

Fall 1984

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Recommended Citation

Schatzki, George (1984) "Some Observations About the Standards Applied to Labor Injunction Litigation Under Sections 10(j) and 10(1) of the National Labor Relations Act," *Indiana Law Journal*: Vol. 59 : Iss. 4 , Article 2.

Available at: <http://www.repository.law.indiana.edu/ilj/vol59/iss4/2>

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Some Observations About the Standards Applied to Labor Injunction Litigation Under Sections 10(j) and 10(l) of the National Labor Relations Act

GEORGE SCHATZKI*

Recently, I gave a lecture to a seminar of federal judges. In preparing the talk, which was about the National Labor Relations Act's¹ authorization of injunctions in exception to the Norris-LaGuardia Act's² general preclusion of such authority for federal courts, I confirmed what I had suspected at first impression: the judiciary has reverted significantly, although not universally, to some practices of pre-Norris-LaGuardia days. In dealing with the NLRA's sections 10(l) and 10(j), the courts often practice two standards. As for section 10(l), which is aimed almost entirely at unions, federal courts are inclined virtually to rubber-stamp National Labor Relations Board requests for injunctions. However, in considering applications for section 10(j) injunctions, which are primarily aimed at employers, the courts are inclined—especially when employers are the respondents—to be more critical of the Board's petition and, as a result, often deny or significantly qualify the requested relief. The Norris-LaGuardia Act was enacted to prevent federal courts from interfering with union activities. Serving as a backdrop to sections 10(l) and 10(j), the Norris-LaGuardia Act suggests that, if there were to be a double standard, it would work in a manner opposite to the one that has evolved.

The first two sections of this article briefly summarize the events leading to the Norris-LaGuardia Act and to the enactment of the two explicit exceptions in the National Labor Relations Act. Next, I attempt to set out and critique what the courts are doing. Finally, I urge standards which I think should be applied to both section 10(l) and section 10(j) cases.

I. ADOPTION OF THE NORRIS-LAGUARDIA ACT

Prior to 1932, there was almost no federal legislation regarding labor relations.³ Despite this absence of statutory law, the federal courts had little difficulty exercising jurisdiction over cases in which employers and industrial producers sought injunctions against work stoppages and picketing.⁴ At the

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1. 29 U.S.C. §§ 151-169 (1982).

2. *Id.* §§ 101-115.

3. However, there was the Railway Labor Act, ch. 347, 44 Stat. pt.2, 577-87 (1926) (current version at 45 U.S.C. §§ 151-164 (1982)), which applied, at that time, only to the railroads.

4. See F. FRANKFURTER & N. GREENE, *THE LABOR INJUNCTION* (1930), for a rich description of the uses of the "labor injunction" in the federal courts during the period preceding the Norris-LaGuardia Act.

time, most unions had little money in their coffers; legal remedies against them were unlikely to be adequate. Moreover, injunctions were of far more importance than damages to the employers, who were attempting to stop union organizational drives at their outset. An injunction would not only remove the economic coercion that a union was applying, but also it would protect the employer from being forced to make any immediate economic concessions until the court determined whether the strike and picketing were properly enjoined on the full merits of the case. In the absence of any gains, employees, who were often coerced by their employers to abandon or avoid unions, lost whatever interest they had, and the union's organizational drive died. Thus, the employer won in the courts its battle to keep the union out of its shop. In this scenario, the injunction played a crucial part.

Though some state courts were also available to employers seeking relief from union activities, oftentimes these courts were not available either because state substantive law precluded recovery (that is, the unions' activities were protected by state common or statutory law) or because the state courts were precluded from granting injunctions.⁵ Contrarily, the federal courts had little sympathy for strikes and picketing which interfered with the owners' use of their capital. Due to some favorable, although questionable, interpretations of federal antitrust laws, in particular, and of federal common law, in general, employers flocked to federal courts to obtain injunctions.

Over a period of years, the federal court labor temporary restraining order and injunction became notorious. The procedures were stacked against the unions. An employer would seek an *ex parte* restraining order based only on affidavits. Without notice to the union, the federal district court would grant the order, issue it to the world, and expect that world—including union sympathizers—to honor the widely aimed prohibition. Everyone might be restrained from doing anything that might help the strike; often, the tabu was just that vague. Additionally, it was not uncommon for many of the intended restraints never to receive notice of the order. Contempt proceedings frequently followed. Without the aid of a jury, the same judge who issued the order would imprison or fine union leaders, members, and sympathizers for activities that today would often be viewed as benign.

The second reason the federal court labor injunction was viewed with suspicion was that the substantive standards, already referred to, were strongly shaped against the unions' interests. Both the procedural and the substantive rules were entirely a product of the federal judiciary.

In 1932, after a number of years of agitation for reform of this situation, Congress passed and President Hoover signed into law the Norris-LaGuardia

5. At one point in time, the Supreme Court of the United States even held that these state efforts to help unions were unconstitutional. See *Coppage v. Kansas*, 236 U.S. 1 (1915); *Truax v. Corrigan*, 257 U.S. 312 (1921).

Act. This statute removed from the federal courts the jurisdiction⁶ to hear any case arising out of a "labor dispute" (which was broadly defined),⁷ in which the plaintiff sought either a temporary restraining order or an injunction.

What Congress was attempting to accomplish with the passage of this Act is unclear, because there are significant variables that are neither seriously addressed nor resolved by the statute or its legislative history.⁸ One of those variables is whether unions *and* management are protected by the Norris-LaGuardia Act, or whether only unions are given the benefit of the statute.⁹

There can be no doubt that Congress meant, at least, to protect unions. Though there are some meager legislative threads which hint that employers might also be protected by the Act,¹⁰ it is unquestionable that Congress had two major and ubiquitous concerns which proved to be the overwhelming moving forces for the passage of the Act. First, there was deep concern that, through the device of temporary injunctions, the courts were resolving labor disputes without the merits of the disputes ever being seriously addressed and without even a semblance of fairness in the process.¹¹ Second, the federal courts were viewed as unnecessarily unsympathetic to the labor movement, its objectives, and its methods. It was the view of Congress that, combined, these two concerns amounted to the federal courts, consciously or not, aligning themselves with employers' efforts to prevent labor unions' successful organizing.¹²

In the years that followed the Norris-LaGuardia Act, the federal courts abided by the congressional limitation on their powers.¹³ Following World

6. The Norris-LaGuardia Act was written as a jurisdictional statute because Congress had good reason to fear that the Supreme Court would rule unconstitutional any direct legislative attempt to prohibit the issuance of injunctions in labor disputes. See *Truax v. Corrigan*, 257 U.S. 312 (1921) (striking down, on equal protection grounds, an Arizona statute which prohibited injunctions in labor disputes, but not in other situations).

