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The Propriety of Section 10(j) Bargaining Orders in *Gissel* Situations

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INTRODUCTION

Section 10(j) of the Labor-Management Relations Act (LMRA)[1] authorizes the National Labor Relations Board (Board)[2] to petition a federal district court for temporary injunctive relief[3] from the effects of unfair labor practices[4] pending the Board's adjudication of those practices.[5] Congress provided this mechanism to relieve the harms

1. Labor-Management Relations Act §10(j), 29 U.S.C. § 160(j) (1976), provides that:
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.

Congress amended the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169 (1976), with the LMRA, 29 U.S.C. §§ 141-197 (1976), in 1947. This Note uses the abbreviations NLRA and LMRA interchangeably to denote the NLRA as amended by the LMRA.

2. "NLRB" denotes the administrative agency as a whole, while "Board" denotes the 5-member adjudicatory branch of that agency.

3. The Board's petition must allege that (1) An alleged victim of an unfair labor practice has filed a charge with a regional office of the NLRB; (2) the regional office, having investigated the charge and having found it to be meritorious, has issued a complaint; (3) the facts presented support the charge; (4) the unfair labor practices are likely to continue unless restrained; (5) the federal district court has jurisdiction; and (6) the parties that the Board seeks to restrain are subject to the LMRA. *See* D. McDOWELL & K. HUHN, NLRB REMEDIES FOR UNFAIR LABOR PRACTICES 252-55 (1976).

4. Section 7 of the NLRA, 29 U.S.C. § 157 (1976), guarantees employees certain rights. Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1) (1976), protects those rights by making it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§] 157 . . . ." This section of the NLRA designates such unlawful conduct as "unfair labor practices."

Among the employees' § 7 rights are the right to form or join a union and the right to bargain collectively through representatives of the employees' choosing. Thus, if the Board has certified a union as the representative of the employees in a bargaining unit, *see* notes 38-39 *infra*, § 7 guarantees those employees the right to bargain with the employer through that union. If the employer refuses to bargain with a duly certified union, it commits an unfair labor practice in violation of NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5) (1976).

Section 8(a)(3) of the NLRA forbids an employer from discriminating "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ." 29 U.S.C. § 158(a)(3) (1976).

5. The administrative proceedings following the issuance of the regional office's complaint, *see* note 3 *supra*, involve several steps. First, both sides present evidence and arguments to an administrative law judge. The administrative law judge renders a written decision containing findings of fact, conclusions of law, and recommendations for relief. Then, if either side takes exception to the administrative law judge's decision, the Board reviews the record, renders its decision, and issues an order. The order may adopt, modify, or reject the findings and recommendations of the administrative law judge. *See* 29 C.F.R. § 101.12 (1983); *see also* Nolan & Lehr, *Improving NLRB Unfair Labor Practices Procedures*, 57 TEX. L. REV. 47, 48-50 (1979). Finally, since the Board's order is not self-enforcing, the refusal of either party to comply with

caused by the delay inherent in the Board's adjudicative processes.[6] A federal district court petitioned by the Board pursuant to section 10(j) may grant such temporary relief "as it deems just and proper."[7]

One situation in which section 10(j) relief may be useful occurs where the Board petitions for a bargaining order pending its disposition of an unfair labor practices claim like the one presented in *NLRB v. Gissel Packing Co.*[8] In *Gissel*, the Supreme Court upheld a Board order requiring collective bargaining where the employer had committed unfair labor practices that were so severe that a fair representational election was no longer possible.[9] Although the Board itself has the authority to order bargaining even if the union has not won a representational election,[10] the question remains whether a federal district court may issue a temporary bargaining order pending the Board's final decision. An NLRB Regional Director will seek such an order in a classic *Gissel* situation: where a majority of employees sign cards authorizing the union to represent them, and the employer allegedly responds by committing unfair labor practices.[11] The desired injunction, which this Note will refer to as a

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the order means that the Board must petition a federal appellate court for an order enforcing its decision. *See id.*

6. In fiscal year 1977, the median time that elapsed between the filing of a charge and the Board's decision was 385 days. Nolan & Lehr, *supra* note 5, at 50. It takes another year for the Board to obtain enforcement from the appellate court. *Id.* at 51; *see also* note 25 *infra*.

7. 29 U.S.C. § 160(j) (1976); *see* note 1 *supra*.

8. 395 U.S. 575 (1969).

9. 395 U.S. at 610-16. This note will refer to such Board orders as *"Gissel* bargaining orders."

10. The Board can order an employer to bargain collectively with a union certified as the exclusive representative of the employees in the appropriate bargaining unit. *See* NLRA § 10(c), 29 U.S.C. § 160(c) (1976); notes 35-37 *infra* and accompanying text. The Board makes such an order after certifying the union through the electoral process, *see* notes 38-39 *infra*, and after determining in its adjudicatory proceedings that the employer has violated § 8(a)(5) of the NLRA. *See* notes 4-5 *supra*.

In addition, the Supreme Court has upheld the Board's authority to order bargaining pursuant to § 10(c) of the NLRA in the absence of a union victory in a representational election. The Board may order bargaining if, in its adjudicatory proceedings, it determines that (1) a majority of the employees signed valid authorization cards and (2) the employer's unfair labor practices after the signing of the cards made a fair election or rerun election unlikely. *Gissel*, 395 U.S. at 610-16 (1969); *see* notes 41-46 *infra* and accompanying text.

Under *Gissel*, the employer's violations of §§ 8(a)(1) and 8(a)(3) trigger the employer's obligation to bargain. Elm Hill Meats of Owensboro, Inc., 213 N.L.R.B. 874, 874-75 (1974); Steel-Fab, Inc., 212 N.L.R.B. 363, 363-65 (1974); *accord* Bandag, Inc. v. NLRB, 583 F.2d 765, 770-71 (5th Cir. 1978); NLRB v. Montgomery Ward & Co., Inc., 554 F.2d 996, 1002-03 (10th Cir. 1977). The Board will also issue *Gissel* bargaining orders to remedy violations of § 8(a)(5). *See* Trading Port, Inc., 219 N.L.R.B. 298, 301 (1975); note 4 *supra*.

11. The Board, acting on the recommendation of the Office of General Counsel, authorizes a Regional Director to petition for § 10(j) relief. 29 C.F.R. § 101.37 (1983). In petitioning the district court, the Regional Director acts as an agent of the General Counsel, the head of the NLRB's prosecutorial branch. *See* 29 U.S.C. § 153(d) (1976); NATIONAL LABOR RELATIONS BOARD, RULES AND REGULATIONS AND STATEMENTS OF PROCEDURE, §202, at 316 (1979). Thus, in a § 10(j) proceeding, the Regional Director acts under the auspices of the prosecutorial rather than the adjudicatory branch of the NLRB.

section 10(j) bargaining order, requires the employer to bargain with the union until the Board adjudicates the case.

The courts have split on the question of whether a bargaining order constitutes "just and proper" relief under section 10(j).[12] This Note contends that such an order is always just in a *Gissel* situation but that a district court may properly issue one only in situations where the Board's prior decisions clearly establish the relevant labor policy and indicate a high probability that the Board will eventually issue a *Gissel* bargaining order. Part I of the Note develops the criteria relevant to determining what kind of temporary relief is "just." Although section 10(j) does not itself define these criteria, the courts may turn to the goals of the LMRA for assistance. Part I relies on these goals to conclude that a court should issue an appropriate section 10(j) order if a union would otherwise suffer irreparable injury between the time an employer commits unfair labor practices and the time the Board adjudicates those practices.

Part II applies this principle and concludes that the section 10(j) bargaining order is always just and sometimes proper in *Gissel* situations. The order is just because it prevents the affected union from suffering irreparable injury while imposing only remediable side effects on other parties. The order is proper only where clearly established labor policy indicates a high probability that the Board will subsequently issue a *Gissel* bargaining order.

I. Criteria for Section 10(j) Relief

A. *The Reasonable Cause Standard*

Section 10(j) permits a district court to issue a temporary injunction only if the requested relief would be "just and proper."[13] Before deciding whether the injunction would be just and proper, however, the courts require the petitioner to show "reasonable cause to believe that unfair labor practices have occurred."[14]

12. Several courts have concluded that § 10(j) bargaining orders are just and proper. *See* Seeler *ex rel.* NLRB v. Trading Port, Inc., 517 F.2d 33 (2d Cir. 1975); Wilson v. Liberty Homes, Inc., 108 L.R.R.M. (BNA) 2688 (W.D. Wis. 1980), *order vacated as moot and opinion withdrawn as moot*, 109 L.R.R.M. (BNA) 2492 (7th Cir. 1982); Hirsch *ex rel.* NLRB v. Trim Lean Meat Prods., 479 F. Supp. 1351 (D. Del. 1979); Gottfried *ex rel.* NLRB v. Mayco Plastics, Inc., 472 F. Supp. 1161 (E.D. Mich. 1979), *aff'd. mem.*, 615 F.2d 1360 (6th Cir. 1980); Smith v. Old Angus, Inc., 81 L.R.R.M. (BNA) 2936 (D. Md. 1972).

