*

Kellburn Manufacturing Co., Inc., 149 F.2d 686 (2d Cir. 1945) (NLRA Section 10(e)). See generally *SEC v. Bartlett*, 422 F.2d 475 (8th Cir. 1970); *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711 (5th dr. 1982), cert. denied 456 U.S. 973; *FSLIC v. Sahni*, 868 F.2d 1096 (9th Cir. 1989).

d) District Court can grant T.R.O. under Section 10(j) and Fed. R. Civ. P. 65(b), see *Squillacote v. Local 248, Meat and Allied Food Workers*, 534 F.2d 735, 743 (7th Cir.. 1976). Such TROs can be granted to sequester assets and prevent the destruction of a respondent's books and records. See *CFTC v. Morgan, Harris & Scott, Ltd.*, 484 F. Supp. 669, 671 (S.D.N.Y. 1979); cite also to attached copies of 10(j) "protective order" TROs, like *BGB Construction, Milwaukee Terminal, Yellowstone*, and *New Hope Industries* (copies available from ILB).

APPENDIX I

APPENDIX I-9

Model Argument for
"Protective Order" or Sequestration
of Assets Injunctions Under Section 10(j)
[29 U.S.C. Section 160(j)]

[redacted]

1. NLRB Backpay Orders - The Statutory Scheme

In Section 10(a) of the Act [29 U.S.C. Section 160(a)], Congress granted to the Board exclusive authority, acting in the public interest, to prevent any person from engaging in unfair labor practices. See *Amalgamated Utility Workers v. Consolidated Edison Co. of N.Y.,* 309 U.S. 261, 265 (1940). In addition, Section 10(c) of the Act [29 U.S.C. Section 160(c)] empowers the Board to remedy those violations already committed by "restor[ing], as far as possible the status quo that would have obtained but for the wrongful act." *NLRB v. J.H. Rutter-Rex Mfg. Co.,* 396 U.S. 258, 265 (1969). In *Rutter-Rex,* the Court explained that "[r]estoration of the status quo not only secures the rights of the injured parties, but also deters the commission of unfair labor practices by preventing the wrongdoer from gaining by his unlawful conduct." ~. Accordingly, Congress specifically included among the remedies made available to the Board "the affirmative action" of awarding backpay to employees. NLRA Section 10(c). Thus, like the Board's other remedies restoring the status quo ante, a backpay order "[m]aking the workers whole for losses suffered on account of an unfair labor practice is part of the public policy which the Board enforces*." Albemarle Paper Co. v. Moody,* 422 U.S. 405, 419 (1975), quoting from *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 197 (1941).[3]

[1] [redacted]

[2] Section 3 infra should be modified to reflect the facts of the case.

[3] See, also *Nathanson v. NLRB,* 344 U.S. 25, 27 (1952); *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883, 900 (1984).

APPENDIX I

In recognition of the importance of a backpay award as a remedial device, the federal courts have acted to preserve the vitality of such a Board backpay order in situations where its efficacy was being threatened by external forces. For example, in *NLRB v. Killoren,* 122 F.2d 609 (8th Cir. 1941), reh. denied, cert. denied 314 U.S. 696, the court held that the Board was entitled to make a proof of claim under the Bankruptcy Act despite the absence of any -finalized amount of backpay liability. The court cogently explained the need to preserve the Board's authority to effectively award backpay (122 F.2d at 612):

> An unvindicated or paper decree [awarding backpay] would hardly tend to encourage self—organization efforts and peaceful industrial relations. And so, public policy cannot permit such a valid order of the Board to be thwarted or escaped, if there is any sound way to prevent it. The mere fact that an employer may cease to do business certainly does not end the public interest involved in seeing that a back pay award under the Act is satisfied.

Likewise, in *NLRB v. Sunshine Mining Company,* 125 F.2d 757 (9th Cir. 1942), the court enjoined a state garnishment proceeding against a respondent employer because it would have interfered with the Board's backpay processes.[4]

Of course, it is also possible for a respondent deliberately to defeat a backpay order of the Board by dissipating or dispersing its assets before the Board either can finally compute the amount of backpay liability or can obtain enforcement of its remedial order under Section 10(e) of the Act [29 U.S.C. Section 160(e)].[5] In either case, if the respondent were permitted to accomplish this goal, the Board's backpay order would become simply a "paper decree" -- a nullity in fact. Where courts have been confronted with such a threat, they have not hesitated to issue appropriate orders to preserve the vitality of the Board's backpay award.

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[4] Accord: *NLRB v. Schertzer,* 360 F.2d 152 (2d Cir. 1966); *Lenz v. Lenz,* 723 F. Supp. 1329 (N.D. Iowa 1989), affd. 915 F.2d 388 (8th Cir. 1990). See also *NLRB v. Stackpole Carbon Co.,* 128 F.2d 188 (3d Cir. 1942) (state agency as creditor of discriminatees may not attach backpay fund established by employer); *NLRB v. Mooney Aircraft, Inc.,* 366 F.2d 809 (5th Cir. 1966) (employer may not use debts of employees as set off to Board backpay).

[5] It is well settled that a respondent's sale or liquidation of its business does not extinguish its backpay liability for unfair labor practices committed prior to such termination of operations. See *Golden State Bottling Co., Inc. v. NLRB,* 414 U.S. 168, 187 n. 9 (1973); *Waterman Steamship Corporation v. NLRB,* 119 F.2d 760, 763 (5th Cir. 1941).

Thus, in *NLRB v. Kellburn Manufacturing Co., Inc.,* 149 F.2d 686 (2d Cir. 1945), the court ordered a respondent in the process of liquidation to preserve its assets pending the Board's final computation of the respondent's backpay obligation. Similarly, where courts of appeals have been presented with evidence that an employer is divesting itself of its assets while a backpay order against it is pending enforcement under Section 10(e) of the Act, the courts have granted to the Board temporary injunctions preserving the respondent's assets pending completion of the Board's enforcement proceedings.[6]

In their concurring opinion in *NLRB v. Deena Artware, Inc.,* 361 U.S. 398, 412 (1960), Justices Harlan and Frankfurter observed that:

> [i]t is plainly within that [permissible] area of discretion for the Board to order an employer who is found to have violated Section 8 by the discriminatory discharge of employees, to refrain from conduct which is solely designed to defeat any remedial backpay order which may be entered when specific amounts are finally determined.

The Justices obviously were endorsing court enforcement of such an order to enjoin a respondent from dissipating its assets while the amount of backpay owing is being decided in a supplemental backpay hearing.[7] Moreover, it is well settled that federal courts have general equity power to preserve funds that are the subject of disputes before administrative agencies.[8]

2. Section 10(j) and Temporary Sequestration of Assets Injunctions

The same considerations are equally compelling where a respondent in an unfair labor practice proceeding before the Board threatens to render any remedial backpay order meaningless by undertaking to dissolve its business and/or dispose of its assets while the Board is adjudicating the charges against it. In enacting Section 10(j) of the Act, Congress provided an appropriate avenue by which the Board may obtain temporary injunctive relief in just such circumstances to protect its ability to issue an effective administrative remedial order.

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[6] See, e.g., *NLRB v. Interstate Equipment Co.,* 74 LRRM 2003 (7th Cir. 1970); *NLRB v. Burnette Castings Co.,* 24 LRRM 2354 (6th Cir. 1949). See also *NLRB v. A.N. Electric Corp.,* 140 LRRM 2860 (2d Cir. 1992); *NLRB v. Irving N. Rothkin,* 95 LRRM 3108 (6th Cir. 1977) (on contempt).

[7] See generally *Nathanson v. NLRB,* 344 U.S. at 28-29; *NLRB v. Trident Seafoods Corp.,* 642 F.2d 1148, 1150 (9th Cir. 1981).

[8] See *U.S. v. First National City Bank,* 379 U.S. 378 (1965); *Deckert v. Independence Shares Corp.,* 311 U.S. 282 (1940); *U.S. v. Morgan,* 307 U.S. 183 (1939).

Thus, in considering its 1947 amendments to the original Wagner Act, Congress observed that "[e]xperience under the . . . Act has demonstrated that by reason of lengthy hearing 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," and that "it has sometimes been possible for persons violating the Act to . . . make it impossible or not feasible to restore or preserve the status quo pending litigation.'[t] S. Rep. No. 105, BOth Cong., 1st Sess., p. 27, reprinted in I *Legislative History of the Labor Management* Relations Act of 1947), 433 (G.P.O. 1985). It was in response to this shortcoming, and to protect the public interest in the effectuation of the remedial purposes of the Act, that Congress enacted Section 10(j), empowering the Board to seek temporary injunctive relief in the appropriate district court to preserve the status quo pending determination of the issues by the Board.[9]

As noted by the Second Circuit, "'the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief in [Section 10(j)] cases'" *Seeler v. The Trading Port, Inc., 517 F.2d at 40,* quoting from *Hecht Co. v. Bowles,* 321 U.S. 321, 331 (1944). While a district court under Section 10(j) is given broad discretion to protect the public interest, its ruling is subject to meaningful review to ensure consistency with the statutory purpose of the Act. *Aguayo v. Tomco Carburetor Co.,* 853 F.2d at 749.[10]

It is fully consonant with these principles that, in appropriate cases, the Board has sought, and the district courts have granted, interim orders under Section 10(j) of the Act to preserve, pending the Board's adjudication of unfair labor practice charges, a portion of a respondent's assets sufficient to ensure the respondent's ability to satisfy its potential backpay liability. See *Hirsch v. Dorsey Trailers, Inc.,* 147 F.3d 243 (3d Cir. 1997); *Schaub v. Brewery Products, Inc.,* 715 F. Supp. 829 (E.D. Mich. 1989); *Kobell v. Menard Fiberglass Products, Inc. et al.,* 678 F. Supp. 1155 (W.D. Pa. 1988); *Pascarell v. Alpine*

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[9] See *Asseo v. Pan American Grain Co.,* 805 F.2d 23, 25 and 26 (1st Cir. 1986); *Seeler v. The Trading Port, Inc.,* 517 F.2d 33, 37-38 (2d Cir. 1975); *Pascarell v. Vibra Screw, Inc.,* 904 F.2d 874, 878-879 (3d Cir. 1990); *NLRB v. Aerovox Corporation,* 389 F.2d 475, 477 (4th Cir. 1967); *Boire v. Teamsters,* 479 F.2d 778, 787-788 (5th Cir. 1973), rehearing denied 480 F.2d 924 (5th Cir. 1973); *Schaub v. West Michigan Plumbing & Heating, Inc.,* 250 F.3d 962 (6th Cir. 2001); *NLRB v. Electro-Voice, Inc.,* 83 F.3d 1559, 1566 (7th Cir. 1996); *Minnesota Mining & Manufacturing Co. v. Meter,* 385 F.2d 265, 269-270 (8th Cir. 1967); *Scott v. Stephen Dunn & Associates,* 241 F.3d 652, 659 (9th Cir. 2001); *Sharp v. Webco Industries, Inc.,* 225 F.3d 1130, 1136 (10th Cir. 2000);); *Arlook v. S. Lichtenberg & Co., Inc.,* 952 F.2d 367, 371 (11th Cir. 1992); *UAW v. NLRB (Ex-Cell-O Corp.),* 449 F.2d 1046, 1050-1053 (D.C. Cir. 1971).

[10] Accord: *Fleischut v. Nixon Detroit Diesel, Inc.,* 859 F.2d 26, 30-31 (6th Cir. 1988). Section 10(j) injunctions are temporary in nature, and last only during the litigation of the administrative proceedings before the Board. The injunction terminates by operation of law upon the issuance of the Board's administrative decision and order. *Barbour v. Central Cartage, Inc.,* 583 F.2d 335 (7th Cir. 1978).

Fashions, Inc., 126 LRRM 2242 (D. N.J. 1987); *Norton v. New Hope Industries, Inc.,* 119 LRRM 3086 (M.D. La. 1985); *Maram v. Alle Arecibo Corp. et al.,* 110 LRRN 2495 (D. P.R. 1982) (sequestration of assets orders); *Fuchs v. Workroom For Designers, Inc.,* 116 LRRN 2324 (D. Mass. 1984) (appointment under Section 10(j) of special master with receivership powers).[11] For where, as here, Petitioner has shown reasonable cause to believe **[or: a likelihood of success in proving]** that a respondent has engaged in unfair labor practices which ultimately will give rise to a remedial backpay order, and where there is evidence that the respondent is liquidating and/or dispersing its assets or threatening to do so, without providing for satisfaction of that future backpay liability, the issuance of an order under Section 10(j) of the Act enjoining the dissipating of assets, or sequestering assets, or directing the deposit of funds with the registry of the district court, or establishing a receivership, is clearly "just and proper" -- indeed, is absolutely essential -- to preserve the status quo and prevent the nullification or frustration of the Board's ultimate remedial order. See generally *Angle v. Sacks,* 382 F.2d at 660.[12]

In sum, where a district court temporarily encumbers a respondent's funds at the Board's petition under Section 10(j), it acts "for the protection of the litigants and the public, whose interests the injunction and final disposition of the fund[s] affect." *U.S. v. Morgan,* 307 U.S. at 193-194. Accordingly, where, in the exercise of its informed discretion,[13] the Board seeks such a temporary order sequestering a portion of a respondent's assets, we submit that the request should be granted unless it can be shown that the order is a patent attempt to achieve ends not effectuating the purposes and policies of the Act. Cf. *NLRB v. Seven-Up Bottling Co. of Miami, Inc.,* 344 U.S. 344, 346-347 (l953).[14]

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[11] Significantly, the standards for issuing preliminary relief pursuant to Section 10(j) of the Act are the same as those for issuance of such relief under Section 10(e), *NLRB v. Aerovox Corp.,* 389 F.2d at 477, and as shown above, pp. 2-3 the courts of appeals have been receptive to requests for interim sequestration of assets orders under Section 10(e).

[12] Similar preliminary injunctive relief has often been granted to other federal agencies in like circumstances. See, e.g., *Aldred Investment Trust v. SEC,* 151 F.2d 254 (1st Cir. 1945), cert. denied 326 U.S. 795 (1946); *SEC v. American Board of Trade, Inc.,* 830 F.2d 431, 438-39 (2d Cir. 1987); *FTC v. Southwest Sunsites, Inc.,* 665 F.2d 711 (5th Cir. 1982), cert. denied 456 U.S. 973; *SEC v. Bartlett,* 422 F.2d 475 (8th Cir. 1970); *FTC v. H.N. Singer, Inc.,* 668 F.2d 1107 (9th Cir. 1982); *CFTC v. Muller,* 570 F.2d 1296 (5th Cir. 1978); *SEC v. Keller Corp.,* 323 F.2d 397 (7th Cir. 1963); *FTC v. U.S. Oil & Gas Corp.,* 748 F.2d 1431 (11th Cir. 1984). See *also Nursing Home & Hospital Union No. 434 v. Sky Vue Terrace, Inc.,* 759 F.2d 1094 (3d Cir. 1985) (Section 301 L.M.R.A. suit to enjoin distribution of employer assets pending arbitration); *IBT Local 71 v. Akers Motor Lines,* 582 F.2d 1336 (4th Cir. 1978), cert. denied 440 U.S. 929 (same).

[13] See *Maram v. Universidad Interamericana de Puerto Rico, Inc.,* 722 F.2d 953, 960 (1st Cir. 1983).

[14] See generally *Mono v. North American Soccer League,* 632 F.2d 217, 218 (2d Cir. 1980) (aggressive remedial relief on an interim basis under Section 10(j) is necessary in

3. A Temporary Sequestration of Assets Injunction Under Section 10(j) is Just and Proper In this Case

Petitioner believes that the evidence that will be adduced before the Court will satisfy the standards necessary to warrant issuance of a temporary sequestration of assets injunction under Section 10(j). The record will establish reasonable cause to believe **[or: a likelihood of success in proving]** that Respondent has committed unfair labor practices that will give rise to a remedial backpay obligation under the Act. The facts also will indicate that the conduct of Respondent creates a -reasonable possibility that, absent such interim relief, the Board's ultimate backpay award will be nullified or frustrated by a dissipation or dispersal of Respondent's assets. See *FSLIC v. Sahni,* 868 F.2d 1096, 1097 (9th Cir. 1989) (federal agency entitled to asset freeze under preliminary injunction where there existed "possibility of dissipation"; where public interest is involved court's equitable powers "assume an even broader and more flexible character than when only a private controversy is at stake", quoting from *FTC v. H.N. Singer, Inc.,* 668 F.2d 1107, 1112 (9th Cir. 1982)). The carefully tailored 10(j) order that Petitioner proposes is designed to be as accommodating as possible to Respondent's property/business rights, while at the same time guarantee to the Board the legitimate protection to look to Respondent's assets to satisfy a potential monetary award.

The temporary relief sought herein would not be unduly burdensome to the Respondent. It would not prevent the Respondent from selling any of its assets in arms' length transactions for a fair and present consideration. Nor would it proscribe the Respondent from incurring and paying legitimate, current business expenses. Rather, it would merely preclude the Respondent from dispersing or dissipating its assets or the proceeds of the sale thereof without first ensuring the preservation of sufficient funds to satisfy its potential statutory backpay obligation. See *Kobell v. Menard Fiberglass,* 678 F. Supp. at 1166-1167; *Schaub v. Brewery Products,* 715 F. Supp. at 831. This temporary deprivation of Respondent's unfettered control over its property is consistent with due process standards. See generally *Mitchell v. W.T. Grant Co.,* 416 U.S. 600, 618-619 (1974); *Deckert v. Independence Shares Corp.,* 311 U.S. at 288-290. The requested injunction would, moreover, respect the prior claims of secured and judgment creditors. For, the Board seeks only the status of an unsecured creditor and its pro rata share of assets available after the discharge of secured obligations. Cf. *Nathanson v. NLRB,* 344 U.S. at 27. The amount of money that may be properly sequestered need only be a "satisfactorily close approximation" of a respondent's total backpay obligation. See *Schaub v. Brewery Products,* 715 F. Supp. at 831. As noted supra, any relief granted by

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appropriate labor cases). Accord: *Scott v. El Farra Enterprises, Inc.. d/b/a Bi-Fair Market,* 863 F.2d 670, 676-677 (9th Cir. 1988) (district court should give "great deference" to Board's choice of interim relief under Section 10(j)).

the Court is temporary in nature, and lasts only during the administrative litigation before the Board. *Barbour v. Central Cartage, Inc.*, 583 F.2d at 337.[15]

Further, in order to insure compliance with the injunction, it is also just and proper for the Court to require the Respondent to affirmatively carry out the following obligations: maintain regular business records and grant Board agents reasonable access to such records for inspection and copying, see *Kobell v. Menard Fiberglass Products*, 678 F. Supp. at 1170, *Pascarell v. Alpine Fashions, Inc.*, 126 LRRM at 2245, *FTC v. H.N. Singer, Inc.*, 668 F.2d at 1114, *NLRB v. S.E. Nichols of Ohio, Inc.*, 592 F.2d 326 (6th Cir. 1979), *Sandy Hill Iron and Brass Works*, 69 NLRB 353, 382 (1946), enfd. 165 F.2d 660, 663 (2d Cir. 1947); grant Board agents reasonable access to its plant and business premises in order to verify the accuracy of business records, see *NLRB v. Southwire Co.*, 801 F.2d 1252, 1259 (11th Cir. 1982); and file with the Court, with a copy submitted to Petitioner, within a reasonable period of time, a sworn statement (a) listing and describing all present assets valued in excess of $250, see *NLRB v. A.N. Electric Corp.*, 140 LRRN at 2862, *Norton v. New Hope Industries*, 119 LRRM at 3088; and (b) describing with specificity what steps it has taken to comply with the Court's injunction order, see *Pascarell v. Gitano Group, Inc.*, 730 F. Supp. 616, 625-626 (D. N.J. 1989), *Bloedorn v. Teamsters Local 695*, 132 LRRM 3102, 3110 (W.D. Wisc. 1989), *NLRB v. Southwire Co.*, 801 F.2d at 1259, *NLRB v. Ambrose Distributing Co.*, 382 F.2d 92, 96 (9th Cir. 1967). The injunction would also proscribe any destruction of business or financial records or documents. See, e.g., *CFTC v. Morgan Harris & Scott, Ltd.*, 484 F. Supp. 669, 671 (S.D.N.Y. 1979). In conclusion, we submit that the requested temporary injunctive relief as prayed for in the instant Petition is clearly "just and proper" within the meaning of Section 10(j) of the Act, as it will prevent a possible nullification or frustration of the policies and remedial purposes of the Act. See, e.g., *Hirsch v. Dorsey Trailers, Inc.*, 147 F.3d at 247; *Schaub v. Brewery Products*, 715 F. Supp. at 831; *Kobell v. Menard Fiberglass*, 678 F. Supp. at 1166-1167.[16]

[15] Indeed, upon the issuance of the Court's 10(j) decree, the Board would be required to expedite the underlying administrative proceeding consistent with its own outstanding Rules and Regulations. See 29 C.F.R. Section 102.94(a).

[16] Cf. *NLRB v. Kellburn Manufacturing Co., Inc.*, 149 F.2d at 687; *FTC v. Southwest Sunsites, Inc.*, 665 F.2d at 722; *FSLIC v. Sahni*, 868 F.2d at 1097.

APPENDIX I

APPENDIX I-10

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

RONALD S. COHEN, Acting Regional Director
of the First Region of the
National Labor Relations Board, for
and on behalf of the NATIONAL LABOR
RELATIONS BOARD,

Petitioner

v. Civil No.

ESTORIL CLEANING CO., INC.

Respondent

and

POLAROID CORPORATION,

Party-in-Interest

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION UNDER SECTION 10(J) OF THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, [29 U.S.C. SECTION 160(J)] [AND THE ALL WRITS ACT [28 U.S.C. SECTION 1651(A)]][1]

I

STATEMENT OF THE CASE

This proceeding is before the Court on a petition filed by the Acting Regional Director of the First Region of the National Labor Relations Board (herein called the Board), pursuant to Section 10(j) of the National Labor Relations Act, as amended (29 U.S.C. Sec. 160(j)) (herein called the Act), for a temporary restraining order and a preliminary injunction pending the final disposition of the matters involved herein

1 [redacted]

pending before the Board on a Consolidated Complaint and Notice of Hearing issued by Petitioner on February 28, 2000, in NLRB Cases 1-CA-37811, 1-CA-37828, and 1-CA-37875, (herein called Consolidated Complaint), and a Complaint and Notice of Hearing issued by the Petitioner on March 7, 2000 in Case 1-CA-37931 (herein called Complaint), alleging that Estoril Cleaning Co., Inc., (herein called Respondent) violated Sections 8(a)(1) and (5) of the Act, by *inter alia*, failing to bargain in good faith with Service Employees International Union, Local 254, AFL-CIO, CLC, (herein called the Union) over the effects on its bargaining unit employees of its decision to cease its operations, and by failing to pay bargaining unit employees for work performed during the month of January 2000. Petitioner seeks a temporary restraining order and other injunctive relief in order to guarantee that, should the Board find Respondent has violated the Act, as alleged in the Consolidated Complaint and the Complaint, there will be money to satisfy the Board's remedial order. Petitioner seeks a temporary restraining order and other injunctive relief in order to prevent the Respondent from dispersing or dissipating assets, thereby frustrating any prospective remedial order of the Board.

It is recognized that District Courts have authority to grant temporary restraining orders under Section 10(j). *Squillacote v. Local 248, Meat & Allied Food Workers*, 534 F.2d 735, 742-743 (7th Cir. 1976); *Kobell v. Menard Fiberglass Products, Inc.*, 678 F. Supp. 1155, 1157 (WD PA 1988).

This Court has the authority to grant a temporary restraining order pursuant to Section 10(j) of the Act **[**and/or the All Writs Act**]**, but may do so only after a respondent is given proper "notice." Adequate and appropriate notice pursuant to Section 10(j) of the Act is provided where, as here, Respondent **[**and counsel for Polaroid Corporation,

(herein called Polaroid)**]** were notified at about 2:00 p.m. and 1:45 p.m., respectively on March 7, 2000, that a petition for a temporary restraining order would be filed on March 8, 2000, and that a March 8, 2000 hearing would be requested. Moreover, Respondent **[**, Polaroid and Polaroid's counsel**]** will be served with copies of the pleadings herein on March 8, 2000. *Squillacote v. Local 248, Meat & Allied Food Workers,* supra, at 743.

II

LEGAL STANDARDS FOR INJUNCTIVE RELIEF

Section 10(j) of the Act was enacted by Congress as a means of protecting the Board's Orders from remedial failure during the pendency of its administrative proceedings. Absent interim relief under Section 10(j), those violating the Act (or seeking to evade their liability thereunder), might be able to accomplish their unlawful objective before being placed under any legal restraint. *Kaynard v. Palby Lingerie*, 625 F.2d 1047, 1055 (2nd Cir. 1980) [citing S. Rep. No. 105, 80th Cong., 1st Sess. 27 (1947)].

This case meets the standards for obtaining a Section 10(j) injunction under such First Circuit cases as *Pye v. Sullivan Brothers Printers*, 38 F.3d 58, 147 LRRM 2584 (1st Cir. 1994); *Asseo v. Centro Medico del Turabo, Inc.*, 900 F.2d 445, 454, 133 LRRM 2722, 2729-2730 (1st Cir. 1990); *Asseo v. Pan American Grain Co.*, 805 F.2d 23, 25, 123 LRRM 2996, 3000 (1st Cir. 1986); *Fuchs v. Jet Spray*, 725 F.2d 664, 116 LRRM 2191 (1st Cir. 1983), aff'g. 560 F. Supp. 1147, 114 LRRM 3493 (D. Mass. 1983); and *Maram v. Universidad Interamericana,* 722 F.2d 953, 115 LRRM 2118 (1st Cir. 1983).

APPENDIX I

The First Circuit's standards for a temporary restraining order appear to be similar to those of a standard preliminary injunction, and the same factors are examined. *Merril Lynch, Pierce, Fenner & Smith, Inc., v. Bishop,* 839 F.Supp. 68 (D.ME.1993)

Under the First Circuit's standards, the district court may grant a Section 10(j) petition upon finding (1) that the Board has "reasonable cause" to believe the Act has been violated, and (2) that injunctive relief would be "just and proper," as expressly required by Section 10(j) itself. *Asseo v. Centro Medico del Turabo, Inc.,* supra at 454; *Asseo v. Pan American Grain Co.,* supra at 25; *Fuchs v. Hood Industries,* 590 F.2d 395, 397, 100 LRRM 2547, 2549 (1st Cir. 1979). In *Pye v. Sullivan Brothers,* the court indicated that if the reasonable cause test still survives, it is, in any event, subservient to the question, posed under the just and proper standard, of whether the Board has demonstrated a likelihood of success on the merits. 147 LRRM at 2588, n. 7. On the basis of the above analysis of the charges, the Petitioner believes that it has satisfied the First Circuit's "reasonable cause" standard establishing that violations of Section 8(a)(1) and (5) of the Act have occurred.

In determining whether injunctive relief is "just and proper," the First Circuit applies the standards it normally applies for preliminary injunctive relief. Specifically, these standards are: (1) that the plaintiff will suffer irrevocable injury if the injunction is not granted; (2) that such injury outweighs any harm which an injunction would inflict on the defendant if granted; (3) that the plaintiff has shown a likelihood of success on the merits; and (4) that the public interest will not be adversely affected by granting the injunction. *Maram v. Universidad Interamericana,* supra, 115 LRRM at 2121, citing *Planned Parenthood League of Mass. v. Bellotti,* 641 F.2d 1006, 1009 (1st Cir. 1981).

In applying these "just and proper" standards, the First Circuit follows the "sliding scale" approach used by the Ninth Circuit in *Miller v. California Pacific Medical Center,* 19 F.3d 449, 145 LRRM 2769 (9th Cir. 1994) (en banc). Under this balancing test, as the degree of irreparable harm increases, the requirement for showing a probability of success on the merits decreases, and vice versa. Id. at 459-460. If the Board demonstrates that it is likely to prevail on the merits, irreparable harm may be presumed. If the charge is disputed, or if the Board has only a fair chance of succeeding on the merits, the court will expressly consider the possibility of irreparable harm. *Miller v. California Pacific,* 19 F.3d at 460. If the harm to the plaintiff outweighs the harm to the defendant, then a Section 10(j) injunction is just and proper. This is similar to the approach taken by the First Circuit in *Pye v. Sullivan Brothers,* a case dealing with allegations of withdrawal of recognition, the repudiation of collective-bargaining agreements, and a number of unilateral changes. In discussing its application of the just and proper test, the court stated: "When, as in this case, the interim relief sought by the Board 'is essentially the final relief sought, the likelihood of success should be *strong.*'" *Pan American Grain Co.,* 805 F.2d at 29 (emphasis added), 147 LRRM at 2588.

As to the applicability of these standards in a motion for a temporary restraining order (TRO), the purpose of a TRO is to preserve an existing situation in status quo until the court has an opportunity to pass upon the merits of the demand for a preliminary injunction. *CTC Communication, Inc., v. Bell Atlantic Corp.,* 14 F.Supp. 2d 133 (D. ME 1998)

District Courts have recognized the need for injunctive relief under Section 10(j) of the Act to prevent the dissipation of assets or other conduct by respondents that would

render a backpay order of the Board meaningless. *Schaub v. Brewery Products, Inc.,* 715 F. Supp. 829 (ED MI 1989); *Kobell v. Menard Fiberglass Products, Inc.,* 678 F. Supp. 1155 (WD PA 1988); and *Pascarell v. Alpine Fashion, Inc.,* 126 LRRM 2242 (D. N.J. 1987). [2] Here, Petitioner asks the Court to enjoin Respondent under Section 10(j) in order to preserve the ability of the Board to render a meaningful backpay order.

The Petitioner herein asks that the Court issue a temporary restraining order enjoining and restraining Respondent from distributing, transferring or disposing of its business assets or funds, except as permitted by the Court and by the terms of the temporary restraining order, and also enjoining and restraining Respondent from concealing, altering or destroying any of his business or personal financial documents. Petitioner asks that the temporary restraining order direct Respondent to deposit any income it presently has or should receive, immediately upon receipt, until the amount of $32,202.80 is reached, in the registry of the Court, in an interest bearing account, pending the Court's ruling on the merits of the petition for a temporary injunction. **[**Petitioner also asks that the temporary restraining order enjoin Respondent's former customer, Polaroid, from disbursing monies due to Respondent, pending the Court's ruling on the merits of the petition for a temporary injunction.**]** Finally, Petitioner respectfully asks the Court to direct Respondent to file an answer to the petition by 1:00 p.m. on March 14, 2000; to hold a hearing on the merits of Petitioner's request for a temporary restraining order on March 8, 2000, and to set a hearing on the merits of Petitioner's request for a temporary injunction for 10:00 a.m. on March 16, 2000, or as soon thereafter as counsel may be heard.

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[2] A copy of the LRRM report in *Pascarell v. Alpine Fashion, Inc.* is attached as Appendix A.

APPENDIX I

III

STATEMENT OF FACTS

Upon charges filed by the Union, in Cases 1-CA-37811, 1-CA-37828 and 1-CA-37875, the Regional Director of Region One issued a Consolidated Complaint and Notice of Hearing on February 28, 2000, alleging that *inter alia*, by letter dated January 28, 2000, the Union requested that Respondent bargain collectively with it regarding the effects upon bargaining unit employees of Respondent's decision to close its operations effective January 31, 2000, and that Respondent failed and refused to bargain over the effects on unit employees of its decision to close its operations, which subject is related to wages, hours and other terms and conditions of employment and is a mandatory subject of bargaining.

Upon a charge filed by the Union, in Case 1-CA-37931, the Regional Director of Region One issued a Complaint and Notice of Hearing on March 7, 2000, alleging that Respondent failed to pay bargaining unit employees wages earned in January 2000, which subject relates to wages, hours and other terms and conditions of employment and is a mandatory subject of bargaining.

Respondent was in the business of providing cleaning services, and maintained only one cleaning contract, with Poloroid in Waltham, Massachusetts. Respondent employed approximately 46 employees when it closed its operations on January 31, 2000. Approximately 11 of these employees worked 40 hours per week on the day shift, and about 35 employees worked approximately 20 hours per week during the evenings.

The Union began organizing the Respondent's employees in about September 1998. An election was held on November 12, 1998, and the Union won this election by a

vote of 24 to 12. The Region certified the Union as the representative of the Respondent's employees who cleaned at Polaroid on November 24, 1998.

Sometime in January 2000, the Respondent decided not to re-bid its cleaning contract with Polaroid, which was set to expire on January 31, 2000. On January 24, 2000, another cleaning contractor, who is a signatory to the Master Janitorial Agreement, told the Union's business agent, Donald Coleman, (herein Coleman) that it would be taking over the Polaroid cleaning contract as of February 1, 2000 and hiring all of the unit employees. The Respondent never told the Union that it was not re-bidding its cleaning contract with Polaroid or that it was ceasing operations.

On January 28, 2000, Coleman sent a letter to Respondent's Owner, Emilia Delgado, (herein Emilia) and its Senior Vice-President of Operations, Marco Delgado, (herein Marco) requesting to meet with them to bargain over the effects of the Respondent's decision to cease its operations. The Respondent did not respond to Coleman's letter, and has since refused to meet and bargain with the Union over the effects of terminating its cleaning contract with Polaroid.

Since closing its operations on January 31, 2000, Respondent has failed and refused to pay its part-time employees for hours worked between January 17 and January 31, 2000. Additionally, the Respondent has failed to make good on a bounced check that it issued to one of its part-time employees for 40 hours worked during the first half of January 2000. [3]

[3] The Petitioner is seeking a protective order to sequester certain assets of the Respondent so that, in the event that the Region prevails on its Complaints, there will be sufficient funds to satisfy both a remedy pursuant to *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), which provides for a minimum of two-weeks of backpay for all unit employees where an employer has failed and refused to bargain over the effects of its closing of operation, and to compensate employees for the wages that the Employer

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Before the Respondent failed and refused to bargain with the Union over closing its operations, Respondent violated the Act by refusing to sign an agreed upon collective-bargaining agreement and failing to provide relevant information to the Union.

On September 29, 1999, the Respondent and the Union signed an agreement, effective January 1, 2000, whereby the Respondent agreed to be bound by all terms and conditions of the Master Janitorial Contract, which had been negotiated between the Union and the Maintenance Contractors of New England, Inc. On November 14, 1999, the employees of the unit voted unanimously to ratify this agreement. On November 14, 1999, after the contract ratification vote, Coleman met with Marco and Emilia Delgado. At this time, Coleman notified the Delgados of the results of the ratification vote and told them that the written collective-bargaining agreement ("contract") between the Union and the Respondent would take effect January 1, 2000. Coleman told the Delgados that they had to execute the contract.[4]

Beginning on November 15, 1999, Coleman began calling Marco to set up a meeting where he and the Delgados would execute the contract. Coleman called Marco at least 20 times and left messages for Marco to call him back to set up a meeting.

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failed to pay to them for work performed during January 2000. The Petitioner is not otherwise seeking 10(j) injunctive relief. The portion of this memorandum relating to the Respondent's refusal to execute an agreed-upon collective-bargaining agreement and refusal to furnish information are included for background purposes and to demonstrate the Respondent's total disregard for compliance with the Act, thereby buttressing the need for a protective order.

[4] At some point, Coleman told the Delgados that the pay rates outlined in the contract need not be implemented until February 1, 2000, as the Master Agreement provides for a 30-day grace period.

Marco, however, failed to take or return any of Coleman's calls.[5] By letter dated December 6, 1999, Coleman informed Marco that he would be at the Respondent's office at 5:30 p.m. on December 8, 1999 to execute the contract. Coleman went to the Respondent's office for the purpose of executing the contract on December 7, 1999, December 8, 1999, and December 23, 1999. Marco was not at the office on any of these occasions.

On January 6, 2000, Coleman filed the charge in Case 1-CA-37811, alleging that the Employer had failed to execute the agreed-upon contract. Since that time, Marco has told Coleman that he had sent the signed contract, via certified mail, on numerous occasions.

On January 7, 2000, Coleman sent a letter to the Employer requesting that the Employer furnish the Union with the names, dates of hire, addresses, and work schedules of all Unit employees.

On January 24, 2000, Coleman spoke with Marco. Again, Marco told Coleman that Marco would send the signed contract to the Union that day.

On January 28, 2000, Coleman again spoke with Marco. Marco told Coleman that he would not send the signed contract to the Union because the Respondent was his mother, Emilia's, business and Marco did not want to get involved in the business any longer. That same day, Coleman sent a letter to Marco confirming this telephone conversation. After speaking with Marco, Coleman called Emilia Delgado. Emilia told Coleman that she would send the signed contract and forward a current seniority list to the Union if Coleman sent her a letter stating that this would resolve everything between

[5] Marco operated his business primarily by way of a cell phone with a caller identification feature.

the Employer and the Union. Coleman sent Emilia such a letter, dated January 28, 2000. Also in this January 28th letter, Coleman again requested that the Respondent provide the Union with the names, dates of hire, addresses, and work schedules of all unit employees, as well as the Respondent's complete payroll records for the preceding three months and a list of employees owed wages. To this date, the Respondent has sent none of the requested information to the Union.

Coleman spoke with Marco on numerous occasions when Marco has promised Coleman that the executed contract was "in the mail." Most recently, Coleman spoke to Marco on February 10, 2000, at which time Marco again told Coleman that he was sending the signed contract to Coleman that day. To this date, the Union has not received the signed contract from the Employer.[6]

The Respondent maintained an office at 1277 Main Street in Waltham until approximately August 1999. At that time, the Respondent's phone was disconnected and its place of business moved to 1273 Main Street. The Respondent did not notify the Union of its address change, nor did it provide the Union with a telephone number at which the Union could reach the Respondent. Throughout the time period of August of 1999 through January 2000, Marco claimed to have been overwhelmed by the vast disarray resulting from the Respondent's office move and has, therefore, been unable to locate certain documents, such as certified mail receipts, requested by the Board agent. The Employer closed its Waltham office upon ceasing its operations at Polaroid on January 31, 2000.