7. The legislation did leave the courts free to grant injunctions in exceptional situations, but only if tightly constructed procedures were followed.

8. One of these variables is whether Congress meant to include disputes arising out of collective bargaining contracts, which clearly were not of any concern to the legislators at the time they wrote the Act. This is a question more relevant to issues arising under section 301 of the NLRA, and not to the matters addressed in this article.

9. A second variable is whether all activities and types of controversies (if in a "labor dispute" context) were removed from court overview, or whether only those activities of which Congress was aware or about which it was concerned in 1932 were removed.

10. See S. REP. No. 163, 72d Cong., 1st Sess. 19 (1932); 75 CONG. REC. 4929 (1932).

11. See 75 CONG. REC. 4929 (1932).

12. *Id.*

13. See, e.g., *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n*, 457 U.S. 702 (1982). This judicial acceptance of a legislative restriction on the courts' authority may strike some as a little surprising, especially if one believes that the federal judges continue to be less than enthusiastic about the labor movement and its methods. While the language of the Act surely explains a good deal of the judicial acquiescence, the courts have gone further than one might have expected. In my judgment, the major reasons for this expansive view of the courts in limiting their own jurisdiction is that the federal courts have regularly interpreted jurisdictional statutes narrowly; the other, but entirely consistent, side of that practice is that the courts will interpret broadly limitations on their own jurisdiction.

War II, the labor movement—which, to a considerable extent, had refrained from use of economic coercive activities until the close of the hostilities—engaged in widespread work stoppages to regain what it believed it had voluntarily lost during the war. There was a negative societal reaction to the disruptions caused by the labor movement. In response, the Taft-Hartley Act, a series of amendments to the Wagner Act of 1935, was passed in 1947. For the first time, Congress had enacted substantive prohibitions against union activities. Additionally, as part of the Taft-Hartley Act, sections 10(*l*) and 10(*j*) provided authority for labor injunctions to be issued by federal courts.

II. SECTIONS 10(*l*) and 10(*j*)

Section 10(*l*), which has become known as the “mandatory” injunction provision of the Act, states that should the Board’s regional personnel have “reasonable cause to believe” that a charge of a violation of specifically identified unfair labor practices is true and that a complaint should issue, they “shall” petition the appropriate federal district court for an injunction. This language sets out a mandatory standard for Board action. What constitutes “reasonable cause to believe” that there is a violation of a relevant provision of the Act is a substantial question which is not resolved by the “mandatory” quality of the section.

Upon receiving such a petition for an injunction, section 10(*l*) directs the district court to give notice to the union and to give the union the opportunity, through representation, to present testimony. The court has the “jurisdiction to grant such injunctive relief as it deems just and proper, notwithstanding any other provision of law.”¹⁴ The last clause is an obvious reference to the Norris-LaGuardia Act.

Thus, the court’s burden, after notifying the union and hearing its “testimony,” is to do the “just and proper” thing. But, what does “just and proper” mean? That is “where the horse is buried.” At first blush, the phrase appears to refer only to the traditional equitable powers of the courts.¹⁵ The words do not even hint that a court has a mandatory obligation to issue the sought-after injunction. At a minimum, the statute implicitly requires the

14. Indeed, the Supreme Court has readily accepted a sweeping definition of “labor dispute,” thus giving the Act’s prohibition a broad reach. These procedural provisions provide considerably more safeguards for respondent unions than existed prior to the Norris-LaGuardia Act, although Norris-LaGuardia had imposed even stricter procedural barriers to the granting of an injunction. See Norris-LaGuardia Act §§ 6-10, 29 U.S.C. §§ 106-110 (1982). In holding that a respondent was not entitled to a jury trial for alleged contempt of a section 10(*l*) injunction, however, the Supreme Court has suggested that none of Norris-LaGuardia’s procedural limitations apply to section 10(*l*) and section 10(*j*) proceedings. *Muniz v. Hoffman*, 422 U.S. 454 (1975).

15. Congress hardly talked about the standards to be applied to section 10(*l*) injunctions. Senator Morse, a sponsor of the provision, opined, “[W]e have given to the courts certain discretionary power in issuing injunctions” 93 CONG. REC. 4840 (1947).

court to determine whether there is "reasonable cause to believe" that the union has violated the Act and to ascertain what is the "just and proper" manner to deal with a case in which that reasonable cause does exist. In this author's judgment, the interplay of these two substantive questions left to the courts—what is "reasonable cause to believe" and what is "just and proper"—is such that answers to one question necessarily affect answers to the other. Put differently and more directly, one should always remember that what is important to the parties, and probably to the judge, is not the meaning to be given the statutory phrases or how they apply in a given case; what is important is whether the injunction is granted.

Section 10(j) clearly differs from the mandatory injunction provision. One important distinction between section 10(j) and section 10(l) is that the former authorizes injunctions for *any* type of unfair labor practice. In that respect, it is significantly broader in scope than section 10(l). While the section may be broader, the opportunity for the district courts to grant injunctions is significantly narrower than in section 10(l) cases because the Board is merely authorized—not compelled—to seek injunctions pursuant to section 10(j). The "mandatory" quality of section 10(l) is missing. This means that district courts see section 10(j) petitions only when the Board chooses to seek an injunction. Clearly, the choice is for the Board to make. Though there are other differences expressed in the wording of the two sections, the two distinctions described in this paragraph are the most important ones.