Other courts have reached the opposite conclusion. *See* Boire *ex rel.* NLRB v. Pilot Freight Carriers, Inc., 515 F.2d 1185 (5th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976); Wilson *ex rel.* NLRB v. Hart Ski Mfg. Co., 472 F. Supp. 484 (D. Minn. 1979), *vacated as moot*, 617 F.2d 1313 (8th Cir. 1980); Fuchs *ex rel.* NLRB v. Steel-Fab, Inc., 356 F.Supp. 385 (D. Mass. 1973); Great Chinese-American Sewing Co., 227 N.L.R.B. 1670 (1977), *aff'd.*, 578 F.2d 251 (9th Cir. 1978); Newton Joseph, 225 N.L.R.B. 294 (1976). In those last two cases, the decision denying the § 10(j) order was not reported. Pettibone, *The Sec. 10(j) Bargaining Order in* Gissell*-Type Cases*, 27 Lab. L.J. 648, 655 n.42 (1976).

13. 29 U.S.C. § 160(j) (1976); *see* note 1 *supra*.

14. Section 10(l) of the NLRA, 29 U.S.C. § *160(l)* (1976), is the source of the reasonable

The section 10(j) petitioner must first allege that unfair labor practices have occurred.[15] Such an allegation poses two questions: a question of fact and a question of policy. The factual issue requires an examination of certain events and of the conduct of the party charged with unfair labor practices. The policy issue requires a prescriptive judgment as to whether the conduct in question should constitute unfair labor practices.[16]

The reasonable cause standard poses a relatively light burden of proof for the facts in issue, and it requires that courts defer to the policy decision reached by the prosecutorial branch of the NLRB.[17] The petitioner's factual determinations need only be "within the range of rationality,"[18] and his policy decision merely must not be "insubstantial or frivolous".[19] Given the Board's stringent screening

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cause standard for § 10(j) proceedings. Section *10(l)* requires a Regional Director to petition a United States district court for injunctive relief if a preliminary investigation gives the Director "reasonable cause to believe" that secondary boycotts are occurring.

The courts that have considered § 10(j) petitions have been unanimous in applying the § *10(l)* reasonable cause standard to § 10(j) proceedings. *See, e.g.*, Fuchs *ex rel.* NLRB v. Hood Indus., 590 F.2d 395, 397 (1st Cir. 1979); Squillacote *ex rel.* NLRB v. Local 248, Meat & Allied Food Workers, 534 F.2d 735, 743 (7th Cir. 1976); Hirsch *ex rel.* NLRB v. Building and Constr. Trades Council, 530 F.2d 298, 302 (3d Cir. 1976); Eisenberg *ex rel.* NLRB v. Hartz Mountain Corp., 519 F.2d 138, 140-41 (3d Cir. 1975); Seeler *ex rel.* NLRB v. Trading Port, Inc., 517 F.2d 33, 36 (2d Cir. 1975); Boire *ex rel.* NLRB v. Pilot Freight Carriers, Inc. (5th Cir. 1975), 515 F.2d 1185, 1189, *cert. denied*, 426 U.S. 934 (1976); Minnesota Mining and Mfg. Co. v. Meter *ex rel.* NLRB, 385 F.2d 265, 269 (8th Cir. 1967); Angle v. Sacks *ex rel.* NLRB, 382 F.2d 655, 660 (10th Cir. 1967).

15. *See* note 3 *supra*.

16. Because the Board has heard so many cases involving unfair labor practices, it has in a wide range of circumstances established the type of conduct that constitutes unfair labor practices. Thus, the crucial question will be factual. The court should refuse to issue a temporary bargaining order if the § 10(j) petitioner alleges conduct the legality of which has never been determined by the Board under § 8(a). *See* notes 130-36 *infra* and accompanying text.

17. For a brief discussion of the NLRB's prosecutorial capacity, see note 11 *supra*.

18. Danielson *ex rel.* NLRB v. Joint Bd. of Coat, Suit and Allied Garment Workers' Union, 494 F.2d 1230, 1245 (2d Cir. 1974) ("the Regional Director may [resolve issues] in favor of the charge [of unfair labor practices] and the district court should sustain him if his choice is within the range of rationality"); *accord* Kaynard *ex rel.* NLRB v. Mego Corp., 633 F.2d 1026, 1031 (2d Cir. 1980) (§ 10(j)); Fuchs *ex rel.* NLRB v. Hood Indus., 590 F.2d 395, 397 (1st Cir. 1979); Squillacote *ex rel.* NLRB v. Graphic Arts Intl. Union, 540 F.2d 853, 860 (7th Cir. 1976) ("[C]ourt's function is limited to a determination of whether contested factual issues could ultimately be resolved by the Board in favor of the General Counsel."); Seeler *ex rel.* NLRB v. Trading Port, Inc., 517 F.2d 33, 37 (2d Cir. 1975) (If disputed issues of fact arise, "the Regional Director should be given the benefit of the doubt in a proceeding for § 10(j) relief."). The presumptions favoring the petitioner on disputed issues of fact and inferences from those facts have led two courts examining § 10(j) petitions to describe the burden imposed by the reasonable cause standard as "relatively insubstantial." Levine *ex rel.* NLRB v. C & W Mining Co., 610 F.2d 432, 435 (6th Cir. 1979); Hirsch *ex rel.* NLRB v. Building and Constr. Trades Council, 530 F.2d 298, 302 (3d Cir. 1976).

19. *See, e.g.*, Hendrix *ex rel.* NLRB v. International Union of Operating Engrs., 592 F.2d 437, 442 (8th Cir. 1979); Squillacote *ex rel.* NLRB v. International Bhd. of Teamsters, 561 F.2d 31, 34 (7th Cir. 1977); Hirsch *ex rel.* NLRB v. Building and Constr. Trade Council, 530 F.2d 298, 302 (3d Cir. 1976); Boire *ex rel.* NLRB v. Pilot Freight Carriers, Inc., 515 F.2d 1185, 1189, *cert. denied*, 426 U.S. 934 (1976); Boire *ex rel.* NLRB v. International Bhd. of Teamsters, 479 F.2d 778, 789-92 (5th Cir. 1973) (§ 10(j)); San Francisco-Oakland Newspaper Guild v. Ken-

procedures for unfair labor practices that merit section 10(j) relief,[20] the existence of a section 10(j) petition in a *Gissel* situation virtually guarantees that the reasonable cause standard will be satisfied.[21] Once the district court has found reasonable cause to believe that unfair labor practices have occurred, the next question is whether the proposed section 10(j) remedy would be "just and proper."

B. *The Just and Proper Standard*

The NLRA authorizes the Board to remedy unfair labor practices.[22] But because of the delay inherent in the Board's adjudication process,[23] the final order for relief may not adequately remedy the injury produced by those practices.[24] Congress enacted section 10(j) to prevent irreparable harm from developing in the interim between the commission of unfair labor practices and the issuance of the

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nedy *ex rel.* NLRB, 412 F.2d 541, 544 (9th Cir. 1969); *see also* Silverman *ex rel.* NLRB v. 40-41 Realty Assocs., 668 F.2d 678, 681 (2d Cir. 1982).

20. *See* note 134 *infra*. The Board uses eight factors to determine whether to petition for 10(j) relief, including:

> a. the clarity of the alleged violations;
>
> . . . .
>
> d. whether the unfair labor practices create special remedy problems so that it would probably be impossible either to restore the status quo or effectively dissipate the consequences of the unfair labor practices through resort solely to the regular procedures provided in the Act for Board order and subsequent enforcement proceedings;
>
> e. whether the unfair labor practices involve interference with the conduct of an election or constitute a clear and flagrant disregard of Board certification of a bargaining representative or other Board procedures;
>
> f. whether the continuation of the alleged unfair labor practices will result in exceptional hardship to the charging party; [and]
>
> g. whether the current unfair labor practice is of a continuing or repetitious pattern. . . .

NLRB, CASEHANDLING MANUAL ¶ 10310.2 (1983).

21. The Board's guidelines have led it to petition for § 10(j) relief only where the employer's conduct, if proved, would clearly constitute unfair labor practices. Even courts denying § 10(j) bargaining orders have found reasonable cause to believe that unfair labor practices have occurred. *See* Boire *ex rel.* NLRB v. Pilot Freight Carriers, Inc., 515 F.2d 1185, 1192 (5th Cir. 1975), *cert. denied*, 427 U.S. 934 (1976); Fuchs *ex rel.* NLRB v. Steel-Fab, Inc., 356 F. Supp. 385, 387 (D. Mass. 1973); Kaynard v. Lawrence Rigging, Inc., 80 L.R.R.M. (BNA) 2600, 2602 (E.D.N.Y. 1972). Moreover, the Board ultimately issued a *Gissel* bargaining order in each of these cases. *See* note 134 *infra*.

The court considering the § 10(j) petition can also usually turn to the record compiled in the hearings before the administrative law judge in order to determine the existence of unfair labor practices. *See* note 136 *infra*. This record is the one from which the Board makes the ultimate determination on the existence of unfair labor practice. *See* 5 U.S.C. § 556 (e) (1976) (hearing record is "the exclusive record for decision in accordance with [§] 557 of this title"); 5 U.S.C. § 557 (a)-(c) (1976).

22. 29 U.S.C. § 160(c) (1976); *see* San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959); cases cited in notes 50 & 69 *infra*.

23. *See* note 6 *supra*.

24. Because the Board has remedial power, its final order will be ineffective only if *irremediable* harm — harm that cannot be repaired by the Board's final order — occurs in the interval between the unfair labor practices and the issuance of that order. Harm that cannot be remedied by the agency that exercises the relevant remedial power is, by definition, irreparable harm.