[6] The Union still needs the signed contract so that the Unit employees do not have to repeat the one-month grace period for contract benefits with their new employer.

Additionally, as part of its settlement of earlier charges filed against Respondent,[7] the Respondent was to pay $1035 to one discriminatee. This settlement agreement was approved on October 8, 1999. On October 12 and again on November 12, 1999, the Region sent letters to the Respondent requesting that it comply with the terms of the settlement. The Region's compliance officer phoned and left messages for the Respondent, who failed to respond to the compliance officer's messages. Finally, on December 16, 1999, the Region received a check in the amount of $1035 from Marco. While this check was signed by Marco, it was not drawn from a bank account of the Respondent, but rather from a bank account of a different corporation: Delgado Enterprises, Inc. Emilia is the principal officer of Delgado Enterprises, Inc.

The Respondent has submitted its final invoices to Polaroid, and Polaroid was processing those invoices when contacted by the Petitioner on February 17, 2000. Since that time, Polaroid has agreed to temporarily hold off on paying the money that it owes to the Respondent, but is awaiting a Protective Order that would secure this position.[8]

IV

REASONABLE CAUSE

It is well settled that, in Section 10(j) proceedings, the District Court is not called upon to decide the issues before the Board. *Rivera-Vega v. Conagra, Inc.*, 70 F.3d 153 (1st Cir. 1995); *Pye v. Sullivan Brothers Printers*, 38 F.3d 58, 147 LRRM 2584 (1st Cir.

[7] Cases 1-CA-36775 and 1-CA-37492.

[8] Polaroid currently owes the Respondent, and is temporarily holding, $54,331.52. Polaroid has informed the Petitioner that the monies are due to be paid to the Respondent on March 10, 2000, and it intends to tender the monies at that time unless enjoined from doing so. The Petitioner's initial calculations indicate that 2-weeks backpay for the unit would total approximately $15,700. Additionally, the unpaid wages alleged to be owing to employees in the recently filed charge would total approximately $10,300.

1994); *Asseo v. Centro Medico del Turabo, Inc.*, 900 F.2d 445, 454, 133 LRRM 2722, 2729-2730 (1st Cir. 1990); *Asseo v. Pan American Grain Co.,* 805 F.2d 23, 25, 123 LRRM 2996, 3000 (1st Cir. 1986)

Thus, the "reasonable cause" standard does not require the Board to adduce evidence to the extent required in a full hearing on the merits, nor does it require the District Court to resolve disputed issues of fact or credibility; rather, its role is limited to determining whether the NLRB's position is "fairly supported by the evidence." *Rivera-Vega v. Conagra, Inc.*, 70 F.3d 153 (1st Cir. 1995); *Pye v. Sullivan Brothers Printers*, 38 F.3d 58, 147 LRRM 2584 (1st Cir. 1994); quoting *Asseo v. Centro Medico del Turabo, Inc.*, 900 F.2d 445, 454, 133 LRRM 2722, 2729-2730 (1st Cir. 1990).

The evidence which could be adduced in a hearing before this court shows that there is reasonable cause to believe that Respondent violated Section 8(a)(5) of the Act by failing and refusing to bargain over the effects of its closing of operations and by failing to pay employees wages due for work performed in January 2000, which would be remedied by requiring Respondent to, *inter alia*, compensate employees for the hours that they worked in January 2000, and pay a backpay remedy of a minimum of 2 weeks backpay per unit employee. *Transmarine Navigation Corp.,* 170 NLRB 389 (1968); *NLRB v. National Care Rental System, Inc.*, 672 F.2d 1182, 1191, 109 LRRM 2832 (3d Cir. 1982). In *Transmarine Navigation Corp.,* an employer unlawfully refused to bargain with a union about the effects on employees of the employer's closing of its operations. The Board held that the union was denied any opportunity to engage in meaningful bargaining, at a meaningful time: before the shut down, when the employer still may have needed the employees' services. The Board ordered a limited backpay remedy, which at

a minimum would equal two weeks, in part to make the employees whole, but also to recreate in some practicable manner a situation in which the parties' bargaining position has economic consequences for the employer. *Id.* This backpay award is not offset by the fact that the unit employees were hired by the new cleaning contractor and suffered no interruption in their work. See, *NLRB v. Dallas Times Herald*, 315 NLRB 700 (1994) [*Transmarine* remedy not offset by payments made pursuant to the Workers Adjustment and Retraining Notification Act of 1988 (WARN)].

V

A TEMPORARY RESTRAINING ORDER
IS JUST AND PROPER

The Board's remedies are restorative, rather than punitive. Backpay, specifically provided for in Section 10(c) of the Act, is central to the Board's remedial efforts to restore the lawful status quo. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941); *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 265 (1969). It is, therefore, respectfully submitted that, in order to protect the Board's ability it issue a meaningful backpay Order, and indeed its ability to remedy the unfair labor practices of Respondent, the Court should find that it is "just and proper" that a temporary restraining order be granted.

Federal Courts have granted extraordinary injunctions to preserve the assets of a defendant or respondent, where those assets appeared to be in danger of dissipation during the pendency of federal administrative proceedings, including those of the Board. *NLRB v. Horizon Hotel Corp.*, 159 LRRM 2449 (1st Cir. 1998)[9]; *Aldred Investment Trust v. SEC*, 151 F.2d 254 (1st Cir. 1945), cert. Denied 326 U.S. 795 (1946); *Kobell v.*

[9] A copy of the LRRM report in *NLRB v. Horizon Hotel Corp.* is attached hereto as Appendix B.

Menard Fiberglass Products, Inc., 678 F. Supp. 1155 (WD PA 1988); *Schaub v. Brewery Products, Inc.,* 715 F. Supp 829 (ED MI 1989). See generally*: SEC v. American Board of Trade, Inc.,* 830 F.2d 431, 438-439 (2nd Cir. 1987); *SEC v. Bartlett,* 422 F.2d 475 (8th Cir. 1970); *FTC v. Southwest Sunsites, Inc.,* 665 F.2d 711 (5th Cir. 1982), cert. denied 456 U.S. 973; *FSLIC v. Sahni,* 868 F.2d 1096 (9th Cir. 1989); *CFTC v. Morgan, Harris and Scott, Ltd.,* 484 F. Supp. 669, 671 (SDNY 1979) [temporary restraining order granted, prohibiting destruction of records.] Federal Courts have also found that relief such as the protective order requiring Respondent to pay income derived from revenues into the registry of the District Court prayed for here, to be appropriate in other administrative proceedings including those involving the Board. See e.g., *U. S. v. Morgan,* 307 U.S. 183, 193-94 (1939) (upholding deposit in court of stockyard rate differences pending determination of rates by Secretary of Agriculture); *In re Villa Marina Yacht Harbor, Inc.,* 984 F.2d 546 (1st Cir. 1993), cert. denied 510 U.S. 818 (court has inherent power to order mortgagor to make payments into court account; until judgment, neither party can use the money); *NLRB v. A.N. Electric, et al,* 141 LRRM 2386 (2nd Cir. 1992) (circuit court granted Section 10(e) (29U.S.C. Section 160(e) injunction to sequester funds in escrow account or registry of the court)[10]; *City of New York v. Citisource, Inc.,* 679 F. Supp. 393 (S.D.N.Y. 1988) (attachment of bank accounts in RICO action because risk of concealment); *SEC v. Netelkos,* 638 F. Supp. 503 (S.D.N.Y. 1986) (court ordered assets of respondent liquidated and deposited into interest bearing account under control of the clerk of the court); *Bentz v. International Longshoremen's Association, Local 1410,* Civil Action 75-507-H (S.D. Ala. Southern

[10] A copy of the LRRM report in *NLRB v. A.N. Electric, et al* is attached hereto as Appendix C.

Division March 11, 1996) (unpublished) (in Section 10(l) proceeding, 29 U.S.C. Section 160(l), district court ordered disputed funds paid into registry of court pending completion of Board's administrative proceeding).

Here, Respondent discontinued its operations on January 31, 2000. The assets of Respondent are uncertain as Respondent has failed to furnish the Union with requested information**[**; however, according to Polaroid, Polaroid will pay monies due to Respondent in the amount of $54,331.52 on March 10, 2000**]**.[11]

The Respondent's actions with regards to the investigation of the charges at hand as well as prior charges indicates that there is a strong likelihood that Respondent will dissipate its assets as quickly as possible if not precluded from doing so. In addition to violating the Act by refusing to notify the Union of its decision to close and thereafter refusing to bargain over the effects of ceasing its operations, the Respondent has also unlawfully refused to execute an agreed upon collective-bargaining agreement and refused to furnish information to the Union. The Respondent's conduct in these, as well as prior cases, demonstrates a total disregard for its employees' rights under the Act. Not only has the Respondent abruptly ceased its operations without informing the Union, the Respondent recently has: moved its office without informing the Union; disconnected its business telephone without providing the Union with a new telephone number; failed to return numerous telephone calls both from the Union and from the Region; refused to

[11] As noted above, there is reasonable cause to believe that Respondent engaged in statutory violations which would be remedied by requiring Respondent to, *inter alia*, pay a backpay remedy of a minimum of 2 weeks backpay per unit employee. See *Transmarine Navigation Corp.*, 170 NLRB 389 (1968); *NLRB v. National Care Rental System, Inc.*, 672 F.2d 1182, 1191, 109 LRRM 2832 (3d Cir. 1982). As noted in the affidavit of Compliance Officer Elizabeth Gemperline, the Petitioner estimates the minimum backpay liability, also including money due to Unit employees for unpaid wages earned in January 2000 and estimated interest, to be $32,202.80.

accept certified letters from the Region; issued checks to employees that have bounced; allegedly failed to pay employees for their last eleven working days, and paid the Employer's indebtedness for an earlier unfair labor practice charge from a different corporation's bank account. Finally, the Employer has totally ceased operations and the only assets known to exist that may be available to satisfy a Board order are the monies currently being held by Polaroid. Based upon the above, the Region believes that it may fairly be anticipated that Respondent will in fact dissipate its remaining assets and thus unjustifiably deny employees any opportunity to recover backpay and remedies pursuant to *Transmarine Navigation Corp.,* 170 NLRB 389, as well as the unpaid wages Unit employees earned in January 2000. In these circumstances, not protecting the Respondent's assets would likely cause irreparable harm as it is very likely that no assets of the Respondent will exist by the time that a decision is rendered in this case.

In this case, it is "just and proper" to secure a protective order to secure the Respondent's remaining assets. *NLRB v. Horizon Hotel Corp.,* 159 LRRM 2449 (1st Cir. 1998); *Aldred Investment Trust v. SEC,* 151 F.2d 254 (1st Cir. 1945), cert. denied 326 U.S. 795 (1946); *Jensen v. Chamtech Services Center,* 155 LRRM 2058, 2059-60 (C.D. CA 1997) (10(j) sequestration of assets injunction granted; court balanced potential threat of dissipation of assets on respondent's inchoate NLRA backpay obligation against injunction's restrictions on respondent's use of its own assets)[12]; *Kobell v. Menard Fiberglass Products, Inc.,* 678 F. Supp. 1155 (WD PA 1988*); Schaub v. Brewery Products, Inc.,* 715 F. Supp 829 (ED MI 1989); *Pascarell v. Alpine Fashions, Inc.,* 126

[12] A copy of the LRRM report in *Jensen v. Chamtech Services Center* is attached hereto as Appendix D.

LRRM 2242 (D. N.J. 1987); *Norton v. New Hope Industries, Inc.*, 119 LRRM 3086 (M.D. LA 1985)[13].

An order precluding Respondent from dissipating its assets would preserve the status quo and prevent a frustration of a Board order in the Union's favor. While the hearing before an administrative law judge has been scheduled for April 3, 2000, an immediate final Board decision cannot issue in time to preserve these assets. Finally, an order preserving the assets would not interfere with any ongoing business operation, since the Respondent no longer operates.

[In addition, Petitioner requests that this Court issue a Temporary Restraining Order directed to Polaroid, enjoining Polaroid from disbursing monies due to Respondent, pending a hearing on Petitioner's request for a temporary injunction. It is appropriate to name Polaroid as a party-in-interest in the 10(j) proceedings and there is ample law to assert jurisdiction over it in this case. Under the All Writs Act,[14] the district court has authority to protect its jurisdiction for the purpose of issuing an effective Section 10(j) injunction against the Respondent. See, e.g., *Whitney Bank v. New Orleans Bank*, 379 U.S. 411, 425-426 and n. 7 (1965) (lower court could properly issue All Writs Act decree against non-defendant public official to preserve its own jurisdiction); *FTC v. Dean Foods Co.*, 384 U.S. 597, 603-608 (1966) (federal agencies may use All Writs Act proceedings in order to ensure effective judicial review). Thus, the district court has jurisdiction under the All Writs Act to enjoin Polaroid to make payment directly into the

[13] A copy of the LRRM report in *Norton v. New Hope Industries, Inc.* is attached hereto as Appendix E.

[14] 28 U.S.C. §1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

court's registry for the purpose of safeguarding the efficacy of the 10(j) decree against the Respondent. Such a course of action is not unprecedented for the Board. See *Aguayo v. Chamtech Service Center*, 157 LRRM 2299, 2300 (C.D. Ca. 1997) (ex parte TRO protective order under Section 10(j) and All Writs Act included parties not yet named in underlying Board administrative proceeding).

VI

CONCLUSION

Based on the petition, the affidavits and exhibits attached thereto, and on the points and authorities cited herein, Petitioner respectfully asks the Court to issue a temporary restraining order as prayed for in the petition herein.

DATED: March 8, 2000
Boston, Massachusetts

Respectfully submitted,
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APPENDIX J

GUIDELINES FOR FILING MOTIONS FOR TEMPORARY RESTRAINING ORDERS UNDER SECTION 10(j)

1. Overview

Temporary Restraining Orders (TROs) are limited injunctive orders designed to maintain the status quo pending a district court's adjudication of the merits of a request for a preliminary injunction. They are appropriate when irreparable harm will occur before a court can hear and decide the motion for a preliminary injunction and may be granted without the full notice and hearing requirements that attach to a preliminary injunction proceeding.[1]

District courts can grant TROs under Section 10(j). Such TROs are controlled by Fed. R. Civ. P. 65(b). See *Squillacote v. Local 248 Meat & Allied Food Workers,* 534 F.2d 735, 743, 92 LRRM 2089 (7th Cir. 1976). Courts have granted TROs under Section 10(j) in a variety of circumstances, including union picketing violence (see *Squillacote v. Local 248,* supra, *Wilson v. UAW,* 97 LRRM 2013 (S.D. Iowa 1977)), unlawful hiring arrangements (*Douds v. Anheuser-Busch, Inc.,* 28 LRRM 2277 (D. N.J. 1951)), refusals to bargain in good faith (*Danielson v. ILA,* 70 LRRM 2487 (S.D.N.Y. 1969) and to prevent the imminent sale or dissipation of assets by a respondent (see, e.g., *Kobell v. Menard Fiberglass Products, Inc.,* 678 F. Supp. 1155, 1157, 127 LRRM 2697 (W.D. Pa. 1988)). Courts have also granted TROs to prevent plant closings or relocations in the context of labor disputes. See, e.g., *ILGWU v. Bali Co.,* 649 F. Supp. 1083, 123 LRRM 3210 (D. P.R. 1986).[2]

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[1] There is normally no right to appeal either the grant or a denial of a TRO, as such decrees are not considered final orders under 28 U.S.C. Section 1292. See, e.g., *Austin v. Altman,* 332 F.2d 273 (2d Cir. 1964). But compare *Wirtz v. Powell Knitting Mills Co.,* 360 F.2d 730 (2d Cir. 1966) (denial of TRO may be appealed under 28 U.S.C. Section 1291 if passage of time may moot underlying dispute).

[2] TROs are also available under Section 10(l). However, they are not governed by Rule 65(b). Rather, Section 10(l) specifically allows for ex parte TROs when "substantial and irreparable injury to the charging party will be unavoidable" and establishes that TROs under this section may be effective for no more than five days. See *Squillacote v. Graphic Arts Int'l Union Local 277,* 540 F.2d 853, 859-860, 93 LRRM 2257 (7th Cir. 1976). Regions should follow the same general guidelines discussed in Section 3 infra when filing for TROs under Section 10(l). See also GC Memorandum 75-18, dated April 22, 1975, "Authorization of Regional Directors to Process Without Clearance Requests and Applications for Temporary Restraining Orders in Section 10(l) Proceedings –- Guide for Processing."

2. Duration of TROs

As established by Rule 65(b), TROs are limited to a duration of 10 days and may be extended for an additional 10 days for good cause shown. See, e.g., *U.S. v. United Mine Workers of America*, 330 U.S. 258, 301, 19 LRRM 2346 (1947) (good cause for extension found when arguments over contempt of TRO were still in progress at expiration of TRO). It will be appropriate to request an extension of the TRO in certain circumstances, such as when the injunction hearing cannot be scheduled before the TRO's original 10-day term. TROs may also be extended for longer periods of time when the restrained party consents to the extension. See, e.g., *Kobell v. Menard Fiberglass Products*, 678 F. Supp. at 1157.

A TRO's term under the "10 days plus 10 days" rule is computed on the basis of working days, excluding weekends and holidays. See *U.S. v. Int'l Brotherhood of Teamsters,* 728 F. Supp. 1032, 1057-1058, 134 LRRM 2281 (S.D.N.Y. 1990).

3. Notice and Service Requirements; Procedural Guidelines

Rule 65(b) provides that TROs may be issued in certain circumstances without any notice to the adverse party or hearing. There is some case law to suggest, however, that a TRO under Section 10(j), without any notice, is precluded by the jurisdictional language of that provision. Thus, the last sentence of Section 10(j) provides that "the court shall cause notice [of the 10(j) petition] to be served and *thereupon* shall have jurisdiction" to grant relief (emphasis added). One reading of this sentence is that the court obtains subject matter jurisdiction under Section 10(j) only after respondent is served with the 10(j) papers pursuant to a court-executed order to show cause. Consistent with this reading, at least one court has stated, in dicta, that ex parte (i.e. without *any* notice) TROs are not authorized under Section 10(j). See *Squillacote v. Local 248,* 534 F.2d at 743. Rather, when seeking TROs under 10(j) "the Board should give a respondent the most prompt and effective notice that can practically be given." *Id.* To avoid any question, when filing requests for 10(j) TROs, Regions should follow the general principles of *Squillacote v. Local 248* and the following guidelines:

a) Regions should notify the court ahead of time of their intention to file a request for a TRO and inquire of the clerk's office if the court has any preferred procedures for handling such requests.

b) Separate TRO and 10(j) papers should be prepared. TRO papers should include a motion for a TRO under Rule 65(b), a short memorandum of points in support of the TRO, a proposed order to show cause and a proposed TRO. Every TRO request must set forth the need for immediate relief pending the preliminary injunction hearing. Therefore, the TRO memorandum must set forth the arguments and facts showing the need for immediate action and should be supported by either a specially prepared

"immediate and irreparable injury" affidavit or, where appropriate, the preliminary injunction "just and proper" affidavits.[3]

> **For general guidance on the content and form of TRO papers, see Appendix H of this Manual (Sample 10(j) Pleadings); and for TROs seeking protective orders, see Appendix I.**

c) Regions should give early informal notice to respondents by providing copies of the complete 10(j) and TRO papers once they are ready for filing. TRO papers may include an affidavit of service that describes how respondent was given such prior notice of the 10(j) and TRO filings. In that case, the proposed TRO Order to Show Cause should also include language by which the court acknowledges that the papers have been served in the manner described in the affidavit of service and approves of such service. This procedure may speed up the processing of the TRO request if the court accepts this as sufficient notice to comply with due process and jurisdictional requirements. Regions should be aware, however, that the court may not deem this informal notice sufficient and may require that respondent be re-served after execution of the order to show cause.

These procedures should be sufficient to ensure speedy processing of the TRO request and full compliance with the "prompt and effective notice" requirement of *Squillacote v. Local 248*.[4]

On a few exceptional occasions, courts *have* granted ex parte TROs under Section 10(j) or 10(e), notwithstanding the rationale of *Squillacote v. Local 248*. *See NLRB v. Horizons Hotel Corp.*, 159 LRRM 2449 (1st Cir. 1998) (10(e)); *Aguayo v. Chamtech Service Center*, 157 LRRM 2299 (C.D. Cal. 1997) (10(j)); *NLRB v. A.N. Electric Corp.*,

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[3] Rule 65(b) requires that where a TRO is sought without any notice, the specific facts demonstrating irreparable harm before the adverse party may be heard must be set out in an "affidavit or verified complaint." It is unclear whether this requirement applies to TRO requests where some notice is given to the other party. Compare 11A Wright, Miller & Kane, *Federal Practice and Procedure* § 2952 (affidavit or verified complaint not "technically" necessary if notice has been given) with *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 543-544 (1991) (stating that Rule 65(b) requires verification or affidavit without making distinction between TROs with notice and ex parte TROs).

[4] In rare situations the warrant for a TRO may arise only after the commencement of the 10(j) case. The TRO can be sought at any time during the litigation. See generally *Douds v. Wine, Liquor & Distillery Workers Union*, 75 F. Supp. 184, 186, 21 LRRM 2120 (S.D.N.Y. 1947).

140 LRRM 2860, 141 LRRM 2386 (2d Cir. 1992) (10(e)).[5] Therefore, if a Region has reason to believe that an ex parte TRO is necessary in a particular case,[6] it should discuss the matter with the Injunction Litigation Branch before seeking such relief.

[5] In these cases, the court's jurisdiction had already been invoked in prior injunction or enforcement proceedings over at least some of the respondents included in the ex parte TRO request. In these instances, jurisdiction over additional respondents not involved in the original injunction or enforcement proceeding was asserted under the All Writs Act, 28 U.S.C. Section 1651(a), in addition to Section 10(j) or 10(e). See generally *FTC v. Dean Foods Co.,* 384 U.S. 597, 603-608 (1966).

[6] E.g., the possibility that a respondent may dissipate its assets if it receives notice before an order is entered.

APPENDIX K

SAMPLE MOTIONS & MEMORANDA TO HEAR 10(j) CASE ON AFFIDAVITS OR ALJ TRANSCRIPT

APPENDIX K

APPENDIX K 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

In the Matter of RONALD S. COHEN, Acting Regional Director of the First Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, Petitioner v. ESTORIL CLEANING CO., INC., Respondent and POLAROID CORPORATION Party-in-Interest	Civil No.

MOTION FOR HEARING ON AFFIDAVITS

Now comes Sara R. Lewenberg, Counsel for the Petitioner, Ronald S. Cohen, Acting Regional Director of the First Region of the National Labor Relations Board, herein called the Board, and respectfully moves that the injunctive relief prayed for in the Petition filed in the above-captioned case be granted based solely on the pleadings, including the verified assertions of belief made therein, and witness affidavits on which such belief is based, and that said relief be granted without conducting an evidentiary hearing regarding said Petition. In support of this Motion, Petitioner argues as follows:

In ruling on whether to grant the preliminary injunctive relief sought by the Board pursuant to 29 U.S.C. at Section 160(j), the District Court's role is properly limited to determining whether there is reasonable cause to believe that a respondent has violated the National Labor Relations Act, herein called the Act, and whether temporary

injunctive relief is just and proper. *Pye v. Excel Case Ready,* 238 F.3d 69, 72 (1st Cir. 2001). In addition, petitions under Section 10(j) or 10(l) of the Act receive statutory priority in the United States district courts under 28 U.S.C. Section 1657(a).

In light of this statutory scheme, it is well settled that district courts in proceedings under Section l0(j) or l0(l)[1] are not called upon to finally determine the merits of the unfair labor practice charges, but should only evaluate the evidence to determine whether the Regional Director has "reasonable cause" to believe that the respondent has violated the Act.[2] See, e.g., *Maram v. Universidad Interamericana de Puerto Rico, Inc.,* 722 F.2d 953, 958-59 (1st Cir. 1983) (Sec. 10(j)); *Kobell v. United Paperworkers Int'l. Union,* 965 F.2d 1401, 1406-1407 (6th Cir. 1992) (Sec. 10(j)); *Arlook v. S. Lichtenberg & Co., Inc.,* 952 F.2d 367, 371-372 (11th Cir. 1992) (Sec. 10(j)); *Gottfried v. Sheet Metal Workers, Local No. 80,* 876 F.2d 1245, 1248 (6th Cir. 1989) (Sec. 10(l)); *Aguayo v. Tomco Carburetor Co.,* 853 F.2d 744, 748 (9th Cir. 1988) (Sec. 10(j)); *Kaynard v. Mego Corp.,* 633 F.2d 1026, 1032-33 (2d Cir. 1980) (Sec. 10(j)); *Squillacote v. Graphic Arts International Union,* 540 F.2d 853, 858 (7th Cir. 1976) (Sec. 10(l)); *Gottfried v. Samuel Frankel, et al.,* 818 F.2d 485, 493 (6th Cir. 1987) (Sec. 10(j)); *Lewis v. New Orleans Clerks & Checkers, I.L.A., Local No. 1497,* 724 F.2d 1109, 1114-15 (5th Cir. l984) (Sec. 10(l)); *Boire v. Pilot Freight Carriers, Inc.,* 515 F.2d 1185, 1191

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[1] Section 10(l), 29 U.S.C. Section 160(l), the companion provision to Section 10(j), mandates that the NLRB seek a temporary injunction in district court after the preliminary investigation of a charge reveals reasonable cause to believe that a charged party has violated certain specified unfair labor practice provisions of the Act, e.g., union secondary boycotts. See, e.g., *Hirsch v. Building and Construction Trades Council,* 530 F.2d 298, 302 (3d Cir. 1976).

[2] The Petitioner's additional burden of showing that injunctive relief is "just and proper" includes a showing of a likelihood of success on the merits. *Maram v. Universidad Interamericana,* 722 F.2d at 959; *Asseo v. Pan American Grain Co.,* 805 F.2d at 25. The First Circuit has held, however, that a showing of reasonable cause satisfies the "likelihood of success on the merits" requirement. *Asseo v. Centro Medico del Turabo, Inc.,* 900 F.2d at 454-455. Thus, the Court's inquiry into the likelihood of success on the merits does not require litigation of the underlying unfair labor practice.

(5th Cir. 1975), cert. denied 426 U.S. 934 (1976) (Sec. 10(j)); *Kobell v. Suburban Lines, Inc.*, 731 F.2d 1076, 1083-84 (3d Cir. 1984) (Sec. l0(j)); *San Francisco-Oakland Newspaper Guild v. Kennedy,* 412 F.2d 541, 544-45 and n. 3 (9th Cir. l969) (Sec. l0(l)); *Levine v. C & W Mining Co., Inc.*, 610 F.2d 432, 435 (6th Cir. 1979) (Sec. 10(j)).

Moreover, it is reversible error for a district court to go beyond this limited inquiry and to make findings on the ultimate merits of the charge. See *Maram v. Universidad Interamericana de Puerto Rico, Inc.,* 722 F.2d at 958-959 (Sec. 10(j)); *Arlook v. S. Lichtenberg & Co.*, 952 F.2d at 372-373; *Scott v. El Farra Enterprises, Inc., d/b/a Bi-Fair Market,* 863 F.2d 670, 676 (9th Cir. 1988) (Sec. 10(j)); *Solien v. United Steelworkers of America,* 593 F.2d 82, 86-87 (8th Cir. l979), cert. denied 444 U.S. 828 (Sec. 10(l)); *Kaynard v. Independent Routemen's Assn.,* 479 F.2d 1070, 1072 (2d Cir. 1973) (Sec. 10(l)).

The District Court is thus not called upon to resolve disputed issues of fact or the credibility of witnesses; this function is reserved exclusively for the Board in the underlying administrative proceeding. See, *Maram v. Universidad Interamericana de Puerto Rico, Inc.*, 722 F.2d at 958-959 (Sec. 10(j)); *NLRB v. Electro-Voice, Inc.,* 83 F.3d 1559, 1570, 1571 (7th Cir. 1996) (Sec. 10(j)); *Kobell v. United Paperworkers Int'l. Union*, 965 F.2d at 1407 (Sec. 10(j)); *Fuchs v. Jet Spray Corporation,* 560 F. Supp. 1147, 1150-51 at n. 2 (D. Mass. 1983), affd. per curiam 725 F.2d 664 (1st Cir. l983) (Sec. 10(j)); *Balicer v. I.L.A.,* 364 F. Supp. 205, 225-226 (D. N.J. 1973), affd. per curiam 491 F.2d 748 (3d Cir. 1973) (Sec. 10(l)); *Dawidoff v. Minneapolis Building & Construction Trades Council,* 550 F.2d 407, 411 (8th Cir. 1977) (Sec. 10(l)); *Local 450, International Union of Operating Engineers, AFL-CIO v. Elliott,* 256 F.2d 630, 638 (5th Cir. 1958) (Sec. 10(l)); *San Francisco-Oakland Newspaper Guild v. Kennedy,* 412 F.2d at 546 (Sec. 10(l)).[3]

[3] See also, *Jaffee v. Henry Heide, Inc.,* 115 F. Supp. 52, 57 (S.D.N.Y. 1953); *Fusco v. Richard W. Kaase Baking Co.,* 205 F. Supp. 465, 476 (N.D. Ohio 1962); *Taylor v. Circo*

Indeed, it is settled that, in these preliminary proceedings, the courts should give the Regional Director's version of the disputed facts the "benefit of the doubt", and should accept the reasonable inferences he draws therefrom if they are "within the range of rationality". *Seeler v. The Trading Port, Inc.,* 517 F.2d 33, 36-37 (2d Cir. 1975) (Sec. 10(j)); Accord: *Maram v. Universidad Interamericana de Puerto Rico, Inc.,* 722 F.2d at 958-959 (Sec. 10(j)); *Arlook v. S. Lichtenberg & Co.,* 952 F.2d at 371-372 (Sec. 10(j)); *Kaynard v. Palby Lingerie, Inc.,* 625 F.2d 1047, 1051 (2d Cir. 1980) (Sec. 10(j)); *Kobell v. Suburban Lines, Inc.,* 73l F.2d at 1084 (Sec. 10(j)); *Squillacote v. Graphic Arts International Union,* 540 F.2d at 858-859 (Sec. 10(l)); *Hendrix v. Operating Engineers, Local 571,* 592 F.2d 437, 442 (8th Cir. 1979) (Sec. 10(l)); *Levine v. C & W Mining Co., Inc.,* 610 F.2d at 435 (Sec. 10(j)); *Humphrey v. International Longshoremen's Association,* 548 F.2d 494, 498 (4th Cir. 1977) (Sec. 10(l)).

Accordingly, in view of the Regional Director's "relatively insubstantial burden of proof,"[4] it is not necessary for a district court to hold a full, evidentiary hearing to enable it to conclude whether "reasonable cause" has been established. See, *Gottfried v. Samuel Frankel,* 818 F.2d at 493 and 494 (Sec. 10(j)); *San Francisco-Oakland Newspaper Guild v. Kennedy,* 412 F.2d at 546 (Sec. 10(l)). See also, *Aguayo v. Tomco Carburetor Co.,* 853 F.2d at 750-751.

In view of the foregoing, the weight of judicial authority holds that it is proper for a district court to base its "reasonable cause" determinations in Section 10(j) and 10(l) cases upon evidence presented in the form of affidavits or record testimony in a hearing before an administrative law judge. See, *Sharp v. Webco Industries Inc.,* 225 F.3d 1130, 1134 (10th Cir. 2000) (affidavits); *Silverman v. JRL Food Corp.,* 196 F.3d 334 (2d Cir.

Resorts, Inc., 458 F. Supp. 152, 154 (D. Nev. 1978); *Hoffman v. Cross Sound Ferry Service, Inc.,* 109 LRRM 2884, 2887 (D. Conn. 1982) (all Sec. 10(j) cases).

[4] *Kobell v. Suburban Lines, Inc.* , 731 F.2d at 1084; *Levine v. C & W Mining Co.,* 610 F.2d at 435; *Gottfried v. Samuel Frankel,* 818 F.2d at 493; *Aguayo v. Tomco Carburetor, Inc.,* 853 F.2d at 748.

1999) (ALJ transcript); *San Francisco-Oakland Newspaper Guild v. Kennedy,* 412 F.2d at 546 (affidavits); *Aguayo v. Tomco Carburetor Co.,* 853 F.2d at 750-751 (same); *Squillacote v. Graphic Arts International Union,* 540 F.2d at 860; *Kennedy v. Teamsters, Local 542,* 443 F.2d 627, 630 (9th Cir. 1971) (same); *Squillacote v. Automobile, Aerospace & Agricultural Implement Workers,* 383 F. Supp. 491, 493 (E.D. Wis. 1974) (same).

Finally, neither Rule 43(e) nor Rule 65 of the Federal Rules of Civil Procedure requires oral testimony in this type of statutory, temporary injunction proceeding, *Kennedy v. Sheet Metal Workers,* 289 F. Supp. 65, 87-91 (C.D. Cal. 1968),[5] and such procedures do not deny a fair hearing or due process to the Respondents. See, *Aguayo v. Tomco Carburetor Co.,* 853 F.2d at 750-751; *Asseo v. Pan American Grain Co.,* 805 F.2d at 25-26; *Gottfried v. Samuel Frankel,* 818 F.2d at 493; *Squillacote v. Graphic Arts International Union,* 540 F.2d at 860; *Kennedy v. Teamsters, Local 542,* 443 F.2d at 630; *San Francisco-Oakland Newspaper Guild v. Kennedy,* 412 F.2d at 546. Cf. *Brock v. Roadway Express, Inc.,* 481 U.S. 252, 263-64, 107 S.Ct. 1740 (1987) (Secretary of Labor may order temporary reinstatement of unlawfully discharged employee pending full administrative hearing; not a denial of due process to deny respondent full evidentiary hearing at preliminary stage).

In sum, submission of this Section 10(j) matter on the affidavits submitted by the Board will avoid the delay inherent in scheduling and conducting a full evidentiary hearing, will avoid duplicative litigation, will facilitate a speedy decision, and will conserve the time and resources of the court and the parties. Such procedure fully

[5] There is nothing in the texts of Section 10(j) and 10(l) that mandates oral testimony in these proceedings. See *San Francisco-Oakland Newspaper Guild v. Kennedy,* 412 F.2d at 546.

comports with the statutory priority that should be given to this proceeding under 28 U.S.C. Section 1657(a) and the original intent of the 1947 Congress which enacted Section 10(j). See *Legislative History LMRA 1947*, 414, 433 (Government Printing Office 1985).

Dated at Boston, Massachusetts this 8th day of March, 2000.

Respectfully submitted,

_____

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First Region
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APPENDIX K

APPENDIX K-2

IN THE UNITED STATES DISTRICT,COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.

B. ALLAN BENSON, REGIONAL
DIRECTOR OF REGION 27 OF THE
NATIONAL LABOR RELATIONS BOARD,
FOR AND ON BEHALF OF THE NATIONAL
LABOR RELATIONS BOARD,

Petitioner,

v.

MAINTENANCE UNLIMITED, INC.,

Respondent.

MOTION OF THE NATIONAL LABOR RELATIONS BOARD TO TRY COMPLAINT AND PETITION FOR TEMPORARY INJUNCTION ON THE BASIS OF THE RECORD DEVELOPED BEFORE THE ADMINISTRATIVE LAW JUDGE

To the Honorable, the Judges of the United States District Court for the State of Colorado:

The petitioner moves the court to try the issues in this matter on the basis of Administrative Law Judge Transcript and Exhibits and exhibits submitted by the Board and the Respondent rather than holding an evidentiary hearing. The Petitioner suggests that trying this case on the basis of the Administrative Law Judge Hearing Transcript and Exhibits can both expedite the proceeding and conserve the resources of the court and the parties.

APPENDIX K

Section 10(j) of the Act authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. This provision embodies Congress' recognition that because the Board's administrative proceedings often are protracted, absent interim relief, a respondent in many instances could accomplish its unlawful objective before being placed under any legal restraint, and it could thereby render a final Board order ineffectual. The legislative history is cited in cited in *Sharp v. Webco Industries, Inc.,* 225 F.3d 1130, 1136 (10th Cir. 2000) and *Angle v. Sacks,* 382 F.2d 655, 659-660 (10th Cir. 1967). Section 10(j) was intended to prevent the potential frustration or nullification of the Board's remedial authority caused by the passage of time inherent in Board administrative litigation. Id. at 659.

To resolve a Section 10(j) petition, a district court in the Tenth Circuit considers only two issues: whether there is "reasonable cause to believe" that a respondent has violated the Act and whether temporary injunctive relief is "just and proper." See *Sharp v. Webco Industries,* 225 F.3d at 1133, 1137; *Angle v. Sacks,* 382 F.2d at 658, 660.