Section 10(j) does not have a provision requiring that the Board have reasonable cause to believe there has been a violation, but the section does require that the Board issue a complaint in the case before seeking an injunction. The "jurisdictional fact," then, is the issuance of a complaint. In such a case, as in the section 10(l) cases, the district court is authorized to issue relief it determines to be "just and proper." These provisions, on their face, do not suggest a different role for the court than does section 10(l).¹⁶ For the General Counsel of the Board to have properly issued a complaint, there surely must have been reasonable cause to believe the Act had been violated. The phrase, "just and proper," is identical to the phraseology contained in section 10(l). Under section 10(j), then, the court must determine whether

16. The injunction provisions found in sections 10(l) and 10(j) originated in the Senate. In setting out justification for the two provisions, the Senate Report did not differentiate between them.

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

S. REP. NO. 105, 80th Cong., 1st Sess. 8 (1947).

the complaint was properly issued (to wit, whether there was "reasonable cause to believe" a violation had been committed) and what is the "just and proper" thing to do.

On the basis of this statutory language and background, one can attempt a few observations about the comparative ease with which the Board should be able to obtain injunctions. While the two provisions in the NLRA clearly are a legislative rescission of some aspects of the Norris-LaGuardia Act, as a matter of general federal law it is still true that labor injunctions, especially against unions, are not viewed as a "good thing" because the continued existence of the Norris-LaGuardia Act reflects a congressional discomfort with federal courts' granting such injunctions. This observation does not negate the express provisions of sections 10(*l*) and 10(*j*); it merely proposes that the Act is still part of the fabric of federal labor law legislation and provides an important backdrop to understanding sections 10(*l*) and 10(*j*).

In the opposite vein, however, the requirement that the Board seek injunctions aimed at conduct almost entirely the doing of unions may indicate that Congress did want unions enjoined in a more aggressive fashion than employers. That is, whether or not the courts are directed in the same "mandatory" fashion as is the Board, there can be little question—on the face of the statute at least—that Congress did not want the Board to have the discretion to keep from the court's consideration the propriety of injunctive relief in unfair labor practices cases to which section 10(*l*) is addressed. It is not clear whether this judgment reflected stronger congressional views against the unions' activities than against the employers' activities, or whether it reflected a lack of trust in the Board and its agents to pursue the unions with sufficient aggressiveness. It may well have been both. In any event, the language is at least some support for more judicial action in section 10(*l*) cases than in section 10(*j*) cases.

One must also note, however, that if the courts rubber-stamp the Board's efforts by always granting the sought-after relief whenever only "reasonable cause" is found to exist, section 10(*l*) injunctions will be issued without anyone—the Board, the court, or any other person or institution—ever studying the particular cases to determine whether in "this case" an injunction is appropriate. That is, if the Board determines that there is "reasonable cause to believe" there is a violation, regardless of whether it believes there is a violation of the Act, the Board must seek an injunction, even when it believes such relief is unwise or unnecessary.¹⁷ Then, if in issuing injunctive orders,

17. One case in which that hypothetical clearly occurred, *Retail Clerks Union v. Food Employers Council, Inc.*, 351 F.2d 525 (9th Cir. 1965), was rather remarkable. After petitioning for a section 10(*l*) injunction, the Board's agent and the respondent union reached an agreement to arbitrate the underlying dispute; in the interim, the union agreed not to engage in any allegedly unlawful behavior of the sort being attacked. Both parties, the Board and the union, requested that no injunction issue. Nevertheless, the district court granted the injunction. Both parties, the Board and the union, appealed. The court of appeals affirmed.

the courts merely review to assure themselves that reasonable cause does exist, neither the Board nor the courts will have made any determination as to the propriety of the injunction in the particular case. While one can rationalize that Congress made that determination in writing section 10(*l*), I suggest that this is merely "putting the rabbit in the hat." Absent rather clear and commanding language from Congress that a court must issue an injunction under any and all circumstances where there has been a judgment only that there *may* be a violation, it is remarkable—especially in light of Norris-LaGuardia and its background—for courts to assume that they must grant injunctions against unions solely on the ground that there is a mandate to someone else to seek an injunction. Assuming the courts have adopted the rubber stamp role, what underlies such judicial willingness to abandon traditional equitable powers in response to such vague, ambiguous, and nondirective congressional language? This question is addressed after a discussion of what the courts have actually done.

III. JUDICIAL APPLICATION OF SECTIONS 10(*l*) and 10(*j*)

Should the courts' standards for granting or denying injunctions pursuant to section 10(*l*) be the same or different from standards applied to section 10(*j*)? The federal courts of appeals expressly disagree. Some have stated that the standard should be the same;¹⁸ others have said they should be different.¹⁹ The Third Circuit has stated that the standards are both the same and different.²⁰ Whatever the courts say the standards are, however, two conclusions can be drawn: first, no court makes it more difficult to obtain a section 10(*l*) injunction than a 10(*j*) injunction; second, many courts make it easier for the Board to get a section 10(*l*) injunction than a 10(*j*) injunction.²¹ Why?

18. See, e.g., *Kaynard v. Mego Corp.*, 633 F.2d 1026 (2d Cir. 1980) (the court applied typical section 10(*l*) review of the section 10(*j*) merits, but the court limited the remedy); *Squillacote v. Local 248, Meat & Allied Food Workers*, 534 F.2d 735 (7th Cir. 1976) (a section 10(*j*) case in which a union was respondent); *Danielson v. Joint Bd. of Coat, Suit & Allied Garment Workers' Union*, 494 F.2d 1230 (2d Cir. 1974); *Boire v. International Bhd. of Teamsters*, 479 F.2d 778 (5th Cir. 1973) (involving proceedings against a union).

19. See, e.g., *Maram v. Universidad Interamericana*, 722 F.2d 953 (1st Cir. 1983); *Minnesota Mining & Mfg. Co. v. Meter*, 385 F.2d 265 (8th Cir. 1967).

20. Compare *Eisenberg v. Hartz Mountain Corp.*, 519 F.2d 138 (3d Cir. 1975) (the standards to be applied are different) with *Eisenberg v. Wellington Hall Nursing Home, Inc.*, 651 F.2d 902 (3d Cir. 1981) (standards for sections 10(*j*) and 10(*l*) are the same).