Board's final order.[25] To ensure that this Congressional design is put into effect, a district court considering a section 10(j) petition must

25. In discussing the interval between the issuance of the Board's order and a subsequent judicial enforcement decree, Congress clearly recognized the possibility of interim harm and the concomitant inadequacy of final relief:

> Time is usually of the essence in these matters [disputes involving alleged unfair labor practices], and consequently the relatively slow procedure of the Board hearing and order, followed many months later by an enforcing decree of the circuit court of appeals, falls short of achieving the desired objective—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 . . . .
>
> Experience under the National Labor Relations Act has demonstrated that by reason of lengthy hearings and litigation enforcing its orders, the Board has not been able in some instances to correct unfair labor practices until after substantial injury has been done. Under the present act the Board is empowered to seek interim relief only after it has filed in the appropriate circuit court of appeals its order and the record on which it is based. Since the Board's orders are not self-enforcing, it has sometimes been possible for persons violating the act to accomplish their unlawful objective before being placed under any legal restraint and thereby to make it impossible or not feasible to restore or preserve the status quo pending litigation.

SENATE COMM. ON LABOR AND PUBLIC WELFARE, FEDERAL LABOR RELATIONS ACT OF 1947, S. REP. NO. 105, 80th Cong., 1st Sess. 8, 27, *reprinted in* 1 NLRB LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 1947, at 414, 433 (1947) [hereinafter cited as S. REP. NO. 105, *reprinted in* LEGLISLATIVE HISTORY, LMRA].

The legislative history's emphasis on preserving the status quo reinforces the conclusion that Congress intended § 10(j) to prevent irreparable harm pending the Board's adjudication. To prevent similar harm from occurring during the period pending judicial enforcement of the Board's orders, Congress authorized the Board to petition the appellate courts for temporary relief. LMRA § 10(e), 29 U.S.C. § 160(e) (1976); *see also* S. REP. NO. 105 at 27, *reprinted in* LEGISLATIVE HISTORY, LMRA at 433, *supra*. In the § 10(e) setting, the Board's order establishes the status quo by establishing the legal relations among the parties. Section 10(e) is designed to restore this arrangement pending an enforcement decree by vesting an appellate court, in language identical to that contained in § 10(j), with the "power to grant such temporary relief or restraining order as it deems just and proper . . . ." To the extent that the judicial enforcement decree cannot reestablish the § 10(e) status quo, the Board's order has lost its effectiveness — that is, irreparable harm has occurred.

Preserving the status quo is the goal of § 10(j) relief as well. Congress recognized that harm could also occur pending the Board's adjudication:

> By [§] 10(j), the Board is authorized . . . to petition the appropriate district court for temporary relief or restraining order. Thus the Board need not wait, if the circumstances call for such relief, until it has held a hearing, issued its order, and petitioned for enforcement of its order.

S. REP. NO. 105, at 27, *reprinted in* LEGISLATIVE HISTORY, LMRA, at 433, *supra*. Thus, Congress demarcated two intervals of time: the interval between the unfair labor practices and their adjudication by the Board, and the interval between the Board's decision and the court's enforcement decree. Congress designed § 10(e) to prevent irreparable harm from occurring in the second interval and § 10(j) to prevent harm from occurring in the first. Congress' intent to prevent harm that would render the Board's order ineffective shows its intent to prevent irreparable interim harm. A judicial decree enforcing the Board's order would be useless if irreparable harm had already destroyed the effectiveness of the order. And the Board's order would itself be useless if irreparable harm occurred before it could be issued. *See* note 24 *supra*; *cf.* Sachs *ex rel.* NLRB v. Davis & Hemphill, Inc., 71 L.R.R.M. (BNA) 2126 (4th Cir. 1969), *opinion withdrawn and case dismissed as moot*, 72 L.R.R.M. (BNA) (4th Cir. 1969) (holding that since the language in the two sections was identical, the standards for just and proper relief under § 10(e) were the same as those under § 10(j)); NLRB v. Aerovox Corp. of Myrtle Beach, S.C., 389 F.2d 475, 476-77 (4th Cir. 1967) (same).

act to prevent irreparable injury in order to guarantee the effectiveness of the Board's remedial order.

The district court should evaluate the potential effectiveness of the Board's *Gissel* order by referring to the goals that Congress set forth in the NLRA. The Board's final order will be ineffective if it fails to promote the free flow of commerce and to protect the collective bargaining process.[26] Because the public has an interest in the free flow of commerce, and because the free flow of commerce is one of the statutory policies that Congress intended section 10(j) to protect, courts must weigh this factor in their evaluation of section 10(j) petitions.[27] Congress also designed section 10(j) to protect the statutory preference for collective bargaining. Therefore, the district court must also consider the interests of the employer, the employees, and the union in determining whether the Board's final order will be effective.[28] Taken together, these goals help to define the

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26. "The free flow of commerce" and "the practice and procedure of collective bargaining," are the goals that Congress designed the NLRA to achieve:

> It is declared to be the policy of the United States to eliminate the cause of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own chooosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151 (1976); *see also* NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 257 (1939) ("[T]he fundamental policy of the Act is to safeguard the rights of self-organization and collective bargaining, and thus by the promotion of industrial peace to remove obstructions to the free flow of commerce as defined in the Act.").

27. Congress has defined the interest of the public coextensively with the policy of the NLRA to promote the free flow of commerce:

> Experience has further demonstrated that certain practices . . . have the intent or necessary effect of burdening or obstructing commerce . . . through . . . concerted activities which impair the interest of the public in the free flow of such commerce. . . .

29 U.S.C. § 151 (1976). The fact that Congress equated the public interest with the free flow of commerce helps explain why it indicated in the legislative history of § 10(j) "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 . . . ." S. REP. NO. 105, at 8, *reprinted in* LEGISLATIVE HISTORY, LMRA, at 414, *supra* note 24. A court acting to vindicate "purely" private interests would ignore the public's interest in the free flow of commerce. *See* S. REP. NO. 105, at 8, *reprinted in* LEGISLATIVE HISTORY, LMRA at 414, *supra* note 25. But the legislative directive not to act in vindication of "purely private rights" does not logically require the court to act to the exclusion of private rights. Such exclusion would be inappropriate given Congress' apparent intent to include the interests of the employer, the employees, and the union — the parties affected by collective bargaining — in the § 10(j) balance.

28. Congress has recognized that the rights and interests of the parties affected by collective bargaining are intertwined with the statutory policy to promote the collective bargaining process itself:

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

scope of a section 10(j) order.

The Board's final order will often be ineffective in a *Gissel* situation. This result follows because the employer's unfair labor practices erode union support during the interim between their commission and their adjudication by the Board. The Supreme Court acknowledged that this injury could be irreparable if left unchecked:

> If an employer has succeeded in undermining a union's strength . . . he may see no need to violate a cease-and-desist order by further unlawful activity. The damage will have been done, and perhaps the only fair way to effectuate employee rights is to re-establish the conditions as they existed before the employer's unlawful campaign.[29]

The occurrence of this interim irreparable harm could impair effective collective bargaining and the free flow of commerce. The injury to the union may disrupt the collective bargaining process in two ways. First, unremedied unfair labor practices might permanently cripple the union's bargaining position.[30] For example, such practices might prevent a union from using legally protected bargaining chips such as the threat of a strike. Second, the possibility that this harm would occur might encourage an employer to commit unfair labor practices in order to weaken employee support for the union.[31] Unfair labor practices must be redressed *and* deterred in order to offset these developments.

Even if the employer's unfair labor practices do not injure the union's bargaining ability, they may well precipitate strikes that will disrupt the free flow of commerce.[32] An order redressing the injuries

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29 U.S.C. § 141(b) (1973) (emphasis added). Thus, Congress, in defining the scope of the collective bargaining process, also delimited the rights of the parties engaged in bargaining. Consequently, a court acts inconsistently if, in considering a § 10(j) petition, it seeks to protect the collective bargaining process but fails to take those measures needed to protect from irreparable harm the parties involved in that bargaining. *See* cases cited in note 33 *infra*.

29. NLRB v. Gissel Packing Co., 395 U.S. 575, 612 (1969). Similarly, the legislative history of the NLRA reflects Congress' recognition that the final disposition of a case may be rendered ineffective by procedural delays. *See* note 25 *supra*.

30. *See* notes 67-70 *infra* and accompanying text.

31. For example, even if the Board will eventually order the employer to reinstate a wrongfully discharged employee with back pay, the back pay award might not offset the perceived gain to the employer in the form of deterring the employees from exercising their organizational rights.

32. In Lebus *ex rel.* NLRB v. Manning, Maxwell and Moore, Inc., 218 F. Supp. 702 (W.D. La. 1963), the court, in granting a § 10(j) bargaining order pending the Board's adjudication of a § 8(a)(5) claim, observed that

> the very fact that the [employer] is admittedly refusing to recognize and bargain with the Union is the type of action which inevitably undermines the Union's status and leads to, or tends to lead to, labor disputes *and strikes*. The basic purpose of the Act and of this proceeding is to eliminate the cause of labor disputes which might have this undesirable effect.