In light of this statutory scheme, it is well settled that district courts in proceedings under Section 10(j) or 10(l)[1] are not called upon to finally determine the merits of the unfair labor practice charges, but should only evaluate the evidence to determine whether the Regional Director has "reasonable cause" to believe that the respondent has violated the Act. See, e.g., *Kobell v. United Paperworkers Int'l. Union,* 965 F.2d 1401, 1406-1407 (6th Cir. 1992) (Sec. 10(j)); *Arlook v. S. Lichtenberg & Co., Inc.,* 952 F.2d 367, 371-372 (11th Cir. 1992) (Sec. 10(j)); *Gottfried v. Sheet Metal Workers, Local No. 80,* 876 F.2d 1245, 1248 (6th Cir. 1989) (Sec. 10(l)); *Aguayo v. Tomco Carburetor Co.,* 853 F.2d 744, 748 (9th Cir. 1988) (Sec. 10(j)); *Kaynard v. Mego*

[1] Section 10(l), 29 U.S.C. Section 160(l), the companion provision to Section 10(j), mandates that the NLRB to seek a temporary injunction in district court after the preliminary investigation of a charge reveals reasonable cause to believe that a charged party has violated certain specified unfair labor practice provisions of the Act, e.g., union secondary boycotts. See, e.g., *Hirsch v. Building and Construction Trades Council,* 530 F.2d 298, 302 (3d Cir. 1976)

Corp., 633 F.2d 1026, 1032-33 (2d Cir. 1980) (Sec. 10(j)); *Squillacote v. Graphic Arts International Union,* 540 F.2d 853, 858 (7th Cir. 1976) (Sec. 10(l)*); Gottfried v. Samuel Frankel, et al.,* 818 F.2d 485, 493 (6th Cir. 1987) (Sec. 10(j)); *Lewis v. New Orleans Clerks & Checkers, I.L.A., Local No. 1497,* 724 F.2d 1109, 1114-15 (5th Cir. 1984) (Sec. 10(l)); *Boire v. Pilot Freight Carriers, Inc.,* 515 F. 2d 1185, 1191 (5th Cir. 1975), cert. denied 426 U.S. 934 (1976) (Sec. 10(j)); *Kobell v. Suburban Lines, Inc.,* 731 F.2d 1076, 1083-84 (3d Cir. 1984) (Sec. 10(j)); *San Francisco-Oakland Newspaper Guild v. Kennedy,* 412 F.2d 541, 544-45 and n. 3 (9th Cir. 1969) (Sec. 10(l)); *Maram v. Universidad Interamericana de Puerto Rico, Inc.,* 722 F.2d 953, 958-959 (1st Cir. 1983) (Sec. 10(j)); *Levine v. C & W Mining Co., Inc.,* 610 F.2d 432, 435 (6th Cir. 1979) (Sec. 10(j)).

Moreover, it is reversible error for a district court to go beyond this limited inquiry and to make findings on the ultimate merits of the charge. See *Arlook v. S. Lichtenberg & Co.,* 952 F.2d at 372-373; *Scott v. El Farra Enterprises, Inc. d/b/a Bi-Fair Market,* 863 F.2d 670, 676 (9th Cir. 1988) (Sec. 10(j)); *Solien v. United Steelworkers of America,* 593 F.2d 82, 86-87 (8th Cir. 1979), cert. denied 444 U.S. 828 (Sec. 10(l)); *Kaynard v. Independent Routemen's Association,* 479 F.2d 1070, 1072 (2d Cir. 1973) (Sec. 10(l)); *Maram v. Universidad Interamericana de Puerto Rico, Inc.,* 722 F.2d at 958-959 (Sec. 10(j)).

The district court is thus not called upon to resolve disputed issues of fact or the credibility of witnesses; this function is reserved exclusively for the Board in the underlying administrative proceeding. See *NLRB v. Electro-Voice, Inc.,* 83 F.3d 1559, 1570, 1571 (7th Cir. 1996) (Sec. 10(j)); *Balicer v. I.L.A.,* 364 F. Supp. 205, 225-226 (D.N.J. 1973), affd. per cumiam 491 F.2d 748 (3d Cir. 1973) (Sec. 10(l)); *Dawidoff v. Minneapolis Building & Construction Trades Council,* 550 F.2d 407, 411 (8th Cir. 1977) (Sec. 10(l)); *Local 450, International Union of Operationg Engineers, AFL-CIO v. Elliott,* 256 F.2d 630, 638 (5th Cir. 1958) (Sec. 10(l)); *San Francisco-Oakland*

Newspaper Guild v. Kennedy, 412 F.2d at 546 (Sec. 10(l)); *Maram v. Universidad Interamericana de Puerto Rico, Inc.*, 722 F.2d at 958-959 (Sec. 10(j)); *Kobell v. United Paperworkers Int'l. Union*, 965 F.2d at 1407 (Sec. 10(j)); *Fuchs v. Jet Spray Corporation*, 560 F. Supp. 1147, 1150-51 at n. 2 (D. Mass. 1983), affd. per curiam 725 F.2d 664 (1st Cir. 1983) (Sec. 10(j)).[2]

Indeed, it is settled that, in these preliminary proceedings, the courts should give the Regional Director's version of the disputed facts the "benefit of the doubt", and should accept the reasonable inferences he draws therefrom if they are "within the range of rationality". *Seeler v. The Trading Post, Inc.*, 517 F.2d 33, 36-37 (2d Cir. 1975) (Sec. 10(j)); *Sequillacote v. Graphic Arts International Union*, 540 F.2d at 858-859 (Sec. 10(l)). Accord: *Arlook v. S. Lichtenberg & Co.*, 952 F.2d at 371-372 (Sec. 10(j)); *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d 1047, 1051 (2d Cir. 1980) (Sec. 10(j)); *Hendrix v. Operating Engineers, Local 571*, 592 F.2d 437, 442 (8th Cir. 1979) (Sec. 10(l)); *Levine v. C & W Mining Co., Inc.*, 610 F.2d at 435 (Sec. 10(j)); *Maram v. Universidad Interamericana de Puerto Rico, Inc.*, 722 F.2d at 958-959 (Sec. 10(j)); *Kobell v. Suburban Lines, Inc.*, 731 F.2d at 1084 (Sec. 10(j)); *Humphrey v. International Longshoremen's Association*, 548 F.2d 494, 498 (4th Cir. 1977) (Sec. 10(l)).

Accordingly, in view of the Regional Director's "relatively insubstantial burden of proof",[3] it is not necessary for a district court to hold a full, evidentiary hearing to enable it to conclude whether "reasonable cause" has been established. See *Gottfried v. Samuel Frankel*, 818 F.2d at 493 and 494 (Sec. 10(j)); *San Francisco-Oakland Newspaper Guild*

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[2] See also, *Jaffee v. Henry Heide, Inc.*, 115 F. Supp. 52, 57 (S.D.N.Y. 1953); *Fusco v. Richard W. Kaase Baking Co.*, 205 F. Supp. 465, 476 (N.D. Ohio 1962); *Taylor v. Circo Resorts, Inc.*, 458 F. Supp. 152, 154 (D. Nev. 1978); *Hoffman v. Cross Sound Ferry Service, Inc.*, 109 LRRM 2884, 2887 (D. Conn. 1982) (all Sec. 10(j) cases).

[3] *Kobell v. Suburban Lines, Inc.*, 731 F.2d at 1084; *Levine v. C & W Mining Co.*, 610 F.2d at 435; *Gottfried v. Samuel Frankel*, 818 F.2d at 493; *Aguayo v. Tomco Carburetor, Inc.*, 853 F.2d at 748.

v. Kennedy, 412 F.2d at 546 (Sec. 10(l)). See also *Aguayo v. Tomco Carburetor Co.,* 853 F.2d at 750-751.

In view of the foregoing, the weight of judicial authority holds that it is proper for a district court to base its "reasonable cause" determinations in Section 10(j) and 10(l) cases upon evidence presented in the form of affidavits. See *Sharp v. Webco Industries, Inc.,* 225 F.3d 1130, 1134 (10th Cir. 2000) (affidavits); *Silverman v. JRL Food Corp.,* 196 F.3d 334 (2d Cir. 1999) (ALJ transcript); *Aguayo v. Tomco Carburetor Co.,* 853 F.2d at 750-751; *Squillacote v. Graphic Arts International Union,* 540 F.2d at 860. Accord: *Gottfried v. Samuel Frankel,* 818 F.2d at 493 (combination of affidavits and ALJ transcript); *San Francisco-Oakland Newspaper Guild v. Kennedy,* 412 F.2d at 546 (affidavits); *Kennedy v. Teamsters, Local 542,* 443 F.2d 627, 630 (9th Cir. 1971) (same); *Squillacote v. Automobile, Aerospace & Agricultural Implement Workers,* 383 F. Supp. 491, 493 (E.D. Wis. 1974) (same).[4] *A fortiorari,* reasonable cause determinations can also properly be based upon the transcript of sworn testimony given before an NLRB administrative law judge, subject to cross examination, in the underlying administrative proceeding. See *Gottfired v. Samuel Frankel,* 8181 F.2d at 493; *Asseo v. Pan American Grain Co.,* 805 F.2d at 493; *Asseo v. Pan american Grain Co.,* 805 F.2d 23, 25-26 (1st Cir. l979) (the use of an ALJ transcript "could be of considerable assitance in expediting the work of the [district] court."); *Eisenberg v. Honeycomb Plastics Corp.,* 125 LRRM 3257, 3262 (D. N.J. l987).[5]

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[4] See generally *F.T.C. v. Rhodes Pharmacal Co.,* 191 F.2d 744 (7th Cir. 1951); *U.S. v. Wilson Williams, Inc.,* 277 F.2d 535 (2d Cir. 1960); *Johnston v. J.P. Stevens & Company, Inc.,* 341 F.2d 891 (4th Cir. 1965).

[5] In *Kaynard v. Palby Lingeir, Inc.,* 625 F.2d 1047, 1050-51 (2d Cir. l980), the Second Circuit affirmed a Section 10(j) injunction issued by a district court on the basis of the transcript and exhibits adduced before the administrative law judge in the underlying administrative proceeding.

Finally, neither Rule 43(e) nor Rule 65 of the Federal Rules of Civil Procedure requires oral testimony in this type of statutory, temporary injunction proceeding, *Kennedy v. Sheet Metal Workers,* 289 F. Supp. 65, 87-91 (C..D. Cal. 1968),[6] and such procedures do not deny a fair hearing or due process to the Respondent. See *Aguayo v. Tomco Carburetor Co.,* 853 F.2d at 750-751; *Asseo v. Pan American Grain Co.,* 805 F.2d at 25-26; *Gottfried v. Samuel Frankel,* 818 F.2d at 493; *Squillacote v. Graphic Arts International Union,* 540 F.2d at 860; *Kennedy v. Teamsters, Local 542,* 443 F.2d at 630; *San Francisco-Oakland Newspaper Guild v. Kennedy,* 412 F.2d at 546. Cf. *Brock v. Roadway Express, Inc.* 481 U.S. 252, 263-64, 107 S.Ct. 1740 (1987) (Secretary of Labor may order temporary reinstatement of unlawfully discharged employee pending full administrative hearing; not a denial of due process to deny respondent full evidentiary hearing at preliminary stage).

In sum, submission of this Section 10(j) matter on the affidavits and exhibits submitted by the Board and the Respondent will avoid the delay inherent in scheduling and conducting a full evidentiary hearing, will avoid duplicative litigation, will facilitate a speedy decision, and will conserve the time and resources of the court and the parties.

[6] There is nothing in the texts of Section 10(j) and 10(l) that mandates oral testimony in these proceedings. See *San Francisco-Oakland Newspaper Guild v. Kennedy,* 412 F.2d at 546.

Such procedure fully comports with the statutory priority that should be given to this proceeding under 28 U.S.C. Section 1657 and the original intent of the 1947 Congress which enacted Section 10(j). See I *Legislative History LMRA 1947* 414, 433 (Government Printing Office 1985).

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APPENDIX K

APPENDIX K-3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 98-B-1144

B. ALLAN BENSON,
REGIONAL DIRECTOR FOR REGION 27
OF THE NATIONAL LABOR RELATIONS BOARD,
FOR AND ON BEHALF OF THE NATIONAL
LABOR RELATIONS BOARD,

Petitioner,

v.

MAINTENANCE UNLIMITED, INC.,

Respondent.

BRIEF OF NATIONAL LABOR RELATIONS BOARD IN SUPPORT OF MOTION LIMITING SECTION 10(J) HEARING ON THE ISSUE OF "REASONABLE CAUSE TO BELIEVE" TO THE ADMINISTRATIVE RECORD AND SUPPLEMENTING THE RECORD WITH EVIDENCE ON WHETHER INJUNCTIVE RELIEF IS "JUST AND PROPER"

I. INTRODUCTION

The statutory scheme underlying Section 10(j) of the National Labor Relations Act, as amended, 29 U.S.C. Section 160(j)("The Act"),[1] clearly permits this Court to rule

[1] Section 10(j) of the National Labor Relations Act 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 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

on the Petition without holding an additional evidentiary hearing on the merits of the unfair labor practice allegations. The issues presented by the petition are (1) whether there is reasonable cause to believe that the Respondent violated the Act as alleged, and (2) whether injunctive relief is just and proper. All of the evidence relevant to the first issue has been [will soon be] presented to an administrative law judge. Accordingly, although the introduction of evidence concerning the propriety of injunctive relief may be appropriate, the Petitioner urges this Court to determine whether there is reasonable cause to believe that the Respondent violated the Act based solely on the record [that will be] created before the administrative law judge.

The Petitioner seeks a temporary injunction preventing the Respondent from continuing its alleged unfair labor practices while the administrative proceedings are taking place. The question of whether the Respondent in fact violated the Act, which is not before this Court, can be determined only through those administrative proceedings. Inasmuch as the administrative law judge, the Board, and any reviewing court of appeals will only consider the administrative record when deciding whether the Respondent violated the Act, this Court should only consider that same record when deciding the first issue before it, i.e., whether there is reasonable cause to believe that the Respondent violated the Act.

The second issue before this Court, however, may not have been addressed in the administrative record. Thus, evidence relevant to whether injunctive relief would be just and proper may not be relevant to the primary question in the administrative proceedings, i.e., whether the Respondent violated the Act. Consequently, such evidence may not

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person, and thereupon shall have jurisdiction to grant the Board such temporary relief or restraining order as it deems just and proper.

have been introduced or admitted during the administrative hearing. Therefore, the parties should be permitted to present to the Court evidence relevant to that second issue in the form of documents, affidavits, or testimony.

II. ARGUMENT

A. The Administrative Record Fully Answers the Question of Whether Reasonable Cause Exists, and the Introduction of Additional Evidence on that Issue Would be Improper

This 10(j) proceeding is not a replacement for, or a continuation of the administrative hearing. Section 10(j) of the Act authorizes United States district courts to grant temporary injunctions to enjoin ongoing unfair labor practices pending the Board's resolution of its administrative proceedings. This provision embodies Congress' recognition that, because the Board's administrative proceedings often are protracted, a respondent, absent interim relief, could accomplish its unlawful objective before being placed under any legal restraint. In those circumstances, a final Board order would be rendered ineffective. *Sharp v. Webco Industries*, 225 F.3d 1130, 1135 (10th Cir. 2000); *Angle v. Sacks*, 382 F.2d 655, 659-660 (10th Cir. 1967).

The only issues before a district court in the Tenth Circuit in this type of ancillary injunction proceeding are whether there is "reasonable cause to believe" that the Respondent has violated the Act, and whether the Petitioner's requested temporary injunctive relief is "just and proper" pending final Board adjudication of the administrative proceeding. *See Sharp*, 225 F.3d 1130, 1137; *Angle*, 382 F.2d at 660. Thus, it is not the district court's role, in a 10(j) proceeding, to resolve the merits of the underlying dispute, and there is no need to receive additional evidence on that issue.

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In determining whether there is reasonable cause to believe that the Act has been violated, a United States District Court in the Tenth Circuit need only decide whether the Regional Director has produced some evidence that his position is fairly supported by the evidence. *Sharp*, 225 F.3d at 1134, *quoting Asseo v. Centro Medico Del Turabo, Inc.*, 900 F.2d 445, 450 (1st Cir. 1990). Further, the Regional Director need only advance legal theories that are "valid, substantial and not frivolous" in order to "permit a rational factfinder, considering the evidence in the light most favorable to the Board, to rule in favor of the Board." *Sharp*, 225 F.3d at 1134, *quoting Arlook v. S. Lichtenberg & Co.*, 952 F.2d 367, 371 (11th Cir. 1992). Clearly, the record produced at the administrative hearing, where each party had an opportunity to present evidence and cross-examine witnesses is sufficient to permit this Court to make these determinations.

In fact, the Court has no jurisdiction to resolve the merits of the underlying dispute—that is, whether Respondent actually committed the alleged unfair labor practices. That function is reserved exclusively for the Board under Section 10(a) of the Act, 29 U.S.C. Section 160(a), subject to limited appellate review by the courts of appeals pursuant to Section 10(e) or (f) of the Act, 29 U.S.C. Section 160(e) or (f). *See, e.g., Aguayo v. Tomco Carburetor Co.*, 853 F.2d 744, 748-49 and n.3 (9th Cir. 1988); *Kobell v. Suburban Lines, Inc.*, 731 F.2d 1076, 1083 (3d Cir. 1984); *Boire v. International Brotherhood of Teamsters*, 479 F.2d 778, 792 (5th Cir. 1973). Furthermore, it is reversible error for a district court to go beyond this limited inquiry and to make findings on the ultimate merits of the charge. *See Arlook*, 952 F.2d at 372-373; *Maram v. Universidad Interamericana de Puerto Rico, Inc.*, 722 F.2d 953, 958-959 (1st

Cir. 1983). Thus, because of the court's role, a Section 10(j) proceeding has a much more limited evidentiary scope than the Board's administrative hearing.

The Court's inquiry is limited to a determination as to whether the conflicting evidence, viewed in a light most favorable to the Petitioner, could ultimately be resolved by the Board in the Petitioner's favor. *See Arlook,* 952 F.2d at 371; *Gottfried v. Frankel,* 818 F.2d 485, 493 (6th Cir. 1987). It is unnecessary, indeed improper, for the district court to resolve disputed issues of fact or witness credibility; these functions are reserved exclusively for the Board in the underlying administrative proceeding. *NLRB v. Electro-Voice, Inc.,* 83 F.3d 1559, 1570, 1571 (7th Cir. 1996); *Gottfried,* 818 F.2d at 493 (district court is not permitted to resolve conflicts in evidence; respondent's attack on credibility of Board's witnesses merely establishes conflict). Since the Court is not permitted to resolve conflicts in the evidence, a "complete" story is not necessary to make a reasonable cause determination. *See Gottfried,* 818 F.2d at 493 Reasonable cause determinations can thus properly be based upon the transcript of sworn testimony given before a Board ALJ, subject to cross examination, in the underlying administrative proceeding. *See Gottfried,* 818 F.2d at 493 (injunction based upon use of partially completed ALJ hearing transcript, supplemented by affidavits proper); *Fuchs v. Hood Industries, Inc.,* 590 F.2d 395, 398 (1st Cir. l979) (ALJ transcript "could be of considerable assistance in expediting the work of the [district] court."); *Eisenbergv. Honeycomb Plastics Corp.,* 125 LRRM 3257, 3262 (D.N.J. l987) (administrative record sufficient to determine reasonable cause; parties granted leave to supplement ALJ record with evidence relevant to "just and proper" issue).[2]

[2] In *Kaynard v. Palby Lingerie, Inc.,* 625 F.2d 1047, 1050-51 (2d Cir. l980) the Second Circuit affirmed a Section 10(j) injunction issued by a district court on the basis of the

APPENDIX K

The district court may not decide to issue or deny injunctive relief based on its belief as to whether Respondent committed the alleged unfair labor practice. *Kobell*, 731 F.2d at 1083. The district courts, therefore, should give the Regional Director's version of the disputed facts, which were introduced during the administrative hearing, the "benefit of the doubt," and should accept the reasonable inferences the Regional Director has drawn therefrom, provided they are "within the range of rationality." *Seeler v. Trading Port, Inc.*, 517 F.2d 33, 36-37 (2d Cir. 1975); *Arlook*, 952 F.2d at 371-372.

Once the record before the administrative law judge has been closed, the Board will not, indeed cannot, consider any other evidence in making a determination on the merits of the unfair labor practice allegations. Administrative Procedure Act, 5 U.S.C. Section 556(e) (1998). *See also NLRB v. Johnson*, 310 F.2d 550, 552 (6th Cir. 1962) (per curiam); *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1264 (9th Cir. 1977); *Marmon v. Califano*, 459 F. Supp. 369, 371 (D. Mont. 1978); *Innovative Communications Corp.*, 333 NLRB 665, 665 n.2 (2001) (Board refused to consider documents entered in related 10(j) proceeding but not made part of administrative record). Therefore, any new testimony or other evidence regarding the merits created after the close of the administrative hearing is irrelevant to the merits of the unfair labor practice allegations and cannot be considered by the Board in the ultimate resolution of the underlying administrative case. Thus, the admission of additional "reasonable cause" evidence by the Court in this Section 10(j) proceeding could not assist the Court in determining whether the Board could reasonably

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transcript and exhibits adduced before the administrative law judge in the underlying administrative proceeding. In *Asseo v. Pan American Grain Co.*, 805 F.2d 23, 25-26 (1st Cir. l986) the First Circuit affirmed a Section 10(j) injunction based upon a partially completed ALJ hearing transcript, supplemented by live testimony before the district court.

sustain the allegations of the General Counsel's unfair labor practice complaint. *See Arlook*, 952 F.2d at 372-73. In fact, this Court's reliance on "new" evidence could hinder its ability to make this determination, as such evidence will not be considered by the Board in the unfair labor practice proceeding. In sum, there is no reason to permit the Respondent to re-litigate the unfair labor practice case before this Court.[3]

Contrary to the Respondent's assertion, this Court's failure to hold an evidentiary hearing would not deny a fair hearing or due process to the Respondent. *See Gottfried*, 818 F.2d at 493; *Asseo*, 805 F.2d at 25-26; *Aguayo v. Graphic Arts International Union*, 540 F.2d 853, 860 (7th Cir. 1976). Cf. *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 263-64, 107 S.Ct. 1740 (1987) (Secretary of Labor may order temporary reinstatement of unlawfully discharged employee pending full administrative hearing; not a denial of due process to deny respondent full evidentiary hearing at preliminary stage). The Respondent fully participated [will fully participate] in the evidentiary hearing before the Board's ALJ and had [will have] every opportunity to present its case. The Respondent also had [will have] the opportunity to cross-examine all of the General Counsel's witnesses and to present its own witnesses. In addition, pursuant to Board Rule 102.118(b)(1), 29 C.F.R. Section 102.118(b)(1)(1998),[4] the Board's "*Jencks* rule,"[5] the

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[3] The district court's findings in the Section 10(j) proceeding are unrelated to the administrative proceeding except to the extent that the administrative record supports the granting or denial of interlocutory relief. *NLRB v. Acker Industries, Inc.*, 460 F.2d 649, 652 (10th Cir. 1972) (result in 10(j) litigation not binding upon Board in underlying administrative proceeding).

[4] The relevant portion of the Rule reads as follows:

> [A]fter a witness called by the General Counsel … has testified … the administrative law judge shall, upon motion of the respondent, order the production of any statement of such witness in the possession of the General Counsel which relates to the subject matter as to which the

Respondent had [will have] an opportunity to examine the pre-trial affidavits of all the General Counsel's witnesses before commencing its cross-examination. Moreover, neither Rule 43 nor Rule 65 of the Federal Rules of Civil Procedure requires oral testimony in this statutory temporary injunction proceeding. *See Kennedy v. Sheet Metal Workers*, 289 F. Supp. 65, 87-91 (C.D. Cal. 1968).[6] Likewise, there is nothing in the text of Section 10(j) that mandates oral testimony in this proceeding. Accordingly, the Respondent cannot claim reasonably to have been denied due process, nor should it use such an argument to support any attempt to introduce new evidence regarding any "reasonable cause" issues before the Court.

For all of the foregoing reasons, the Court should grant the Petitioner's Motion to decide the reasonable cause issue in this case based solely on the record created during the administrative proceedings.

> witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the administrative law judge shall order it to be delivered directly to the respondent for his examination and use for the purpose of cross-examination.

[5] Patterned after the Supreme Court's decision in *Jencks v U.S.*, 353 U.S. 657, 77 S.Ct. 1007 (1957). *See also Harvey Aluminum v. NLRB*, 335 F.2d 749 (9th Cir. 1964); *Inland Shoe*, 211 NLRB 724, 724 n.3 (1974).

[6] In its Objection and Response to Petitioner's Motion to Try Complaint and Petition for Temporary Injunction on the ALJ Record, the Respondent points out that under Fed.R.Civ.P. 65(a)(2) the Court may order the trial on the merits consolidated with hearing of the application for injunction and that Fed.R.Civ.P. 43(a) requires that, in every trial, testimony of witnesses shall be taken in open court. However, in the instant case, the trial on the merits was already held before the ALJ. No trial will be held in District Court on the merits. Rather, the Court is *only* called upon to decide whether an injunction should issue. Consequently, Rule 43(a) simply does not apply in this case.

B. The Parties Should be Permitted to Introduce Evidence as to Whether Injunctive Relief Would be Just and Proper

While the administrative record is sufficient to resolve the "reasonable cause" issue, the Court should allow the parties to present supplemental evidence and make appropriate arguments as to whether injunctive relief is "just and proper." Injunctive relief is just and proper when there is a reasonable apprehension that the efficacy of the Board's final order may be nullified or the administrative procedures will be rendered meaningless in the absence of interim relief. *Angle v. Sacks*, , 382 F.2d 655, 660 (10th Cir. 1967). The burden is on the Regional Director to show that there is a reasonable apprehension that the purposes of the Act will be defeated absent interim relief, s*ee id.*, but the Court is afforded a certain range of equitable discretion in making the "just and proper" determination. *See Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1189 (5th Cir. 1975), *cert. denied* 426 U.S. 934 (1976). Preservation and restoration of the status quo are appropriate considerations in granting a Section 10(j) injunction. *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1575 (7th Cir. 1996); *Seeler v. Trading Port, Inc.*, 517 F.2d 33, 38 (2d Cir. 1975). *See also, Bloedorn v. Francisco Foods, Inc.*, 276 F.3d 270, 299-300 (7th Cir. 2001); *Asseo v. Pan American Grain Co.*, 805 F.2d 23, 27-28 (1st Cir. 1986); *Levine v. C&W Mining Co.*, 610 F.2d 432, 437 (6th Cir. 1979). These inquiries, however, are usually beyond the scope of the underlying administrative hearing.

As explained in the preceding section of this brief, the purpose of the underlying administrative proceeding is to determine whether the alleged unfair labor practices have *in fact* occurred. Testimony regarding the *effects* of those unfair labor practices is largely irrelevant to the administrative hearing and is, therefore, not necessarily found in the administrative record. Here, the Petitioner alleges that Respondent's unfair labor

practices have had a "chilling" effect on employees' free exercise of their Section 7 rights and will likely render a Board remedy in due course ineffective, a contention that was not relevant to the issues presented to the administrative law judge.[7] Thus, both the Petitioner and the Respondent should be allowed to present evidence, including affidavits or live testimony, to supplement the administrative record and fully address the "just and proper" issue; such evidence is necessary for the Court to properly evaluate the propriety of injunctive relief. At least two circuits have suggested that an evidentiary hearing may be necessary to determine the equitable necessity of Section 10(j) injunctive relief. *See Squillacote v. Food Workers*, 534 F.2d 735, 749 (7th Cir. 1976); *Eisenberg v. Hartz Mountain Corp.*, 519 F.2d 138, 143 n.5 (3d Cir. 1975)

III. CONCLUSION

The Court can resolve any "reasonable cause" issues based on the ALJ record alone, allowing for efficient litigation of these issues and the best use of the Court's time and resources, consistent with case precedent and the legislative intent of Section 10(j). While the record in the administrative hearing is sufficient to resolve "reasonable cause" issues, that record does not address whether injunctive relief is "just and proper" here. Accordingly, the Court should limit the admission of evidence regarding reasonable

[7] *See, e.g., Pascarell v. Vibra Screw Inc.*, 904 F.2d 874, 878-79 (3d Cir. 1990) ("chilling" impact upon employees justified grant of 10(j) injunction).

cause to the administrative record, but grant the parties leave to supplement the administrative record with evidence to address the "just and proper" issue.

DATED AT Denver, Colorado, this ____ day of August 2____.

Respectfully Submitted,

PETITIONER: B. ALLAN BENSON, REGIONAL REGIONAL DIRECTOR OF THE NATIONAL LABOR RELATIONS BOARD, REGION 27

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APPENDIX K

APPENDIX K-4

ARGUMENT TO SUPPORT MOTION TO DISTRICT COURT TO TRY l0(j) OR l0(l) PETITION ON BASIS OF AFFIDAVITS AND/OR ALJ HEARING TRANSCRIPT AND EXHIBITS[1]

In light of this statutory scheme, it is well settled that district courts in proceedings under Section l0(j) or l0(l)[2] are not called upon to finally determine the merits of the unfair labor practice charges, but should only evaluate the evidence to determine whether the Regional Director has "reasonable cause" to believe **[or, a likelihood of success in proving]** that the respondent has violated the Act.

Indeed, it is settled that, in these preliminary proceedings, the courts should give the Regional Director's version of the disputed facts the "benefit of the doubt", and

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2 Section 10(l), 29 U.S.C. Section 160(l), the companion provision to Section 10(j), mandates that the NLRB to seek a temporary injunction in district court after the preliminary investigation of a charge reveals reasonable cause to believe that a charged party has violated certain specified unfair labor practice provisions of the Act, e.g., union secondary boycotts. See, e.g., *Hirsch v. Building and Construction Trades Council*, 530 F.2d 298, 302 (3d Cir. 1976).

should accept the reasonable inferences he draws therefrom if they are "within the range of rationality". *Seeler v. The Trading Port, Inc.*, 5l7 F.2d 33, 36-37 (2d Cir. l975) (Sec. l0(j)); *Squillacote v. Graphic Arts International Union*, 540 F.2d 853, 858-859 (7th Cir. 1976)(Sec. l0(l)).

Accordingly, in view of the Regional Director's "relatively insubstantial burden of proof",[3] it is not necessary for a district court to hold a full, evidentiary hearing to enable it to conclude whether "reasonable cause" **[or, a likelihood of success on the merits]** has been established, (see *Dunbar v. Landis Plastics, Inc.*, 977 F.Supp. 169, 177 (N.D.N.Y. 1997), reconsideration denied 996 F.Supp 174 (N.D.N.Y. 1998), remanded on other grounds 152 F.3d 917 (2nd Cir. 1998); *Gottfried v. Samuel Frankel*, 818 F.2d 485, 493 and 494 (6th Cir. 1984) (Sec. 10(j)); *Pye v. Teamsters Local Union No. 122*, 875 F.Supp 921, 928 (D.Mass. 1995), aff'd 61 F.3d 1013 (1st Cir. 1995); *San Francisco-Oakland Newspaper Guild v. Kennedy*, 412 F.2d 541, 546 (9th Cir. 1969) (Sec. 10(l))[4] or to resolve credibility conflicts in the evidence. *NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1570, 1571 (7th Cir. 1996).

In view of the foregoing, the weight of judicial authority holds that it is proper for a district court to base its "reasonable cause" **[or, likelihood of success]**determinations in

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[3] *Kobell v. Suburban Lines, Inc.* , 73l F.2d 1076, l084 (3rd. Cir. 1984); *Levine v. C & W Mining Co.*, 6l0 F.2d 432, 435 (6th. Cir. 1979); *Gottfried v. Samuel Frankel*, 818 F.2d 485, 493 (6th. Cir. 1987); *Aguayo v. Tomco Carburetor, Inc.*, 853 F.2d 744, 748 (9th Cir. 1988).

[4] [redacted]

Section l0(j) and l0(l) cases upon evidence presented in the form of affidavits. See *Aguayo v. Tomco Carburetor Co.*, 853 F.2d at 750-751; *Squillacote v. Graphic Arts International Union*, 540 F.2d at 860. Accord: *Sharp v. Webco Industries Inc.*, 225 F.3d 1130, 1134 (10th Cir. 2000) (affidavits); *Gottfried v. Samuel Frankel*, 818 F.2d at 493 (combination of affidavits and ALJ transcript); *San Francisco-Oakland Newspaper Guild v. Kennedy*, 4l2 F.2d at 546 (affidavits); *Kennedy v. Teamsters, Local 542*, 443 F.2d 627, 630 (9th Cir. l97l) (same); *Squillacote v. Automobile, Aerospace & Agricultural Implement Workers*, 383 F. Supp. 49l, 493 (E.D. Wis. l974) (same).[5]) *A fortiorari*, reasonable cause **[or, likelihood of success]**determinations can also properly be based upon the transcript of sworn testimony given before an NLRB administrative law judge, subject to cross examination, in the underlying administrative proceeding. See *Silverman v. JRL Food Corp.*, 196 F.3d 334 (2d Cir. 1999); *Gottfried v. Samuel Frankel*, 818 F.2d at 493; *Asseo v. Pan American Grain Co.*, 805 F.2d 23, 25-26 (1st Cir. 1986) (combination of live testimony and ALJ transcript); *Fuchs v. Hood Industries, Inc.*, 590 F.2d 395, 398 (1st Cir. l979) (the use of an ALJ transcript "could be of considerable assistance in expediting the work of the [district] court."); *Eisenberg v. Honeycomb Plastics Corp.*, 125 LRRM 3257, 3262 (D. N.J. 1987).[6] There is particularly no need for additional testimony since the ALJ record is the only evidence the Board will have in determining the final outcome of the case. See *NLRB v. Johnson*, 310 F.2d 550, 552 (6th Cir. 1962); *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1264 (9th Cir. 1977).

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[5] See generally *F.T.C. v. Rhodes Pharmacal Co.*, l9l F.2d 744 (7th Cir. l95l); *U.S. v. Wilson Williams, Inc.*, 277 F.2d 535 (2d Cir. l960); *Johnston v. J.P. Stevens & Company, Inc.*, 34l F.2d 89l (4th Cir. l965). [But see n. 1 supra.]

[6] In *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d l047, l050-5l (2d Cir. l980), the Second Circuit affirmed a Section l0(j) injunction issued by a district court on the basis of the transcript and exhibits adduced before the administrative law judge in the underlying administrative proceeding.

Finally, neither Rule 43(e) nor Rule 65 of the Federal Rules of Civil Procedure requires oral testimony in this type of statutory, temporary injunction proceeding, *Silverman v. Red & Tan Charters, Inc.*, 1993 WL 498062 (S.D.N.Y. Nov. 30, 1993)[7] (declining to find that Rule 65 requires the holding of an evidentiary hearing on a Section 10(j) petition); *Kennedy v. Sheet Metal Workers*, 289 F. Supp. 65, 87-91 (C.D. Cal. 1968),[8] and such procedures do not deny a fair hearing or due process to the Respondent. See *Aguayo v. Tomco Carburetor Co.*, 853 F.2d at 750-751; *Asseo v. Pan American Grain Co.*, 805 F.2d at 25-26; *Gottfried v. Samuel Frankel*, 818 F.2d at 493; *Squillacote v. Graphic Arts International Union*, 540 F.2d at 860; *Kennedy v. Teamsters, Local 542*, 443 F.2d at 630; *San Francisco-Oakland Newspaper Guild v. Kennedy*, 412 F.2d at 546.

In sum, submission of this Section [10(j) or 10(l)] matter [redacted] will avoid the delay inherent in scheduling and conducting a full evidentiary hearing, will avoid duplicative litigation, will facilitate a speedy decision, and will conserve the time and resources of the court and the parties. Such procedure fully comports with the statutory priority that should be given to this proceeding under 28 U.S.C. Section 1657(a) and the original intent of the 1947 Congress which enacted Section [10(j) or 10(l)]. See I *Legislative History LMRA 1947* 414, 433 (Government Printing Office 1985). **[Add if appropriate, and see notes 1 and 4, supra.:** If the Court grants this motion to utilize the record developed before the administrative [redacted]

[8] There is nothing in the texts of Section 10(j) and 10(l) that mandates oral testimony in these proceedings. See *San Francisco-Oakland Newspaper Guild v. Kennedy*, 412 F.2d at 546.

law judge, Petitioner also requests that the Court grant leave to supplement such record with either oral testimony or affidavit evidence bearing on the issue of the equitable necessity of injunctive relief in this case, as such evidence may not be germane in the administrative proceeding.**]**

APPENDIX L

Questions by The Court and Possible Answers In Section 10(j) Proceedings

[This Appendix has been intentionally withheld]

APPENDIX M

OPPOSITION TO INTERVENTION BY CHARGING PARTIES

APPENDIX M

APPENDIX M-1

SAMPLE ARGUMENT TO SUPPORT A MOTION TO OPPOSE INTERVENTION

INCLUDING THE BOARD'S EXCLUSIVE AUTHORITY TO SEEK SECTION 10(J) AND 10(L) INJUNCTIONS AND THE AUTHORITY TO SEEK CONTEMPT UNDER 10(J) AND 10(L) DECREES

In seeking temporary injunctive relief under Section 10(j) and 10(l) of the Act, the NLRB acts solely "in the public interest and not in vindication of purely private rights." Senate Report No. 105 on S.1126, 80th Cong., 1st Sess., (April 17, 1947), reprinted in I *Legislative History LMRA 1947* 414 (G.P.O. 1985). See, e.g., *Seeler v. The Trading Port, Inc.*, 517 F.2d 33, 39-40 (2d Cir. 1975) (Section 10(j)); *Hendrix v. Operating Engineers Local 571,* 592 F.2d 437, 441-42 (8th Cir. 1979) (Section 10(l)). It is thus well established that the right to seek a temporary injunction to enjoin unfair labor practices pursuant to Section 10(j) or 10(l) of the Act is *exclusively* within the authority of the Board. See *Amalgamated Clothing Workers of America v. Richman Brothers Co.*, 348 U.S. 511, 516-17 (1955).[1] In this regard, a proposed amendment to Section 10(l) of the Act to allow private parties to seek directly in the district courts injunctive relief for certain unfair labor practices, was defeated by the 1947 Congress which enacted Section 10(l) and 10(j). See *Muniz v. Hoffman,* 422 U.S. 454, 465-67 (1975) (discussion of legislative history).