21. I have done less than an exhaustive study of courts of appeals decisions in section 10(*l*) and 10(*j*) cases. Nevertheless, I have read virtually all opinions since 1976, and most of the earlier opinions cited frequently by later courts. On the basis of my readings, I have concluded that the Board is far more successful in obtaining section 10(*l*) relief against unions than it is in getting section 10(*j*) relief against employers. The following characterizations of the opinions must be read with a grain of salt. My conclusions for each case were based on what each appellate court wrote; if the court's description was incomplete or inaccurate, so too is my characterization. Moreover, I may have made some errors of my own. Nevertheless, the statistics are so striking that the conclusion I have drawn is, I believe, indisputable. In 24 section 10(*l*) cases,

Recently, the United States Court of Appeals for the First Circuit addressed this question and concluded that different standards ought to apply to section 10(j) and section 10(l) cases.²² The court said that the "special importance" that Congress gave to section 10(l)-type offenses indicates, "at the least, a strong presumption of irreparable harm, with the balance in favor of the charging party, and that the public interest favors the injunction."²³ Thus, all a court needs to find is "reasonable cause." If there are disputed facts, these satisfy the petitioner's burden. On the other hand, the Board has discretion under section 10(j), and it follows that the

whole panoply of discretionary issues with respect to granting preliminary relief must be addressed by the court. . . . Otherwise the court is but a rubber stamp for the Director. . . . There seems [to be] . . . a special reason for such overall weighing [by the courts], section 10(j) being in derogation of the Norris-LaGuardia Act's prohibition. . . . The Board's claim of a "strong Congressional policy in favor of temporary injunctions" is obviously accurate with respect to section 10(l). We do not find it so with respect to section 10(j).²⁴

With the single exception of the observation that the Board has discretion in section 10(j) cases, the court's entire characterization of section 10(j) is equally applicable to section 10(l) cases. Nevertheless, the language and tone of the court's opinion is, in general, an accurate reflection of what many courts of appeals have done with the two sections.

Virtually every court of appeals has stated the following three-tier standard for determining whether a district court should issue a section 10(l) injunction: (1) Can the evidence by some reasonable interpretation support the petitioner's position? If so, the petitioner's burden is met.²⁵ This means that, as the First Circuit has stated, conflicts in the testimony support the Board in the district court.²⁶ It means that reasonable inferences to be drawn from the favorable resolution of the conflicting testimony should be made.²⁷ It

the Board obtained all the relief it sought 22 times; the only two exceptions were both opinions of the Second Circuit, which has consistently marched to a more independent section 10(l) drummer than any other court of appeals. In both of the only two section 10(j) cases in which unions were respondents, injunctions were issued. Thus, unions were enjoined in 24 of 26 attempts. By way of contrast, in 16 section 10(j) cases in which employers were charged, eight times (50% of the cases) the Board obtained the sought-after relief. In four cases, the injunction was denied entirely. In four others, some relief was granted, but, in at least two of these cases, the most crucial relief was denied. See *Levine v. C & W Mining Co.*, 610 F.2d 432 (6th Cir. 1979); *Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185 (5th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976).

22. *Universidad Interamericana*, 722 F.2d 953.

23. *Id.* at 958.

24. *Id.*

25. See, e.g., *Union de Tronquistas, Local 901 v. Arlook*, 586 F.2d 872, 876 (1st Cir. 1978); *Squillacote v. Graphic Arts Int'l Union*, 540 F.2d 853, 858 (7th Cir. 1976); *Local No. 83, Constr., Bldg. Materials & Misc. Drivers Union v. Jenkins*, 308 F.2d 516, 517 (9th Cir. 1962).

26. See, e.g., *Hendrix v. International Union of Operating Eng'rs, Local 571*, 592 F.2d 437, 442 n.11 (8th Cir. 1979).

27. See, e.g., *id.* at 442; *Union de Tronquistas*, 586 F.2d at 876; *Graphic Arts*, 540 F.2d at 858.

follows that the evidentiary burden is quite low, and that live testimony is not necessary.²⁸ (2) Does the Board's legal theory have some substance; is it nonfrivolous?²⁹ Even if the theory of law is quite novel, unsettled, debatable, or merely causes "concern that there may be a violation," the courts will indulge the petitioner.³⁰ (3) Is the relief "just and proper?" That phrase should not be interpreted to have its usual or traditional meaning; the usual equity standards do not apply to prevent injunctive relief.³¹ It follows that injunctive relief follows the finding of "reasonable cause to believe," which is established by the first and second tiers.³² No real judicial discretion is exercised;³³ the injunction is to be granted. The court is a rubber stamp.³⁴

Compare this to the standards applied to section 10(j). When some courts say what the First Circuit did in *Maram v. Universidad Interamericana*,³⁵ or that section 10(j) is only for "serious" unfair labor practices,³⁶ or that violations of section 8(a) of the Act (which are aimed only at employers) do not necessarily affect interstate commerce,³⁷ or that the public interest is not necessarily impacted by employer violations of the NLRA,³⁸ it is not surprising to find that some courts of appeals endorse and practice far more strict standards for issuing section 10(j) injunctions than for 10(l) injunctions. Unlike section 10(l) cases, where evidentiary hearings are unnecessary because conflicts in the testimony need to be resolved in the petitioner's favor, there may

28. See, e.g., *Graphic Arts*, 540 F.2d at 858; *San Francisco-Oakland Newspaper Guild v. Kennedy*, 412 F.2d 541, 546 (9th Cir. 1969).

29. See, e.g., *Union de Tronquistas*, 586 F.2d at 876; *Graphic Arts*, 540 F.2d at 858; *Hirsch v. Building & Constr. Trades Council*, 530 F.2d 298, 302 (3d Cir. 1976). *Contra*, *Garment Workers' Union*, 494 F.2d at 1244.

30. See, e.g., *Solien v. United Steelworkers*, 593 F.2d 82 (8th Cir.), *cert. denied*, 444 U.S. 828 (1979) (a union distributed leaflets and advertised against a corporation which wholly owned the employer with whom the union had its dispute; the trial court refused a section 10(l) injunction; the court of appeals reversed because the Board's legal theory gave the court "concern"). See also *Operating Eng'rs*, 592 F.2d 138; *Kennedy v. Los Angeles Typo. Union No. 174*, 418 F.2d 6 (9th Cir. 1969). *Contra* *McLeod v. Business Mach. & Office Appliance Mechanics Conf. Bd.*, 300 F.2d 237 (2d Cir. 1962) (prior Board precedent did not, in the court's view, support the petitioning Board; therefore, no injunction was issued).