218 F. Supp. at 706 (emphasis in original). *Accord* Boire *ex rel.* NLRB v. International Bhd. of Teamsters, 479 F.2d 778, 788 (5th Cir. 1973) ("If the Company decides to . . . await the final determination of the Board in the pending cases, there will be wide-spread strike activity

produced by these practices may prevent a strike if the relief comes *before* the employees act. The court considering a section 10(j) petition must determine whether injury to commerce or the bargaining environment will accrue during the pendency of the Board's decision. If such harms would occur, the Congressional objectives embodied in the NLRA require that the court issue an appropriate order under section 10(j).

Although courts faced with this issue have used different langauge to describe the criteria for a section 10(j) injunction, they have adopted an approach consistent with the one developed in Part I of this Note. The courts have recognized that section 10(j) must be used to ensure that the Board order will effectively accomplish the goals of the NLRA and have generally held that section 10(j) relief should issue in cases that create "a reasonable apprehension that the efficacy of the Board's final order may be nullified, or the administrative procedures will be rendered meaningless . . . ."[33] Thus, the courts have concluded that section 10(j) relief is appropriate where

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against the [employer], which quite clearly would result in . . . a significant decline in important public services.").

33. Angle v. Sacks *ex rel.* NLRB, 382 F.2d 655, 660 (10th Cir. 1967). In *Angle*, the Tenth Circuit modified but affirmed a § 10(j) order requiring reinstatement of employees allegedly discharged for supporting the union during an election campaign. Citing the legislative history of § 10(j), the *Angle* court noted that Congress had recognized "that the purposes of the National Labor Relations Act could be defeated in particular cases by the passage of time . . . ." 382 F.2d at 659. The court observed the need to weigh the harm to the parties to determine whether the Board would be able to enter an effective order absent a temporary injunction. It cited with approval the district court's link between the effectiveness of the Board's order and the harm caused by the allegedly unlawful discharges: " '[A]ny order of the Board will be an empty formality if, when finally issued, [the employer] has succeeded in destroying any employee interest or initiative in collective bargaining.' " 382 F.2d at 660. The appellate court then recognized that the establishment of conditions under which the Board could enter an effective order was the goal of § 10(j) relief:

> We conclude that an order of reinstatement is a permissible exercise of the court's jurisdiction under the circumstances of the case at bar, for reinstatement will as nearly as is now possible restore the conditions prevailing before the discharges and so prevent a frustration of the ultimate adminstrative action.

382 F.2d at 661. The court also acknowledged that "[p]reservation and restoration of the status quo are . . . appropriate considerations in granting temporary relief pending the determination of the issues by the Board." 382 F.2d at 660.

With the exception of the Third and Seventh Circuits, every other circuit to consider the issue has cited the *Angle* court's formulation of the § 10(j) calculus with approval and has adopted an equivalent one. *See* Boire *ex rel.* NLRB v. Pilot Freight Carriers, Inc., 515 F.2d 1185, 1192 (5th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976); Seeler *ex rel.* NLRB v. Trading Port, Inc., 517 F.2d 33, 39 (2d Cir. 1975) ("[T]he district court has the power to order immediate bargaining to prevent irreparable harm to the union's position in the plant, to the adjudicatory machinery of the NLRB, and to the policy of the Act in favor of the free selection of collective bargaining representatives."); Boire *ex rel.* NLRB v. International Bhd. of Teamsters, 479 F.2d 778, 790 (5th Cir. 1973); NLRB v. Aerovox Corp. of Myrtle Beach, S.C., 389 F.2d 475, 477 (4th Cir. 1967); Minnesota Mining and Mfg. Co. v. Meter *ex rel.* NLRB, 385 F.2d 265, 270 (8th Cir. 1967); Gottfried *ex rel.* NLRB v. Mayco Plastics, Inc., 472 F. Supp. 1161, 1165 (E.D. Mich. 1979), *aff'd. mem.*, 615 F.2d 1360 (6th Cir. 1980) ("the fact that § 10(j) was enacted is an indication that Congress desired courts to furnish relief at the appropriate time and in an effective manner").

Although the Seventh and Third Circuits have not relied on *Angle*, they have developed

interim developments threaten to undermine the effectiveness of the Board's final order.[34]

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standards consistent with its normative components. In Squillacote *ex rel.* NLRB v. Local 248, Meat & Allied Food Workers, 534 F.2d 735 (7th Cir. 1976), the court stated

> that courts should consider such factors as the need for an injunction to prevent frustration of the basic remedial purpose of the act and the degree to which the public interest is affected by a continuing violation as well as more traditional equitable considerations such as the need to restore the status quo ante or preserve the status quo.

534 F.2d at 744. The court's reference to "the need . . . to prevent frustration of the basic remedial purpose of the act" is the same language that other circuits use in describing the § 10(j) calculus and incorporates as a criterion the need to ensure the effectiveness of the Board's order. The phrase "public interest" may have two meanings. Broadly interpreted, it could refer to the policies that Congress intended § 10(j) to promote. *See* note 72 *infra*. Alternatively, the language might refer to the public interest in the free flow of commerce. *See* note 26 *supra*. Even this narrower interpretation does not, however, produce a different § 10(j) calculus by excluding the other policy that Congress designed § 10(j) to further, the process of collective bargaining. The court referred not only to the "public interest" but to "more traditional equitable considerations," a phrase which should be read to include protection of the collective bargaining process since harm to that process translates into harm to the parties. *See* notes 28 *supra* & 72 *infra* (traditional equitable criteria for a temporary injunction include weighing the threats of potential irreparable harm to petitioner and respondent). Indeed, the *Squillacote* court expressly weighed the *employees'* interests under § 7 of the NLRA. *See* 534 F.2d at 744.

The Third Circuit has equated the meaning of "just and proper" with the meaning of "the public interest" as that phrase is used in the legislative history of the LMRA. Eisenberg *ex rel.* NLRB v. Hartz Mountain Corp., 519 F.2d 138, 141-42 (3rd Cir. 1975); *cf.* note 25 *supra* (discussing legislative history). The court defined "the public interest" as coextensive with the policies that Congress designed § 10(j) to promote: "It is a fundamental objective of our national labor relations legislation to promote wholesome and mutually acceptable labor relations and the settlement of labor disputes through collective bargaining between employees and their employer." 519 F.2d at 142. The Third Circuit also includes in its § 10(j) balance the interests of the parties involved in the collective bargaining process and the preservation of the status quo. Eisenberg *ex rel.* NLRB v. Wellington Hall Nursing Home, 651 F.2d 902, 906-07 (3rd Cir. 1981.).

34. The conclusion that the courts agree on the appropriate criteria for § 10(j) relief despite their use of different language to describe them contradicts the conventional wisdom about § 10(j). *See, e.g.*, Note, *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, 534-35, 537 (1981) (five standards); Note, *Section 10(j) of the National Labor Relations Act: A Legislative, Administrative and Judicial Look At A Potentially Effective (But Seldom Used) Remedy*, 18 SANTA CLARA L. REV. 1021, 1044 (1978) (three standards) [hereinafter cited as *Judicial Look*]; Note, *Section 10(j) of the National Labor Relations Act: Increased Exercise of Federal Jurisdiction Over Labor Disputes*, 49 U. CIN. L. REV. 415, 422-23 (1980) (three standards) [hereinafter cited as *Increased Exercise*]; Note, *The Use of Section 10(j) of the Labor-Management Relations Act in Employer Refusal-To-Bargain Cases*, 1976 U. ILL. L.F. 845, 848 n.18 (five standards, which "are very similar as applied"); Note, *Union Authorization Cards: Linden's Peacemaking Potential*, 83 YALE L.J. 1689, 1705 n.123 (1974) (at least two standards); Note, *The Role of the Temporary Injunction in Reforming Labor Law Administration*, 8 COLUM. J.L. & SOC. PROBS. 553, 568 n. 108 (1972) (three standards).

For example, commentators have suggested that the Tenth and Eighth Circuits apply different standards. *See, e.g., Increased Exercise*, *supra*, at 422-23; *Judicial Look*, *supra*, at 1044-48. Both commentators describe the Tenth Circuit's standard as "prevention of frustration of the purposes of the NLRA." *Increased Exercise*, *supra*, at 422; *Judicial Look*, *supra*, at 1046. They contrast this standard with the one used by the Eighth Circuit in Minnesota Mining & Mfg. Co. v. Meter *ex rel.* NLRB, 385 F.2d 265 (8th Cir. 1967), where the court observed that:

> [T]emporary relief under [§] 10(j) cannot be activated and motivated solely by a finding of "reasonable cause" to believe that a violation of the Act has occurred. More is required to guide this permissive range of discretion. Section 10(j) is reserved for a more serious and extraordinary set of circumstances where the unfair labor practices, unless contained,

II. THE JUSTIFICATION FOR THE SECTION 10(j) BARGAINING ORDER IN *GISSEL* SITUATIONS

Section 10(c) of the NLRA vests the Board with the authority to remedy unfair labor practices by ordering the offending party to cease and desist from its unlawful activities.[35] Some cease and desist orders impose affirmative obligations on the employer. For example, the Board may order the employer to cease and desist from its unlawful refusal to bargain with a union that the Board has duly certified through the electoral process.[36] Such an order imposes on the employer the duty to bargain in good faith.[37]

A union can obtain recognition as the bargaining representative of a group of employees through the Board's procedures for election and certification.[38] An election is not, however, the only mechanism that can trigger an employer's obligation to bargain in good faith.[39]

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would have an adverse and deleterious effect on the rights of the aggrieved party which could not be remedied through the normal Board channels.