[1] Accord: *Walsh v. I.L.A.*, 630 F.2d 864, 871-72 (1st Cir. 1980); *California Assoc. of Employers v. BCTC of Reno, Nevada*, 178 F.2d 175 (9th Cir. 1949); *Amalgamated Assoc. of Street and Motor Coach Employees v. Dixie Motor Coach Corp.*, 170 F.2d 902 (8th Cir. 1948); *Amazon Cotton Mill Company v. Textile Workers Union of America*, 167 F.2d 183 (4th Cir. 1948); *Brown & Sharpe Mfg. Co. v. District 64, IAM*, 535 F.Supp. 167, 169 n. 2 (D. R.I. 1982).

It is also well established that a private party cannot intervene by right (see Fed.R.Civ.P. 24(a)(2)) in such proceedings in the district court, *Sears, Roebuck & Co. v. Carpet, etc. Union,* 410 F.2d 1148, 1150-51 (10th Cir. 1969), vacated on other grounds as moot, 397 U.S. 655 (1970),[2] for to do so would interfere with the exclusive jurisdiction which has been vested in the NLRB by Congress and would give such party a right independently to appeal or to seek a contempt citation. See *Penello v. Burlington Industries, Inc.,* 54 LRRM 2165 (W.D. Va. 1963). See also *McLeod v. Business Machine Conference Board,* 300 F.2d 237, 242-43 (2d Cir. 1962) (charging party not permitted to raise issues in 10(l) proceeding which are not raised by the Regional Director). In addition, a private party cannot intervene in such proceedings at the appellate level. See *Hirsch v. Building and Construction Trades Council of Phila. & Vicinity, AFL-CIO,* 530 F.2d 298, 307-08 (3d Cir. 1976).[3]

It is similarly well established that the right to seek contempt of a court decree enforcing a NLRB order resides exclusively in the NLRB, inasmuch as the NLRB seeks judicial enforcement of its orders as a "public agent." See *Amalgamated Utility Workers*

[2] Accord: *Squillacote v. Local 578, Auto Workers*, 383 F.Supp. 491, 492 (E.D. Wisc. 1974); *Wilson v. Liberty Homes, Inc.*, 500 F.Supp. 1120, 1123 (W.D. Wisc. 1980), affd. as mod. 108 LRRM 2699 (7th Cir. 1981), vacated as moot 109 LRRM 2492, 673 F.2d 1333 (7th Cir. 1982); *Reynolds v. Marlene Industries Corp.*, 250 F.Supp. 722, 723-24 (S.D. N.Y. 1966); *Philips v. Mine Workers, District 19*, 218 F.Supp. 103, 105-06 (E.D. Tenn. 1963); *Boire v. Pilot Freight Carriers, Inc.*, 86 LRRM 2976, 2978 (M.D. Fla. 1974), aff'd. 515 F.2d 1185 (5th Cir. 1975), reh. denied, 521 F.2d 795, cert. denied, 426 U.S. 934 (1976).

[3] Accord: *Solien v. Miscellaneous Drivers etc.*, 440 F.2d 124, 129-32 (8th Cir. 1971), cert. denied 403 U.S. 905; *Henderson v. Operating Engineers, Local 701*, 420 F.2d 802, 806 fn. 2 (9th Cir. 1969); *Compton v. N.M.U.*, 533 F.2d 1270, 1276 fn. 4 (1st Cir. 1976).

v. Consolidated Edison Company of New York, Inc., 309 U.S. 261, 269 (1940); *May Department Stores Co. v. NLRB,* 326 U.S. 376, 388 (1945).[4]

Since the NLRB similarly acts to vindicate solely the public interest under Section 10(j) and 10(l) of the Act, see *Fleischut v. Nixon Detroit Diesel, Inc.,* 859 F.2d 26, 30 (6th Cir. 1988) and cases cited therein, the right to seek a contempt adjudication of an order granting a temporary injunction pursuant to Section 10(j) or 10(l) of the Act similarly resides exclusively in the NLRB. See *Shore v. Building and Construction Trades Council,* 50 LRRM 2139 (W.D. Pa. 1962) (motion by nonparty employer in 10(l) proceeding to adjudicate respondent union in contempt, denied on basis that only NLRB can bring contempt action; Fed.R.Civ.P. 71 held not applicable).[5] Thus, while the courts have the inherent power to enforce compliance with their lawful orders through civil contempt, e.g., *Shillitani v. U.S.,* 384 U.S. 365, 370 (1966), charging parties may not be permitted to pursue independently contempt petitions in 10(l) and 10(j) cases which would intrude upon the Board's exclusive authority to initiate and enforce these types of

[4] See also *NLRB v. Shurtenda Steaks, Inc.,* 424 F.2d 192 (10th Cir. 1970); *Vapor Blast Shop Worker's Association v. Simon,* 305 F.2d 717 (7th Cir. 1962); *NLRB v. Retail Clerks International Association,* 243 F.2d 777 (9th Cir. 1956).

[5] See also *Moore v. Tangipahoa Parish School Board,* 625 F.2d 33, 34 (5th Cir. 1980)(Fed.R.Civ.P. 71 does not allow a nonparty to enforce a court decree where such person has no standing to sue). Cf. *Evans v. International Typographical Union,* 81 F. Supp. 675, 678 (S.D. Ind. 1948) (power to initiate and prosecute temporary injunction proceeding under Section 10(j) carries with it the incidental and inherent authority to institute contempt proceedings).

proceedings. See *Shore v. Building and Construction Trades Council*, 50 LRRM at 2141. Accord: *Philips v. Mine Workers, District 19*, 218 F.Supp. at 107-08 (charging party has no right to continue 10(l) decree or to seek contempt adjudication over objection of Regional Director).[6]

[6] Compare the Ninth Circuit's decision in *NLRB v. Retail Clerks International*, 243 F.2d at 782-83 (charging party has no standing to seek injunctive relief to enforce prior court decrees where Board was not seeking such relief) with *Retail Clerks v. Food Employers Council*, 351 F.2d 525, 529 (9th Cir. 1965) (district court has jurisdiction, once Regional Director files 10(l) petition, to grant appropriate relief different from that proposed by the Regional Director).

APPENDIX M

APPENDIX M-2

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 99-4 June 3, 1999

TO: All Regional Directors, Officers-in-Charge
And Resident Officers

FROM: Fred Feinstein, General Counsel

SUBJECT: Participation by Charging Parties in Section 10(j)Injunction and Section 10(j) Contempt Proceedings

1. Introduction

The purpose of this Memorandum is to detail the degree to which charging parties in the underlying unfair labor practice proceeding may participate in the U.S. district court Section 10(j) injunction proceeding. Charging parties in Section 10(j) proceedings should be given the same rights as charging parties in 10(l) proceedings: the "opportunity to appear by counsel and present any relevant testimony." Section 10(l), 29 U.S.C. 160(l). This participation does not, however, include the right to formally intervene as a party in the 10(j) proceeding. It is more analogous to that of an active amicus curiae.

Such participation should apply not only to the initial 10(j) proceeding which seeks the temporary injunction, but also to any subsequent proceedings to modify, amend, reconsider or to oppose a stay of any decree obtained, and any contempt proceeding which seeks a civil contempt adjudication and purgation order.[1]

Set forth below is the legal analysis in support of the argument that charging parties should be denied formal intervention as parties in the injunction proceeding, as well as that supporting the position that charging parties in 10(j) proceedings should be accorded the right of participation due to charging parties in Section 10(l) proceedings. Any charging party motion to intervene should be opposed and any charging party motion for amicus status should be supported, relying upon the analysis set forth below.

2. The Legislative History of Section 10(j) and the Policies under the Federal Rules Demonstrate that Charging Parties Have No Right to Intervene in 10(j) and 10(l) Proceedings.

In seeking temporary injunctive relief under Section 10(j), the National Labor Relations Board (NLRB or Board) acts solely "in the public interest and not in vindication of purely private rights." Senate Report No. 105 on S.1126, 80th Cong., 1st Sess., p. 8 (April 17, 1947), reprinted in I *Legislative History LMRA 1947* 414

[1] Similarly, charging parties should be granted amicus status in any appeal.

(Government Printing Office 1985).[2] Thus, it is well established that the right to seek a temporary injunction to enjoin unfair labor practices pursuant to Section 10(j) is exclusively within the authority of the Board. See *Amalgamated Clothing Workers of America v. Richman Brothers Co.*, 348 U.S. 511, 516-517 (1955).[3] Indeed, during the debate on Section 10(j) and (l) in 1947, Congress defeated a proposed amendment to Section 10(l) to allow private parties direct access to the district courts to seek injunctive relief for certain unfair labor practices. See *Muniz v. Hoffman*, 422 U.S. 454, 465-467 (1975)(discussing legislative history of Taft-Hartley Amendments). Since intervention would permit a party independently to appeal or to seek a contempt citation, granting intervention would inappropriately interfere with the Congressional intent to vest in the Board the exclusive authority to prosecute injunction proceedings. *Penello v. Burlington Industries, Inc.*, 54 LRRM 2165 (W.D. Va. 1963). See also *Sears, Roebuck & Co. v. Carpet, etc. Union*, 410 F.2d 1148, 1150-1151 (10th Cir. 1969), vacated on other grounds as moot, 397 U.S. 655 (1970) (denying intervention at appellate level); *Philips v. Mineworkers*, 218 F. Supp. 103, 105-106 (E.D. Tenn. 1963) (denying intervention for purposes of dissolving the injunction and instituting contempt proceedings).

Courts have also reasoned that because the statutory power to petition for 10(j) and 10(l) relief is limited to the Board, a charging party has no independent interest protectable by intervention under Fed.R.Civ.P., Rule 24(a)(2) or (b)(2). Accordingly, courts have routinely denied charging parties motions to intervene under that Rule. *Reynolds v. Marlene Industries Corp.*, 250 F. Supp. 722, 723-724 (S.D.N.Y. 1966); *Boire v. Pilot Freight Carriers, Inc.*, 86 LRRM 2976, 2978 (M.D. Fla. 1974), aff'd. 515 F.2d 1185 (5th Cir.), reh. denied, 521 F.2d 795 (1975), cert. denied 426 U.S. 934 (1976); *Squillacote v. Local 578, Auto Workers*, 383 F. Supp. 491, 492 (E.D. Wisc. 1974); *Wilson v. Liberty Homes, Inc.*, 500 F. Supp. 1120, 1123 (W.D. Wisc. 1980).[4]

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[2] See also *Seeler v. The Trading Port, Inc.*, 517 F.2d 33, 40 (2d Cir. 1975).

[3] Accord: *Walsh v. I.L.A.*, 630 F.2d 864, 871-872 (1st Cir. 1980); *California Assoc. of Employers v. BCTC of Reno, Nevada*, 178 F.2d 175, 179 (9th Cir. 1949); *Amalgamated Assoc. of Street and Motor Coach Employees v. Dixie Motor Coach Corp.*, 170 F.2d 902, 907 (8th Cir. 1948); *Amazon Cotton Mill Company v. Textile Workers Union of America*, 167 F.2d 183, 185-187 (4th Cir. 1948); *Brown & Sharpe Mfg. Co. v. District 64, IAM*, 535 F. Supp. 167, 169 n. 2 (D. R.I. 1982).

[4] Other district courts have denied intervention without reference to Rule 24. See, *NLRB v. Ona Corp.*, 605 F. Supp. 874, 876 (N.D. Ala. 1985); *Gottfried v. Mayco Plastics, Inc.*, 472 F. Supp. 1161, 1163, 1164 (E.D. Mich. 1979), affd. 615 F.2d 1360 (6th Cir. 1980)(table). Other appellate courts have also denied intervention. See, *Hirsch v. Building and Construction Trades Council of Phila. & Vicinity, AFL-CIO*, 530 F.2d 298, 307-308 (3d Cir. 1976); *Compton v. N.M.U.*, 533 F.2d 1270, 1276 n. 4 (1st Cir. 1976); *Solien v. Miscellaneous Drivers etc.*, 440 F.2d 124, 129-132 (8th Cir.), cert. denied 403 U.S. 905 (1971); *Henderson v. Operating Engineers, Local 701*, 420 F.2d 802, 806 n. 2 (9th Cir. 1969).

3. Charging Parties in Section 10(j) Proceedings Should Enjoy the Same Rights of Participation as in Section 10(l) Proceedings

Section 10(l) expressly directs that charging parties "shall be given an opportunity to appear by counsel and present any relevant testimony." Given the functional similarity of section 10(j) and 10(l)[5] it is appropriate to accord the same degree of participation to charging parties in 10(j) proceedings. Such participation comes under the general rubric of an amicus curiae, a status courts have often granted to charging parties in Section 10(j) cases.[6] Often the court has granted the charging party amicus the same privileges as would be granted under 10(l).[7]

[5] The two provisions were enacted as companion provisions: section 10(l) mandates the Board to seek injunctive relief in cases involving certain enumerated unfair labor practices (chiefly, unlawful secondary boycotts); 10(j) authorizes the Board, in its discretion, to seek injunctive relief in all other cases. The standards for determining the propriety of injunctive relief are generally the same. *Kobell v. Suburban Lines, Inc.*, 731 F.2d 1076, 1084 (3d Cir. 1984); *Kinney v. Local 150*, 994 F.2d 1271, 1276 (7th Cir. 1993). Although one court has held that the absence of any reference in 10(j) to charging party participation distinguishes it from 10(l) (see *Wilson v. Liberty Homes, Inc.*, 500 F. Supp. at 1123), that view has not been adopted generally and that decision has not been read as a rejection of all right to participate in 10(j) proceedings. See *Dunbar v. Landis Plastics, Inc.*, 996 F. Supp. 174, 179-180 (N.D.N.Y. 1998), remanded on other grounds 152 F.3d 917 (2d Cir. 1998) (table) (distinguishing *Liberty Homes* and granting amicus curiae status to charging party).

[6] See, e.g., *Dunbar v. Landis Plastics, Inc.*, 996 F. Supp. at 179-180; *D'Amico v. United States Service Industries, Inc.*, 867 F. Supp. 1075, 1079 (D. D.C. 1994); *Garner v. Macclenny Products, Inc.*, 859 F. Supp. 1478, 1479 (M.D. Fla. 1994); *Zipp v. Caterpillar, Inc.*, 858 F. Supp. 794, 795 (C.D. Ill. 1994); *Gottfried v. Mayco Plastics, Inc.*, 472 F. Supp. 1161, 1163, 1164 (E.D. Mich. 1979), aff'd. 615 F.2d 1360 (6th Cir. 1980); *NLRB v. Ona Corp.*, 605 F. Supp. 874, 876 (N.D. Ala. 1985); *McLeod v. General Electric Company*, 257 F. Supp. 690, 692 n. 1 (S.D.N.Y.), revd. on other grounds 366 F.2d 847 (2d Cir. 1966), stay granted 87 S.Ct. 5, vacated and remanded 385 U.S. 533 (1967).

[7] See *McLeod v. General Electric Company*, 257 F. Supp. at 692, n. 1 (may appear by counsel, examine and cross examine witnesses and make legal submissions); *NLRB v. Ona Corp.*, 605 F. Supp. at 876 (afforded full opportunity to be heard, to examine and cross-examine witnesses and present evidence bearing upon the issues); *Dunbar v. Landis Plastics, Inc.*, 996 F. Supp. at 180 (permitted to file memoranda and evidentiary affidavits and to participate in oral argument).

To be sure, a 10(j) charging party amicus, like the 10(l) charging party, is not a full party in the district court proceeding[8] and may not vary the theory of violation being advanced by the Regional Director or initiate an appeal.[9]

4. Charging Party's Right of Participation Extends to Section 10(j) Civil Contempt Proceedings

The right to institute proceedings for civil contempt of a temporary interim injunction resides exclusively in the NLRB as a "public agent;" a charging party has no independent authority to bring contempt proceedings. *Shore v. Building and Construction Trades Council,* 50 LRRM 2139 (W.D. Pa. 1962). See also *NLRB v. Retail Clerks International Association,* 243 F.2d 777, 782-783 (9th Cir. 1956) (charging party has no standing to seek injunctive relief to enforce prior court decrees where Board was not seeking such relief); *Philips v. Mine Workers, District 19,* 218 F. Supp. at 107-108 (charging party has no right to continue 10(l) decree or to seek contempt adjudication over objection of Regional Director); *Moore v. Tangipahoa Parish School Board,* 625 F.2d 33, 34 (5th Cir. 1980) (Fed.R.Civ.P. 71 does not allow a nonparty to enforce a court decree where such person has no standing to sue). However, consistent with the general policy set forth above, Regions should consent to the participation of charging parties as amicus curiae in Section 10(j) civil contempt proceedings.

5. Conclusion

Consistent with the analysis set forth above, the Regions should deny all requests and oppose all motions of charging parties to obtain formal party status in any Section 10(j) proceeding. However, the Regions should consent to granting the charging parties the status of amicus curiae and the same degree of participation granted to charging parties under Section 10(l) of the Act.

If the Regions have any questions concerning this guideline memorandum, or if issues arise not clearly covered herein, prompt telephonic advice should be sought from the Injunction Litigation Branch in Washington.

F. F.

cc: NLRBU
Release to the Public

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[8] See rationale above p.307, for denying intervention by charging parties. See also *The Miller-Wohl Co., Inc. v. Commission of Labor and Industry, State of Montana,* 694 F.2d 203, 204 (9th Cir. 1982) (amici are not parties; grant of motion to intervene is necessary to confer party status); *Morales v. Turman,* 820 F.2d 728, 732 (5th Cir. 1987) (same).

[9] See *McLeod v. Business Machine Conference Board,* 300 F.2d 237, 242-243 (2d Cir. 1962); *Sears Roebuck & Co. v. Carpet, etc. Union,* 410 F.2d at 1150-1151. See also *Moten v. Bricklayers, Masons, etc.,* 543 F.2d 224, 227 (D.C. Cir. 1976) (where litigant did not seek intervention, its position was analogous to amicus; as such it had no authority to appeal); *Richardson v. Alabama State Board of Education,* 935 F.2d 1240, 1247 (11th Cir. 1991) and cases cited (refusing to consider arguments of amici not presented by party).

APPENDIX N

Discovery Documents

[This Appendix has been intentionally withheld]

APPENDIX O
Sample Letter to District Court

September 5, 2002

The Honorable Frederick Block
United States District Court
For the Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: ALVIN BLYER V. PRATT TOWERS, INC.
Case No. CV-00-2499

Dear Judge Block:

Enclosed please find a copy of the Decision and Recommended Order issued by Administrative Law Judge Jesse Kleiman concerning the above-captioned case. In his Decision and Recommended Order, Judge Kleiman finds all of the violations of the National Labor Relations Act alleged by Counsel for the General Counsel (Petitioner herein) in the Consolidated Complaint in Case Nos. 29-CA-22657, 29-CA-22660 and 29-CA-22666[1]. Specifically, Judge Kleiman found, *inter alia*, that Respondent violated Section 8(a)(3) of the National Labor Relations Act by unlawfully refusing to reinstate six striking employees to their former positions of employment upon their unconditional offer to return to work. Respondent has been ordered to reinstate the six strikers with full backpay and interest. In addition, the Judge found that Respondent "engaged in a predetermined and planned course of conduct designed to undermine the status of the Union and to convince employees that it would be futile to continue to support the Union…" in violation of Section 8(a)(5) of the Act. Respondent has been ordered, upon request, to bargain in good faith with the Union over the terms and conditions of employment of its employees.

Judge Kleiman's Decision strongly bolsters the Petitioner's contention that there is reasonable cause to believe that Respondent violated the Act as alleged by the Regional Director in the Petition for injunctive relief under Section 10(j) of the National Labor Relations Act. See, e.g. *Bloedorn v. Francisco Foods, Inc., d/b/a Piggly Wiggly*, 276 F.3d 270, 288 (7th Cir. 2001); *Silverman v. JRL Food Corp.*, 196 F.3d 334, 335-337 (2d Cir. 1999); *Rivera-Vega v. ConAgra, Inc.*, 70 F.3d 153, 157 n.3, 161 (1st Cir. 1995); *Seeler v. Trading Port, Inc*., 517 F.2d 33, 37, n.7 (2d Cir. 1975).

[1] The ALJ did not decide on the allegation that Respondent unlawfully withdrew recognition from the Union, as alleged in Case No. 29-CA-23137. Petitioner anticipates that the ALJ will issue his Decision and Order in that matter in the very near future.

APPENDIX O

As noted in earlier correspondence, the Administrative Law Judge's decision is not the final administrative decision of the Board. See, e.g. *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d 962, 968 (6th Cir. 2001); *Sharp v. Webco Industries, Inc.*, 225 F.3d 1130, 1136 (10th Cir. 2000). The Petitioner has been advised by Respondent that it will file exceptions to the ALJ's decision, and that Respondent intends to request a one month extension of time for filing from the current deadline of October 25, 2000. Furthermore, in accordance with the Board's Rules and Regulations, Petitioner may file an answering brief opposing Respondent's exceptions, and Respondent could then file a reply brief. In view of the numerous stages remaining in this administrative proceeding, along with the length of the Judge's decision, it is likely that the Board will require a considerably long period of time to review the record, analyze the ALJ's 75-page decision, analyze the exceptions to the ALJ's factual and legal findings, and issue its Decision. Thus, Petitioner anticipates many more months of administrative litigation. See, e.g. *Levin v. Fry Foods, Inc.*, 108 LRRM 2208, 2209 (N.D. Ohio 1979), aff'd. 108 LRRM 2280 (6th Cir. 1981) (issuance of ALJD does not terminate 10(j) decree.) See also, *Fleischut v. Nixon Detroit Diesel, Inc*., 859 F.2d 26, 28 and 31, 129 LRRM 2660 (6th Cir. 1988) (error for district court to limit duration of 10(j) decree to commencement of ALJ hearing.) Thus, as the administrative litigation is still ongoing and the time before a final Board Order may be considerable, the risk of irreparable harm to the discriminatees and to the Union's bargaining strength not only continues, but also increases. Moreover, in light of the ALJ's finding that Respondent never intended to bargain in good faith with the Union and that Respondent deliberately devised a plan to rid itself of the Union by, among other things, dragging out negotiations to allow for the expiration of the certification year (ALJD, p.67, ln. 36-45, p.69, ln. 12-15), the Respondent should not further benefit from its unlawful conduct by allowing more time to pass without interim injunctive relief.

Based on the above, it is clear that the Administrative Law Judge has found that Respondent has violated the Act in the manner set forth in the 10(j) Petition. Further, despite the ALJ's decision, injunctive relief is still warranted.

Thank you for your consideration of this matter.

Respectfully submitted,

Nancy K. Reibstein
Counsel for Petitioner

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

M. KATHLEEN MCKINNEY, Regional Director of Region 15 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, Petitioner	*	
v.	*	Case No. 4:14-cv-04037-SOH
SOUTHERN BAKERIES, LLC, Respondent	*	

PETITIONER'S MOTION TO SUPPLEMENT THE RECORD WITH THE ADMINISTRATIVE LAW JUDGE'S DECISION

Petitioner, M. Kathleen McKinney, Regional Director of Region 15 of the National Labor Relations Board, for and on behalf of the National Labor Relations Board, by the undersigned counsel, moves to supplement the record in this matter with the decision of Administrative Law Judge Robert A. Ringler (ALJ Ringler), which issued on July 17, 2014. (Attached as Exhibit 1). The reasons offered in support of this motion are set forth in the accompanying memorandum.

Respectfully submitted this 21st day of July, 2014.

s/ Linda M. Mohns
COUNSEL FOR PETITIONER
National Labor Relations Board
Region 15, Subregion 26
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Memphis, Tennessee 38103
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CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2014, a copy of Petitioner's Motion to Supplement the Record with the Adminstrative Law Judge's Decision and Petitioner's Memorandum in Support of said motion was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following:

David L. Swider, Esq.
Sandra Perry, Esq.
Bose McKinney & Evans LLP
111 Monument Cir Ste 2700
Indianapolis, IN 46204

/s/ Linda M. Mohns
Attorney for Petitioner

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

SOUTHERN BAKERIES, LLC

and

BAKERY, CONFECTIONERY, TOBACCO AND GRAIN MILLERS UNION, LOCAL 111

Cases 15-CA-101311
15-CA-103186
15-CA-104063
15-CA-106033
15-CA-107597
15-CA-108613
15-CA-109746
15-CA-109753
15-CA-109755
15-CA-115945
26-CA-077268
26-CA-077536

Linda Mohns, Zachary E. Herlands **and** ***Caitlin E. Bergo, Esqs.,***
for the General Counsel.
David L. Swider **and** ***Sandra Perry, Esqs. (Bose McKinney & Evans LLP),***
for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. On February 4 through 7, 2014, this case was heard in Hope, Arkansas. The complaint alleged that Southern Bakeries, LLC (the Company or Respondent) violated Section 8(a)(1), (3) and (5) of the National Labor Relations Act (the Act).[1] On the entire record,[2] including my observation of the demeanor of the witnesses, and after thoroughly considering the parties' briefs, I make the following:[3]

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1 The General Counsel withdrew complaint pars. 14 and 17 covering Earnest Beasley's suspension and firing.

2 Transcript citations relate to the official transcript. The PDF transcript in NXGEN, the Agency's electronic case processing system, is paginated differently.

3 The joint motion to correct the transcript dated March 28, 2014 is granted, and received as JT Exh. 55.

FINDINGS OF FACT[4]

I. JURISDICTION

The Company operates a commercial bakery in Hope, Arkansas (the plant), where it annually sells goods valued at more than $50,000 directly to points outside of Arkansas. I find that it is an employer engaged in commerce under Section 2(2), (6), and (7) of the Act. I also find that the Bakery, Confectionary, Tobacco and Grain Millers Union, Local 111 (the Union) is a labor organization under Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

The plant, a continuous operation, manufactures baked goods. In 2005, the Company purchased the plant from Meyer's Bakeries, Inc. It then recognized the Union as the exclusive collective-bargaining representative of the plant's production and sanitation workers (the unit), and adopted their collective-bargaining agreement. The parties, thereafter, memorialized this relationship in several contracts, with their most recent agreement running from February 8, 2010 to February 8, 2012 (the CBA).[5] (JT Exh. 1). There are 200 employees in the unit.

Cesar Calderon, International Union Representative, serviced the unit.[6] He handled bargaining, grievances and other matters. Alice Briggs, unit employee, is a Shop Steward. Rickey Ledbetter is the Company's Executive Vice President/General Manager, Dan Banks is the Director of Manufacturing, and Linda Burke was the Human Resources Manager.[7]

B. First Decertification Petition

On December 7, 2011, Nadine Pugh, an employee, filed an RD-Decertification petition (the first decertification petition) with the National Labor Relations Board (the Board), which sought to oust the Union. (R Exh. 4). Although the petition was blocked and never resulted in an election, it prompted a flurry of Union visits seeking to address the unit's disenchantment. The Company reacted by impeding the Union's access, and a battle ensued over such rights.

C. Plant Access Disputes Following the First Decertification Petition

1. CBA's Access Provision

Article I of the CBA provides:

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4 Unless otherwise explained, factual findings arise from admissions, joint exhibits, stipulations, and uncontroverted testimony.

5 All dates herein are in 2012, unless otherwise stated.

6 He serviced the unit from 2011 through mid-2013.

7 Burke has since resigned and is now employed by Tyson Foods, Inc.

> **Section 1.03. Union Representative.** . . . . [T]he Union shall . . . enter the production and sanitation departments [to] . . . see . . . that the Agreement is being observed after giving . . . twelve (12) hours actual notice . . . . The Company . . . may accept a reduced notice period . . . . The Union . . . agrees to limit break room visitation to a Company designated break room area . . . .

(JT Exh. 2).

2. Union Access Policy Prior to the First Decertification Petition

Calderon described the Company's Union access policy before the first decertification petition. Specifically, he testified that Union representatives freely met with the unit in the break area, which was a large rectangular room that was divided by a windowed wall into two smaller rooms.[8] See (JT Exh.44). He added that the Company solely sought advance notice, and never monitored visit subject matter or frequency. Sandra Phillips, a unit bread packer since 1993, stated that the Union previously met with the unit in the break area, without interference.

Ledbetter testified that Union representatives were only allowed to visit for grievance-handling. He stated that the CBA supports his position, and that the Company was consistent.

Given that Calderon stated that the Union was previously granted relatively unfettered access to the break area, while Ledbetter testified to the contrary, I must make a credibility determination. I credit Calderon. First, he was a straightforward witness, who answered all queries candidly and thoughtfully. Second, his testimony was corroborated by Phillips, who was also credible and had a strong demeanor. Third, Ledbetter appeared less than candid, sporadically argumentative, and parsed his words when answering tougher queries. Lastly, it is plausible that, when the parties' relationship was less adversarial, the Company took a more liberal stance on Union access.

3. March 8 – Ledbetter's Letter to Calderon

On this date, Ledbetter announced to Calderon that:

> Section 1.03 of the CBA limits the purpose for which you can meet at our facility . . . the only reason for such visits . . . is "for the purpose of seeing that the Agreement is being observed." To me, **that means you can visit employees at our facility . . . to investigate, resolve, and/or pursue potential violations of the contract** . . . . This clearly does not include general visits; visits to drum up support for the Union; . . . or to solicit/discuss ideas for contract negotiation purposes. Typically, these types of meetings are done offsite . . . .
>
> **Please narrow your time frame . . . to accomplish the limited appropriate purpose set out in Section 1.03 . . . or, let me know what possible contract violation(s) could consume so much unrestricted time.**

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[8] He estimated that the frequency of his annual visits ranged from 2 to 36 visits.

(JT Exh. 44) (emphasis added).

4. March 12 to 20 – Parties' Replies Concerning Access

On March 12, Calderon responded:

> Section 1.03 of the CBA does not specify that the union requires a specified reason to conduct a union visit to your plant . . . .
>
> **In past practice, union officials have had access . . . to conduct union business for both specific reasons and general visitations . . . .**
>
> In addition, this letter will serve to notify management that the union will conduct . . . visit[s] . . . March 13th . . . [and] 14th . . . .

(GC Exh. 2) (emphasis added); see also (JT Exh. 44). Although Ledbetter initially denied this request, he later granted Calderon limited access on March 20 for grievance-handling. (Id.).

5. March 20 – Calderon's Plant Visit and the New Cubicle Policy

Calderon testified that Banks greeted him by announcing that he was no longer permitted to meet employees in the break area, and escorted him to an adjacent vending machine area, where a tiny cubicle had been set up for him.[9] He stated that Banks told him that he needed to identify whom he wanted to see, and that he would then retrieve the workers. He added that he explained that this new arrangement might be intimidating for employees, who often preferred a private audience before deciding whether to file a grievance. He recollected that the cubicle had no table and only a single chair. He added that he was unaware of the Union ever being relegated to a cubicle. He stated that Banks offered that employees had complained about him, as a rationale for his new isolation.[10] He added that he refused to enter the cubicle, and insisted that Banks permit him to meet in the break area, in accordance with past practice. He said that Banks then threatened to call the police, and that he then left the plant after only a short meeting. He related that unit employees were uncomfortable with the new arrangement and did not want to be seen meeting with him, due to the great hostility between the parties. He added that sitting in the break area often generated important impromptu meetings concerning the CBA, and that the cubicle rendered him virtually invisible. He stated that, in the past, he lingered in the break area for several hours at a time. David Woods, International Union Representative, corroborated his testimony about the cubicle and the past access policy.

Ledbetter admitted the new cubicle policy, and said that his actions were triggered by complaints. He stated that the CBA afforded him the right to relegate the Union to the cubicle.

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9 The cubicle was approximately 5 by 4 feet.

10 He said that he later learned that he had been accused of improperly hugging Juan Rivera, which he denied. It is noteworthy that Rivera never testified about this matter. For several reasons, I fully credit Calderon's denial regarding Rivera, and find the Company's accusation was a hoax. First, the Company failed to adduce testimony from Rivera or any other employee, who was harassed by Calderon. Second, the Company failed to provide any written documentation or reports, which demonstrated such harassment. Third, as noted, Calderon was a highly believable witness, with a stellar demeanor. Finally, I find it likely that the Company created a hoax about Calderon, as part of its multi-pronged strategy to oust the Union.

6. March 23 – Company's Ban of Calderon

On this date, Ledbetter banned Calderon from the plant as follows:

> We have received another employee complaint concerning inappropriate conduct by Cesar Calderon during his visits . . . . The complaint is that Cesar has, on more than one occasion, harassed this employee, continues to pressure the employee to support union organization after being told to be left alone; physically and mentally interfered with the employee's meal consumption; sent strangers to the employee's home; and, performed inappropriate touching . . . on March 20 . . . .
>
> We will endeavor to investigate the allegations of harassment . . . . In the meantime, we cannot allow Cesar Calderon to access our property . . . .

(JT Exh. 44). The Company, as noted, conspicuously failed to present any harassed workers or offer incident reports. As explained, I credit Calderon's denial and find that the ban was part of a systematic attempt to impede the Union's access before the decertification vote and that the harassment allegations were a hoax. The Company later reinstated Calderon's access rights, as part of an informal Board settlement agreement covering this matter and others.[11] (JT Exh. 4).

D. Second Decertification Petition

On May 23, John Hankins, a unit employee, filed another RD-Decertification petition (the second decertification petition) with the Board seeking to oust the Union. (JT Exh. 45). This petition was blocked by further unfair labor practice charges and an election was never held.

E. Plant Access Disputes Following the Second Decertification Petition

1. January 7, 2013 – Ledbetter's Letter to the Union

In response to the Union's access request, Ledbetter replied:

> Consistent with . . . our expired agreement and its established practice, . . . the visit may only be "for the purpose of seeing that the Agreement is being observed." . . . . These limitations will not permit your representatives to hold general solicitation or election propaganda meetings . . . . If we learn that this is the purpose . . . , we will not . . . allow your presence on our premises. . . .
>
> [Y]our visits will be confined to the reserved small employee break room and you will not be permitted to . . . disturb . . . employees in the large break room . . . .

(JT Exh. 44).

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11 The Settlement Agreement stated that, "[b]y entering into this [resolution] . . . , the Charged Party does not admit that it has violated the National Labor Relations Act." (JT Exh. 4). This settlement was later rescinded by the Board due to the Company's ongoing violations of the Act. (GC Exh. 1(kk)).

2. January 8, 2013 – Surveillance Cameras and Break Area Windows

Calderon, Woods and Fields, met with Ledbetter, Banks and Burke at the plant. Calderon recalled Ledbetter affirming that the Union could only visit for grievances. Woods corroborated his testimony, and added that the Union also observed that surveillance cameras had been placed in the break area.[12] It is undisputed that these cameras were installed without notice or bargaining.[13] He added that he also learned that the windowed wall that divided the break area had been dismantled, and replaced with plywood.

Ledbetter explained that the cameras were installed to deter theft and averred that he was unobligated to bargain. He said that he offered to cover the cameras, whenever the Union visited.[14] See (GC Exh. 9). Regarding the break area windows, he alleged that, in January 2013, the break area air conditioning system failed, which required the Company to temporarily remove the windows for ventilation purposes. He stated that, once the air conditioning was repaired, he installed a plywood wall because food safety regulations required him to replace transparent windows with opaque materials. Banks corroborated this point. But see (GC Exh. 16) (Respondent counsel's position letter, which mentions "food safety," but, conspicuously fails to discuss a broken air conditioning system). It is equally noteworthy that Respondent failed to produce a work order or documents corroborating a broken air conditioning system. It is similarly striking that Respondent failed to cite the relevant food safety regulations that prohibited reinstalling non-breakable windows in the break area.

For several reasons, I do not credit Ledbetter's contention that he removed the break area windows because the air conditioning system failed and was prevented from reinstalling unbreakable windows by food safety regulations. First, his demeanor was less than credible. Second, his air conditioning testimony was contradicted by counsel's position letter, which conspicuously failed to cite a broken air conditioning system. Third, if the air conditioner had actually broken, counsel would have corroborated this point with a work order or other documentation. Finally, the Company failed to cite the supporting food safety regulations.

3. January 16, 2013 – Ledbetter's Letter

On this date, Ledbetter informed the Union that:

> [W]e now have it . . . that the reason for this sudden onslaught of visits has been to "campaign" and solicit support for the upcoming decertification election. That is . . . not consistent with . . . our expired contract . . . or our past practice . . . .

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12 Although surveillance cameras have historically monitored production areas, see (R. Exhs. 8–9), the parties stipulated that such cameras were first installed in the break area in November 2012. See (JT Exhs. 1 and 6).

13 Regarding the cameras, the Employee Handbook states that, "Southern reserves the right to use surveillance . . . equipment . . . . for the general protection of the workforce and for the good of the Company." (JT Exh. 3).

14 Robby Turner, Info. Technologist, said that the cameras do not pan or record audio. (JT Exh. 8; R. Exhs. 6–7).

> Accordingly, we can no longer permit you to access our premises without knowing . . . the particular issue . . . you wish to investigate. We will also need to know with whom you would like to meet . . . . If we become aware of continued deviation . . . , we will have no choice but to prohibit your . . . visits . . . .

(JT Exh. 44). The Company, thereafter, banned visits whenever Briggs, the Union Steward, was not scheduled to work.

4. January 21 and 22, 2013 – Ledbetter's Letters

In reply to Calderon's access request, on January 21, 2013, Ledbetter replied that:

> The terms of our approved visits remain the same . . . .
>
> [W]e require an explanation of the . . . . the issue(s) . . . you wish to investigate. We also need to know who(m) you would like to meet . . . .
>
> I will [then] let you know if the request . . . is approved . . . .

(JT Exh. 44).