31. See, e.g., *Union de Tronquistas*, 586 F.2d 872 (where the union had not picketed since the unfair labor practice charge had been filed—two and one half months earlier). See also *Graphic Arts*, 540 F.2d 853; *Wilson v. Milk Drivers & Dairy Employees Union, Local 471*, 491 F.2d 200, 203 (8th Cir. 1974).

32. See, e.g., *Graphic Arts*, 540 F.2d 853.

33. See *supra* note 15 (Congress did not intend to strip courts of their usual equitable discretion).

34. Ironically, in *Retail Clerks Union v. Food Employers Council, Inc.*, 351 F.2d 525 (9th Cir. 1965), the court insisted on a section 10(l) injunction that even the Board opposed because, *inter alia*, the court did not view itself as a "rubber stamp" of the Board's personnel.

In truth, with the exception of the Second Circuit, the courts appear always to grant section 10(l) injunctions. See *supra* note 21.

35. See *supra* text accompanying notes 22-24.

36. See, e.g., *Minnesota Mining & Mfg.*, 385 F.2d 265.

37. See, e.g., *Hartz Mountain*, 519 F.2d 138.

38. See, e.g., *Minnesota Mining & Mfg.*, 385 F.2d 265.

have to be an evidentiary hearing in a section 10(j) case.³⁹ Unlike section 10(*l*) cases, the Board may have to show more than merely that there is "reasonable cause to believe."⁴⁰ Unlike section 10(*l*) cases, there is a judicial concern for not interfering unduly with Board processes by granting an injunction, even when the Board requests it.⁴¹ Unlike section 10(*l*) cases, unsettled law or a doubtful legal theory may justify denying the injunction.⁴² Finally, because there is no policy favoring the issuance of section 10(j) injunctions,⁴³ unlike section 10(*l*) cases, sometimes traditional equity standards do apply to preclude relief.⁴⁴ Therefore, the district courts have discretion⁴⁵ and are not mere rubber stamps.⁴⁶

Under section 10(*l*), district judges are told by their appellate colleagues that they must grant the injunction requested and that the relief should not be qualified either by time limits⁴⁷ or by equitable notions such as reinstating workers who are involved in the dispute giving rise to the picketing.⁴⁸ It may be proper, however, to enjoin—at least for a period of time—lawful union activity in order to disassociate in the viewers' eyes the effects of the previous unlawful picketing, which was enjoined indefinitely.⁴⁹

39. See, e.g., *Hartz Mountain*, 519 F.2d 138. *Contra*, *Seeler v. Trading Port, Inc.*, 517 F.2d 33 (2d Cir. 1975) (disputed facts do not undermine a finding of "reasonable cause to believe"); *Universidad Interamericana*, 722 F.2d 953.

40. See *Hartz Mountain*, 519 F.2d at 140-43; *Minnesota Mining & Mfg.*, 385 F.2d at 270-71; *Angle v. Sacks*, 382 F.2d 655, 660 (10th Cir. 1967). *Contra*, *Universidad Interamericana*, 722 F.2d at 958.

41. See, e.g., *Pilot Freight Carriers*, 515 F.2d at 1192-93; *Minnesota Mining & Mfg.*, 385 F.2d at 269.

42. See, e.g., *Silverman v. 40-41 Realty Assocs.*, 668 F.2d 678, 681 (2d Cir. 1982); *Hartz Mountain*, 519 F.2d at 269; *McLeod v. General Elec. Co.*, 366 F.2d 847, 850 (2d Cir. 1966). Unlike most other courts of appeals, the Second Circuit appears to apply the same standard to section 10(*l*) injunctions. See e.g., *Business Mach. & Office Appliance Mechanics*, 300 F.2d at 241-43.

43. See, e.g., *Universidad Interamericana*, 722 F.2d at 958.

44. See, e.g., *Pilot Freight Carriers*, 515 F.2d at 1189; *Boire v. International Bhd. of Teamsters*, 479 F.2d at 787 (union was respondent); *Minnesota Mining & Mfg.*, 385 F.2d at 269.

45. E.g., *Pilot Freight Carriers*, 515 F.2d at 1189, 1192.

46. See, e.g., *Universidad Interamericana*, 722 F.2d at 958; *Pilot Freight Carriers*, 515 F.2d at 1193.

47. See, e.g., *Operating Engr's*, 592 F.2d at 446; *Graphic Arts*, 540 F.2d at 860.

Lengthy delays do not justify time limits on section 10(*l*) injunctions. See *Graphic Arts*, 540 F.2d 853. In *Dawidoff v. Minneapolis Bldg. & Constr. Trades Council*, 550 F.2d 407, 414 (8th Cir. 1977), the Eighth Circuit remanded a section 10(*l*) case to the district court with instructions that the trial court, in that case, had discretion—if it chose to exercise it—to limit the duration of the injunction. The Eighth Circuit, however, does not grant district judges the discretion to limit section 10(*l*) injunctions in every case. See *Operating Engr's*, 592 F.2d at 446. I have read no section 10(*l*) case in which a federal appellate court has imposed a termination date on the imposed injunction. See *Solien v. United Steelworkers*, 593 F.2d 82, 88.

48. See, e.g., *Kaynard v. Local 282, Int'l Bhd. of Teamsters*, 576 F.2d 471, 479 (2d Cir. 1978); *Compton v. National Maritime Union*, 533 F.2d 1270, 1276-77 (1st Cir. 1976).

49. *Miller v. United Food Workers Union, Local 498*, 708 F.2d 467, 471 (9th Cir. 1983). *Accord Squillacote v. International Bhd. of Teamsters, Local 344*, 561 F.2d 31, 35 (7th Cir. 1977).

By comparison, one circuit has dictated that section 10(j) injunctions against employers should be limited to six months⁵⁰ because of judicial concern with the impact upon employers' interests of a longer preliminary injunction prior to Board resolution. The same concern may not be appropriate when a union is the section 10(j) respondent.⁵¹ Moreover, at least one court of appeals has refused to order an employer to reinstate employees pending Board resolution,⁵² and some courts refuse to order an employer to bargain with a union pending final Board resolution of the case.⁵³ Are not important union interests adversely affected by such decisions?