385 F.2d at 270. *Judicial Look* inaccurately labels this approach as the "extraordinary circumstances standard." *Judicial Look*, *supra*, at 1045. *Judicial Look* errs by excluding the prescriptive language that follows the phrase "extraordinary set of circumstances." The language that follows this phrase incorporates the same element — irreparable harm — that the Tenth Circuit uses in its calculus. *Increased Exercise*, while correctly observing that this standard in effect requires *irreparable harm*, *Increased Exercise*, *supra*, at 432 n.52, incorrectly contrasts it with the standard used by the Tenth Circuit. *Increased Exercise*, *supra*, at 422-23. As the legislative histories of §§ 10(j) and 10(e) indicate, the purposes of the Act are frustrated if the Board cannot enter an effective order. *See* note 25 *supra* and accompanying text. The Board cannot enter an effective order if irreparable harm occurs before the order is issued. *See id.* Therefore, irreparable harm pending the Board's order frustrates the purposes of the Act and thus falls within the language used by the Tenth Circuit.

The argument that the Tenth and Eighth Circuits use different standards also leads to inaccurate classification of the approaches used by other circuits. For example, both *Increased Exercise* and *Judicial Look* indicate that the Fourth Circuit uses the same standard as the Tenth. *Increased Exercise*, *supra*, at 422 n. 47; *Judicial Look*, *supra*, at 1046 n.117 & 1048. In fact, the Fourth Circuit expressly noted that "[i]n adopting these standards, we follow the Eight *and* Tenth Circuits which applied them to gauge the propriety of relief granted by district courts under § 10(j)." NLRB v. Aerovox Corp., 389 F.2d 475, 477 (4th Cir. 1967). The *Aerovox* court did not find a conflict between the standards used by the Tenth and Eighth Circuits; only a focus on language to the exclusion of policies can stir up such conflict.

35. 29 U.S.C. § 160(c) (1976).

36. *See* 29 U.S.C. §§ 158(a)(5), 160(c) (1976).

37. The Board can issue a bargaining order for violations of § 8(a)(5), which applies to refusals to bargain with a duly certified union. 29 U.S.C. § 158(a)(5) (1976); *see* note 4 *supra*. The Board may also order bargaining for violations of §§ 8(a)(1) and 8(a)(3) and has done so in *Gissel* bargaining orders. *See* note 10 *supra*.

For a general discussion of § 8(a)(5) and the duty to bargain in good faith, see GORMAN, LABOR LAW 399-495 (1976).

38. 29 U.S.C. § 159(c) (1976). For a description of the procedures leading to an election, see note 46 *infra*.

39. NLRA § 9(a), 29 U.S.C. § 159(a) (1976), confers exclusive representational status on a union "designated or selected" by a majority of the employees in an appropriate unit for the purpose of collective bargaining. But this provision does not specify the ways by which the employees designate or select a union. In *Gissel*, the Supreme Court observed that

[a]lmost from the inception of the Act, then, it was recognized that a union did not have to be certified as the winner of a Board election to invoke a bargaining obligation; it could

In *Gissel*,[40] the Supreme Court upheld the Board's decision to order bargaining with a union that had not been certified through the electoral process.[41] The Supreme Court adopted the Board's position that unfair labor practices committed by an employer can sometimes prevent a union from winning a representational election[42] and that the proper remedy for such practices is to grant the union the status of certified representative.[43] Although the Board could have remedied specific unfair labor practices,[44] it could not repair the erosion of the union's support caused by those practices. The Board determined, and the Supreme Court agreed, that this erosion could be reversed only by placing the parties in the position that they would have occupied had the union won a representation election.[45] Thus, the *Gissel* court concluded that the Board could order an employer to bargain with an unelected union where a majority of the employ-

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establish majority status by other means under the unfair labor practice provision of § 8(a)(5)—by showing convincing support, for instance, by a union-called strike or strike vote, or, as here, by possession of cards signed by a majority of the employees authorizing the union to represent them for collective bargaining purposes.

NLRB v. Gissel Packing Co., 395 U.S. 575, 596-97 (1969) (footnotes omitted). For the Court's discussion of authorization cards, see note 75 *infra*.

40. NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

41. *See* note 10 *supra*.

42. 395 U.S. at 591.

43. 395 U.S. at 610-16.

44. For example, the Board could have remedied retaliatory discharges by ordering reinstatement with back pay. 29 U.S.C. § 160(c) (1976). Retaliatory discharge is one of the most common unfair labor practices in the *Gissel* situation. *See* cases cited in note 134 *infra*.

45. The Supreme Court's acceptance of this determination lay at the heart of its decision to permit the Board to order bargaining based on a card majority. If the harm had been reparable, an election or rerun election would be a sufficient remedy. In fact, the remedial purposes of *Gissel* bargaining orders and § 10(j) are identical: both are designed to prevent irreparable harm. *Compare* Kaynard v. Lawrence Rigging, Inc., 80 L.R.R.M (BNA) 2600, 2605 (E.D.N.Y. 1972) ("Gissel stands for the proposition that the Board is empowered to relieve by its final order against the very dissipation of allegiance which lapse of time coupled with employer intrusions may have created."), *and* text at note 29 *supra*, *with* notes 22-25 *supra* and accompanying text (Congress designed § 10(j) to prevent irreparable harm from developing in the interim between the commission of unfair labor practices and the issuance of the Board's final order).

The *Gissel* Court has not been alone in concluding that employees' support for the union can dissipate over time. In IUE v. NLRB (Tiidee Prods., Inc.-I) 426 F.2d 1243 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 950 (1970), for example, the court observed that

> Employee interest in a union can wane quickly as working conditions remain apparently unchanged 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 . . . 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.

426 F.2d at 1249 (citations omitted).

In *Gissel*, the Supreme Court deferred to the Board's adjudicatory determination that unfair labor practices can undermine employee support for the union: "It is for the Board and not the courts, however, to [determine], based on its expert estimate . .. ., the effects on the election process of unfair labor practices of varying intensity." 395 U.S. at 612 n.32; *cf.* note 69 *infra* (description of the deference due the Board when it acts in an adjudicatory capacity).

ees had indicated their support for the union by signing authorization cards.[46]

Although the Board clearly has the authority to issue a bargaining order in a *Gissel* situation, the courts have disagreed over the propriety of ordering section 10(j) relief during the interval between the alleged unfair labor practices and the Board's final decision.[47] The courts disagree on this issue for several reasons. First, some courts have analyzed the potential harms to the union and have concluded that irreparable harm will not occur in the absence of a temporary bargaining order.[48] Other courts have refused to order

46. The union typically urges employees to sign cards during its organizational drive, the first step toward unionization. The cards authorize the union to represent the signer in bargaining with the employer over wages, hours, and working conditions. The union usually submits the cards to the Board along with the union's petition for a representational election in order to satisfy the Board's requirement that at least thirty percent of the employees favor an election. *See* NLRB, *Statements of Procedure*, NLRB RULES AND REGULATIONS AND STATEMENTS OF PROCEDURES SERIES 8 § 101.18 (1979). The election requirement of thirty percent employee support should not be confused with the card majority required for a *Gissel* bargaining order. However, the *Gissel* court also acknowledged, in dicta, the possibility that the Board could order bargaining even without a card majority in cases of egregious unfair labor practices. *See* note 132 *infra*.

47. *See* note 12 *supra*.

48. *See, e.g.*, Boire *ex rel.* NLRB v. Pilot Freight Carriers, Inc., 515 F.2d 1185, 1194 (5th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976) ("We are not convinced that a continuation of the non-bargaining status will so deleteriously affect the union that it cannot recover."); Fuchs *ex rel.* NLRB v. Steel-Fab, Inc., 356 F. Supp. 385, 387 (D. Mass. 1973) (because the employees did not have a collective bargaining agreement, they would not suffer irreparable harm from the absence of one.).

In contrast, courts granting § 10(j) bargaining orders have concluded that such an order was necessary to prevent irreparable harm to the union. In Seeler *ex rel.* NLRB v. Trading Port, Inc., 517 F.2d 33 (2d Cir. 1975), the Second Circuit said:

> Just as a cease and desist order without more is ineffective as final relief in a *Gissel* situation, it is, in certain cases, also insufficient as interim relief. . . . Even if the Board finally orders bargaining, probably close to two years after the union first demanded recognition, the union's position in the plant may have already deteriorated to such a degree that effective representation is no longer possible. Only if the district courts may issue interim bargaining orders can the union's viability be maintained to the degree necessary to make final Board adjudication in the form of an election or bargaining order meaningful.

517 F.2d at 37-38 (footnotes omitted). *See also* Wilson v. Liberty Homes, Inc., 108 L.R.R.M. (BNA) 2688, 2696 (W.D. Wis. 1980) ("[I]n the time it takes for the Board to finally rule on these charges and obtain enforcement of any consequent orders, support . . . for the union may have eroded; erosion of support for the union in turn may unfairly diminish the union's bargaining strength if and when [the employer] is compelled to bargain with it."), *order vacated and opinion withdrawn as moot,* 109 L.R.R.M. (BNA) 2492 (7th Cir. 1982); Levine *ex rel.* NLRB v. C & W Mining Co., 465 F. Supp. 690, 694 (N.D. Ohio) ("Union strength at the Company has dissipated to a large extent in the past several months and is likely to be irreparably debilitated during the time necessary for Board hearings unless the Court acts now."), *modified,* 610 F.2d 432 (6th Cir. 1979); Smith v. Old Angus, Inc., 81 L.R.R.M. (BNA) 2936, 2941 (D. Md. 1972) (Where extensive anti-union campaign by employer would have completely negated the union's organizational efforts, and where the union's inability to aid the employees who embraced it would have undermined employee confidence in it, "[n]o final order of the Board, no matter how wisely drafted, [could] restore the Union to the position it held prior to the anti-union campaign . . . ."). The differing weight that the courts have attached to the notion of irreparable harm constitutes one of the reasons for the split over § 10(j) *Gissel* bargaining orders.