In response to Calderon's reminder that the Union was, inter alia, investigating certain grievances, by letter dated January 22, 2013, Ledbetter replied as follows:

> [Y]our misguided belief . . . that the union does not need our permission to visit is simply untrue. . . . If a representative enters the property after the request is denied then it is trespassing on private property and subject to arrest . . . .
>
> If your next scheduled visit is to adjust grievances, as you have represented, the visit is granted. On the other hand, if the visit is to electioneer, solicit union support, or for any other reason . . . your request to visit is denied . . . .

(Id.).

5. February 2013 – Ongoing Access Issues

On February 7, 2013, Calderon informed Ledbetter that, "the union will be visiting the plant . . . February 8 [at various times] . . . ." (JT Exh. 44). This request was denied. (Id.).

6. April 17, 2013 – Ledbetter's Letter

On April 17, 2013, Calderon sought to visit on April 22. (JT Exh. 47). Ledbetter denied his request. (Id.). Calderon reported that, since that time, he has been barred from the plant.[15]

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15 He left his Union position in August 2013, and commenced employment with a different labor organization.

F. January 17, 2013 - Posting

On this date, the Company posted a memo, which it labeled as "Answers to Employee Questions Dated January 16, 2013," and stated as follows:

> The union . . . . [has] plans to take our employees out on strike . . . same as they . . . did at Hostess, where over 18,000 jobs were lost and 33 bakeries . . . closed.

(JT Exh. 45). This memo attributed several inaccurate statements to the Union, including a racially divisive accusation that the Union said that the Company would, "fire Hispanics" after the election. (Id.). The Company failed to offer any proof that the underlying employee questions, or inaccurate Union campaign statements, were genuine.

G. Captive Audience Meetings

In January and February 2013, Ledbetter delivered several captive audience speeches. These speeches were presented in English, and translated into Spanish.

1. January 23, 2013 Speeches

Ledbetter delivered "kick-off" and "collective-bargaining" talks. (JT Exh. 13). Roughly 170 unit employees attended.

a. "Kick-off" Speech

This segment provided, inter alia, as follows:

> From an economic standpoint, we do not want a union here because . . . it drags our Company down . . . . If we can't beat our competition, we can't survive. Just look at what happened to the Hostess Bakeries, Automobile companies and Steel companies. Unions strangled these companies to death . . . .
>
> There are lots of things a union can do to hurt . . . . Higher costs, less flexibility, lower productivity, and loss of team unity can be crippling . . . and cost employees their jobs . . . .
>
> Just look at what happened to Meyer's Bakeries and . . . at Hostess. At Hostess, a union strike by [this Union] . . . resulted in the loss of over 18K jobs, the liquidation of 33 bakeries . . . . That is one of the reasons why we do not want a union here. Also, all of our costs related to dealing with this union leave less money for wages and benefits . . . .
>
> [The Union] could only hurt our chance of long-term success and security . . . .
>
> If any of you are harassed or threatened on any basis during this election campaign, regardless of whether you are for or against the union, we want to

know about it immediately so we can address the problem . . . .

[T]o remedy the problem . . . , you must bring it to our attention . . . .

(JT Exh. 7) (emphasis omitted).

b. "Collective-bargaining" Speech

This segment provided, inter alia, as follows:

[U]nions are free to promise . . . . they can promise . . . the moon . . . . [T]he union has no power to make its promises come true . . . .

[D]uring collective bargaining , all the union can do is ask and all the union can get is what the Company will agree to give . . . .

[T]he union is free to make any promises . . . . but . . .could not guarantee anything . . . . Because of the rules surrounding collective bargaining, you could have ended up with less than the non-union employees here at Southern Bakeries, which has turned out to be the case . . . .

Don't be a victim of . . . slick salespeople . . . . The union can only promise . . . .

Why is it that collective bargaining . . . result[ed] in your getting less pay than non-union employees?[16] . . . .

[O]ur bottom line is thin . . . , the money . . . spent . . . dealing with the union is money that is simply not otherwise available . . . . [W]e have to hire expensive lawyers to help us . . . [with the] union. Not including the administrative time and other expenses we have had to spend . . . , which takes time away from our efforts to maintain customers and grow . . . , we have incurred tens of thousands of dollars in legal fees that have left us with less money . . . [for] our unionized employees than we have been able to give to our non-union workforce . . . .

Remember what happened to all of the Hostess employees – 2/3 were not part of BCTGM but also lost their jobs along with the striking BCTGM union-covered employees. Over 18,000.

(JT Exh. 8) (emphasis omitted).

2. February 1, 2013 Speeches

Ledbetter delivered "collective-bargaining," "strikes," and "job security" presentations.[17] (JT Exh. 14). Approximately 170 unit employees attended.

16 This query was repeated 10 times. (JT Exh. 8).

17 The "collective-bargaining" segment was a redux of the January 23, 2013 speech.

a. "Strikes" Speech

This segment provided, inter alia, as follows:

> [A]ll a union can do is ask, and . . . get . . . what a company . . . . agrees to . . . .
>
> [T]he union has stated that it plans to deal with Southern Bakeries in the same way as Hostess with a strike and/or boycotts, by trying to get customers to stop buying our products if we don't agree to union demands. If that is the case, this is of great concern because, as you know, the BCTGM strike closed Hostess . . . .
>
> [S]ee if the Union will sign a warranty coupon when it promises you something. Otherwise you have no guarantee . . . only a worthless promise . . . .
>
> [S]trikes hold a real threat of backfiring. And, when they backfire, employees and their families . . . get hurt. Hostess's closure is a good example . . . .
>
> [T]he BCTGM is union that likes to strike . . . the BCTGM has been responsible for at least 42 strikes since the beginning of 2000 . . . .
>
> [E]conomic strikers . . . can also be permanently replaced. During a strike, a company has the right to continue operating . . . . It can . . . be done with employees of other companies through subcontracting. When that happens, jobs are often lost at the striking facility . . . .
>
> Unions sometimes force employees to get involved in union boycotts of our customers . . . . This can be devastating . . . this makes it harder for the company to survive and can obviously lead to less jobs. . . .
>
> The bottom line is that rather than increasing . . . , job security can be seriously threatened by a union.
>
> If a strike does succeed in crippling a company, the company might not have the ability to satisfy its customers' demands . . . . This is how the BCTGM strike closed down the Hostess Company. Over 18,000 jobs. . . .
>
> Can the union help . . . ? Would strikes, boycotts, permanent replacements, labor/management discord, and loss of profitability help . . . ?

(JT Exh. 9) (emphasis omitted).

b. "Job Security" Speech

This segment provided, inter alia, as follows:

> There are many ways that a union can threaten job security . . . .
>
> Just because the contract is for a certain period . . . doesn't meant that the company has to stay open . . . .
>
> Just remember what happened to Meyer's Bakeries. They had a union contract but went bankrupt and out of business.
>
> If business conditions require, the company can . . . close its doors tomorrow. . . .
>
> It doesn't do you any good to make $20 per hour under your union contract if you don't have a job . . . .
>
> The union was willing to put your jobs on the line . . . . They appear ready to . . . put your jobs at risk if they continue to represent you after the Election. Specifically, we are hearing . . . that the union is planning to repeat boycotts of our customers . . . on your behalf. . . .
>
> [V]ote NO and stop any risk of lost jobs . . . .
>
> It makes sense that the more money a company spends on a union, the less money it has to provide safe, steady and secure good-paying jobs for its employees . . . .
>
> Do you trust BCTGM, who did nothing to prevent Meyers and Hostess and several other companies from going out of business . . . ? . . . .
>
> [V]ote "NO" to the . . . possible loss of job security.

(JT Exh. 10) (emphasis omitted).

3. February 5, 2013 Speech

Roughly 150 unit employees attended Ledbetter's "final speech," which provided:

> We encourage you to vote "NO".
>
> We have learned that collective bargaining only gives the union the right to ask the company for . . . what the union wants. . . .
>
> All a union can do is ask and all a union can get is what a company can voluntarily agree to give. . . .

[W]hen you understand the limits of collective bargaining, you begin to realize how a union is powerless . . . .

I continue to be concerned that the money spent dealing with the union . . . means less money that is available for wage and benefit increases. . . .

You're voting on whether you want to pay this union to put all of your wages [and] benefits . . . on the bargaining table again and risk them in a game of high stakes poker . . . .

The recent Hostess strike by BCTGM . . . put over 18k people out of work. . . .

A company may legally transfer work and jobs to another facility or subcontract the work. Those types of decisions can be permanent. . . .

Employees . . . may lose work and job security. . . .

[T]his company fought this union so hard because we believe that we would all be much better off without it . . . .

[I]ncreased costs . . . may affect our job security . . . .

Unfortunately, unions too often bring high costs and inflexibility to a competitive workplace environment. Time spent . . . bargaining and . . . in . . . resolving grievances is non-revenue generating unproductive time . . . .

[J]ob security is really the basic issue you will be voting on . . . .

You know that job security does not come from a union . . . .

[A] union can often take away a company's ability to survive . . . .

[Y]our choice should be an easy one. VOTE NO! . . . .

As we are getting our head above water, the Harlans have shared this success with us as employees. We have received each year since our beginning in 2005, wage increases and annual cash bonuses and continued competitive benefits.

Exceptions: As a result of collective bargaining . . . Production and Sanitation employees did not receive a wage increase in 2008, 2009 and 2012.

Shipping, Receiving, Maintenance and Driver employees (not represented by a union) received pay increases every year . . . .

The union . . . can show you only a history of plant closings, boycotts, strikes, union dues and broken promises . . . .

(JT Exh. 12) (emphasis omitted); see also (JT Exh. 15).

H. Disciplinary Actions

1. Sandra Phillips' Written Warning and Related Investigation

a. General Counsel's Position

Phillips testified that, on January 31, 2013, she and coworker, David Capetillo, Jr., discussed the Company's repeated accusation that the Union caused Hostess' closure. She said that Capetillo blamed the Union, while she blamed poor management. She stated that she is an open Union supporter.[18] She added that a few days later, she found an article, which supported her position, and shared it with Capetillo on the plant floor. She stated that he did not appear upset and their exchange lasted a couple of minutes. See (JT Exh. 29). She related that Capetillo later complained to management, and she was summoned to a meeting with Burke. On March 27, 2013, *i.e., 2 months later*, she received this written warning:

> [Y]ou admitted approaching Capetillo at his work station during . . . paid work time, removing a newspaper article . . . [and] ask[ing him] to read the article . . . .
>
> This behavior is a direct violation of Group B Rule 8:
>
> *Group B Rule 8: Bringing newspaper . . . into a production or distribution area.*
>
> Management respects each individual's right to their opinion . . . however, behavior which may create an unpleasant, threatening or hostile work environment must not be allowed. Demonstrating such acts during the paid working time of either employee is also a violation of Company Rules . . . .
>
> Following the Group B step process you will receive disciplinary action in the form of a 1st Written Warning for violation of Group B Rule 8. . . .
>
> You are also warned to refrain from . . . harassment of fellow employees . . . .

(JT Exh. 32).[19] Phillips stated that the warning was befuddling, given that Pugh openly disseminated the first decertification petition in production areas, without reprisal. She added that coworkers commonly brought newspapers onto the plant floor, without discipline.

b. Company's Position

Ledbetter testified that Phillips jeopardized food safety, and that the prohibition against bringing newspapers onto the plant floor was designed to prevent food contamination. He stated that an auditor could have shut the plant down, on the basis of Phillips' actions.

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18 Calderon credibly testified that Phillips, a vocal Union supporter, handled grievances and related duties.

19 The Facility Rules provide a written warning for a first infraction of a Group B Rule. (JT Exhs. 32-33).

2. Vicki Loudermilk's and Lorraine Marks' Investigations and Personnel File Documentations

The Company also investigated Vicki Loudermilk, whom Capitello accused of, "asking him how [he] . . . was going to vote," and Lorraine Marks, whom he accused of saying that he would lose his job, if the Union were ousted and asking about his vote. (JT Exh. 28). Marks was summoned to Burke's office, and denied these accusations. (JT. Exh. 30). Loudermilk, whom was also summoned to Burke's office, claimed that Capitello openly volunteered how he intended to vote. (JT Exh. 31).

On March 27, 2013, the Company issued Personnel File Documentations to Marks and Loudermilk. (JT Exhs. 34-35). It told Marks that, although it could not resolve the credibility dispute, it would place its investigation report in her personnel file. (JT Exh. 34). It told Loudermilk that, while she violated workplace rules by interfering with a coworker, it would limit its response to placing its investigation report in her personnel file. (JT Exh. 35).

3. Marks' Suspension

a. General Counsel's Position

Marks testified that she regularly met with Union representatives at the plant, attended Union meetings and filed grievances.[20] (GC Exh. 5). She stated that, on March 24, 2013, she had an unexpected and dire need for a restroom break, but, could not find a supervisor or team leader to notify. She added her regularly assigned team leader was on leave, and that the replacement team leader was on a break, when her emergency arose. She stated that, consequently, she left the production line for a short period without advising supervision. She stated that she told Phillips, her coworker, before she left, who covered her 5-minute absence. She added that she has previously taken the same actions under comparable circumstances, without issue. She related that, upon her return, she encountered Banks, who inquired about her whereabouts. She averred that she was then summoned to Burke's office, who issued her a suspension pending investigation for leaving her work area, without permission.[21] (JT Exh. 48). She indicated that she has subsequently seen others taking comparable breaks, without issue.

Phillips stated that Marks was absent for less than 5 minutes, after first unsuccessfully searching for supervision. She stated that she filled in for her and production was unharmed. She stated that coworkers regularly left the line to use the restroom, without issue. She estimated that she personally covered for such coworkers at least once per month. She added that, while supervisors were generally available, there were substantial periods when they were not.[22]

Briggs, another unit employee, testified that she told Banks that she "saw three people walking . . . to the bathroom without permission" and that he coyly replied that, "they weren't

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20 She stated that, about 3 years earlier, she picketed on behalf of the Union concerning contract negotiations.

21 She was then suspended from work without pay from March 24 through 31.

22 She estimated that a supervisor was available for coverage about 90 percent of the time.

investigating them."[23] (Tr. 422). She stated that Marks was treated unfairly.

Calderon testified that Marks was an active Union member, who pursued a key grievance involving temporary workers in 2012, which resulted in 15 workers receiving backpay. He stated that she campaigned for the Union, which included distributing literature and telephoning employees. He noted that she encouraged new employees to become Union members. He said that her suspension was the first discipline of its kind involving a bathroom break.

b. Final Written Warning and Suspension

On May 30, 2013, Marks received the following Final Written Warning:

> You were suspended May 24, 2013 pending investigation of Immediate Termination Rules, Group A Rule(s) 3 and 22.
>
> *Rule 3: Using Company time. . . for personal use unrelated to employment . . . without proper authorization. <u>This includes leaving Company property during paid breaks or leaving your assigned work area without permission</u>.*
>
> *Rule 22: Job abandonment, including . . . <u>leaving an assigned work area without permission – i.e. walking off the job.</u>*
>
> **<u>Conclusion:</u>**
>
> During our investigation you indicated that you did not obtain permission to leave your work area . . . . .
>
> - Department Supervisor Ray Golston informed me that he was in the department . . . .
> - On your way to the restroom you walked past [Dan Banks] . . . .
>
> Management has considered all mitigating circumstances concluding that discharge is appropriate, but recognizes your long term service. You may return to work without back pay . . . subject to a Final Written Warning.

(JT Exh. 49).

c. Company's Position

Ledbetter testified that, although abandoning the production line is a terminable offense, Marks' lengthy service record warranted lesser discipline. He explained that the bakery is a continuous operation, and that her actions could have interrupted operations. He stated that her

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23 She stated that she was later asked to reveal these employees to Burke, and refused.

actions violated work rules and that she had been given notice of such rules.[24] He indicated that the Company has a paging system and it is unacceptable to solely seek a coworker's coverage. He related that Marks was placed on suspension pending investigation and allowed to return to work after 6 days without pay. He denied that others left the line without consent.

Banks testified that Marks works on a fast-paced line. He stated that unscheduled breaks must be reported, and employees can always page supervision on the intercom. He stated that, on May 24, Marks walked right by him, without speaking to him about her issue. Golston, Marks' supervisor, testified that he was only 20 feet from her and that she could have sought his aid. He agreed that she previously sought, and received, permission to leave for restroom breaks.

d. Credibility Resolutions

Although it is undisputed that Marks had substantial and open Union activity, left the line for less than 5 minutes for an emergency break, her absence was covered by Phillips, production was unaffected, she previously asked for and received restroom breaks and that the normal team leader was absent, there is a credibility dispute over whether supervisor Golston was present. I credit Marks' testimony on this point. First, she was a very believable witness with a solid demeanor. She had a good recollection and was unflustered by the courtroom. Second, her testimony was corroborated by Phillips and Briggs, who stated that Golston was not present. Lastly, it is implausible that Marks, who has previously asked Golston for permission to take restroom breaks, would have neglected to ask him for permission on this occasion, if he were actually there.

I also credit Marks', Phillips', and Briggs' claims that bathroom breaks are commonplace and accepted. I credit them for the reasons previously discussed, but, also on the basis of the Company's conspicuous failure to show that anyone else has been disciplined for this type of offense. It is also plausible that, if the Company policed this work rule as diligently as suggested, it would possess several similar disciplinary records.

e. Other Discipline for Leaving the Production Line

The General Counsel provided some disciplinary records involving employees leaving the production line for extended periods, which demonstrate the Company meting out far less severe discipline under vastly more egregious circumstances. The following chart is illustrative:

Date	Employee	Summary
10/17/12	C. Booker	Without permission, he went home mid-shift. He returned in 2 days, said that he was frustrated and was reinstated under a last chance agreement, without loss of pay.
3/17/12	Brandon Moses	Without permission, he left the production area for a reported restroom break and went home. He was reinstated , with only a final written warning.

[24] See (JT Exh. 5 ("Employees must not . . . be out of their assigned work area without permission . . . . Doing so is a Group A violation . . . . .")); (JT Exh. 16)("[When an] urgent . . . situation occurs, and you need to leave your assigned job . . . between scheduled breaks . . . . [,] quickly locate your supervisor . . . for permission. . . . Walking off the job without permission is a Group A rule violation which results in immediate discharge.")).

(GC Exhs. 11–12).

4. Christopher Contreras' Interview and Termination

a. January Interview

Contreras, a unit worker, was interviewed by Burke and Banks. He recalled Burke stating that:

> There was a Union . . . and that if anybody tries to ask you to talk about the Union, then just ignore it . . . because they're . . . trying to get rid of the Union . . . if you want to get paid more . . . then ignore everybody who's in the Union.

(Tr. 437). Both Banks and Burke denied this exchange.

I credit Contreras; he was credible, possessed a straightforward demeanor and had a strong recall. Also, this commentary was consistent with the Company's anti-Union campaign.

b. Tenure

i. General Counsel's Position

Contreras began on January 26. He was supervised by Kenny White, who initially granted him leave to see his probationary officer,[25] but, then rejected his later requests in November and December. He stated that he joined the Union in late-August.[26] See (GC Exh. 8). He said that, in November, he observed Hankins and supervisor White walking around the plant and soliciting employees to sign a petition seeking to oust the Union. He said that they told him to sign the petition, if he wanted more money. (Tr. 449). He added that White told him that, "if they did not get the Union out, then this facility would go down like Hostess." (Tr. 450). He said that he declined, and that 2 weeks later White asked why he wanted to pay $40 per month in Union dues and prompt a plant closure. He said that White later told him that he had the upper hand and could remove him if desired, which he linked to his Union support. He related that he was fired on April 16, 2013. He explained that a warrant had been issued for his arrest because he missed multiple probation meetings. He said that he was stopped for an unrelated matter, arrested for probation revocation, and held for 3 days. He contended that the jail telephone did not permit him to dial extension numbers, which precluded him from notifying the Company. He stated that he later met Burke, who told him that he had been fired for a "no call, no show" violation and nothing could be done. See (JT Exh. 41).

ii. Company's Position

Contreras was granted 7 excused absences between April 2012 and February 2013. (R. Exh. 3). Not including the absence that led to his firing, he sustained four additional

25 He was convicted of theft and receiving stolen property.

26 Calderon testified that he attended Union meetings.

unexcused absences, and received a second written warning and a 1-day suspension for these transgressions. (R. Exh. 3; JT Exhs. 38–40). In total, he was absent a 12 times during his roughly 1 year tenure.

Ledbetter testified that regular attendance is mandatory and Contreras' firing was warranted. The Company's rules expressly provide that incarceration is not a valid excuse for an absence. He stated that "no-call, no-show" employees are generally fired. He stated that Contreras' Union activities were unknown, and played no role in his removal. The Company's personnel records demonstrated that it routinely fired employees for "no-call, no-show" offenses, and other attendance problems. See (R. Exhs. 10-11).

Banks testified that Contreras was fired for missing work without notice. He added that he reached the maximum allowable points under the attendance system and could have also been fired on that basis. He indicated that absences connected to incarceration are unexcused.

White testified that absentees must call in an hour before their scheduled start time. He agreed that Contreras requested leave to visit his probation officer, and that he approved some requests. He indicated that Contreras had repeated attendance issues. He denied knowing about his Union activities, or making the anti-Union comments.

iii. Credibility Resolution

Although Contreras did not dispute his attendance record or that he was "no-call, no-show," there was a credibility dispute over White's plant closure comments and threats. I credit Contreras. First, as noted, he was a generally credible witness, who was candid about sensitive issues, including his poor attendance and criminal record. Second, I found White to be a less than credible witness, who seemed more committed to pleasing supervision than offering a candid account. Finally, I note that White's plant closure and other threats were highly consistent with the Company's election mantra and that he was likely repeating this theme.

I. April 2013 Interview Comments

Jeremy Woods, who was employed from about April to July 2013 as a muffin mixer, testified that he was interviewed by Burke and Banks. He recalled them stating that there was an impending Union decertification vote, and that, "they could offer him better wages than the Union could and . . . the Union was responsible for shutting down Hostess Bakeries." (Tr. 215).

Banks denied such commentary, but, did not have any specific recollection of the interview. Burke similarly denied these comments.

I credit Woods. He had a strong recollection. Burke and Banks, on the other hand, had a poor recall of the meeting, and their comments were deeply consistent with the Company's anti-union mantra.

J. Withdrawal of Union Recognition

On June 13, 2013,[27] Hankins submitted a petition to the Company (the third decertification petition), which was signed by a majority of unit employees,[28] and stated:

> PETITION TO REMOVE UNION AS REPRESENTATIVE
>
> The undersigned employees of Southern Bakeries do not want to be represented by Bakery, Confectionary, Tobacco Workers and Grain Millers ("BCTGM") union. We hereby request that our employer immediately withdraw recognition from the BCTGM union, as it does not enjoy the support of a majority of employees in the bargaining unit.

(JT Exh. 46). Burke stated that she verified the authenticity of the signatures.

Hankins, a production coordinator/scheduler,[29] testified that he has been employed for 3 years. He claimed that he became disenchanted with the Union because the unit had not received a raise for several years. He stated that, after the earlier decertification drives failed, he prepared the third decertification petition, after consulting with the National Right to Work Foundation. He stated that he received no aid from management in its dissemination. He denied promising anything, in exchange for signatures. Israel Amidares helped him disseminate the petition amongst Spanish-speaking workers.

K. July 3, 2013 – Withdrawal of Recognition

On this date, Ledbetter sent the following letter to the Union:

> On Friday, June 14, 2013; we received a petition filed by the vast majority of our bargaining unit employees requesting that we withdraw recognition of the BGTGM union . . . . We . . . have no reason to believe that any of the signatures are not legitimate.
>
> Accordingly, . . . we hereby withdraw recognition of your union . . . .

(JT Exh. 51). The Company subsequently ceased deducting and remitting Union dues.

L. July 22, 2013 – Union Rejects Withdrawal of Recognition

On this date, the Union rejected the withdrawal of recognition and requested plant access. (JT Exh. 53). The Company denied their access request. (JT Exh. 54).

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27 The third decertification petition was signed between May 31 and June 12, 2013.

28 Approximately 2/3 of the unit signed the third petition. See (JT Exh. 46; R. Exh. 13; tr. 575).

29 Lewis testified that this position is not in the unit, although there is no evidence that it is supervisory. Lewis was, however, uncertain if the position was newly created, or akin to a unit team leader. Ledbetter stated that Hankins was, at all times, a unit team leader, who was mistaken about his exact job title.

M. September 29, 2013 – Unilateral Wage Increase

On this date, the Company unilaterally increased the unit's wages by an average of 27 cents per hour. (JT Exh. 1). The increase was implemented without notice or bargaining. (Id.).

III. ANALYSIS

A. Section 8(a)(1) Allegations

The General Counsel, in some cases, has alleged cumulative Section 8(a)(1) violations of the same strain (e.g. multiple plant closure threats). In such cases, where merit was found and the remedy was unaltered by finding cumulative violations, only a few illustrative examples were analyzed. See, e.g., *Smithfield Foods, Inc.*, 347 NLRB 1225, 1228-29 (2006).

1. Interrogations[30]

The Company violated Section 8(a)(1), when it interrogated employees about their Union activities. Two examples are demonstrative: in September, White asked Contreras why he became a dues-paying Union member; and on January 23, 2013, Ledbetter told employees that: "If any of you are harassed or threatened on any basis during this election campaign, regardless of whether you are for or against the union, we want to know about it immediately . . . ."

In *Westwood Healthcare Center*, 330 NLRB 935 (2000), the Board held that the following factors determine whether an interrogation is unlawful:

> (1) The background, i.e. is there a history of employer hostility and discrimination?
> (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?
> (3) The identity of the questioner, i.e. how high was he in the company hierarchy?
> (4) Place and method of interrogation, e.g. was employee called from work to the boss' office? Was there an atmosphere of unnatural formality?
> (5) Truthfulness of the reply.

Id. at 939. In applying these factors, however, the Board concluded that:

> In the final analysis, our task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act.

Id. at page 940.

White's comments were an unlawful interrogation; he was Contreras' direct supervisor,

30 These allegations are listed under pars. 6(a), 9 (f), 10(a), 11(f) and (h), 12 and 39 of the complaint.

he plainly sought information about his Union activities, and this interrogation was, as will be discussed, accompanied by an unlawful plant closure threat. Ledbetter's commentary was another interrogation. He is the Company's highest ranking plant official and his comments equated to a mass questioning about Union activities, with a charge to report such interactions. His comments were also, as will be discussed, accompanied by other unlawful statements.

2. Discharge and Job Loss Threats[31]

The Company violated Section 8(a)(1), when it repeatedly threatened job loss. Two examples are demonstrative: in September, White, concerning Contreras' refusal to sign a decertification petition, told him that he had the "upper hand" and could get rid of him whenever desired; and on February 1, 2013, Ledbetter repeatedly told employees that unionization would lead to strikes, which could backfire, and damage families and job security.

A statement is an unlawful threat, when it coerces employees in the exercise of their Section 7 rights. 29 U.S.C. § 158(a). In evaluating such statements, the Board:

> [D]oes not consider subjective reactions, but rather whether, under all the circumstances, a respondent's remarks reasonably tended to restrain, coerce, or interfere with employees' rights guaranteed under the Act.

Sage Dining Service, 312 NLRB 845, 846 (1993); *Double D Construction Group,* 339 NLRB 303 (2003) ("test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction.").

Both Ledbetter's and White's comments threatened job loss, and, as a result, reasonably tended to restrain, coerce, or interfere with employees' rights guaranteed under the Act. Moreover, the Company failed to demonstrate that Ledbetter's job loss predictions were reasonably based upon objective facts.

3. Plant Closure Threats[32]

The Company repeatedly threatened plant closure. Ledbetter continuously told employees at captive audience meetings, that retaining the Union would threaten job security, prompt a closure and cripple the business. He added that the Union would kill the Company, in the same way that it toppled Meyers Bakeries and Hostess. White told Contreras that the Union would cause a Hostess-like closure. An employer violates Section 8(a)(1), when it engages in conduct that might reasonably tend to interfere with employees' Section 7 rights, which includes plant closure threats, in retaliation for engaging in union activity. *Mid-South Drywall Co., Inc.*, 339 NLRB 480 (2003). Unsubstantiated predictions that a plant shutdown will result from a union victory are unlawfully coercive. *Federated Logistics & Operations.*, 340 NLRB 255, 256

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31 These allegations are listed under pars. 6(b), 9(a), 11(a) and 39 of the complaint.

32 These allegations are listed under pars. 8(a), 9(b), 10(b), 11(b), 13(b) and 39 of the complaint.

(2003).[33] The above-described comments were, accordingly, unlawful.

4. Surveillance[34]

The General Counsel failed to show that the Company engaged in surveillance at the January 23 and February 1, 2013 meetings, as alleged in the complaint. The General Counsel failed to adduce evidence of surveillance, brief the matter, or explain its theory. These allegations are, thus, dismissed.

5. Impression of Surveillance[35]

The Company created an unlawful impression on surveillance, when it installed cameras in the break area. An employer creates an unlawful impression of surveillance, if reasonable employees would assume that their union activities are being monitored. *Stevens Creek Chrysler*, 353 NLRB 1294, 1295–1296 (2009). Given that the break area was the hub, where Union agents conducted their business, the installation of cameras during a decertification campaign reasonably caused employees to assume that their Union discussions and activities in this hub were being monitored.

6. Futility of Bargaining and Unionizing[36]

The Company violated Section 8(a)(1), when Ledbetter repeatedly conveyed that unionization was futile. Specifically, he repeated, at captive-audience meetings, that: "unions are free to promise away"; "they can promise employees the moon"; "the union has no power to make its promises come true"; "all the union can do is ask and all the union can get is what the Company will agree to give"; "the union is free to make any promises . . . . but . . . could not guarantee anything"; "don't be a victim of believing slick salespeople"; and "collective bargaining can, and did, result in your getting less pay than non-union employees."

The Board has held that, barring outright threats to refuse to bargain in good faith with an incoming union, the legality of any particular statement depends upon its context. See, e.g., *Somerset Welding & Steel, Inc.*, 314 NLRB 829, 832 (1994). Statements made in a coercive context are unlawful because they, "leave employees with the impression that what they may ultimately receive depends upon what the union can induce the employer to restore." *Earthgrains Co.*, 336 NLRB 1119, 1119–1120 (2001); see, e.g., *Smithfield Foods*, 347 NLRB 1225, 1230 (2006) (statement from highest official that company was in complete control of future negotiations was unlawful); *Aqua Cool*, 332 NLRB 95, 95 (2000) (statement that employees were unlikely to win anything more at the bargaining table than other employees).

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33 Although a prediction of plant closure may be lawful, if the employer can show that it is the probable consequence of unionization for reasons beyond its control, see *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), there was no evidence presented, which shows that the Company's repeated comparisons to Hostess Brands and Meyers Bakeries and their shutdowns were rational predictions based on probable consequences beyond its control. These statements were, thus, unsupported predictions designed to intimidate employees.

34 These allegations are listed under pars. 9(f), 11(f) and 39 of the complaint.

35 These allegations are listed under pars. 7 and 39 of the complaint.

36 These allegations are listed under pars. 9(e), 11(e) and 39 of the complaint.

Ledbetter's comments unlawfully conveyed that ongoing unionization was futile.

7. Promising Benefits[37]

The Company violated Section 8(a)(1), when it continuously promised to reward employees with higher wages, if they rejected the Union. Ledbetter repeatedly advised the unit that their non-Union colleagues were paid more and received wage increases while theirs stagnated, and identified the Union as the cause. Specifically, in early 2013, he made these statements: "[a]ll of our costs related to dealing with this union leave less money for wages and benefits"; "[w]hy is it that collective bargaining can, and did, result in your getting less pay than non-union employees?"; "[m]oney . . . spent on bargaining and grievances and otherwise dealing with the union is money that is simply not otherwise available to our employees"; and "we have incurred tens of thousands of dollars in legal fees that have left us with less money to put into the pockets of our unionized employees than we have been able to give to our non-union workforce." (JT Exhs. 7-8). Banks and Burke mimicked this theme, when they told Woods that a Union decertification vote was approaching and "they could offer . . . better wages than the Union."

An employer violates the Act, when it promises to reward employees, in order to curtail unionization. See *Curwood, Inc.*, 339 NLRB 1137, 1147 (2003). The danger inherent in a well-timed promise to bestow a benefit is the implication that employees must disavow their union support, in order to obtain the benefit. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). The obvious message behind the above-described unlawful statements was that, if unit employees wanted a raise, they first needed to jettison the Union.

8. Threats of Unspecified Reprisals[38]

The Company violated Section 8(a)(1), when it threatened employees with unspecified reprisals. Ledbetter made this statement in January 2013:

> If any of you are harassed or threatened on any basis during this election campaign, regardless of whether you are for or against the union, we want to know about it immediately so we can address the problem . . . .

(JT Exh. 7). The Board has held that such invitations are unlawful. See, e.g., *Ryder Truck Rental*, 341 NLRB 761, 761–62 (2004) ("the Act allows employees to engage in persistent union solicitation even when it annoys or disturbs the employees who are being solicited . . . . [and] an employer's invitation to employees to report instances of "harassment" by employees engaged in union activity is violative of Section 8(a)(1).").[39]

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37 These allegations are listed under pars. 9(c)-(d), 11(c)-(d), 13(a) and 39 of the complaint.

38 These allegations are listed under pars. 9(g)-(i), 11(g)-(i) and 39 of the complaint.

39 See also *Hawkins-Hawkins Co.*, 289 NLRB 1423 (1988) ("if anyone was harassed by the Union . . . contact management and they would take care of it"); *W. F. Hall Printing Co.*, 250 NLRB 803, 804 (1980).

9. Disparagement of the Union[40]

The Company violated Section 8(a)(1), when it repeatedly disparaged the Union in its January 17, 2013 memorandum. (JT Exh. 25). This memo repeatedly labeled the Union's alleged campaign statements as fraudulent, in tandem with advancing an unlawful plant closure threat[41] and appeal to racial prejudice.[42] See, e.g., *Sears, Roebuck & Co.*, 305 NLRB 193 (1991) (disparagement of a union becomes unlawful, when accompanied by other coercive statements); *Tony Silva Painting Co.*, 322 NLRB 989, 993 fn. 5 (1996).[43]

B. Section 8(a)(3) Allegations[44]

The General Counsel alleged that the Company violated Section 8(a)(3) when it: placed Loudermilk, Phillips and Marks under investigation and issued Personnel File Documentations; issued Marks a warning; suspended Phillips; fired Contreras and refused to grant him time off; and granted a wage increase to the unit following its withdrawal of recognition.[45]

1. General Legal Principles

The framework described in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) sets forth the appropriate standard:

> Under that test, the General Counsel must prove by a preponderance of the evidence that union animus was a substantial or motivating factor in the adverse employment action. The elements commonly required to support such a showing are union or protected concerted activity by the employee, employer knowledge of that activity, and union animus on the part of the employer.
>
> If the General Counsel makes the required initial showing, the burden then shifts to the employer to prove, as an affirmative defense, that it would have taken the

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40 These allegations are listed under pars. 8(b) and 39 of the complaint.

41 The memo stated that, "the union appears to have plans to take our employees out on strike here in Hope, same as they recently did at Hostess, where over 18,000 jobs were lost and 33 bakeries and retail outlets were closed." (JT Exh. 25). The Company failed to produce any evidence showing that the Union actually had concrete strike plans, or that its closure prediction was a probable consequence of the strike for reasons beyond its control. Such commentary was, therefore, unlawful. See *Federated Logistics & Operations.*, supra, 340 NLRB at 256.

42 The memo attributed this racist statement to the Union: "[the Union said that the Company is] "gonna fire Hispanics (Latino employees) if they change their names." (JT Exh. 25). Given that the Company failed to show that the Union actually made this divisive statement, its usage of racial baiting to further its election interests was unlawful. See *Holiday Inn of Chicago South*, 209 NLRB 11 (1974) (election appeal to racial prejudice is unlawful).

43 The repeated nature of the instant disparagement also, arguably, violated the Act. See *Regency House of Wallingford, Inc.*, 356 NLRB No. 86 (2011) (repeated denigration implies that unionization is futile).

44 These allegations are listed under pars. 15, 16, 18, 19, 20, 21, 22, 36 and 40 of the complaint.

45 Given that that the increase independently violated Section 8(a)(5), it is unnecessary to pass on whether it also violated Section 8(a)(3) because the ultimate remedy would be unaltered. *Bryant & Stratton Business Institute*, 321 NLRB 1007 fn. 4 (1996).

> same action even in the absence of the employee's union activity. To establish this affirmative defense, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity."

Consolidated Bus Transit, 350 NLRB 1064, 1065-66 (2007) (citations omitted).

If the employer's proffered defenses are found to be a pretext, i.e., the reasons given for its actions are either false or not relied upon, it fails by definition to show that it would have taken the same action for those reasons, and there is no need to perform the second part of the Wright Line analysis. However, further analysis is required if the defense is one of "dual motivation," that is, the employer defends that, even if an invalid reason might have played some part in its motivation, it would have taken the same action against the employee for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005).

2. Loudermilk Investigation and Personnel File Documentation

a. Prima Facie Case

The General Counsel made a prima facie *Wright Line* showing concerning Loudermilk's investigation and Personnel File Documentation. Union activity was established, when Loudermilk told Capitello, who was anti-Union, that she supported the Union, and opined that it should not be blamed for the Hostess closure. (JT Exh. 31). Knowledge was adduced, when Loudermilk prepared a written statement for the Company about this exchange. Union animus was demonstrated by the multitude of violations present herein.

b. Affirmative Defense

The Company failed to show that it would have taken these actions, absent Loudermilk's Union activity. First, the decision to expend resources interviewing her, investigating uncontested conduct for a full 2 months, and preparing a lengthy memo and analysis is highly suspect, given that she only asked someone about his vote. (JT Exh. 28). The decision to respond so dramatically to such a minor and lawful interaction reeks of invidious intent. Moreover, given that there is no evidence that the Company limited other workplace comments beyond pro-Union banter, or investigated Capitello for his comparable activity, its actions were discriminatory. Finally, the multitude of additional violations present herein further establish that Loudermilk's treatment was unlawful.