Finally, one should consider the standards of review on appeal. Generally, in section 10(l) cases in which the union has been enjoined by the lower courts, the appellate courts' standards are as follows: (1) Were the findings of fact "clearly erroneous?" (2) Was the lower court correct in finding that the Board's theory of law was "nonfrivolous?" (3) Was the granted injunction an abuse of discretion?⁵⁴ In cases where the district courts have issued injunctions pursuant to section 10(j), however, judicial review often appears to be quite aggressive. The courts of appeals do not talk about the "clearly erroneous" standard, and not infrequently the district courts are reversed.⁵⁵

In cases where the section 10(l) injunction has been denied, the courts of appeals consciously play a more active reviewing role and do not appear to apply the "clearly erroneous" standard.⁵⁶ One assumes that this occurs because

50. *Hartz Mountain*, 519 F.2d 138. In *Kaynard v. Mego Corp.*, 633 F.2d 1026, the court limited, on an ad hoc basis, the length of a section 10(j) injunction against an employer.

51. See, e.g., *Grupp v. United Steelworkers*, 532 F. Supp. 102 (W.D. Pa. 1982) (where no six-month limit was imposed on a section 10(j) injunction against a union, although district courts in the Third Circuit—pursuant to the *Hartz Mountain* decision—regularly impose such a limit on section 10(j) injunctions against employers). See, e.g., *Eisenberg v. Suburban Transit Corp.*, 112 L.R.R.M. (BNA) 2708 (D.N.J. 1983); *Kobell v. Cameron Mfg. Co.*, 112 L.R.R.M. (BNA) 2397 (M.D. Pa. 1982). The Third Circuit's six-month rule for section 10(j) injunctions against employers seems to be standard. See *Eisenberg v. Holland Rantos Co.*, 583 F.2d 100 (3d Cir. 1978). Apparently, the six-month limit does not apply to section 10(l) injunctions in the Third Circuit. See, e.g., *Hirsch v. System Council U-2*, 541 F. Supp. 224 (D.N.J. 1982).

52. See, e.g., *Pilot Freight Carriers*, 515 F.2d 1185. *Contra*, *Universidad Interamericana*, 722 F.2d 953; *Wellington Hall*, 651 F.2d 902; *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d 1047 (2d Cir. 1980); *Angle v. Sacks*, 382 F.2d 655.

53. See, e.g., *Pilot Freight Carriers*, 515 F.2d 1185; *Minnesota Mining & Mfg.*, 385 F.2d 265. *Contra*, *Trading Port*, 517 F.2d 33. In one interesting case, the court of appeals, in one breath, authorized a section 10(j) injunction to compel an employer to bargain and, in the next breath, reversed the lower court and refused to enjoin the employer's selling the equipment that provided employment. *C & W Mining*, 610 F.2d 432.

54. See, e.g., *Union de Tronquistas*, 586 F.2d 872; *Pilot Freight Carriers*, 515 F.2d 1185; *Milk Drivers*, 491 F.2d 200; *Warehousemen's Union Local 6 v. Hoffman*, 302 F.2d 352 (9th Cir. 1962); *Schauffler v. Local 1291, Int'l Longshoremen's Assoc.*, 292 F.2d 182 (3d Cir. 1961). *Contra*, *Garment Workers' Union*, 494 F.2d 1230 (indicating that the court, if it believes the General Counsel is wrong, will not approve a section 10(l) injunction).

55. See, e.g., *40-41 Realty Assocs.*, 668 F.2d 678; *C & W Mining*, 610 F.2d 432; *Minnesota Mining & Mfg.*, 385 F.2d 265; *Angle v. Sacks*, 382 F.2d 655.

56. See, e.g., *Solien v. United Steelworkers*, 593 F.2d 82; *Hendrix v. Amalgamated Meat Cutters*, 555 F.2d 175 (8th Cir. 1977); *Humphrey v. International Longshoremen's Assoc.*, 548 F.2d 494 (4th Cir. 1977); *Milk Drivers*, 491 F.2d 200; *Danielson v. Local 275, Laborers Int'l*

the law "favors" such injunctions.⁵⁷ Conversely, when a district judge denies a section 10(j) injunction, the courts of appeals appear to apply the "clearly erroneous" and "abuse of discretion" standards.⁵⁸

All this adds up to something that looks like a double standard. On first blush, the situation might be viewed as based on the differing language of the two sections. There is, however, another possible explanation: section 10(*l*) is aimed at unions, while section 10(j) is usually targeted for employers. To the extent that the six-month limitation on section 10(j) injunctions applies in the Third Circuit to injunctions against employers but not against unions, the employer-union double standard is clear and cannot even be rationalized in terms of the different language found in sections 10(*l*) and 10(j). Even if the double standard rests solely on the statutory language, without more, that foundation does not prove very firm.⁵⁹

IV. CRITIQUE OF JUDICIAL RESULTS

Why are the courts so anxious to grant section 10(*l*) injunctions? Some courts have used the fact that Congress gave the Board a mandate to seek injunctions as a reason for rubber-stamping the petitioning Board agent.⁶⁰ However, this reasoning is unpersuasive. Congress only gave the Board a mandate to seek an injunction. It instructed the courts, on the other hand, to do what was "just and proper." Is one to assume that it is *always* just and proper to issue an injunction if there is reasonable cause to believe a union is violating the Act, no matter what other facts and equities are present? If so, why did Congress not merely instruct the courts to grant injunctions whenever "reasonable cause to believe" was present? What purpose does "just and proper" play? Absent a clearer mandate from Congress, especially since there may be some constitutional problem with a legislative mandate to the judiciary to suspend all equitable discretion while considering the issuance of injunctions, courts ought not assume that they are to ignore entirely traditional equitable considerations in every case. This conclusion is underscored by the history and existence of the Norris-LaGuardia Act.

Union, 479 F.2d 1033 (2d Cir. 1973); *Los Angeles Typo. Union*, 418 F.2d 6; *Local No. 83 v. Jenkins*, 308 F.2d 516 (review of refusal to issue a section 10(*l*) injunction is aggressive because of the "[c]ongressional policy favoring . . . granting" them).