The courts may have attached minimal weight to the possibility of irreparable harm be-

bargaining because it would not restore any temporal status quo; that is, it would not place the parties in a position that they had previously occupied.[49] Finally, some courts have suggested that a court issuing a section 10(j) bargaining order would encroach upon the Board's statutory authority to remedy unfair labor practices.[50]

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cause Regional Directors often delay in seeking authority from the Board to petition for § 10(j) relief. A Regional Director normally seeks authorization from the Board to petition for § 10(j) relief at the same time he issues a complaint initiating administrative proceedings for alleged unfair labor practices. *See* note 3 *supra*. The Regional Director should seek authorization to petition for § 10(j) relief "[i]mmediately upon receipt of a request from a party for 10(j) relief, or whenever the regional director believes that such relief is necessary." NLRB, CASE-HANDLING MANUAL ¶ 10310.1 (1983). Despite this grant of discretion, the NLRB's procedures clearly contemplate prompt action. *Id.* The Regional Director usually seeks authorization at the time a complaint alleging unfair labor practice is issued. Kaynard v. Lawrence Rigging, Inc., 80 L.R.R.M. (BNA) 2600, 2604 (E.D.N.Y. 1972). Indeed, the rationale for § 10(j) relief — prevention of irreparable harm — virtually compels the Regional Director, in the absence of unusual circumstances, to seek § 10(j) relief as soon as possible.

Absent a change in the employer's behavior that spurs the Regional Director to petition for § 10(j) relief where he had not planned to do so, his delay should weigh against a temporary bargaining order. Because irreparable harm to the union increases over time, *see* notes 67-69 *infra* and accompanying text, the marginal remedial effect of a § 10(j) bargaining order as over the Board's *Gissel* bargaining order varies inversely with the petitioner's delay in seeking relief. The longer the delay, the less likely the § 10(j) order is to ensure the effectiveness of the Board's order. Therefore, the petitioner's delay militates against § 10(j) relief.

The courts have taken the Regional Director's delay into account. Each of the courts denying § 10(j) relief indicated that the NLRB's delay in seeking a § 10(j) bargaining order undermined the Board's contention that the Union would be irreparably harmed in the absence of such relief. Boire *ex rel.* NLRB v. Pilot Freight Carriers, Inc., 515 F.2d 1185, 1193 (5th Cir. 1975), *cert. denied*, 427 U.S. 934 (1976); Fuchs *ex rel.* NLRB v. Steel-Fab, Inc. 356 F. Supp. 385, 388 (D. Mass. 1973); Kaynard v. Lawrence Rigging, Inc., 80 L.R.R.M. (BNA) 2600, 2604 (E.D.N.Y. 1972) ("[T]he argument that a steady deterioration in the position of [the union] results irreparably and irreversibly from continuation of the present condition of non- recognition . . . is an argument the force of which has dissipated with time . . . ."); *see also* Seeler *ex rel.* NLRB v. H.G. Page & Sons, Inc., 540 F. Supp. 77, 79 (S.D.N.Y. 1982) (delay weighs against § 10(j) bargaining order in *non-Gissel* situation). Thus, the Regional Director's delay constitutes a strong factual explanation for the split over § 10(j) bargaining orders. *Cf.* NLRB v. C & C Plywood Corp., 385 U.S. 421, 430 (1967) (referring to alleged violation of § 8(a)(5), the court observed that "in the labor field, as in few others, time is crucially important in obtaining relief."); *see also* Note, *The Role of the Temporary Injunction in Reforming Labor Law Administration*, 8 COLUM. J.L. & SOC. PROBS. 553, 558 (1972).

49. *See* notes 92-104 *infra* and accompanying text. As these notes indicate, other courts, though adopting this temporal definition of the status quo, have nevertheless issued § 10(j) bargaining orders in *Gissel* situations.

50. Some courts have indicated their reluctance to make preliminary decisions on any matters, other than the existence of unfair labor practices, that the Board must ultimately decide. *See, e.g.*, Boire *ex rel.* NLRB v. Pilot Freight Carriers, Inc., 515 F.2d 1185, 1192 (5th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976) ("Proper composition of the bargaining unit, reinstatement of unlawfully discharged employees, and certification of the union as the bargaining representative are matters generally left to the administrative expertise of the Board."); Boire *ex rel.* NLRB v. International Bhd. of Teamsters, 479 F.2d 778, 789 (5th Cir. 1973) ("It is axiomatic that the Board should be accorded the opportunity to pass initially on questions involving the construction of the N.L.R.A."); Kaynard v. Steel Fabricators Assn., 95 L.R.R.M. (BNA) 2015, 2019-20 (E.D.N.Y. 1976) ("[A] due process problem lurks in the suggestion that a court impotent to adjudicate the controlling substantive issues should, on a showing of probability of outcome, alter legal relations *pendente lite* . . . ."); Squillacote *ex rel.* NLRB v. UAW Local 578, 384 F.Supp. 1171, 1174 (E.D. Wis. 1974) ("Section 10(j) was not intended to change the basic procedure under the National Labor Relations Act which creates a system in

These courts have refused to do more than order the employer to discontinue certain conduct if there is reasonable cause to believe that the employer has committed unfair labor practices.[51]

This Note contends that a section 10(j) bargaining order is always just in the *Gissel* situation because the balance of harms favors the union and the employees. The Board has conclusively determined that in the *Gissel* situation, the union will suffer severe and irreparable harm in the interval between the unfair labor practices and the Board's final adjudication.[52] The district court should not second guess the Board's determination by trying to predict whether or not such harm will occur in a particular case. On the other hand, the potential harms that the bargaining order causes are remediable. A comparison of the risks of ordering and not ordering temporary bargaining reveals that a section 10(j) bargaining order will preserve the status quo by insuring that the Board's final order will be effective.

The Note goes on to argue that the conditions under which a section 10(j) bargaining order would be proper are delimited by Congress' decision to delegate the authority to make labor policy to the Board rather than the courts.[53] Only where the Board's past decisions have clearly established the relevant labor policy and indicate a high probability that the Board will ultimately issue a *Gissel* bargaining order is section 10(j) relief a proper way to protect the Board's remedial authority.

A. *Just Relief: Preserving the Effectiveness of the Board's Remedial Order*

1. *Deterrence of Unfair Labor Practices*

The Board's final *Gissel* order cannot fully remove the employer's incentive to engage in unfair labor practices calculated to undermine a union's organizational drive.[54] Because a substantial amount of time passes between the unfair labor practices and the

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which the Board, as an expert in the area, would in the first instance consider and decide the issues . . . .").

51. *See, e.g.,* Boire *ex rel.* NLRB v. Pilot Freight Carriers, Inc., 515 F.2d 1185 (2d Cir. 1975) (order prohibiting commission of any unfair labor practices *in futuro*); Boire *ex rel.* NLRB v. International Bhd. of Teamsters, 479 F.2d 788 (5th Cir. 1973) (issuing injunction).

52. *See* notes 59-69 *infra* and accompanying text, note 134 *infra*.

53. *See* note 50 *supra*; note 69 *infra*.

54. The *Gissel* order itself is designed to deter unfair labor practices:

> If the Board could enter only a cease-and-desist order and direct an election or a rerun, it would in effect be rewarding the employer and allowing him 'to profit from [his] own wrongful refusal to bargain,' while at the same time severely curtailing the employees' right freely to determine whether they desire a representative.

NLRB v. Gissel Packing Co., 395 U.S. 575, 610 (1969) (quoting Frank Bros. Co. v. NLRB, 321 U.S. 702, 704 (1944)).

Board's final order,[55] practices that successfully prevent the union's effective organization will allow the employer to gain from the resulting delay in bargaining. An employer can substantially reduce its labor costs during this period, depending on the size of the bargaining unit, the potential increase in employee benefits that union representation would produce, and the probability that the union, absent the employer's unfair labor practices, could have obtained these increased benefits.[56] The employer might also gain if its unfair labor practices reduced the chances of unionization in the long term.[57] Only by denying the employer these potential economic benefits can a court remove the incentive to engage in *Gissel*-type unfair labor practices and thus preserve the Board's ability to deter such practices with its final order. Indeed, section 10(j) relief may have an even stronger deterrent effect than the Board's final order because it would require the employer to bargain at an earlier date.[58]

2. *Redress of Unfair Labor Practices*

a. Irreparable Harm to the Employees

Unfair labor practices that prevent a fair election irreparably harm employees. The employees lose the benefits of representation and of a potential collective bargaining agreement during the interval between the unfair labor practices and the Board's final order.[59]

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55. *See* note 6 *supra*.