3. Marks Investigation, Personnel File Documentation and Suspension

a. Prima Facie Case

The General Counsel has made a prima facie *Wright Line* showing concerning Marks' investigation, Personnel File Documentation and suspension. Calderon testified that she had significant Union activity, which included meeting with Union representatives in the break area, attending Union meetings and handling grievances. The Company knew about these activities,

on the basis of her grievance-handling, and Capitello's complaints. See (JT Exh. 28). As noted, animus was demonstrated by the multitude of violations present herein.

b. Affirmative Defense

The Company failed to show that it would have taken these actions, absent Marks' Union activity. First, regarding the investigation and documentation, it is implausible that the Company would have conducted a multiple-month investigation and drafted a lengthy memo regarding such a minor verbal exchange, absent an anti-Union motive. Moreover, if the Company investigated every minor infraction with the same fervor, it would hardly have time to fulfill its primary purpose. Second, regarding Marks' suspension, its rationale was pretextual. Simply put, it opted to suspend a long-term employee because she needed to use the bathroom and returned in five minutes, when it is undisputed that: she found coverage; there was no team leader or supervisor present for immediate short-term relief; and production was unaffected. The Company failed to show that others were disciplined for similar conduct and only provided documentation that others were disciplined less severely for more egregious abandonments. I credited the testimony, as noted, that others routinely left the line for short restroom breaks, without issue and with supervisory knowledge.

4. Phillips Investigation, Personnel File Documentation and Written Warning

a. Prima Facie Case

The General Counsel has made a prima facie *Wright Line* showing concerning Phillips' investigation, Personnel File Documentation and written warning. Union activity was adduced, when she urged Capitello to support the Union and offered him a pro-Union article. (JT Exh. 31). Knowledge was derived by the Company's investigation of this issue. As noted, animus was demonstrated by the multitude of violations present herein.

b. Affirmative Defense

The Company failed to show that it would have taken these actions, absent Phillips' Union activity. Its decision to investigate her, reflect upon her case for multiple months, prepare a lengthy memo analyzing her actions, and then issue a warning stating that termination was strongly considered, to someone who solely handed a coworker an article, renders its actions highly suspect. It provided no evidence that: she was a recidivist rule violator that jeopardized food safety; handled similar cases comparably; or production was harmed. Additionally, the extensive additional violations present herein irreparably undercut any assertion that its actions were non-discriminatory.

5. Contreras Failure to Grant Leave and Discharge

Contreras' firing and leave refusal were lawful. Although the General Counsel established a prima facie case, the Company adduced that it would have undertaken such actions, absent his Union activity.

a. Prima Facie Case

The General Counsel made a prima facie *Wright Line* showing. Contreras engaged in Union activity, when he joined the Union and rejected White's invitation to sign an anti-Union petition. Knowledge and animus were established by White's anti-Union comments.

b. Affirmative Defense

The Company demonstrated that it would have denied his leave request and fired him, absent his Union activity. Simply put, he had a horrendous attendance record and the Company reached the point, where it rationally determined that it would no longer grant him leave or retain his services. His "no-call, no-show" connected to his arrest was the final straw in this process. The Company's actions were consistent with its workplace rules and repeated terminations of other employees, with severe attendance issues, and, thus, were lawful.

C. Section 8(a)(5) Allegations

1. Pre-Withdrawal of Recognition Unilateral Changes

a. Surveillance Cameras[46]

The Company's installation of surveillance cameras in the break room violated Section 8(a)(5). The installation of such cameras is a mandatory subject of bargaining, which requires pre-implementation notice and bargaining. See, e.g., *Anheuser-Busch*, 342 NLRB 560 (2004); *Colgate-Palmolive Co.*, 323 NLRB 515 (1997); *Nortech*, 336 NLRB 554, 568 (2001). It is undisputed that the Company took unilateral action, without notice or bargaining. The existence of analogous cameras in production areas, where there was limited Union activity, was not a clear and unmistakable waiver of the Union's right to bargain over the installation of such cameras in the break area, where there was repetitive Union activity. The CBA also failed to contain a clear and unmistakable waiver of the Union's right to bargain over this topic. These actions, therefore, violated Section 8(a)(5).

b. Union Access[47]

The Company violated Section 8(a)(5), when Ledbetter repeatedly altered the Union's access rights. These changes, which greatly deviated from the Company's past access practices, included, inter alia: requiring the Union to divulge its reasons for visiting the plant; mandating it to identify the employees that it sought to meet with; banning all visits not involving grievances; prohibiting solicitation and election discussions; capping the duration and frequency of visits; prohibiting meetings in the large break area and then relegating the Union to a cubicle; threatening to respond to violations with expulsion, arrest and total exclusion; prohibiting all access between March and November 2012, and at other times thereafter; and removing the window between the small and large break rooms that the Union used to communicate with unit

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46 These allegations are listed under pars. 24, 37 and 41 of the complaint.

47 These allegations are listed under pars. 25, 26, 27, 28, 29, 30, 31, 32, 33, 37 and 41 of the complaint.

employees. It is undisputed that these changes were imposed, without notice or bargaining.[48]

A contractual union access provision is a term and condition of employment that survives the agreement's expiration. Moreover, changes to contractual access provisions or past access practices are mandatory subject of bargaining, which require notice and bargaining before enacting such changes. *Turtle Bay Resorts*, 353 NLRB 1242, 1275 (2009); *T.L.C. St. Petersburg,* 307 NLRB 605, 610 (1992); *Ernst Home Centers*, 308 NLRB 848–49 (1992).

The Company's voluminous unilateral changes to the Union's access rights violated Section 8(a)(5). See, e.g., *BASF Wyandotte Corp.*, 274 NLRB 978 (1985) (unilateral changes to union office space was unlawful); *Ernst Home Centers, Inc.,* supra, 308 NLRB 848–49 (unilaterally changes to past access practice); *Frontier Hotel & Casino.,* 323 NLRB 815, 818 (1997); *Oaktree Capital Management*, 355 NLRB 1272 (2010).

2. Withdrawal of Recognition[49]

On July 3, 2013, the Company unlawfully withdrew recognition from the Union, as the unit's exclusive collective bargaining representative. As a threshold matter, an employer cannot lawfully withdraw recognition from a union where it has committed unfair labor practices that directly relate to the employee decertification effort, such as actively soliciting, promoting or assisting the effort. See *Hearst Corp.*, 281 NLRB 764 (1986), enfd. 837 F.2d 1088 (5th Cir. 1988)). In circumstances where the employer engages in this type of misconduct, the Board "presumes that the employer's unlawful meddling tainted any resulting expression of employee disaffection, without specific proof of causation, and precludes the employer from relying on that expressed disaffection to overcome the union's continuing presumption of majority support." *Id.* In *Ardsley Bus Corp.*, 357 NLRB No. 85 (2011), the Board further explained that:

> Upon expiration of a collective-bargaining agreement, an incumbent union is presumed to have majority support among the employees it represents. An employer may withdraw recognition from the union only if the union has actually lost majority support. . . . An employer may not, however, lawfully withdraw recognition from a union where it has committed unfair labor practices that have a tendency to cause the loss of union support. . . . Where the unfair labor practices do not involve a general refusal to recognize and bargain with the union, there must be a causal relationship between the unfair labor practices and the loss of support in order for the withdrawal of recognition to be unlawful. . . . To determine whether there is a causal connection between an employer's unfair labor practices and employees' disaffection, the Board considers the following factors:
>
> (1) The length of time between the unfair labor practices and the withdrawal of recognition;
> (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees;

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48 I credited the General Counsel's witnesses, who said that these changes significantly altered prior policies.

49 These allegations are listed under pars. 38 and 41 of the complaint.

(3) any possible tendency to cause employee disaffection from the union; and
(4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union.

357 NLRB No. 85, slip op. at 4.

In the instant case, the Company's extensive and repeated violations caused the widespread employee disaffection, which prompted the third decertification petition. These violations were close in time to this petition, and were so voluminous and egregious that they naturally spawned significant disaffection from a Union that had been rendered powerless by a recalcitrant employer. As noted, the Company repeatedly and unlawfully threatened and disciplined Union adherents, threatened that ongoing Union support would cause a plant closure, continuously labeled ongoing Union support as futile and useless, and deeply undermined the Union by making several unilateral changes, which included eviscerating its ability meet with unit employees at the plant. Such actions naturally spawned the third petition, and left an indelible message that continued unionization was tantamount to job loss and a pointless exercise. See *Penn Tank Lines, Inc.*, 336 NLRB 1066, 1068 (2001).

3. Post-Withdrawal of Recognition Unilateral Changes[50]

Given that the Company unlawfully withdrew recognition from the Union, its subsequent unilateral changes regarding wages and Union access were unlawful. See, e.g., *Northwest Graphics, Inc.*, 342 NRLB 1288, 1288 (2004) (unilateral wage increases); *Turtle Bay Resorts*, supra, 353 NLRB at 1275 (union access).

The Company's refusal to deduct and remit dues to the Union since July 2013, however, was lawful. Although the Board previously held that dues checkoff provisions survive contract expiration and that post-expiration cessation was unlawful (see *Alamo Rent-A-Car*, 359 NLRB No. 149, slip op. at 4 (2103); *WKYC-TV, Inc.*, 359 NLRB No. 30, slip op. at 8 (2012)), such precedent was recently set aside by the United States Supreme Court. See *NLRB v. Noel Canning*, No. 12-1281, ___ S.Ct. ___ (Jun 26, 2014) (setting aside Board precedent from January 4, 2012 through August 4, 2013 because the Board lacked a quorum during this period, as a consequence of the invalid appointments of three of its five members). I find, as a result, that the Board's pre-*Noel Canning* precedent is controlling herein, which provides that employers do not violate Section 8(a)(5) by unilaterally ceasing dues checkoff following the expiration of their collective-bargaining agreements. See, e.g., *Hacienda Resort Hotel & Casino*, 331 NLRB 665 (2000). Thus, given that the parties' CBA expired on February 8, 2012, the Company's July 2013 cessation of dues deductions and remissions was valid.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

50 These allegations are listed under pars. 34–37 and 41 of the complaint.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union is, and, at all material times, was the exclusive bargaining representative for the following appropriate unit:

> All full-time and regular production and sanitation employees employed by the Company at its Hope, Arkansas plant, excluding all other employees, including temporary and seasonal employees as defined in the parties' expired collective bargaining agreement, office clerical employees, professional employees, guards and supervisors as defined by the Act.

4. The Company violated Section 8(a)(1) of the Act by

a. Threatening employees with discipline, job loss and other unspecified reprisals, if they engaged in Union or other protected concerted activities.

b. Interrogating employees concerning their Union or other protected concerted activities.

c. Creating the impression that employee Union activities were under surveillance.

d. Telling employees that it would be futile for them to retain the Union as their collective-bargaining representative.

e. Promising employees improved wages and other unspecified benefits, in order to discourage them from retaining the Union as their collective-bargaining representative.

f. Disparaging the Union, while appealing to racial prejudice, in order to discourage employees from retaining the Union as their collective-bargaining representative.

g. Threatening employees that the Company would close, if they engaged in Union or other protected concerted activities.

5. The Company violated Section 8(a)(1) and (3) of the Act by

a. Subjecting Loudermilk to a disciplinary investigation and issuing her a Personnel File Documentation because she engaged in Union or other protected concerted activities.

b. Subjecting Marks to a disciplinary investigation and issuing her a Personnel File Documentation and suspension because she engaged in Union or other protected concerted activities.

c. Subjecting Phillips to a disciplinary investigation, and issuing her a

Personnel File Documentation and written warning because she engaged in Union or other protected concerted activities.

6. The Company violated Section 8(a)(1) and (5) of the Act by

a. Withdrawing recognition from the Union on July 3, 2013.

b. Unilaterally installing surveillance cameras in the break area.

c. Unilaterally changing the Union's plant access rights and procedures.

d. Prohibiting the Union from entering the plant between March and November 2012, and, at all times, after February 2013.

e. Unilaterally increasing employees' wages in September 2013.

7. The Company has not otherwise violated the Act.

8. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Company committed certain unfair labor practices, it must cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

It shall expunge from its records any reference to these personnel actions: Loudermilk's disciplinary investigation and documentation; Marks' disciplinary investigation, documentation and suspension; and Phillips' disciplinary investigation, documentation and warning. It shall also provide them with written notice of such expunction, and inform them that its unlawful conduct will not be used against them as a basis for future discipline. It shall also make Marks whole for her suspension; her backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

It shall also recognize the Union and, upon request, meet and bargain with it regarding the unit's terms and conditions of employment. It will reinstate its access rights, and rescind any unilateral changes made to such access rights since March 8, 2012. It shall remove the surveillance cameras that were installed in the break area in January 2013 and restore the windowed walls that divided the break area. It will, if requested by the Union, rescind the unilateral wage increase that was implemented after its withdrawal of recognition.

It shall distribute appropriate remedial notices electronically via email, intranet, internet, or other appropriate electronic means to unit employees, in addition to the traditional physical posting of paper notices, if it customarily communicates with workers in this manner. See *J*

Picini Flooring, 356 NLRB No. 9 (2010). Because the record demonstrates that it employs a significant number of unit employees, who do not speak or read English, the attached notice shall be posted in English and Spanish.

In addition to the traditional remedies for the violations found herein, Ledbetter will read the notice marked "Appendix" to unit employees at the plant, during work time, in the presence of a Board agent. His notice reading will simultaneously be translated into Spanish. A notice reading will counteract the coercive impact of the instant unfair labor practices, which were substantial, pervasive and frequently committed at analogous captive audience meetings. See *McAllister Towing & Transportation Co.*, 341 NLRB 394, 400 (2004).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[51]

ORDER

The Company, Southern Bakeries, LLC, Hope, Arkansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

a. Threatening employees with discipline, job loss and other unspecified reprisals, if they engage in Union or other protected concerted activities.

b. Interrogating employees concerning their Union or other protected concerted activities.

c. Creating the impression that employee Union activities were under surveillance.

d. Telling employees that it would be futile for them to retain the Union as their collective-bargaining representative.

e. Promising employees improved wages and other unspecified benefits, in order to discourage them from retaining the Union as their collective-bargaining representative.

f. Disparaging the Union, while appealing to racial prejudice, in order to discourage employees from retaining the Union as their collective-bargaining representative.

g. Threatening employees that the Company would close, if they engaged in Union or other protected concerted activities.

h. Commencing disciplinary investigations against, issuing written warnings

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51 If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

and personnel file documentations to, suspending, or otherwise discriminating against Lorraine Marks, Sandra Phillips or Vicki Loudermilk, or any other employee, for supporting Bakery, Confectionary, Tobacco, Grain Millers Union, Local 111, or any other labor organization, or for engaging in other protected concerted activities.

i. Withdrawing recognition from the Union as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

> All full-time and regular production and sanitation employees employed by the Company at its Hope, Arkansas plant, excluding all other employees, including temporary and seasonal employees as defined in the parties' expired collective-bargaining agreement, office clerical employees, professional employees, guards and supervisors as defined by the Act.

j. Granting a wage increase to its unit employees, without providing the Union notice and an opportunity to bargain.

k. Implementing new rules regarding the Union's access to unit employees at the plant since March 8, 2012, and, thereafter, barring the Union from entering the plant, without providing it notice and an opportunity to bargain.

l. Installing surveillance cameras in the break area, without providing the Union notice and an opportunity to bargain.

m. In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.[52]

2. Take the following affirmative action necessary to effectuate the policies of the Act

a. Recognize the Union as the exclusive collective-bargaining representative of the unit and, upon request, bargain with it regarding the wages, hours, and terms and conditions of employment of unit employees and, if an understanding is reached, embody the understanding in a signed agreement.

b. If requested by the Union, rescind the wage increase that was implemented in September 2013, and bargain with it before implementing future wage and benefit increases for unit employees.

c. Restore the plant access policy, which was in effect prior to March 8, 2012.[53]

d. Remove the surveillance cameras that were installed in the break area, and bargain with the Union before installing such cameras in the break area in the future.

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52 A broad cease and desist order is appropriate herein. See, e.g., *Regency Grande Nursing & Rehabilitation Center*, 354 NLRN No. 75, slip op. at 2, n. 10 (2009).

53 This includes restoring the windowed wall, which divided the break area.

e. Make Marks whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

f. Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful disciplinary investigations, written warning, Personnel File Documentations and suspension concerning Marks, Phillips and Loudermilk, and within 3 days thereafter notify them, in writing, that this has been done and that such discipline will not be used against them in any way.

g. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the backpay amounts due under the terms of this Order.

h. Within 14 days after service by the Region, physically post at its Hope, Arkansas facility, and electronically send and post via email, intranet, internet, or other electronic means to its unit employees who were employed at its Hope, Arkansas facility at any time since March 8, 2012, copies of the attached Notice marked "Appendix" in English and Spanish.[54] Copies of the Notice, on forms provided by the Regional Director for Region 15, after being signed by the Company's authorized representative, shall be physically posted by the Company and maintained for 60 consecutive days in conspicuous places including all places where Notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that the Notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the Notice to all current employees and former employees employed by it at the facility at any time since March 8, 2012.

i. Within 14 days after service by the Region, hold a meeting or meetings during working hours, which will be scheduled to ensure the widest possible attendance of unit employees, at which time the attached notice marked "Appendix" is to be read to its employees by Ledbetter in the presence of a Board agent; such notice reading will be simultaneously translated into Spanish by an interpreter.

j. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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54 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the complaint is dismissed, insofar as it alleges violations of the Act not specifically found.

Dated Washington, D.C. July 17, 2014

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Robert A. Ringler
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT threaten discipline, job loss or other unspecified reprisals, because you support the Bakery, Confectionary, Tobacco and Grain Millers Union, Local 111 (the Union) or any other union.

WE WILL NOT interrogate you about your Union or other protected concerted activities.

WE WILL NOT create the impression that your Union activities are under surveillance.

WE WILL NOT tell you that it would be futile or useless for you to retain the Union as your collective-bargaining representative.

WE WILL NOT promise you better wages and benefits, in order to discourage you from retaining the Union as your collective-bargaining representative.

WE WILL NOT disparage the Union, while appealing to racial prejudice, in order to discourage you from retaining the Union as your collective-bargaining representative.

WE WILL NOT threaten that we will close the plant, if you engage in Union or other protected concerted activities.

WE WILL NOT investigate you, issue written warnings and personnel file documentations, suspend you, or otherwise discriminate against because you support the Union or any other labor organization, or for engaging in other protected concerted activities.

WE WILL NOT withdraw recognition from the Union or refuse to bargain with it as the exclusive collective-bargaining representative of employees in the following appropriate unit:

All full-time and regular production and sanitation employees employed at our Hope, Arkansas plant, excluding all other employees, including temporary and

seasonal employees as defined in the parties' expired collective-bargaining agreement, office clerical employees, professional employees, guards and supervisors as defined by the Act.

WE WILL NOT make changes to your wages, hours, and other terms and conditions of employment, without first notifying the Union and offering it an opportunity to bargain regarding these proposed changes.

WE WILL NOT limit the Union's ability to enter the plant and break area, without first notifying the Union and offering it an opportunity to bargain regarding the proposed changes.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, upon request, bargain with the Union as the exclusive collective-bargaining representative of our unit employees concerning their terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL, upon request, cancel and rescind all terms and conditions of employment that we unlawfully implemented since March 8, 2012, which included our installation of surveillance cameras in the break area, changes in the Union's plant access rights and wage increase, but we are not required to cancel any unilateral changes that benefited you, such as the wage increase that we implemented in September 2013.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful investigations, personnel file documentations, written warnings and suspensions involving Lorraine Marks, Sandra Phillips and Vicki Loudermilk.

WE WILL make Marks whole for any loss of earnings and other benefits resulting from her suspension.

WE WILL, within 3 days thereafter, notify Marks, Phillips and Loudermilk in writing that the above-described actions have been taken and that the investigations, personnel file documentations, written warning and suspension will not be used against them in any way.

WE WILL hold a meeting or meetings during working hours and have this notice read to you and your fellow workers in English by Executive Vice President Rickey Ledbetter, and simultaneously translated into Spanish, in the presence of an agent of the National Labor Relations Board.

SOUTHERN BAKERIES, LLC
(Employer)

Dated: _____ **By:** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

600 South Maestri Place, 7th Floor, New Orleans, LA 70130-3413
(504) 589-6361, Hours: 8 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/15-CA-101311 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (504) 589-6389.

APPENDIX O
Memorandum in Support of Motion to Supplement

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

M. KATHLEEN MCKINNEY, Regional Director of Region 15 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD, Petitioner	*	
v.	*	Case No. 4:14-cv-04037-SOH
SOUTHERN BAKERIES, LLC, Respondent	*	

MEMORANDUM IN SUPPORT OF PETITIONER'S MOTION TO SUPPLEMENT THE RECORD WITH THE ADMINISTRATIVE LAW JUDGE'S DECISION

I. INTRODUCTION

Petitioner filed a Petition for Preliminary Injunction pursuant to Section 10(j) of the National Labor Relations Act on February 28, 2014 (ECF No. 1). On the same date, Petitioner filed a Motion to Try Section 10(j) Injunction Petition on Basis of Administrative Record (ECF No. 6), which was not opposed by Respondent Southern Bakeries, LLC. The Petition is currently pending before this Court, and Petitioner has an obligation to apprise the court of changed circumstances in an injunction proceeding. See 29 CFR Section 102.94(b). On July 17, 2014, Administrative Law Judge (ALJ) Robert A. Ringler, issued his Decision and Recommended Order in Board Cases, 26-CA-077268 et al., the administrative case underlying

this injunction proceeding. (Exh. 1). Petitioner moves for the admission of ALJ Ringler's decision into the record before this Court.

II. SUMMARY OF DECISION

In the attached decision, ALJ Ringler found that Respondent interfered with, restrained and coerced employees in the exercise of their rights under the National Labor Relations Act by committing numerous violations of Section 8(a)(1) and (5) of the Act. Most significant to the case before this Court are Judge Ringler's findings that Respondent's serious and pervasive unfair labor practices tainted the June 2013 employee disaffection petition such that Respondent's withdrawal of recognition in reliance on that petition was unlawful.

Judge Ringler's decision, however, further determined that Respondent's discharge of Christopher Contreras was lawful, and that Respondent's failure to remit dues after July 3, 2013 was also lawful. Accordingly, injunctive relief is no longer being sought as to those complaint allegations. Petitioner is submitting to this Court proposed Findings of Fact and Conclusions of Law and a proposed Order Granting Injunction which reflect only those allegations in the Petition for Injunction which Judge Ringler found to be violative of the Act.

III. ARGUMENT

As Petitioner noted it the Memorandum in Support of the Petition for Injunction (ECF No. 3) and the Memorandum in Support of the Motion to Try Section 10(j) Injunction Petition on Basis of Administrative Record (ECF No. 7), the role of the district court in a Section 10(j) proceeding is to determine whether there is a likelihood of success on the merits in the administrative proceeding as well as the equitable necessity for interim injunctive relief. *Sharp v. Parents in Community Action, Inc.*, 172 F.3d 1034, 1038-1039 (8th Cir. 1999); *Dataphase Systems, Inc. v. CL Systems, Inc.*, 640 F.2d 109, 112-113 (8th Cir. 1981) (en banc).

APPENDIX O
Memorandum in Support of Motion to Supplement

Supplementing the record in this case with the ALJ decision will permit the Court a more complete picture of both elements of proof which are pertinent to the instant proceeding. Courts have repeatedly found that favorable ALJ decisions bolster the Board's likelihood of success on the merits.[1] *See, e.g., Lineback v. Spurlino Materials, LLC*, 546 F.3d 491, 502-503 (7th Cir. 2008); *Ahearn v. Jackson Hospital*, 351 F.3d 226, 238 (6th Cir. 2003); *Overstreet v. El Paso Disposal, LP*, 668 F. Supp.2d 988, 1005 n.28 (W.D. Tex 2009), affd. 625 F.3d 844 (5th Cir. 2010); *Pye v. Excel Case Ready*, 238 F.3d 69, 73 n.8 (1st Cir. 2001). Thus, any concerns the Court may have had about the likelihood of success prong now cuts strongly in favor of issuing the injunction.

Despite Judge Ringler's largely favorable decision, a prompt ruling on Petitioner's request for injunctive relief is still imperative because an ALJ's ruling has no final force or effect until acted on by the Board. *See, e.g., Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d 962, 968 (6th Cir. 2001); *Sharp v. Webco Industries, Inc.*, 225 F.3d 1130, 1136 (10th Cir. 2000). Thus Judge Ringler's decision does not place Respondent under any judicial restraint nor does it compel, on its own, Respondent to take any immediate action to remedy the unfair labor practices. Absent prompt injunctive relief, a final Board order could be rendered meaningless, and the harm done to employees' statutory rights will be irreparable. This is precisely the outcome Section 10(j) was enacted to prevent.

In accordance with Section 102.46 of the Board's Rules and Regulations, Respondent has 28 days to appeal Judge Ringler's decision to the Board, in which case Petitioner has the right to file an answering brief and Respondent could then file a reply brief. In light of the numerous stages remaining in the administrative proceeding, it is likely that it will take some time for the

[1] In some Circuits the legal standard is not a likelihood of success on the merits, but whether there is "reasonable cause" to believe the Act has been violated.

Board to review the record, the ALJ's decision, and any briefs filed by the parties, before a decision will be issued by the Board in this matter. Petitioner anticipates that this process will require many more months of litigation, during which Respondent will continue to reap the benefits of its unlawful conduct unless injunctive relief is granted by this Court.

IV. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court supplement the record with ALJ Ringler's Decision and Recommended Order.

Respectfully submitted this 21st day of July, 2014.

s/ Linda M. Mohns
COUNSEL FOR PETITIONER
National Labor Relations Board
Region 15, Subregion 26
80 Monroe Avenue, Suite 350
Memphis, Tennessee 38103
Telephone: (901) 544-0027
Fax: (901) 544-0008
E-mail: linda.mohns@nlrb.gov
New York Bar No. 2107944

APPENDIX P
Instructions and Sample Letter, Motion and Memorandum To Expedite District Court Decision

[This Appendix has been intentionally withheld]

APPENDIX Q

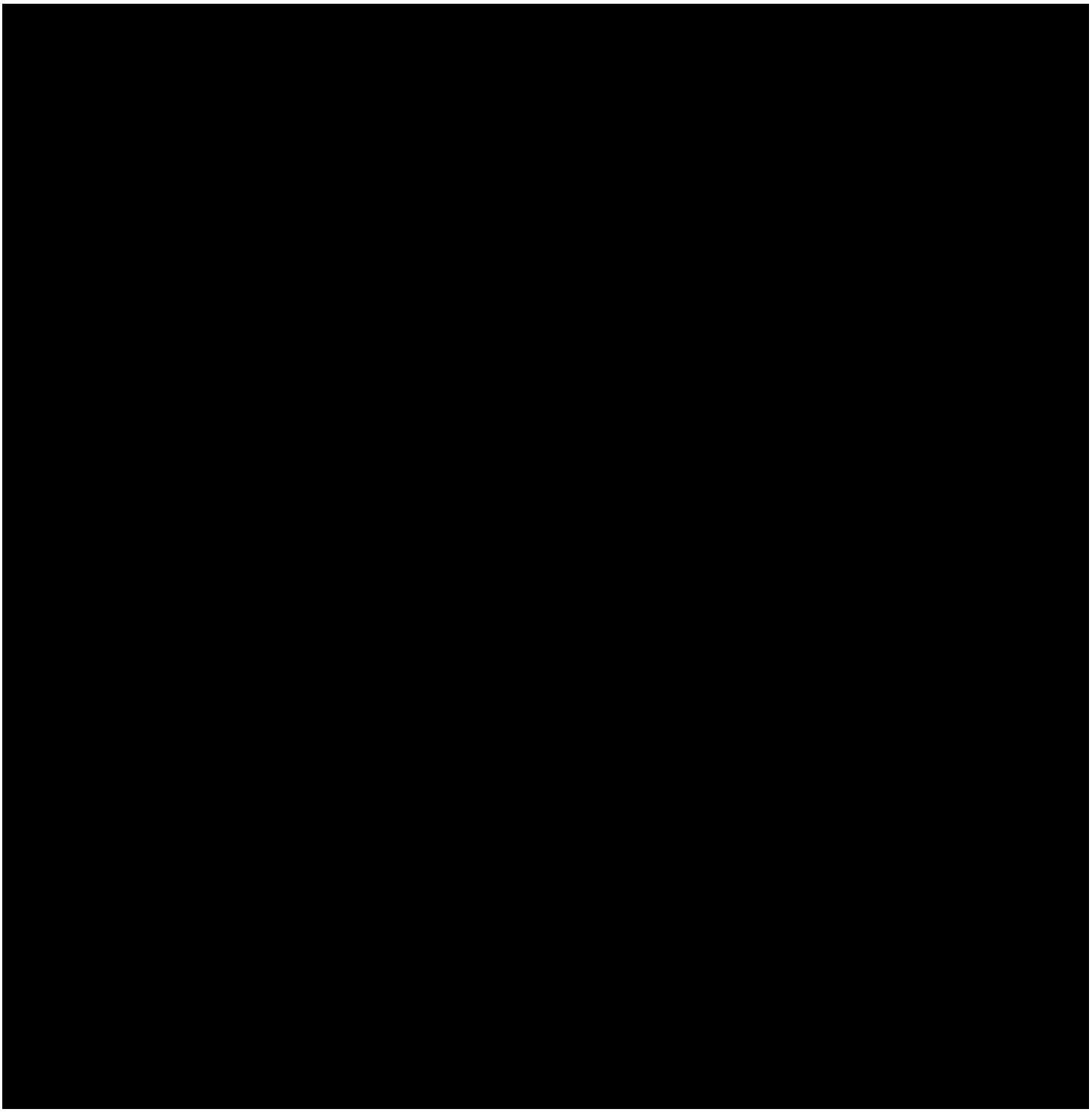
SAMPLE CONTEMPT MEMO AND PETITION FOR CONTEMPT

APPENDIX Q-1

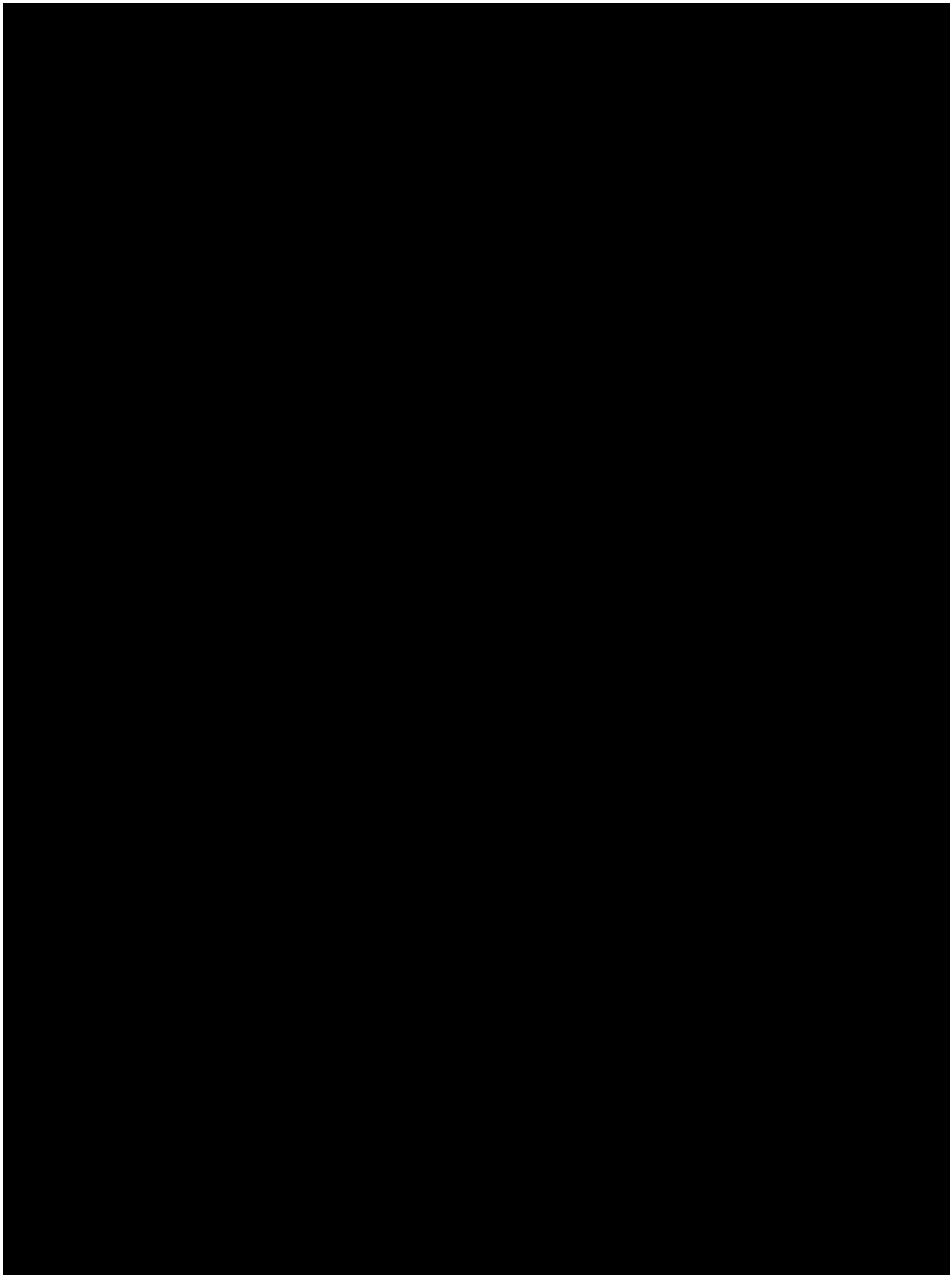
UNITED STATES GOVERNMENT

memorandum

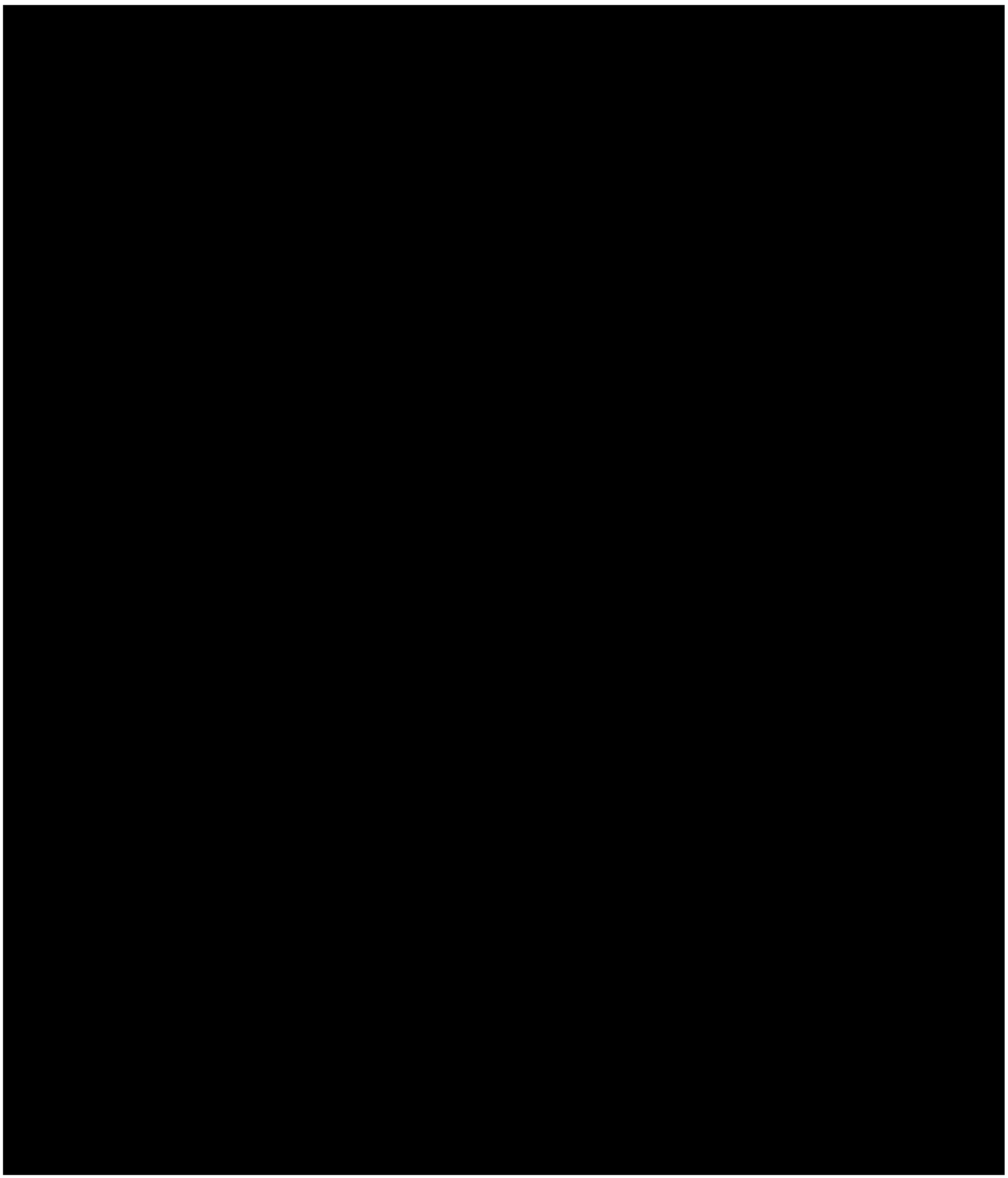
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL



APPENDIX Q-1

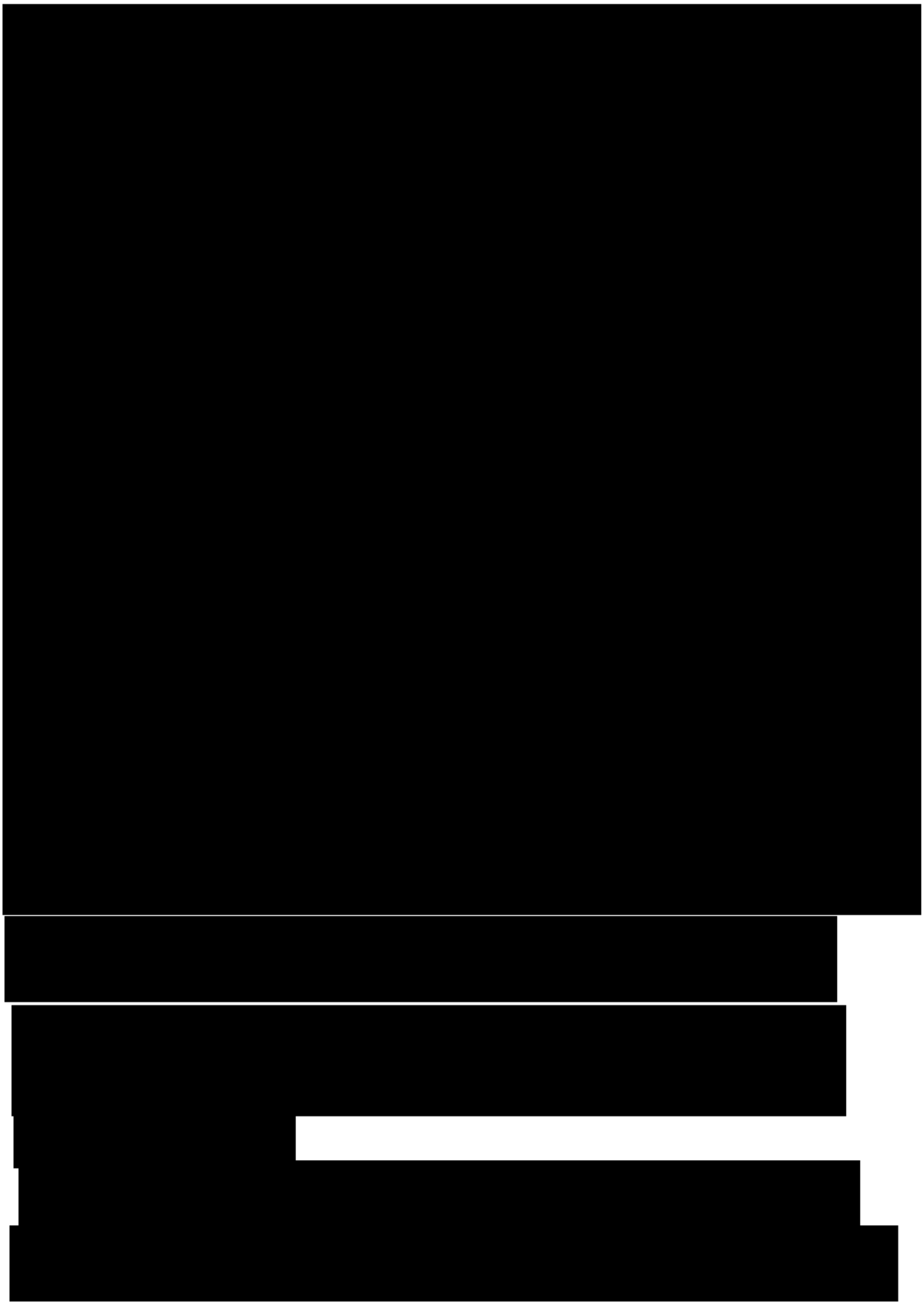


APPENDIX Q-1

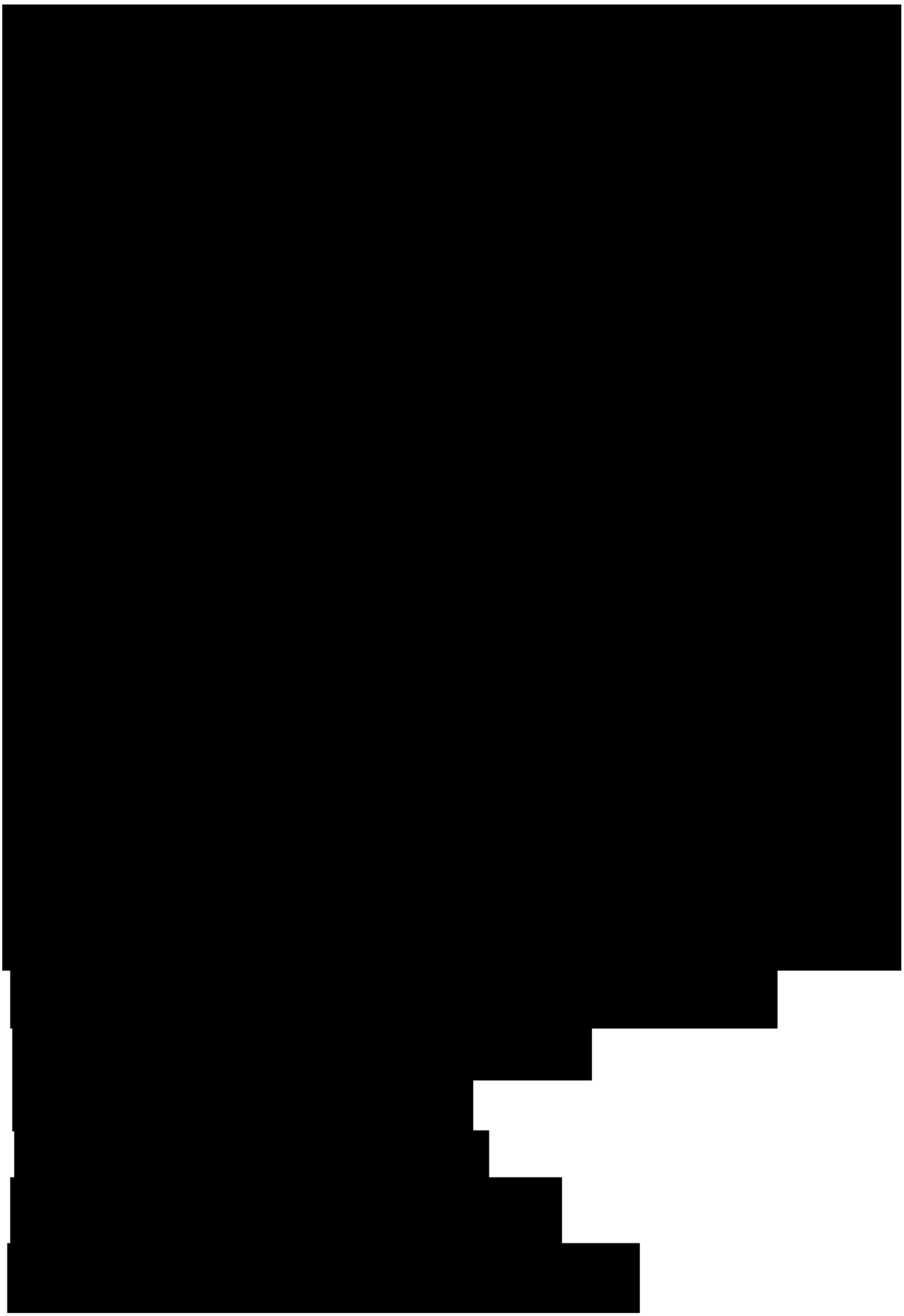


APPENDIX Q-1

APPENDIX Q-1



APPENDIX Q-1



APPENDIX Q-1

APPENDIX Q-1

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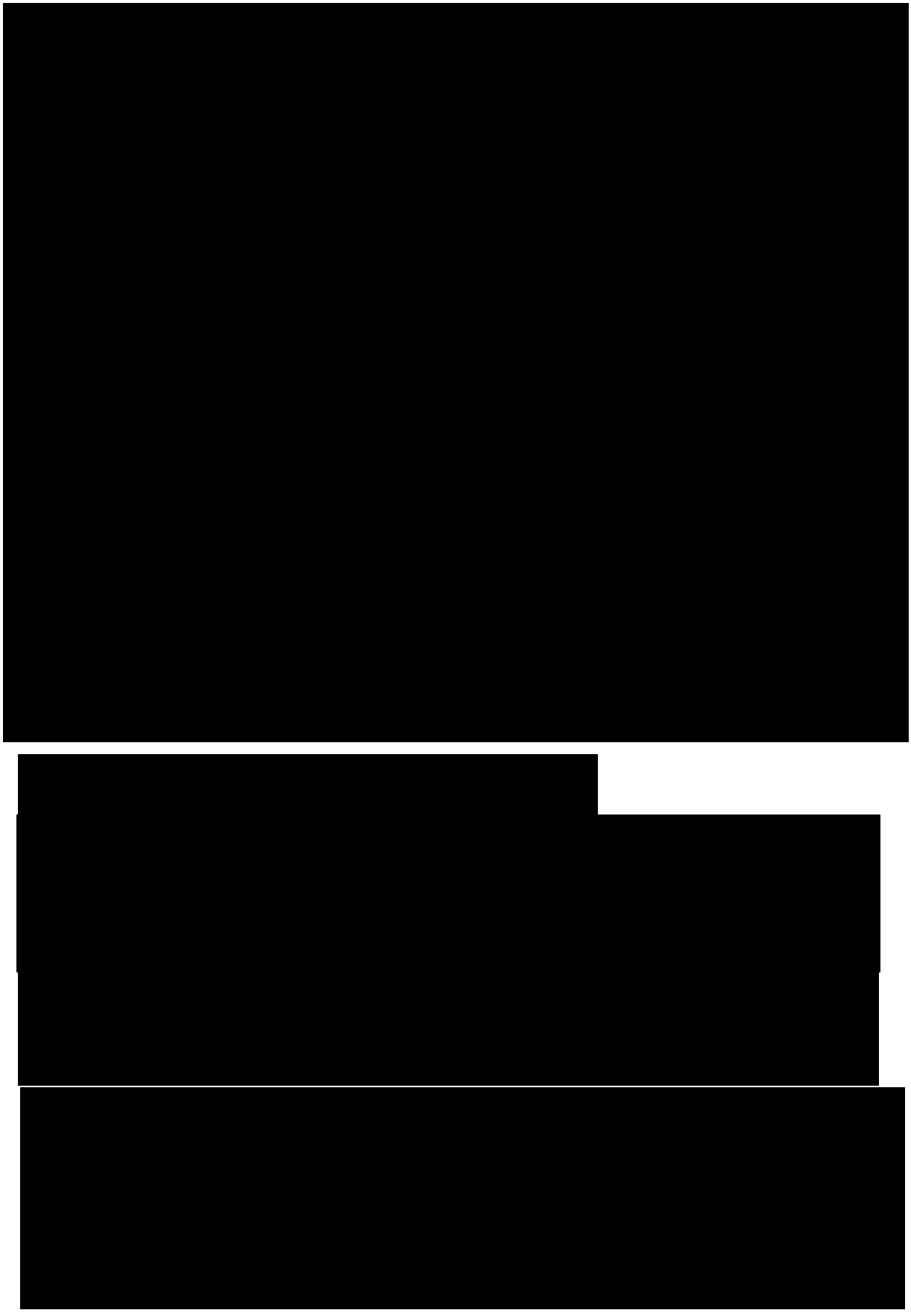
APPENDIX Q-1



APPENDIX Q-1

APPENDIX Q-1

APPENDIX Q-1

APPENDIX Q-2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

JONATHAN B. KREISBERG, Regional Director of Region 34 of the National Labor Relations Board, for and on behalf of the **NATIONAL LABOR RELATIONS BOARD** Petitioner vs. **HEALTHBRIDGE MANAGEMENT, LLC; 107 OSBORNE STREET OPERATING COMPANY II, LLC D/B/A DANBURY HCC; 710 LONG RIDGE ROAD OPERATING COMPANY II, LLC D/B/A LONG RIDGE OF STAMFORD; 240 CHURCH STREET OPERATING COMPANY II, LLC D/B/A NEWINGTON HEALTH CARE CENTER; 1 BURR ROAD OPERATING COMPANY II, LLC D/B/A WESTPORT HEALTH CARE CENTER; 245 ORANGE AVENUE OPERATING COMPANY II, LLC D/B/A WEST RIVER HEALTH CARE CENTER; 341 JORDAN LANE OPERATING COMPANY II, LLC D/B/A WETHERSFIELD HEALTH CARE CENTER,** Respondents; and **LISA CRUTCHFIELD,** Additional Respondent in Contempt	3:12-cv-01299-RNC May 30, 2013

PETITION FOR ADJUDICATION AND ORDER IN CIVIL CONTEMPT AND FOR OTHER CIVIL RELIEF

Counsel for Petitioner moves this Court, for and on behalf of the National Labor Relations Board (the "Board"), to adjudicate HealthBridge Management, LLC, ("Respondent HealthBridge") and additional respondent in contempt, Lisa Crutchfield (the "Additional Respondent") in civil contempt of this Court and to grant other civil relief for having violated and disobeyed, and for continuing to violate and disobey, the

Injunctive Order issued by this Court on December 11, 2012.[1] In support thereof, Petitioner respectfully shows as follows:

1. On September 7, 2012, Petitioner filed with this Court a Petition for Injunction under Section 10(j) of the National Labor Relations Act, as amended (the "Act"), 29 U.S.C. § 160(j), seeking a temporary injunction order enjoining and restraining Respondent Healthbridge and several HealthBridge-managed Respondent Health Care Centers (collectively, the "Respondents") [2] from engaging in certain conduct violative of the Act, and affirmatively directing Respondent Healthbridge to take certain ameliorative action, including restoring the wages, benefits, and other terms and

[1] As modified on December 13, 2012 to correct a typographical error.

[2] The following Respondent Health Care Centers (the "Centers") are Respondents in the underlying 10(j) proceedings, but Petitioner is **not** seeking that these following Respondents be held in contempt at this time: 107 Osborne Street Operating Company II, LLC d/b/a Danbury Health Care Center (Respondent Danbury); 710 Long Ridge Road Operating Company II, LLC, d/b/a Long Ridge of Stamford, (Respondent Long Ridge); 240 Church Street Operating Company II, LLC d/b/a Newington Health Care Center (Respondent Newington); 245 Orange Avenue Operating Company II, LLC d/b/a West River Health Care Center (Respondent West River); 1 Burr Road Operating Company II, LLC d/b/a Westport Health Care Center (Respondent Westport) (collectively, the "Centers"), who filed voluntary petitions for Chapter 11 Bankruptcy relief in the U.S. Bankruptcy Court for the District of New Jersey on February 24, 2013. On March 4, 2013, the Debtors were provided with interim relief under 11 U.S.C. § 1113(e), and on April 10, that interim relief was extended by the Bankruptcy Court to July 15, 2013. The NLRB has appealed the Bankruptcy Court's Order in that case arguing that § 1113(e) does not authorize interim relief (i) in the absence of a current collective bargaining agreement ("CBA"), (ii) where the debtors have previously breached CBAs, or (iii) contrary to a prior federal district court injunction, where a necessary element of the § 1113(e) relief was previously litigated and decided in that injunction litigation. The Union has also appealed. Solely as a result of the Bankruptcy Court's Order, the Petitioner is not seeking acontempt adjudication against the Centers at this time, but will re-assess the situation if and when the Bankruptcy Order is overturned, and may seek a contempt adjudication at that time if required by the extant circumstances. A sixth health care center, 341 Jordan Lane Operating Company II, LLC d/b/a Wethersfield Health Care Center (Wethersfield) received permission in June 2012 to cease operations. Accordingly, references to the "Centers" or the "Respondents" will exclude Respondent Wethersfield.

condition of employment in place on June 16, 2012, prior to the implementation of Respondent's Last, Best, Final Proposal (the LBF Proposal).

2. On December 11, 2012, this Court issued an Injunctive Order (the "Injunctive Order") granting Petitioner's request for a preliminary injunction during the pendency of the administrative litigation now pending before the Board in Cases 34-CA-070823, et al. A copy of the Injunctive Order, as modified on December 13, 2012, is attached hereto as Exhibit A.

(a) Among other things, the Court's Injunctive Order affirmatively ordered Respondents to reinstate the employees' previous wages, benefits and other terms and conditions of employment that were in place on June 16, 2012, and rescind any or all unilateral changes implemented by Respondent Healthbridge.

(b) Respondents were further directed to file a sworn affidavit with the Court setting forth with specificity the manner in which it had complied with the Court's Order.

3. The Court electronically forwarded copies of its December 11, 2012 injunctive Order on that date to counsel for the parties, including Respondents' counsel, Rosemary Alito and James Glasser.

(a) Counsel for the Board received a copy of the Court's December 11, 2012 injunctive Order on the same date.

(b) Consistent with the Court's electronic service on the parties of its December 11, 2012 injunctive Order, service of that document on Rosemary Alito and James Glasser, Respondents' counsel, was presumptively effective on the same date.

4. The following provisions of this Court's Injunctive Order have been in full force and effect since its issuance on December 11, 2012, and have been binding on Respondent Healthbridge, its officers, attorney and agents within the meaning of Rule 65(d) of the Federal Rules of Civil Procedure (Fed. R. Civ. P.), since service was effected upon Respondent's counsel on or about December 11, 2012:

(a) Respondent shall bargain in good faith with the Union as the exclusive collective bargaining representative of the employees;

(b) Respondent shall post copies of this Order at all of its facilities where notices to employees are customarily posted, including electronic posting if respondent customarily communicates with employees by such means; said postings shall be maintained free from all obstructions and defacements; and agents of the Board shall be granted reasonable access to the facilities to monitor compliance with this posting requirement; and

(c) on or before December 30, 2012, Respondent shall file with this Court, and submit a copy to the Regional Director of Region 34 of the Board, a sworn affidavit from a responsible official, stating with specificity the manner in which respondent has complied with this Order, including the exact locations where respondent has posted the required documents.

5. The following provisions of this Court's Injunctive Order were subject to an emergency partial stay by the Second Circuit Court of Appeals from December 17, 2012 until January 30, 2013 (a copy of the Appellate Court's December 17, 2013 Order

is attached as Exhibit B). Since January 30, 2013, the following provisions of the Court's Injunctive Order have been in full force and effect (a copy of the Appellate Court's January 30, 2013 Order is attached as Exhibit C), and have been binding on Respondent HealthBridge, its officers, attorneys, and agents within the meaning of Fed. R. Civ. P. 65(d), as service was effected upon Respondents' counsel on or about December 11, 2012:

(a) On or before December 17, 2012, Respondent shall offer every striker reinstatement to his or her former position, without prejudice to their seniority, rights and privileges previously enjoyed, displacing, if necessary, any other employees hired, transferred or reassigned to replace them;

(b) Respondent shall reinstate the previous wages, benefits and other terms and conditions of employment for the employees that were in place on June 16, 2012, and rescind any or all unilateral changes implemented by Respondents;

6. This Court has jurisdiction under Section 10(j) of the Act to enforce the terms and conditions of the Injunctive Order through appropriate civil contempt proceedings.

7. At all material times, the following persons have been and continue to be agents of Respondent Healthbridge, acting within the meaning of Fed R. Civ. P. 65(d) and the scope of their agency authority:

(a) Daniel Straus, Owner of Respondent HealthBridge.

(b) Alberto Lugo, Executive Vice President and General Counsel of Respondent HealthBridge.

(c) Thomas McKinney, Senior Vice President of Respondent HealthBridge.

(d) Lisa Crutchfield, Senior Vice President, Labor Relations for Respondent HealthBridge.

(e) Edmund Remillard, Regional Director of Human Resources in Connecticut for Respondent HealthBridge.

(f) Lawrence Condon, Regional Director of Operations for Respondent HealthBridge, and Acting Administrator for Respondent Long Ridge.

(g) Cynthia Roessler, Administrator for Respondent Danbury;

(h) Lizabeth Carmichael, Administrator for Respondent Newington;

(i) Joanne Wallak, Administrator for Respondent West River;

(j) Marion Najamy, Administrator for Respondent Westport;

8. On December 28, 2012, Lisa Crutchfield, on behalf of Respondent Healthbridge, filed and submitted an affidavit of compliance as required by paragraph 4(c), above, a copy of which is attached as Exhibit D.

9. On about February 24, 2013, the Centers sought protection under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of New Jersey (the "Bankruptcy Court").

(a) Pursuant to the Bankruptcy filing, on February 25, 2013, the Centers requested relief under 11 U.S.C. §1113(e) from certain terms and conditions of employment that were in effect on June 16, 2012.

(b) The Centers sought the Bankruptcy Court's permission to implement changes similar or identical to several of the changes implemented on June 17, 2012, which this Court had ordered rescinded.

(c) A hearing was held on March 1, 2013 regarding the Centers' request for relief under 11 U.S.C. § 1113(e).

(d) The striking employees returned to work at the Centers beginning March 3, 2013.

(e) On March 4, 2013, the Bankruptcy Court granted the Centers' requested interim relief for a period of 6 weeks. A copy of the Bankruptcy Court's Decision and Order is attached as Exhibit E.

(f) On April 10, 2013, the Bankruptcy Court provided the Centers with an additional 12 weeks of relief, pursuant to the Centers' motion. A Copy of the Bankruptcy Court's April 10 Order is attached as Exhibit F.

10. Based upon information and belief, Petitioner has, and there is, clear and convincing evidence that Respondent Healthbridge and the Additional Respondent have disobeyed and failed and refused, and continues to disobey and fail and refuse, to comply with the provisions of the Court's injunctive Order described above in paragraph 2, in the following respects:

(a) Respondent Healthbridge and the Additional Respondent have failed and refused, and are failing and refusing, to provide employees a 30-minute meal break, a benefit provided to employees on and prior to June 16, 2012.

(b) Respondent Healthbridge and the Additional Respondent have failed and refused, and are failing and refusing, to pay employees "daily overtime" for hours worked in excess of 8 per day, a benefit provided to employees on and prior to June 16, 2012.

(c) Respondent Healthbridge and the Additional Respondent have failed and refused, and are failing and refusing, to allow employees to accrue sick leave at the accrual rates in effect on and prior to June 16, 2012.

(d) Respondent Healthbridge and the Additional Respondent have failed and refused, and are failing and refusing, to provide employees with health and other insurance at no monthly cost to the employee, a benefit in effect on and prior to June 16, 2012.

(e) Respondent Healthbridge and the Additional Respondent have failed and refused, and are failing and refusing, to contribute to the District 1199 Pension Fund on behalf of eligible employees, a benefit provided to employees on and prior to June 16, 2012.

(f) Respondent Healthbridge and the Additional Respondent have failed and refused, and are failing and refusing, to contribute to the District 1199 Training Fund on behalf of eligible employees, a benefit provided to employees on and prior to June 16, 2012.

(g) Respondent Healthbridge and the Additional Respondent have failed and refused, and are failing and refusing, to pay a yearly uniform allowance to eligible employees, a benefit provided to employees on and prior to June 16, 2012.

(h) Respondent Healthbridge and the Additional Respondent have failed and refused, and are failing and refusing, to allow employees to accrue paid personal days, a benefit provided to employees on and prior to June 16, 2012.

(i) Respondent Healthbridge and the Additional Respondent have failed and refused, and are failing and refusing, to pay employees their wages on a weekly basis, a benefit provided to employees on and prior to June 16, 2012.

11. By memoranda dated March 5, 2013, copies of which are attached as Exhibit G, the returning employees were told that they would be working under the terms and conditions of employment described above in paragraph 10.

12. By letter dated March 6, 2013, a copy of which is attached as Exhibit H, the Union was informed that the returning employees were working, and would continue to work, under the terms and conditions of employment described above in paragraph 10.

13. The wages and benefits described above in paragraphs 10 are mandatory subjects of collective bargaining within the meaning of §§ 8(d) and 8(a)(5) of the Act, 29 U.S.C. §§ 158(d) and 158(a)(5).

14. By the acts and conduct described above in paragraph 10, Respondent Healthbridge and the Additional Respondent have failed and refused, and are failing and refusing, to obey and comply with the terms of the Court's injunctive Order. More particularly:

(a) By the acts and conduct described above in paragraph 10, Respondent Healthbridge and the Additional Respondent have disobeyed and failed to comply with affirmative paragraph 2 of the Court's Injunctive Order, which required Respondent Healthbridge to reinstate the previous wages, benefits and other terms and conditions of employment for the employees that were in place on June 16, 2012, and rescind any or all implemented unilateral changes.

(b) By the acts and conduct described above in paragraph 10, Respondent Healthbridge and the Additional Respondent has disobeyed and failed to comply with affirmative paragraph 3 of the Court's Injunctive Order, which required Respondent Healthbridge to bargain in good faith with the Union as the exclusive collective bargaining representative of the employees.

WHEREFORE, Petitioner respectfully prays the following:

1. That the Court direct Respondent Healthbridge and the Additional Respondent to file with the Court and serve upon Petitioner, by a date certain, an answer to this Petition, specifically admitting or denying, or meeting by affirmative defense, each and every allegation of this Petition, and to file with the Court and serve upon Petitioner, by a fixed date, counter affidavits or declarations in support of any such denial or affirmative defenses.

2. That the Court direct Respondent Healthbridge and the Additional Respondent to appear before it, at a time and place to be fixed by the Court, and show cause, if any there be, why Respondent Healthbridge and the Additional Respondent should not be adjudged in civil contempt for disobeying and refusing to fully comply with the Court's injunctive Order of December 11, 2012.

3. That upon return of said order to show cause, and such other proceedings as are appropriate, the Court adjudge Respondent Healthbridge and the Additional Respondent in civil contempt of the Court's December 11, 2012 injunctive Order and that the Court issue the following purgation order requiring Respondent Healthbridge, its officers, agents, attorneys, owners, and all persons acting in concert or participation with it, as well as the Additional Respondent, to:

(a) comply with all provisions of the District Court's order of December 11, 2012, as well as all provisions of the Court's Contempt Purgation Order;

(b) reinstate and maintain the previous wages, benefits and other terms and conditions of employment for the employees that were in place on June 16, 2012, and rescind any or all implemented unilateral changes;

(c) promptly post copies of the District Court's Contempt Opinion and Purgation Order at Respondent HealthBridge's premises and at each of the five Centers in all places where notices to its affected employees are normally posted; maintain such postings free from all obstructions and defacements for the duration of the 10(j) decree; all bargaining unit employees shall have free and unrestricted access to said postings; and grant reasonable access to agents of Region 1 of the Board to all such locations to monitor compliance with this posting requirement;

(d) promptly serve copies of the District Court's Contempt Purgation Order on each officer, agent, owner, and counselor of each of the Centers, as well as on each officer, agent, owner, and counselor, of Respondent HealthBridge, and obtain signed acceptances of such copies from each officer, agent, owner, and counselor, and submit the originals of those acceptances to the Regional Director of Region 1 of the Board;

(e) within 20 days of the entry of this Contempt Purgation Order, serve upon the District Court, with a copy submitted to the Regional Director of Region 1 of the Board, a sworn affidavit by a responsible corporate official of Respondent HealthBridge, and by the Additional Respondent, setting forth with specificity the

manner in which they have complied with the terms of the Court's Contempt Purgation Order;

(f) grant reasonable, periodic access to agents of the Board to all of Respondent HealthBridge's corporate records, payroll data, personnel records and files, for inspection and reproduction, to assure compliance with the terms of the Court's Injunctive Order and the Contempt Purgation Order; and

(g) comply with any other further relief of a remedial nature that the Court deems "just and proper" to coerce future compliance with the terms of the Section 10(j) decree.

4. In addition, Petitioner seeks as part of the purgation order that Respondent HealthBridge shall:

(a) pay to the Board compensatory damages for all the costs and expenditures incurred in the investigation and prosecution of this contempt proceeding; these costs shall include attorneys' fees of Board personnel; said amounts, unless agreed upon by the parties, shall be fixed by the Court upon further submission by the Board of a verified statement of costs and expenses;

(b) Pay to all bargaining unit employees at each of the Centers, as compensatory damages, all backpay and/or fringe benefits, plus normal interest as computed in Board proceedings, accrued and owing as a result of Respondent HealthBridge's failure to implement and maintain the terms and conditions of

employment in place on June 16, 2012, as required by the District Court's Injunctive Order.

5. Petitioner seeks the imposition of a prospective compliance fine schedule upon Respondent HealthBridge and the Additional Respondent to coerce them to fully comply with the terms of the injunctive decree and of the contempt purgation order and to refrain from further breaches of that injunction or that purgation order in the future. Thus, Petitioner seeks prospective compliance fines, including daily compliance fines as specified, payable to the National Labor Relations Board, as follows:

(a) $10,000.00 (ten thousand dollars) against Respondent HealthBridge, and $5,000 (five thousand dollars) against the Additional Respondent, and a daily compliance fine of $500.00 (five hundred dollars) per day against Respondent HealthBridge, and $150 (one hundred and fifty dollars) per day against the Additional Respondent, upon the failure of Respondent HealthBridge to comply with each of the paragraphs, noted above, of the Contempt Purgation Order.

(b) $5,000.00 (five thousand dollars) against Respondent HealthBridge and $1,000 (one thousand dollars) against the Additional Respondent for each future violation of any other provision of the Court's Section 10(j) decree.

6. That this Court include a provision in the Contempt Purgation Order that any fines imposed upon and collected from the Additional Respondent shall neither be paid for nor reimbursed by HealthBridge nor reimbursed by any entity she controls.

7. That this Court order any further relief or procedure of a remedial nature that the Court deems "just and proper" to coerce future compliance with the terms of the Court's December 11, 2012 Injunctive Order.

8. That this Court grant expedited consideration of this contempt Petition pursuant to 28 U.S.C. Section 1657(a) and the Congressional intent underlying Section 10(j) of the Act.

Respectfully submitted this 30th day of May, 2013.

/s/ John McGrath
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APPENDIX Q-3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

JONATHAN B. KREISBERG, Regional Director of Region 34 of the National Labor Relations Board, for and on behalf of the **NATIONAL LABOR RELATIONS BOARD** Petitioner vs. **HEALTHBRIDGE MANAGEMENT, LLC; 107 OSBORNE STREET OPERATING COMPANY II, LLC D/B/A DANBURY HCC; 710 LONG RIDGE ROAD OPERATING COMPANY II, LLC D/B/A LONG RIDGE OF STAMFORD; 240 CHURCH STREET OPERATING COMPANY II, LLC D/B/A NEWINGTON HEALTH CARE CENTER; 1 BURR ROAD OPERATING COMPANY II, LLC D/B/A WESTPORT HEALTH CARE CENTER; 245 ORANGE AVENUE OPERATING COMPANY II, LLC D/B/A WEST RIVER HEALTH CARE CENTER; 341 JORDAN LANE OPERATING COMPANY II, LLC D/B/A WETHERSFIELD HEALTH CARE CENTER,** Respondents; and **LISA CRUTCHFIELD,** Additional Respondent in Contempt	3:12-cv-01299-RNC May 30, 2013

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR ADJUDICATION AND ORDER IN CIVIL CONTEMPT AND FOR OTHER CIVIL RELIEF

I. STATEMENT OF THE CASE

Counsel for Petitioner[1] moves this Court, for and on behalf of the National Labor Relations Board (the Board), to adjudicate HealthBridge Management, LLC,

[1] When the underlying 10(j) proceedings were initiated, Petitioner Jonathan Kreisberg was the Regional Director of Region 34 of the NLRB. While those proceedings were

("Respondent HealthBridge") and Additional Respondent in contempt, Lisa Crutchfield (the "Additional Respondent") in civil contempt of this Court and to grant other civil relief for having violated and disobeyed, and for continuing to violate and disobey, the injunctive Order issued by this Court on December 11, 2012. In support thereof, Petitioner respectfully shows as follows:

On September 7, 2012, Petitioner filed in this Court a Petition for Injunction under Section 10(j) of the National Labor Relations Act (the "Act") (29 U.S.C. § 160(j) seeking a temporary injunction enjoining and restraining Respondent Healthbridge, and the Respondent Health Care Centers[2] managed by HealthBridge (collectively, with HealthBridge, the "Respondents") from engaging in certain conduct violative of the Act, and affirmatively directing Respondents to take certain ameliorative action.

On December 11, this Court granted the requested injunctive relief. The Court found that there was reasonable cause to believe that Respondents violated the Act by unilaterally implementing their last, best, final proposals without first having bargained with the Union to a good-faith impasse, and by refusing to reinstate unfair labor practice strikers upon their unconditional offer to return to work. The Court concluded that

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pending, Region 34 was made a Subregion of Region 1, and Petitioner became the Regional Director of Region 1.

[2] The following Respondent Health Care Centers (the "Centers") are Respondents in the underlying 10(j) proceedings, but Petitioner is **not** seeking that these following Respondents be held in contempt at this time: 107 Osborne Street Operating Company II, LLC d/b/a Danbury Health Care Center (Respondent Danbury); 710 Long Ridge Road Operating Company II, LLC, d/b/a Long Ridge of Stamford, (Respondent Long Ridge); 240 Church Street Operating Company II, LLC d/b/a Newington Health Care Center (Respondent Newington); 245 Orange Avenue Operating Company II, LLC d/b/a West River Health Care Center (Respondent West River); 1 Burr Road Operating Company II, LLC d/b/a Westport Health Care Center (Respondent Westport). A sixth health care center, 341 Jordan Lane Operating Company II, LLC d/b/a Wethersfield Health Care Center (Wethersfield) received permission in June 2012 to cease operations. Accordingly, references to the "Centers" or the "Respondents" will exclude Respondent Wethersfield.

interim relief was necessary to preserve the Board's remedial authority and serve the public interest. The Court affirmatively directed Respondents to, in relevant part:

> (1) on or before December 17, 2012, Respondents shall offer every striker reinstatement to his or her former position, without prejudice to their seniority, rights and privileges previously enjoyed, displacing, if necessary, any other employees hired, transferred or reassigned to replace them;
>
> (2) Respondents shall reinstate the previous wages, benefits and other terms and conditions of employment for the employees that were in place on June 16, 2012, and rescind any or all unilateral changes implemented by Respondents;
>
> (3) Respondents shall bargain in good faith with the Union as the exclusive collective bargaining representative of the employees;[3]

Respondents immediately requested a partial stay of the Injunctive Order from this Court, which this Court denied on December 14, 2012. (ECF No. 54.)

Respondents filed a notice of appeal on December 12, 2012. Respondent also requested an emergency partial stay, as well as a partial stay pending appeal of the Injunctive Order, from the Court of Appeals for the Second Circuit. On December 17, 2012, the Court of Appeals granted an emergency partial stay – pertaining only to the first two paragraphs of affirmative relief – pending a decision by the next available motions panel on Respondents' motion for partial stay pending appeal. Respondents did not seek, and were not granted, a stay of the order to bargain in good faith. On January 30, 2013,[4] Respondents' motion for a partial stay pending appeal was denied, ending the emergency partial stay.

[3] The original version of the Order had a typographical error, which was corrected on December 13, 2012.

[4] Unless otherwise noted, all dates hereafter are in 2013.

Respondents then applied to Justice Ruth Bader Ginsburg for a stay, but were denied. Respondents next resubmitted their application for a stay to Justice Antonin Scalia, who referred it to the Supreme Court, which denied the application. (ECF No. 57.)

Respondents' appeal is still pending before the Court of Appeals. Oral arguments were heard on May 15, 2013.

The five operating Respondent Health Care Centers (the "Centers") subsequently filed voluntary bankruptcy petitions in the United States Bankruptcy Court for the District of New Jersey (the "Bankruptcy Court"), requesting interim relief under 11 U.S.C. § 1113(e)[5] from the terms of the expired collective bargaining agreements with the Union (the "CBAs"). The Bankruptcy Court granted the requested interim relief for an initial 6 weeks, and later granted additional interim relief for an additional 12 weeks. The NLRB and the Union moved to appeal the Bankruptcy Court's decision, and the U.S. District Court for the District of New Jersey has granted leave to appeal.[6] These contempt proceeding are ***not*** brought against the Centers at this time. Rather, Petitioner seeks that Respondent HealthBridge – which is not in bankruptcy – be found in contempt, as well as the Additional Respondent, HealthBridge's Senior Vice President for Labor Relations, who is not in bankruptcy either.

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[5] 11 U.S.C. § 1113(e) reads, in relevant part "If, during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement."

[6] *710 Long Ridge Road Operating Co. II, LLC, et al., v. U.S. Trustee*, Case No. 2:13-cv-02977-DMC (D.N.J.); *NLRB v. 710 Long Ridge Road Operating Co. II, LLC, et al.*, Case No. 2:13-cv-03247-DMC (D.N.J.); *New England Health Care Employees Union, District 1199 SEIU, et al., v. 710 Long Ridge Road Operating Co. II, LLC et al.*, Case No. 2:13-cv-03248-DMC (D.N.J.)