57. See, e.g., *Universidad Interamericana*, 722 F.2d 953; *Milk Drivers*, 491 F.2d 200; *Local No. 83 v. Jenkins*, 308 F.2d 516. In *Danielson v. Local 275*, 479 F.2d 1033, the court of appeals reversed a district court's refusal to grant a section 10(*l*) injunction because the appellate court, unlike the trial court, thought irreparable harm was threatened.

58. See, e.g., *Solien v. Merchants Home Delivery Service, Inc.*, 557 F.2d 622 (8th Cir. 1977). In *Merchants Home Delivery*, the appellate court agreed with the trial court not to issue a section 10(j) injunction because an administrative law judge had already found the employer guilty of an unfair labor practice. There being no doubt as to "reasonable cause," it is difficult to understand why an injunction would not have been appropriate.

59. The double standard, however, may reflect the same judicial inclinations at which the Norris-LaGuardia Act was aimed.

60. See, e.g., *supra* notes 22-24 and accompanying text.

Other reasons for the willingness of courts to grant section 10(*l*) injunctions are, to some extent, intuitive. First, the courts are persuaded that usually the General Counsel is going to win or that, at least, the General Counsel is correct. Second, Congress did express some special interest in enjoining these particular activities when they occurred. The fact that the mandatoriness is aimed only at the General Counsel does not change the existence of this special congressional interest. Third, courts do not like industrial strife, work stoppages, and the like. History shows that the courts have had difficulty coming to grips with the legitimacy of work stoppages which inconvenience all of us.⁶¹

Fourth, the judicial approach of ignoring the “just and proper” consideration saves a great deal of judicial time and effort. The temptation must be immense for a district court judge to be done with these somewhat annoying cases, especially if he or she is building—at least psychologically—on the first three points. One must remember that the trial courts, in particular, are relatively ignorant of the complicated laws that trigger section 10(*l*) injunctions. Sections 8(b)(4), 8(b)(7), and 8(e) contain probably the most intricate and complicated statutory language to be found in the National Labor Relations Act, and they often address relatively technical problems. Busy federal trial judges have virtually no time to master these Byzantine bodies of law and their application. The Board’s agents, on the other hand, are experts in the substantive law, in the problems which give rise to the cases, and in the game of getting injunctions. The federal agency has a division of lawyers who do nothing—or virtually nothing—but travel around the country getting injunctions pursuant primarily, to section 10(*l*), and secondarily, to section 10(*j*). They are well-versed in all the issues of the cases. They have “canned” pleadings, proposed orders, routines for trial, and briefs. What is more, they are extremely well-versed on how to persuade a busy and relatively ignorant federal judge, who may well already have the value system suggested in the earlier parts of this analysis.

To combat this extremely well-oiled legal machine in any given case, the respondent has a lawyer who may well know more about the substantive law than the judge, but who may not be as expert as the Board’s attorney is. Moreover, the lawyers for the respondents are rarely persons who spend substantial parts of their practices litigating these kinds of cases. Despite whatever ability and general knowledge in the field they possess, they often are not a match for the Board’s injunction division and its representatives. Finally, the respondent’s lawyer rarely has had as much time to prepare the case as the Board’s representative has had. All this adds up to a process often involving an inclination—varying from judge to judge—to grant the injunc-

61. The reason may be illegitimate; this judicial attitude is the very one at which the Norris-LaGuardia Act was aimed.

tion and an imbalance in the adversary process that only encourages the judiciary to vindicate that inclination.⁶²

Is it a bad practice for the courts to grant section 10(*l*) injunctions? In a sense, the answer is an empirical one. How often does the General Counsel prevail before the Board, and before the courts? How often does the General Counsel prevail even with unique theories? There are other empirical questions that are more difficult to answer. How many cases settle because of the injunctions? How often and in what way are the contents of settlements affected by the issuance of the injunction? How much legitimate union economic force is stifled? While I suspect that the General Counsel's record with the Board is quite good, how much protected and encouraged activity is suppressed by the issuance of injunctions is unclear.⁶³ In the absence of hard evidence which would assure the virtually perfect competence and good faith of the Board agent, who is almost surely more neutral and fair than the private employer-plaintiffs in the days of yore, the courts must look to a number of factors in issuing an injunction. The following seem to be relevant: How likely is it that the General Counsel will win before the Board and the courts? Alternatively, how good is the General Counsel's legal theory? How long will it take the Board to resolve the case? What injury will be done to the union's legitimate interests if the injunction is granted and the General Counsel is wrong? What injury will be done to the other private parties—primarily the employer—if the injunction is refused and the General Counsel eventually wins?

If one believes that the petitioner is almost always "correct," the description I present of judicial practices may not be seriously disturbing. The reason for having process, however, is to protect the parties, since in an important sense we can never truly know whether the petitioner is almost always "correct."

Not surprisingly, I am uneasy with the courts' easy granting of section 10(*l*) injunctions, especially in cases where courts believe it is possible that no violation will be found. It is also bothersome when a court issues an injunction, which is of great assistance to an employer in its struggle with a union,⁶⁴

62. The desire to save time and not to be enmeshed in unfamiliar and difficult law is especially acute for the district judges. The courts of appeals, which created the doctrinal material appearing in this paper, are less justified in relying—even on a human (as distinct from judicial process) level—on these difficulties. The courts of appeals do not have the same pressing immediacy as do the district courts; the appellate judges have more clerk support than do district judges; and, the former also have more exposure and familiarity with the NLRA's substantive law than do the latter.

63. Clearly, some legitimate union activity is enjoined. *See, e.g., Miller v. United Food & Commercial Workers Union, Local 498*, 708 F.2d 467 (9th Cir. 1983). Injunctions may be erroneously granted, overly broad, or interpreted broadly by respondents anticipatorily avoiding possible contempt sanctions. Whenever this happens, employee activities authorized, and perhaps encouraged by the Act, are discouraged. *See NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477 (1960); National Labor Relations Act § 7, 29 U.S.C. § 157 (1982).