56. The employer will eventually lose to the extent that the Board's remedial measures impose costs - for example, back pay awards for retaliatory discharge. *See* note 44 *supra*. But if the employer believes that the increased labor costs avoided by delaying bargaining pending the Board's decision will outweigh the costs later imposed by the Board's order, it will have an incentive to continue to engage in unfair labor practices.

57. *See* IUE v. NLRB (Tiidee Prods., Inc.,-I), 426 F.2d 1243, 1249 (D.C. Cir. 1970) ("Thus the employer may reap a . . . 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."), *cert. denied*, 400 U.S. 950 (1970); *see also* notes 67-70 *infra* and accompanying text.

58. *Cf.* Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 133 (1964) ("Since an order to bargain with the union will destroy any value to be derived from violating the law, it provides a highly effective deterrent."); McCulloch, *An Evaluation of the Remedies Available to the NLRB— Is There Need for Legislative or Administrative Change?*, 15 LAB. L.J. 755, 760 (1964) ("It is not uncommon in these as in other cases for the Board's institution of extraordinary action [a petition for a § 10(j) injunction] to precipitate settlements or agreements to end alleged unlawful conduct pending final decision.").

59. The unfair labor practices in *Gissel* situations often included firings alleged to violate § 8(a)(3). *See, e.g.*, Kaynard *ex rel.* NLRB v. Palby Lingerie, Inc., 625 F.2d 1047, 1051 (2d Cir. 1980); Levine *ex rel.* NLRB v. C & W Mining Co., 610 F.2d 432, 435 (6th Cir. 1979); Seeler *ex rel.* NLRB v. Trading Port, Inc., 517 F.2d 33, 35 (2d Cir. 1975); Boire *ex rel.* NLRB v. Pilot Freight Carriers, Inc., 515 F.2d 1185, 1191 (5th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976); Wilson *ex rel.* NLRB v. Liberty Homes, Inc., 108 L.R.R.M. (BNA) 2688, 2691 (W.D. Wis. 1980), *order vacated as moot and opinion withdrawn as moot*, 109 L.R.R.M. (BNA) 2492 (7th Cir. 1982); Gottfried *ex rel.* NLRB v. Mayco Plastics, Inc., 472 F. Supp. 1161, 1163 (E.D. Mich. 1979), *aff'd. mem.* 615 F.2d 1360 (6th Cir. 1980); Hirsch *ex rel.* NLRB v. Trim Lean Meat Prods., Inc., 479 F. Supp. 1351, 1358-59 (D. Del. 1979); Smith *ex rel.* NLRB v. Old Angus,

The Board has, however, refused to compensate employees for these lost benefits in its *Gissel* orders,[60] arguing that such awards would be speculative,[61] would discourage an employer's good faith appeals of legitimate legal issues,[62] and would as a practical matter illegally force the employer to accept particular terms of a collective bargaining agreement.[63] Nevertheless, the Board has lamented its inability

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Inc., 81 L.R.R.M. (BNA) 2936, 2941 (D. Md. 1972); Kaynard v. Lawrence Rigging, Inc., 80 L.R.R.M. (BNA) 2600, 2605-06 (E.D.N.Y. 1972). Consequently, a § 10(j) court often must decide whether to order reinstatement as well as bargaining. The harm that loss of jobs imposes on employees certainly weighs in the § 10(j) criteria for reinstatement. *See* note 28 *supra* (§ 10(j) protects parties affected by collective bargaining). However, § 10(j) reinstatement orders are beyond the scope of this Note; therefore, the Note does not explicitly weigh an employee's interest in reinstatement in the criteria for a § 10(j) bargaining order. Nevertheless, unlawful firings are probative of the severity of the employer's unfair labor practices and thus of the probablility that the Board will ultimately issue a *Gissel* bargaining order. *See* notes 130-36 *infra* and accompanying text.

60. The Board has emphatically stated that it remains "convinced . . . that [it] lacks statutory authority to grant such relief," and that it "will therefore adhere to [its] position in this matter unless and until the Supreme Court decides otherwise." Heck's, Inc. 191 N.L.R.B. 886, 888 (1971); *accord* Ex-Cell-O Corp., 185 N.L.R.B. 107, 108-10 (1970), *modified on other grounds per curiam sub nom.* UAW v. NLRB, 449 F.2d 1046 (D.C. Cir. 1971), *order of remand vacated on other grounds*, 449 F.2d 1058, 1065 (D.C. Cir. 1971). The Board's refusal to allow relief persists despite judicial prodding to grant retroactive compensation. *See, e.g.*, IUE V. NLRB (Tiidee Prods., Inc.-I), 426 F.2d 1243, 1253 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 950 (1970).

The only retrospective relief that the Board has included in its bargaining orders has been to make the employer's obligation to bargain effective "as of the time the employer . . . embarked on a clear course of unlawful conduct or . . . engaged in sufficient unfair labor practices to undermine the union's majority status." Trading Port, Inc., 219 N.L.R.B. 298, 301 (1975). Thus, if the employer commits unfair labor practices during the union's organizational drive, a *Gissel* bargaining order will be retroactive to the time at which the union obtained a card majority and demanded recognition. If the employer commits unfair labor practices after the union's demand for recognition, a *Gissel* bargaining order will be retroactive to the time at which the employer first committed unfair labor practices. *See, e.g.*, Doug Hartley, Inc., 255 N.L.R.B. 800, 801 (1981); Justak Bros. and Co., 253 N.L.R.B. 1054, 1087 (1981); The Kroger Co., 228 N.L.R.B. 149, 151 (1977); Corl Corp., 222 N.L.R.B. 243, 258-59 (1976). The retroactive obligation to bargain prevents the employer from making unilateral changes in the mandatory subjects of bargaining - wages, hours, and other terms and conditions of employment. *See* 29 U.S.C. §§ 158(d) & 159(a) (1976); *Trading Port, Inc.*, 219 N.L.R.B. at 302. It does not, however, require the employer to compensate employees for any economic benefits they would have gained from a collective bargaining agreement.

61. The benefits of a collective bargaining agreement are inherently speculative, because the terms of the agreement that the parties would have reached in the absence of unfair labor practices cannot be determined in advance of an actual agreement. *See* Ex-Cell-O Corp., 185 N.L.R.B. 107, 110 (1970), *modified on other grounds per curiam sub nom.* UAW v. NLRB, 449 F.2d 1046 (D.C. Cir. 1971), *order of remand vacated on other grounds*, 449 F.2d 1058 (D.C. Cir. 1971).

62. The employer would be discouraged from appealing by the threat of large monetary damages accruing during the course of its appeal. *See* Ex-Cell-O Corp., 185 N.L.R.B. 107, 109 (1970), *modified on other grounds per curiam sub nom.* UAW v. NLRB, 449 F.2d 1046 (D.C. Cir. 1971), *order of remand vacated on other grounds*, 449 F.2d 1058 (D.C. Cir. 1971).

63. NLRA § 8(d), 29 U.S.C. § 158(d) (1976), states that the obligation to bargain collectively "does not compel either party to agree to a proposal or require the making of a concession." *See* H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970); Ex-Cell-O Corp., 185 N.L.R.B. 107, 110 (1970), *modified on other grounds per curiam sub nom.* UAW v. NLRB, 449 F.2d 1046 (D.C. Cir. 1971), *order of remand vacated on other grounds*, 449 F.2d 1058 (D.C. Cir. 1971).

to protect the employees' interim interests[64] and has also concluded that the resulting threat of irreparable harm in this situation justifies preventive section 10(j) relief.[65]

b. Irreparable Harm to the Union

The Board issues *Gissel* orders to remedy the erosion of union support caused by unfair labor practices.[66] Although the Board's final order can remedy this erosion to some extent, the Board has determined that its order may be unable to restore the union to the level of strength it held before the employer's unfair labor practices. Certain unfair labor practices reduce employees' support for the union,[67] thus irreparably undermining the union's strength over time.[68] The longer the period before adjudication, the less effective the Board's *Gissel* order will be. For example, by the time of the Board's order, the union may not have majority support, and may

64. Ex-Cell-O Corp., 185 N.L.R.B. 107, 108 (1970) ("current remedies of the Board designed to cure violations of [§] 8(a)(5) are inadequate"), *modified on other grounds per curiam sub nom.* UAW v. NLRB, 449 F.2d 1046 (D.C. Cir. 1971), *order of remand vacated on other grounds*, 449 F.2d 1058, 1065 (D.C. Cir. 1971); *see also* note 68 *infra*.

65. *See* Ex-Cell-O Corp., 185 N.L.R.B. 107, 110 (1970), *modified on other grounds per curiam sub nom.* UAW v. NLRB, 449 F.2d 1046 (D.C. Cir. 1971), *order of remand vacated on other grounds*, 449 F.2d 1058 (D.C. Cir. 1971); *see also* note 68 *infra*. The § 10(j) bargaining order can remedy the interim harm to the employees where the Board's order cannot, because the § 10(j) order would be prospective. Thus, the problems of speculative damages and imposition of contractual terms on the parties, *see* notes 61 & 63 *supra*, would not exist, because the parties would bargain for their own agreement. The problem of deterring legitimate appeals, *see* note 62 *supra*, would not exist where the order was prospective, because the employees' receipt of an agreement's benefits could be conditioned on the Board's final affirmance of the duty to bargain. *See* notes 85-86 *infra* and accompanying text.

66. *See* note 45 *supra*.

67. *See* note 45 *supra* and accompanying text.