II. STATEMENT OF FACTS AND LAW

In its Injunctive Order, this Court concluded that Petitioner presented evidence showing a reasonable cause to believe that Respondents did not bargain with the Union in good faith to a bona fide impasse before declaring impasse and unilaterally implementing its last, best final proposal (the "LBF Proposal"). (Contempt Pet. Exh. A, at 3.) Accordingly, this Court ordered Respondents to rescind the unilateral changes, and restore the wages, benefits, and other terms and conditions of employment previously existing on June 16, 2012. On December 17, 2012, Respondents obtained an emergency partial stay from the Second Circuit Court of Appeals. That emergency partial stay was dissolved on January 30, 2013, when a panel of the Court of Appeals denied Respondent's motion for partial stay. Yet at this time, the bargaining unit employees are not working under the terms and conditions in place on June 16, 2012.

On December 28, 2012, Respondents filed a declaration of compliance with this Court (Contempt Pet. Exh. D). That declaration was signed by Lisa Crutchfield, the Senior Vice President of Labor Relations for HealthBridge. (Id. at ¶ 1.)

On February 8, the Union requested[7] to meet with Respondents to negotiate the roughly 600 strikers' return to work. Copies of correspondence between the Union and Respondents is attached as Exhibit 1. The Union and Respondents met for several hours on February 18 to discuss reinstatement issues. At the end of the meeting, it was understood that the striking workers would return to work beginning March 3, and that their medical coverage would be established as of March 1. No mention of bankruptcy or insolvency was made at that meeting.

[7] The Union had originally requested that Respondents meet with it to discuss the reinstatement of the ULP strikers on December 12, 2012, but received no response.

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On Sunday, February 24, without warning to either the Union or the Region, the Centers – but not Respondent HealthBridge – filed voluntary bankruptcy petitions under Chapter 11 in the Bankruptcy Court.[8] On February 25, the five Centers requested temporary relief from the terms of the expired CBAs under 11 U.S.C. § 1113(e), arguing that they would no longer be able to operate or pursue reorganization without implementation of interim modifications to the terms and conditions of bargaining unit members' employment. (Exh. 2 at ¶¶ 2-4.) The Centers requested that they be permitted to reinstate many of the unilateral changes made on June 17, 2012, including the cessation of payments to the Union pension fund, charging employees new monthly premiums for insurance, and the elimination of paid lunch breaks.

On February 25, the Centers requested that the hearing on their motion be expedited – and held on March 1 – so that the proposed modifications could be made before the ULP strikers returned to work. (Exh. 3 at ¶ 7.) On February 26, the Bankruptcy Court granted the motion and set a hearing date of Friday, March 1. On March 1, a hearing was held in Newark, New Jersey.

The strikers returned to work on Sunday, March 3.

On March 4, the Honorable Donald H. Steckroth, Unites States Bankruptcy Judge, issued an order and an opinion (collectively, the "Bankruptcy Order") authorizing the Centers to implement the requested interim modifications to their CBAs through April 12, 2013 (Contempt Pet. Exh. E, at 2). Specifically, the Bankruptcy Order authorized the Centers to make the following changes:

[8] *In re 710 Long Ridge Road Operating Co. II, LLC et al.*, Case No. 13-13653-DHS (Bankr. D.N.J).

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1) DAILY WORK SCHEDULE. The Daily work schedule change from 8 hours including a 30-minute paid meal period to 7.5 hours plus a 30-minute unpaid meal period

2) OVERTIME. Paid at one and one half times the regularly hourly rate to be paid only after employee works 40 regular hours in a week as the law requires, and not on a daily basis anytime an employee works more than 8 hours a day

3) SICK LEAVE. Reduced from 12 days per year accruing at [sic] rate of one per month to an accrual rate of one hour of sick time for every 40 hours worked up to a total of 45 hours

4) MEDICAL AND PRESCRIPTION DRUG PLAN AND OTHER INSURANCE BENEFITS. Debtors seek to have unionized employees contribute towards the costs of medical and prescription drug plan and maintain the level of co-pays and co-insurance applicable to non-union employees

5) PENSION PLAN. Rather than contribute to the New England Health Care Employees Pension Fund, employees will be able to enroll in the 401(k) plan established after June 17, 2012 and Debtors will match 25% of employee contributions up to 3% of the annual salary

6) TUITION REIMBURSEMENT. Debtors will end contribution to the New England Health Care Training Fund

7) UNIFORMS. Discontinue uniform allowance of $300 per year

8) PERSONAL DAYS. Eliminate Personal Days

9) PAY FREQUENCY. Debtors want to maintain a bi-weekly payroll rather than revert to a weekly payroll because of the increased administrative and manpower costs associated with running twice as many payrolls in a year and developing the system functionality in moving back to a weekly payroll.

(Contempt Pet. Exh. E, at 5-6.) As the Court will no doubt recognize, each of these changes had been part of Respondents' LBF Proposal. Each of these changes had been unilaterally implemented by Respondents on June 17, 2012, and had been ordered rescinded by the Injunctive Order.

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On March 5, the returning employees were presented with memoranda informing them that, as of 11:00 pm the previous night, their wages, benefits, and other compensation would be set according to the Bankruptcy Order. (Contempt Pet. Exh. G.)

On March 6, Jonathan Kaplan wrote a letter to John Creane stating that the employees had returned to work on March 3 under the pre-implementation terms and conditions of employment, confirming that the Centers would be modifying the pre-implementation terms and conditions according to the Bankruptcy Order, and requesting that the Union meet to resume contract negotiations. (Contempt Pet. Exh. H., at 1.)

On April 10, the Bankruptcy Court extended the interim modifications through July 15. (Contempt Pet. Exh. F, at 2-4.) The NLRB has appealed the Bankruptcy Court's decision and orders, arguing that § 1113(e) does not authorize interim relief: (i) in the absence of a current CBA; (ii) where the debtors have previously breached CBAs; or (iii) contrary to a prior federal district court injunction, where a necessary element of the Section 1113(e) relief was previously litigated and decided in that injunction litigation. The Union has also appealed. Solely as a result of the Bankruptcy Court's Order, the Petitioner is not seeking a contempt adjudication against the Centers at this time, but will re-assess the situation if and when the Bankruptcy Order is overturned, and may seek a contempt adjudication at that time if required by the extant circumstances.

Thus few of the material facts, if any, are in dispute. Neither the Centers nor Respondent HealthBridge deny that the Union-represented employees are currently working under terms and conditions of employment different than those existing on June 16, 2012.

III. ARGUMENT

A. General Applicable Principles of Civil Contempt

The Court's injunctive Order issued on December 11, 2012, and has been in full effect since January 30, 2013. It is an axiom of federal jurisprudence that an "order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings." *United States v. United Mine Workers of America*, 330 U.S. 258, 293 (1947). This is so because the "interests of orderly government demand that respect and compliance be given" to such orders, and a party who "willfully refuses his obedience, does so at his peril." *Id.* at 303. "No one, no matter how exalted his public office, or how righteous his private motive, can be judge in his own case. That is what courts are for." *Id.*, at 308-309 (Justice Frankfurter, concurring); see also, *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949) ("The [respondents] undertook to make their own determination of what the decree meant. They acted at their peril").

Injunctive orders of United States district courts are binding upon the respondent, as well as its officers, agents, employees, and attorneys. Fed. R. Civ. P. 65(d)(2). A non-party to the initial proceedings may be held in contempt if it is legally identified with the contemnor or abets the contemnor. *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 833 (2d Cir. 1930).

> A command to the corporation is in effect a command to those who are officially responsible for the conduct of its affairs. If they, apprised of the writ directed to the corporation, prevent compliance or fail to take appropriate action within their power for the performance of the corporate duty, they, no less than the corporation itself, are guilty of disobedience, and may be punished for contempt.

NLRB v. Hopwood Retinning Co., 104 F.2d 302, 305 (2d Cir. 1939) (holding company's president and principal owner liable in contempt), quoting *Wilson v. United States*, 221 U.S. 361, 376 (1911). *See also, Backo v. Local 281, Carpenters & Joiners*, 438 F.2d 176, 180 (2d Cir. 1970) (holding that officers' positions in respondent union "suggested prima facie that they had power to effect compliance with the order."); *NLRB v. Sequoia Dist. Council of Carpenters*, 568 F.2d 628, 633 (9th Cir. 1977) ("It can hardly be argued that the principal officers of a labor union are not legally identified with it, and thus liable in contempt for disobeying an order directed to the union.").

"A court has the inherent power to hold a party in civil contempt in order to enforce compliance with an order of the court or to compensate for losses or damages." *Powell v. Ward*, 643 F.2d 924, 931 (2d Cir. 1981) (citations, quotations omitted). The power of courts "to punish for contempt is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law." *SEC v. First Fin. Group of Texas, Inc.*, 659 F.2d 660, 669 (5th Cir. 1981), quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450 (1911). A respondent may be held in contempt "if the order is clear and unambiguous, the proof of noncompliance is clear and convincing, and the defendant has not been reasonably diligent and energetic in attempting to accomplish what was ordered." *Powell v. Ward*, 643 F.2d at 931 (citations, quotations omitted). The "basic proposition is that all orders and judgments of courts must be complied with promptly." *Jim Walter Resources, Inc. v. United Mine Workers of America*, 609 F.2d 165, 168 (5th Cir. 1980), citing *Maness v. Meyers*, 419 U.S. 449, 458 (1975). The contempt need not be willful. *NLRB v. Local 3,*

IBEW, 471 F.3d 399, 403 (2d Cir. 2006); *NLRB v. J.P. Stevens & Co.*, 563 F.2d 8, 16 (2d Cir. 1977).

Because a Section 10(j) decree orders a party to comply with the relevant principles of the National Labor Relations Act, it "implicitly incorporate[s] the basic principles that the Labor Board and the courts have developed to guide the application of these provisions. *Szabo v. U.S. Marine Corp.*, 819 F.2d 714, 718 (7th Cir. 1987). Thus, the court should look to labor law principles to determine whether a respondent is in compliance with its Section 10(j) order. *See id.*

Once a prima facie case for civil contempt is made, the burden shifts to the respondent to establish its defense. *Donovan v. Sovereign Sec., Ltd.*, 726 F.2d 55, 59 (2d Cir. 1984). A respondent may not defend against a civil contempt citation by trying to re-litigate the legal or factual basis of the order alleged to have been breached. *See, e.g., Local 28, Sheet Metal Workers v. EEOC*, 478 U.S. 421, 441 n. 21 (1986), and the cases cited therein. Nor may a respondent defend itself by reliance on a hyper-technical reading of an order. *John B. Stetson Co. v. Stephen L. Stetson Co.*, 128 F.2d 981, 983 (2d Cir. 1942) ("it is proper to observe the objects for which the relief was granted and to find a breach of the decree in a violation of the spirit of the injunction, even though its strict letter may not have been disregarded.")

B. <u>Respondent's Conduct Violated the Injunctive Order</u>

The Injunctive Order was clear and unambiguous. The Order, in plain, unequivocal terms, requires the Respondents – including Respondent HealthBridge specifically – to restore the June 16, 2012 terms and conditions of employment, reinstate the striking employees to their former jobs at their previous wages and other terms and

conditions of employment, and to bargain in good faith with the Union. Furthermore, Respondent HealthBridge is specifically obligated under the Injunctive Order as a joint employer with the Centers to restore the prior terms and conditions of employment. Respondent HealthBridge did little, if anything, to contest its joint-employer status in the proceedings before this Court, and it cannot now credibly deny that it is a joint employer. An issue may not be raised for the first time in a contempt proceeding where the parties earlier had the opportunity to raise the issue. *United States v. Rylander*, 460 U.S. 752, 756-57 (1983).

There is clear and convincing evidence of Respondent HealthBridge's failure to comply with the Injunctive Order. The Order requires the Respondents to reinstate the striking employees to their former jobs at their pre-implementation terms and conditions of employment. Respondents have openly admitted that the bargaining unit employees are now working under terms and conditions of employment that differ from those terms and conditions in effect on June 16, 2012. While the Centers have received permission via their bankruptcy proceedings to modify the terms of the expired CBAs, Respondent HealthBridge has received no such permission, and is still bound by this Court's Injunctive Order. Accordingly, HealthBridge should be adjudged in contempt.

Ms. Crutchfield's position as HealthBridge's Senior Vice President of Labor Relations "identifies" Crutchfield with Respondent HealthBridge, and her actions in providing the December 28, 2012 declaration constitutes prima facie evidence that Crutchfield had both knowledge of the Injunctive Order and power to effect compliance with it. Fed. R. Civ. P. 65(d)(2); *Backo v. Local 281, Carpenters & Joiners*, 438 F.2d at

180. Accordingly, Ms. Crutchfield should be adjudged in contempt as an Additional Respondent.

C. Contempt Sanctions

1. Affirmative Purgation Order, Notice Remedies; Compliance Report

Petitioner requests that the Court require Respondent HealthBridge, its officers, agents, attorneys, owners and any person acting in concert or participation with it, to, affirmatively, restore the wages, benefits , and other terms and conditions of employment that were previously in place on June 16, 2012, in compliance with the terms of paragraph 2 of the December 11, 2012 Injunctive Order. The additional recommended remedies requiring Respondent HealthBridge to post notices to employees; to file a compliance report; and to permit the Board access to requested information, are all normal civil contempt remedies in cases arising under the Act. *See, e.g., NLRB v. S. E. Nichols of Ohio, Inc.,* 592 F. 2d 326, 326-327 (6th Cir. 1974); *Oil, Chemical Workers v. NLRB,* 547 F.2d 575, 597 (D.C. Cir. 1976), cert. denied 431 U.S. 966 (1977); *NLRB v. Service Employees Local* 77, 123 LRRM 3213, 3214-3215 (9th Cir. 1986); *NLRB v. Teamsters Local 85,* 101 LRRM 2933, 2934-2935 (9th Cir. 1979); *NLRB v. Ironworkers Local 86,* 79 LRRM 2723, 2724 (9th Cir. 1972).

2. Compensatory Remedies

The recommended remedies in paragraphs 4(a) and (b) of the Contempt Petition require Respondent Healthbridge to pay the Board's costs and attorneys' fees, and to pay and the bargaining unit employees’ lost wages and fringe benefits for the period between

the effective date of the Injunctive Order – January 30 – until the time at which the June 16, 2012 terms and conditions of employment are restored.[9]

The purpose of civil contempt is not to punish but "to secure future compliance with court orders and to compensate the party that has been wronged." *Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Technologies, Inc.*, 369 F.3d 645, 657 (2d Cir. 2004), citing *Manhattan Indus., Inc. v. Sweater Bee by Banff, Ltd.*, 885 F.2d 1, 5 (2d Cir.1989), and *Vuitton et Fils S.A. v. Carousel Handbags*, 592 F.2d 126, 130 (2d Cir.1979). *See also*, *Milburn v. Coughlin*, 83 F. App'x 378, 380 (2d Cir. 2003) ("The assessment of monetary sanctions in a civil contempt proceeding serves two purposes: to coerce future compliance and to compensate the plaintiff for any harms caused by the contempt.").

With respect to the Board's costs and attorneys' fees, it is well established that respondents who are found in civil contempt are commonly required to pay the expenses and attorneys' fees incurred by the Board in the investigation, preparation and presentation of contempt proceedings. *See, e.g., Levine v. Fry Foods, Inc.*, 108 LRRM 2208, 2212 (N.D. Ohio 1979), affd. 657 F.2d 268 (6th Cir. 198 1); *Asseo v. Bultman Enterprises, Inc.*, 951 F. Supp. 307, 312 (D.P.R. 1996). *See also*, *W. E. Bassett Co. v. Revlon, Inc.*, 435 F.2d 656, 665 fn. 5 (2d Cir. 1970) ("The plaintiff in a civil contempt case may recover not less than the expenses, including counsel fees, which it has incurred in enforcing the disobeyed order of the court."). Board attorneys' fees are charged at the "prevailing rate" for hourly rates charged by the private bar in the area. *See, e.g., NLRB v. Local 3, IBEW*, 471 F.3d at 407. Petitioner will maintain on a daily basis a record of the

[9] Petitioner does not request that Ms. Crutchfield be required to pay compensatory remedies.

time spent on the contempt case by professionals. *See, Hensley v. Eckerhart,* 461 U.S. 424, 437 and n. 12 (1983); *Ramos v. Lamm,* 713 F. 2d 546, 553 (10th Cir. 1983).

It is also well settled that in civil contempt, "broad compensatory awards" are appropriate to make whole other parties injured by the contumacy. *United Mine Workers of America v. Bagwell,* 512 U.S. 821, 838 (1994), citing *Sheet Metal Workers v. EEOC,* 478 U.S. 421 (1986); *Paramedics Electromedicina Comercial,* 369 F.3d at 658 (compensatory damages should correspond to the amount of damages); *NLRB v. J.P. Stevens & Co.*, 81 LRRM 2285 (2d Cir. 1972) (awarding backpay in contempt). Accordingly, to the extent that the bargaining unit employees have lost wages because of Respondent Healthbridge's failure to comply with the Court's Injunctive Order, they should be made whole by Respondent HealthBridge.

3. Prospective Fines

In order to coerce Respondent Healthbridge and the Additional Respondent to fully comply with the terms of the injunctive Order and the Court's Contempt Order, and to refrain from further breaches of either Order in the future, Petitioner seeks the imposition of a prospective fine schedule. It is well recognized that prospective compliance fines may be assessed in a civil contempt proceeding in order to insure future compliance with court orders. *NLRB v. J.P. Stevens & Co.,* 81 LRRM 2285; *NLRB v. Local 3, IBEW,* 471 F.3d at 406. *See also, NLRB v. A-Plus Roofing,* 39 F.3d 1410, 1419 (9th Cir. 1994); *NLRB v. S.E. Nichols of Ohio, Inc.*, 592 F.2d at 327; *Humphrey v. Southside Electric Cooperative, Inc.,* 104 LRRM 2589, 2592 (E.D. Va. 1979) (contempt proceeding under Section 10(j)). Daily compliance fines have been found appropriate in Board contempt proceedings. *See, e.g., NLRB v. Local 3, IBEW,* 471 F.3d at 405; *NLRB*

v. A-Plus Roofing, 39 F.3d at 1419; *Clark v. Int'l Union, UMWA*, 752 F. Supp. 1291, 1294 (W.D. Va. 1990) (contempt proceeding under Section 10(j)).

Accordingly, Petitioner has requested a prospective fine of $10,000 against Respondent Healthbridge, and a daily compliance fine of $500 per day, upon the failure of Respondent Healthbridge to comply with each of paragraphs 3(a) – (g) of the recommended remedies in the Petition. *See, e.g., United States v. United Mine Workers,* 330 U.S. 258, 304 (1947); *Perfect Fit Ind., Inc. v. Acme Quilting Co.,* 673 F.2d 53, 57 (2d Cir.), cert. denied 459 U.S. 832 (1982). Petitioner seeks prospective fine of $5,000 against the Additional Respondent, and a daily compliance fine of $150 per day, upon the failure of Respondent HealthBridge to comply with each of paragraphs 3(a) – (g) of the recommended remedies in the Petition. Further, Petitioner seeks a separate prospective fine of $5,000 against Respondent Healthbridge and $1,000 against the Additional Respondent for each future violation of any other provision of the December 11, 2012 Injunctive Order.

IV. CONCLUSION

Based upon the foregoing, Petitioner has shown, by clear and convincing evidence, that Respondent Healthbridge did not, and is not, complying with the Court's Injunctive Order because bargaining unit employees are working under terms and conditions of employment different from those previously in place on June 16, 2012. Accordingly, Respondent Healthbridge and Additional Respondent should be found in contempt of the Injunctive Order, and the Court should impose upon Respondent Healthbridge and the Additional Respondent the order requested in the Petition for Contempt, to purge Respondent Healthbridge and the Additional Respondent of its

contumacious conduct, and to coerce Respondent Healthbridge and the Additional Respondent from engaging in further future breaches of the Court's Injunctive Order.

Respectfully submitted this 30th day of May, 2013.

___/s/ John McGrath_____
John A. McGrath
Phv No. 04849
Thomas E. Quigley
Federal Bar No. CT 05126
Attorneys for Petitioner,
National Labor Relations Board

APPENDIX R

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 01-62 **May 10, 2001**

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Richard A. Siegel, Associate General Counsel

SUBJECT: Use of Special Informal Settlement Language in Cases with Outstanding Section 10(j) - 10(l) Injunctions

From time to time, cases in which the Board has obtained interim Section 10(j) or 10(l) relief are subsequently settled by an informal settlement agreement. This Memorandum provides revised settlement language that should be used in such cases to avoid any questions that the injunction continues in effect during the compliance period. Use of this language will insure that there is no procedural impediment to instituting proceedings for contempt of the injunction if a respondent fails to comply with the settlement.

Section 10(j) and 10(l) of the Act permit the Board to obtain temporary injunctive relief to remedy unfair labor practices pending the entry of the Board's final remedial order. It is well settled that any Section 10(j) or 10(l) injunctive order terminates by operation of law upon the Board's final disposition of a case.[1] We would normally take the position that the closing of a case on compliance, rather than execution of a settlement agreement, is the more accurate time for determining that a settled case has been "finally disposed of."

The language of the standard form informal settlement agreement currently provides, however, that approval of the settlement agreement constitutes withdrawal of the complaint. This provision creates the potential for a respondent to conclude that the case has been disposed of with the execution of the settlement and that the injunction thereupon expires by operation of law. Such an interpretation could interfere with our ability to institute proceedings for contempt of the injunction based on continued

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[1] See *Sears, Roebuck & Co. v. Carpet, Linoleum, etc. Local Union No. 419*, 397 U.S. 655 (1970) (final decision of Board in ULP proceeding ends 10(l) jurisdiction); *Levine v. Fry Foods, Inc.*, 596 F.2d 719 (6th Cir. 1979) (same principle under Section 10(j)); *Barbour v. Central Cartage Co.*, 583 F.2d 335 (7th Cir. 1978) (same); *Johansen v. Queen Mary Restaurant Corp.*, 522 F.2d 6 (9th Cir. 1975) (same).

misconduct during the compliance period, even if such action would constitute a breach of the settlement agreement sufficient to justify setting aside the agreement and litigating the unfair labor practice case.

Accordingly, to preserve the Board's authority to seek contempt sanctions under the 10(j) or 10(l) decree, and to avoid a controversy over the continued viability and enforceability of the outstanding 10(j) or 10(l) injunction during the compliance period of the settlement, the Region should modify the language of the standard form Board settlement agreement to make it perfectly clear that the respondent's entering into the settlement will not result in the withdrawal of the ULP complaint, dismissal of the charge or the vacating of the 10(j) or 10(l) injunction. Rather, by use of the special language set forth infra, the Region will clearly put the respondent on notice that the ULP complaint will be withdrawn and/or the charge will be dismissed only after the case is closed on compliance and that the 10(j) or 10(l) decree will remain in effect and enforceable as long as the complaint is outstanding or the charge still pending. This will permit the Board to initiate contempt proceedings before the district court, when otherwise warranted, where the misconduct takes place prior to the close of the compliance process.

Thus, when informally settling the underlying administrative case where the Board has obtained a Section 10(j) or 10(l) injunction, the Region should modify the standard informal settlement agreement by substituting, for the final sentence in the paragraph "Refusal to Issue Complaint," the following:

> The Complaint and any Answer(s) in [the captioned administrative cases and numbers] shall be withdrawn only upon closing of these matters on compliance. The Respondent agrees not to move to vacate, modify, dissolve, clarify or alter the injunction decree in [caption and case number of the Section 10(j) or 10(l) decree] on the basis that this Settlement Agreement has been reached. The closing of these matters on compliance will be considered the final adjudication of these cases before the Board for the purposes of [caption and case number of the Section 10(j) or 10(l) decree]. Until these matters have been closed on compliance, the injunction in [caption and case number of the Section 10(j) or 10(l) decree] will continue in full force and effect for all purposes.

If a Section 10(l) decree is obtained prior to the issuance of the ULP complaint, the special language of the settlement should be modified to provide that the dismissal of the charge will be held in abeyance until the case closes on compliance.

The Regions are instructed to seek such special language in all cases where respondents are prepared to enter into informal settlements after the entry of Section 10(j) or 10(l) injunctions. The Regions should continue to use established criteria in deciding whether a particular case can be adjusted through an informal settlement agreement. See Casehandling Manual (Part One), Section 10140.2. If a respondent is unwilling to accept

the special language described supra, the Region should consult with the Injunction Litigation Branch.

Any questions concerning this matter should be addressed to your Assistant General Counsel or Deputy.

/s/
R. A. S.

cc: NLRBU

Release to Public

APPENDIX S-1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Cornele A. Overstreet, Regional Director of the Twenty-Eighth Region of the National Labor Relations Board, for and on behalf of the National Labor Relations Board, Petitioner, vs. Cactus Bay Apparel, Inc., Respondent.	No. CV 12-00410-PHX-NVW **CONSENT DECREE**

A Petition for Temporary Injunction Under Section 10(j) of the National Labor Relations Act (Petition) having been filed herein on February 27, 2012, by Cornele A. Overstreet, Regional Director for the Twenty-Eighth Region of the National Labor Relations Board (Board), for and on behalf of the Board, praying for a temporary injunction pursuant to Section 10(j) of the National Labor Relations Act (Act), as amended, pending the final disposition of said matters before the Board, and the parties having thereafter consented to the entry of the within order, it is therefore,

IT IS ORDERED, ADJUDGED, AND DECREED that pending the final disposition of the matters involved before the Board, Respondent, Cactus Bay Apparel, Inc., its officer representatives, agents, servants, employees, attorneys, successors, and

assigns, and all persons acting in concert or participation with it or them, be, and hereby is, enjoined and restrained from:

(a) threatening its employees by informing them they are being discharged because they engaged in concerted activities with other employees;

(b) threatening its employees by having a uniformed police officer present when they are being discharged;

(c) laying off or discharging its employees, or causing its employees to quit, because they engaged in concerted activities, including, but not limited to, by bringing their work-related complaints to Respondent, to ADOSH, or to other third parties;

(d) discharging its employees because of their Union membership or support;

(e) failing or refusing to recognize and bargain in good faith with the United Food and Commercial Workers Union, Local 99, AFL-CIO (Union) as the exclusive collective-bargaining representative of employees in the following unit (Unit):

> All full-time and regular part-time production, shipping, and receiving employees employed by Respondent at its Phoenix, Arizona manufacturing facility, excluding all other employees, office clericals, confidential employees, guards, and supervisors as defined in the Act; and

(f) in any other manner interfering with, restraining, or coercing its employees in the exercise of their Section 7 rights.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Respondent, its officers, representatives, agents, servants, employees, attorneys, successors, and assigns, and all persons acting in concert or participation with it or them, pending the final disposition of the matters involved herein pending before the Board, **HEREBY AGREES TO TAKE THE FOLLOWING AFFIRMATIVE ACTIONS:**

(a) Within five (5) days of the Court's issuance of this Order, offer, in writing, Maura Karina Ortiz aka Victoria Carranza De Ortiz (Ortiz), Elba Tenchilt (Tenchilt), and Maria Antonia Vargas (Vargas) immediate reinstatement to their former respective positions, and if such jobs no longer exist, to substantially equivalent positions, without any loss to their seniority rights or any other privileges;

(b) Within fourteen (14) days of the Court's issuance of this Order, remove from its files, any and all records of its discharges of Ortiz, Laura Giron (Giron), Rosa Jurado (Jurado), Benito Sanchez (B. Sanchez), Tenchilt, and Vargas, and of its constructive discharge of Rosa Isela Chavira (Chavira), and within three (3) days thereafter, notify Ortiz, Giron, Jurado, B. Sanchez, Tenchilt, Vargas, and Chavira, respectively, in writing that this was done, and that the material removed will not be used as a basis for any future personnel action against them or referred to in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or otherwise used against them;

(c) Post copies of this Order at Respondent's facility, as well as translations of this Order in Spanish and languages other than English as necessary to ensure effective communication to Respondent's employees as determined by the Regional Director, said translations to be provided to Respondent by the Regional Director, in all places where notices to its employees are normally posted; maintain these postings during the Board's administrative proceeding free from all obstructions and defacements; grant all employees free and unrestricted access to said postings; and grant to agents of the Board reasonable access to its facilities to monitor compliance with this posting requirement;

(d) In addition to physical posting of paper copies of this Order, distribute the Court's Order electronically, such as by e-mail, posting on an intranet site or an internet site, or other electronic means, if Respondent customarily communicates with its employees by such means. Respondent shall e-mail to the Regional Director, to the attention of Region 28's Compliance Officer, at Miguel.Rodriguez@nlrb.gov, a link to the electronic posting location on the same day as the posting. In the event that passwords or other log-on information is required to access the electronic posting, Respondent agrees to provide such access information to the Region's Compliance Officer. If the Notice is distributed via e-mail, Respondent will forward a copy of the e-mail distributed to the Region's Compliance Officer;

(e) Within ten (10) days of the Court's issuance of this Order, hold a meeting or meetings at which the Court's Order is to be read to the employees by a responsible agent of Respondent, by or in the presence of Murray Cohen, Lynee Carlson, and Lorena Orive, or the successor to any of these individuals, and in the presence of an agent of the Board, or, at Respondent's option, by a Board Agent in the presence of Cohen, Carlson, and Orive, or the successor to any of these individuals, to all employees employed by Respondent at Respondent's facility, including at multiple meetings and in Spanish and other languages, if necessary as determined by the Regional Director, to ensure that it is read aloud to all employees;

(f) Recognize the Union as the collective-bargaining representative of the Unit;

(g) Bargain in good faith with the Union with respect to rates of pay, wages, hours of work, and other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement; and

(h) Within twenty days of the Court's issuance of this Order, submit to the Court and the Regional Director for Region 28 of the Board a sworn affidavit from a responsible agent of Respondent stating, with specificity, the manner in which Respondent has complied with the terms of the Court's Order.

This Order shall expire upon the issuance of the Board's final order, and service of said order by the Board on Respondent, in the underlying administrative proceedings in Board Consolidated Cases 28-CA-068006 and 28-CA-071581.

DATED this 6th day of March, 2012.

Neil V. Wake
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Rik Lineback, Regional Director of the Twenty-fifth Region of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD Petitioner	)	
v.	)	CIVIL NO. 1:10-cv-1647-WTL-MJD
SPURLINO MATERIALS, LLC, or in the Alternative SPURLINO MATERIALS OF INDIANAPOLIS, LLC, or in the alternative SPURLINO MATERIALS, LLC and SPURLINO MATERIALS OF INDIANAPOLIS, LLC, a single integrated employer Respondent	)	

CONSENT AGREEMENT

On December 17, 2010, Petitioner, for and on behalf of the National Labor Relations Board ("the Board"), filed a Petition pursuant to Section 10(j) of the National Labor Relations Act (61 Stat. 149: 73 Stat. 544; 29 U.S.C. 160(j))("the Act"), and filed an Amended Petition on February 7, 2011, praying, inter alia, for issuance of an order enjoining and restraining Spurlino Materials, LLC, and Spurlino Materials of Indianapolis, LLC, (hereinafter collectively called "Respondent") from engaging in certain acts and conduct in violation of Section 8(a)(1) and (3) of the Act, pending the final disposition of the matters involved herein pending before said Board.

On March 18, 2011, Respondent offered to return to work all 12 bargaining unit drivers who had been on strike. Eleven of the bargaining unit drivers accepted the offer and returned to work.

The Parties, by their signatures below, having advised this Court of their desire to dispose of this matter by summary entry of a consent order, and without waiving their respective rights under the Act,

IT IS HEREBY ORDERED that pending the final disposition of the underlying unfair labor practice case by the Board, Respondent, its officers, representatives, agents, servants, employees, attorneys and all persons acting in concert, or participation with it or them are:

1. Enjoined and restrained, pending final disposition of the matters involved herein which are now pending before the Board, from in any manner or by any means:

(a) failing and refusing to reinstate or otherwise discriminate against its employees in regard to hire or tenure of employment or any term or condition of employment because of their protected concerted and union activity, including their engagement in an unfair labor practice strike, and

(b) in any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. **IT IS FURTHER ORDERED** that Respondent take the following affirmative actions:

(a) to the extent that Respondent has not already done so, immediately reinstate strikers Matthew Bales, Jason Mahaney, Eric Kiefer, Terry Mooney, Keith Payne, Blackston Poindexter, Jimmy Riggs, Timothy Rodgers, Jeffery Ipock, Daniel Shaw, Samuel Southerland, and Ryan Truex;

(b) withdraw its August 11, 2010 letter and any other written notification to the Union and/or employees informing them that the strikers had been permanently replaced and placed on a preferential hiring list;

(c) post copies of this Order at its Indiana facilities in Indianapolis and Noblesville at all locations where notices to employees customarily are posted, maintain said postings during the pendency of the Board's administrative proceedings free from all obstructions and defacements, and grant agents of the Board reasonable access to its facilities to monitor compliance with the posting requirement; and

(d) within twenty (20) days of the issuance of this Order, file with the Court a sworn affidavit from a responsible official of the Respondent setting forth with specificity the manner in which the Respondent has complied with the terms of this decree, including how it has posted the documents required under this Order. A copy of this sworn affidavit shall also be filed with the Regional Director of Region 25 of the Board.

SIGNED at Indianapolis, Indiana, this 22d day of April 2011.

Kimberly R. Sorg-Graves
Counsel for Petitioner
National Labor Relations Board
Region Twenty-Five
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jhanson@scopelitis.com
jfinklea@scopelitis.com

APPROVED AND SO ORDERED this 04/26/2011

Hon. William T. Lawrence, Judge
United States District Court
Southern District of Indiana

APPENDIX S-2

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

* **

HUGH FRANK MALONE, Regional Director
of Region 15 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,

CIVIL ACTION
NO.

Petitioner,

v.

BEAIRD INDUSTRIES, INC.,

Respondent.

* *

Model

STIPULATION AND ORDER CONTINUING CASE UNDER 29 U.S.C. SECTION 160(j)

IT IS HEREBY STIPULATED AND AGREED by and between the Petitioner, Hugh Frank Malone, Regional Director of Region 15 of the National Labor Relations Board, for and on behalf of the National Labor Relations Board ("the Board") and the Respondent, Beaird Industries, Inc. ("the Company"), by their respective attorneys and subject to the approval of the Court, that:

1. On [date], after securing authorization from the Board, the Petitioner, for and on behalf of the Board, filed a petition with this Court pursuant to Section 10(j) of the National Labor Relations Act, 29 U.S.C. Section 160(j), seeking a temporary injunction against the Company, pending the final administrative disposition of certain unfair labor

practice charges now pending before the Board, from violating Section 8(a)(1)[, (3) and (5)] of the Act, 29 U.S.C. Section 158(a)(1)[,(3) and (5)].

2. In consideration of the following undertakings of the Company, the Board agrees that the hearing before the Court on this Petition [now scheduled for {date}]shall be postponed indefinitely and that this cause of action shall be placed on the Court's inactive docket.

3. The parties further agree that the Company, pending the Board's final administrative adjudication of NLRB Cases 15-CA-11334-1, et al., will cease and desist from:

(a) Failing or refusing to recognize the United Automobile, Aerospace and Agricultural Implement Workers of America ("the Union") as the exclusive collective-bargaining representative of its employees in the appropriate unit, of which the Union was certified as the exclusive bargaining representative on March 30, 1990;

(b) Failing or refusing to meet and bargain in good faith with the Union upon request;

(c) Failing or refusing to provide relevant information requested by the Union; and

(d) In any other manner failing or refusing to recognize and, upon request, bargain in good faith with the Union as the exclusive collective-bargaining representative of its employees in the unit of which the Union was certified as the exclusive bargaining representative on March 30, 1990.

4. The parties further agree that the Company will affirmatively continue, pending administrative completion of NLRB Cases 15-CA-11334-1, et al., to engage in the following affirmative conduct:

(a) Recognize and, upon request, meet and bargain in good faith with the Union as the exclusive collective-bargaining representative of its employees in the unit of which the Union was certified as the exclusive bargaining representative on March 30, 1990; and

(b) Promptly provide the Union with all requested information relevant to bargaining.

5. The parties further agree that if, upon investigation, the Board concludes that there is [reasonable cause to believe][a likelihood of success in demonstrating][1] that the Company, after the date of this stipulation, has resumed any of the acts or conduct described in paragraph 3, above, or failed to perform any of the acts or conduct set out in paragraph 4, above,

(a) the Board shall by motion apply to this Court for, and be granted, notwithstanding any local rule of this Court, an expedited hearing to be conducted no less than seven (7) days after said motion is filed, for the purpose of determining whether such [reasonable cause][likelihood of success][2] exists that the Company has failed to comply with the undertakings described in paragraphs 3 or 4, above; and

[1] Choose the language appropriate to the 10(j) standards in the applicable circuit.

[2] See fn. 1, ante.

(b) if the Court concludes that such [reasonable cause][likelihood of success][3] as alleged by the Board does exist, the Company shall not contest that interim injunctive relief is otherwise just and proper and the Court shall enter a temporary injunctive order to require the Company, pending the Board's final administrative adjudication of NLRB Cases 15-CA-11334-1, et al., to cease and desist from the conduct as described in paragraph 3, above, and to comply with the affirmative conduct described in paragraph 4, above.

6. Unless the provisions of paragraph 5, above are invoked by the Board, this case shall remain on the inactive docket of the Court pending the Board's final administrative adjudication of NLRB Cases 15-CA-11334-1, et al. After final disposition of these unfair labor practice cases, currently pending before the Board, the Board shall

[3] See fn. 1, ante.

cause this proceeding, including any injunctive order(s) issued by the Court pursuant to the provisions of paragraph 5, above, to be dismissed with prejudice and without costs to either party.

DONE at New Orleans, Louisiana on the date set forth below:

_____	_____
[Name]	[Name]
Counsel for Petitioner	Counsel for Respondent
[Address]	[Address]

Dated at _____
this ___ day of _____, 1995

APPROVED AND SO ORDERED this ___ day of _____, 1995.

_____
Judge [name]
UNITED STATES DISTRICT COURT