64. Section 303, contained in the Taft-Hartley Act's amendments, provides for monetary damages for parties injured by union violations of section 8(b)(4), which describes virtually all

in a case in which the employer's "injury" from the union's alleged unlawful activity is slight or theoretical, and the possible injury to the union's legitimate interests is great. In short, the words of the statute, as well as their background, suggest that courts should use their traditional equity powers in assessing the propriety of any particular request for a section 10(*l*) injunction.

In section 10(*j*) cases, as already described, the courts are far less willing to interfere with an employer's freedom than they are to interfere with a union's freedom under section 10(*l*). Why the disparity? The rationalization of the United States Court of Appeals for the First Circuit is based on the mandatory quality of section 10(*l*). That reasoning does not get one far. At most, the mandatory quality of section 10(*l*) and the nonmandatory quality of section 10(*j*) constitute only part of the mosaic. First, I suspect—although I have no hard evidence to prove it—that the courts are not so sure the General Counsel will win these section 10(*j*) cases on the merits. This judicial reservation, which probably has its roots in empirical intuition, may be colored by another distinction. That is, unlike judicial distaste for work stoppages and their resulting inconveniences, employer efforts to combat unionism are often couched in terms that are far more likely to strike a chord of sympathy with the judges. The employer is vindicating efficiency by firing an arguably poor or troublesome employee. The employer is unwilling to recognize, negotiate with, and sign a contract with a union that has not yet been chosen by a majority of the relevant employees. The employer wishes to maximize profits and do what all owners ought to be able to do—conduct business in the location it wants or in the way it wants. These and other employer objectives are ones with which judges sympathize and often empathize. I suspect that judges view these employer objectives differently than they view unions' interference with people's enjoyment of their lives and disruption of the smooth flow of commerce. It is not surprising, then, that courts, either explicitly or implicitly, practice what the First Circuit rationalized from the language of sections 10(*l*) and 10(*j*). The possibility that this judicial reaction may be a reincarnation of what Congress wanted to avoid in passing the Norris-LaGuardia Act may not deter judges, who are also charged with the 1947 amendments to the NLRA.

There is a second reason for the courts' more active participation in section 10(*j*) cases. As already indicated, the substantive law giving rise to section 10(*l*) injunctions is obviously complicated and unfamiliar to federal judges. The substantive law being vindicated by section 10(*j*) injunctions may also be quite complicated, but it does not so obviously appear that way. Moreover, the issues seem to raise easily understood value judgments about the freedom

the unfair labor practices for which a section 10(*l*) injunction is available (recognition picketing is the most significant exception). Because of the threat of damages, unions may well prefer injunctions to the potential destruction of their treasuries. It is conceivable that, consciously or otherwise, the federal courts are, on one hand, protecting the unions' treasuries but, on the other hand, compelling the unions to stop the behavior which otherwise would oftentimes give rise to massive recoveries for damages.

of running a business, the freedom to engage in union activities, and the balancing of these interests, at least for an interim period. These competing interests are ones which the judges, as active members of society for many years, believe they are in a position to evaluate. It is not so surprising, then, that in this context judges are ready to do some second-guessing of the agency's representatives.

V. PROPOSED STANDARDS

For explicit and implicit reasons already set out in this article, the standards for judicial activity in granting and denying section 10(*l*) and 10(*j*) injunctions ought to be the same.⁶⁵ As indicated, some courts have said as much.⁶⁶ What should the single set of standards be? In section 10(*l*) cases, the courts have correctly looked only to see if there is reasonable factual scenario that would justify an injunction. That same standard should apply to section 10(*j*). That is, Congress authorized an injunction if there was reasonable cause to believe a violation had occurred or if the General Counsel had issued (presumably properly) a complaint charging a violation. Whether the evidentiary issues are over credibility disputes or over which reasonable inferences should be drawn, it appears that Congress instructed the courts to find that "reasonable cause to believe" exists whenever a reasonable person might resolve the evidentiary issues against the respondent. As to assessing the substantive law upon which the General Counsel is relying in section 10(*l*) cases, however, the courts should be more aggressive than they are presently. Surely, if the legal theory is "wrong"—either because precedent (the Board's or the courts') says so, or because the theory is novel—the courts should not find "reasonable cause." This is a desirable accommodation of Norris-LaGuardia's legacy. As a practical matter, this is already the standard applied in many section 10(*j*) cases.

Having found "reasonable cause" that a violation exists, a court should act as a court of equity. It should balance the weight of injuries; if that balance significantly favors the charging party's interest, an injunction should be granted. Conversely, if the nature of injury that either the charging party or society faces is negligible, an injunction would be improper. Moreover, courts should exercise their traditional discretion in granting and shaping relief,

65. I have stated that the history of Norris-LaGuardia suggests, perhaps, that only unions were protected by that statute. Conversely, for example, the *Universidad Interamericana* case, 722 F.2d 953 (1st Cir. 1983), suggests that courts should more aggressively enjoin respondents pursuant to section 10(*l*) than section 10(*j*). While I recognize that each of these observations is not necessarily of equal weight, I am prepared to treat them as such because finer distinctions, in my view, are not administrable and can only cause mischief. Thus, in the text, I suggest the same standards for section 10(*l*) and section 10(*j*) injunctions, whether or not the respondent is an employer or a union.

66. See *supra* note 18 and accompanying text.

and the relief should be applied even-handedly. For example, the limit on the length of injunctions against employers should also be available in cases against unions.⁶⁷

Finally, in all of this, society's historical discomfort with the federal courts in the labor injunction arena should never be far from judges' consciousness. Despite their good faith efforts to escape the prejudices of the past—prejudices about which Congress expressed concern and legislated—the evidence produced by the section 10(*l*) and 10(*j*) experience suggests that the courts have not changed sufficiently in their understanding and integration of the labor movement and its values. Unions' use of economic weapons, as inconvenient as it may be to employers and to society, is something Congress wanted to protect and even to foster, at least some of the time. Congress desired to stop some employers' acts, even when those acts are perfectly rational from the view of one sympathetic to the employers' interests. The federal courts' construction and implementation of sections 10(*l*) and 10(*j*) should affect labor-management relations in a way that achieves the kind of balance Congress has sought.

67. The Third Circuit's six-month rule may be a valid one (although six months in every case may be difficult to justify in a court of equity).