68. In Ex-Cell-O Corp., 185 N.L.R.B. 107 (1970), *modified on other grounds per curiam sub nom.* UAW v. NLRB, 449 F.2d 1046 (D.C. Cir. 1971), *order of remand vacated on other grounds*, 449 F.2d 1058 (D.C. Cir. 1971), the Board acknowledged that the "current remedies of the Board designed to cure violations of [§] 8(a)(5) are inadequate." 185 N.L.R.B. at 108. In so acknowledging, the Board determined, in its capacity as an adjudicatory agency delegated the power to make national labor policy, that the effects of unfair labor practices over time irreparably erode employee support for the union and thus diminish the union's bargaining strength:

> A mere affirmative order that an employer bargain upon request does not eradicate the effects of an unlawful delay of 2 or more years in the fulfillment of a statutory bargaining obligation. It does not put the employees in the position of bargaining strength they would have enjoyed if their employer had immediately recognized and bargained with their chosen representative. It does not dissolve the inevitable employee frustration or protect the Union from the loss of employee support attributable to such delay.

185 N.L.R.B. at 108. To prevent this irreparable harm, the Board called for "full resort to the injunctive relief provision[] of [§] 10(j)." 185 N.L.R.B. at 110; *see also* IUE v. NLRB, 502 F.2d 349, 362 (D.C. Cir. 1974) (In advocating the make-whole remedy for unlawful refusals to bargain, the court stated that "[t]he policy of the NLRA requiring good faith bargaining between management and labor is too important to be vindicated only through *in futuro* relief."); United Steelworkers of America v. NLRB, 496 F.2d 1342, 1351-52 (5th Cir. 1974); Wellman Indus., 248 N.L.R.B. 325, 326 n.8 (1980) ("[a] mere affirmative order [to bargain] does not eradicate the effects of an unlawful delay") (citing *IUE v. NLRB*). Although the Board did not discuss this harm in the context of a § 10(j) proceeding, the harm is one that occurs because of

therefore be unable to use the threat of a strike as a bargaining chip. Thus, the Board has indicated *as a matter of policy* that it cannot effectively remedy the harm that the union will suffer during the interim period.[69] Because the injurious effects of eroding support in-

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the delays inherent in the process of administrative adjudication. The harm is, therefore, one that Congress designed § 10(j) to prevent. *See* notes 22-28 *supra* and accompanying text.

Similarly, the Supreme Court in *Gissel* recognized that the effects of unfair labor practices can continue into 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.

395 U.S. at 614-15. The Supreme Court has also recognized that an employer's refusal to bargain can eventually cause irreparable harm by deflating the morale of the employees, disrupting organizational drives, and discouraging membership in unions. Franks Bros. v. NLRB, 321 U.S. 702, 704 (1944).

In cases where the employer has discharged employees to destroy the union's majority support, the possibility of an eventual reinstatement order should not diminish the need for § 10(j) relief to prevent the harm of erosion. The discharged employees may well move or obtain other employment before the Board's order. Empirical studies have demonstrated that unless reinstatement takes place within a short time after discharge, the wrongfully discharged employee will probably never again be permanently employed by the employer that discharged him. *See, e.g.*, Stephens & Chaney, *A Study of the Reinstatement Remedy Under the National Labor Relations Act*, 25 LAB. L. J. 31, 40 (1974); *Amendments to Expedite the Remedies of the National Labor Relations Act: Hearings on H.R. 7125 Before the Special Subcomm. on Education and Labor*, 92d Cong., 1st Sess. 265, 265-73 (1973); McCulloch, *Past, Present and Future Remedies Under Section 8(a)(5) of the NLRA*, 19 LAB. L. J. 131, 137 (1968) ("When an employer violates [§] 8(a)(5) by refusing to engage in initial bargaining, the harmful consequences of delay may be especially harsh . . . because, with the passage of time, their chosen representative's effectiveness tends to be diluted by turnover, employee frustration and other changing circumstances."). For these reasons, the courts have also recognized the inadequacy of the Board's reinstatement order. *See, e.g.*, Wilson v. Liberty Homes, Inc., 108 L.R.R.M. 2688, 2693-94 (W.D. Wis. 1980) ("[T]he delay inherent in the Board's processes will cause [the] order to be ineffective. There is a significant possibility that, by that time, the [employees] who will be entitled to reinstatement . . . will have accepted employment with other employers, perhaps in other locations, and will be understandably reluctant to . . . return to their former jobs."), *order vacated as moot and opinion withdrawn as moot,* 109 L.R.R.M. (BNA) 2492 (7th Cir. 1982).

69. Whether or not the Board's determination that unfair labor practices irreparably diminish the union's strength and render ineffective the Board's order holds true in every case need not concern the court considering a § 10(j) petition. The court should defer to the Board's determination for two reasons. First, the Board possesses expertise in industrial relations that the courts lack. NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266 (1975) (The Board "has the 'special function of applying the general provisions of the Act to the complexities of industrial life,' and its special competence in this field is the justification for the deference accorded its determination.") (citations omitted); NLRB v. Gissel Packing Co., 395 U.S. 575, 612 n.32 (1969) ("In fashioning its remedies under the broad provisions of § 10(c) of the Act (20 U.S.C. § 160(c)), the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts.").

Second, the Board's determination is a policy decision: it has concluded that it will better be able to accomplish the goals of the NLRA by assuming the existence of harm than by making a case by case inquiry. The courts should defer to this policy decision because Congress has delegated the power to formulate labor policy to the Board, not the courts. *See* NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963) ("The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review."); *accord* NLRB v. Food Store Employees Union Local 347, 417 U.S. 1, 10 (1974) (The Supreme

crease with time, immediacy of relief is essential. Only a section 10(j) bargaining order can provide such relief. Therefore, absent countervailing irreparable harm from the order itself, the courts should use section 10(j) relief to prevent irreparable injury to the union.[70]

3. *Potential Harms Created by the Section 10(j)* Gissel *Bargaining Order*

A temporary bargaining order will impose costs on parties other than the union.[71] Of course, if these costs are inherent in a *Gissel* order of any type, whether issued by a court or the Board, they should not weigh in the balance against the section 10(j) bargaining order. But section 10(j) relief would not be just if the harm caused by the temporary bargaining order, discounted by the chance that the Board will not order bargaining, outweighs the harm to the union in the absence of such an order.[72]

Court has required adherence to "the congressional scheme investing the Board and not the courts with broad powers to fashion remedies that will effectuate national labor policy."); Golden State Bottling Co. v. NLRB, 414 U.S. 168, 176 (1973) (the Board has the "broad discretion to fashion and issue . . . relief adequate to achieve the ends, and effectuate the policies of the [NLRA]"); *see also* Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941). Thus, the court should not substitute its own judgment on the effect of unfair labor practices for the Board's. In Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951), for example, the court stated that judicial review of decisions made by the Board acting in its capacity as an adjudicatory agency is not "intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." Moreover, "even as to matters not requiring expertise," a court may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Accord* Consolo v. Federal Maritime Commn., 383 U.S. 607, 621 (1966) ("[I]t is usually better to minimize the opportunity for reviewing courts to substitute their discretion for that of the agency.").

Whether employer unfair labor practices *actually* reduce employee support for the union is an open question. Their effect on the union's bargaining strength is unknown and their impact on the union's chances of winning a representational election is disputed. *Compare* J. GETMAN, S. GOLDBERG & J. HERMAN, UNION REPRESENTATION ELECTIONS: LAW AND REALITY 128-29 (1976) ("The unions did not lose significantly more support in unlawful elections than in clean elections"), *with* NLRB v. Gissel Packing Co. 395 U.S. 575, 611 n.30-31 (1969) (employer can "affect the outcome of a rerun election by delaying tactics"); General Knit of California, Inc., 239 N.L.R.B. 619, 621-22 (1978); Eames, *An Analysis of the Union Voting Study from a Trade Unionist's Point of View*, 28 STAN. L. REV. 1181 (1976) ("the data [of the Getman, Goldberg, and Herman study] do not support the authors' conclusions that campaign propaganda and campaign coercion do not affect the outcome of the campaign."); Note, *Misrepresentation in NLRB-Conducted Elections*, 26 WAYNE L. REV. 119, 128-31 (1979).

70. This balancing of potential harms comports with the traditional equitable criteria for a temporary injunction. *See* note 72 *infra*.

71. These costs consist of (1) the loss to employees forced to accept unwanted representation, *see* text at notes 73-78 *infra*; (2) the loss to the employer from denial of the chance for a representation election, *see* notes 79-82 *infra* and accompanying text; and (3) the loss to the employer from the cost of any agreement reached, *see* notes 83-86 *infra* and accompanying text.

72. Protection of the process of collective bargaining and promotion of the free flow of

a. Potential Harm to the Employees

The purpose of a *Gissel* bargaining order is to give effect to the employees' preference for union representation.[73] But in *Gissel* situations, the employees express their preference through authorization cards, a process admittedly inferior to a representational election.[74] Therefore, both section 10(j) relief and the Board's *Gissel* bargaining order run the risk of imposing union representation even though a majority of the employees did not really support the union at the close of the organizational drive.

In *Gissel*, the Supreme Court concluded that this risk is not serious, holding that authorization cards, which the union must solicit under the NLRB's rules, can adequately reflect the employees' desire for union representation.[75] The Court also concluded that the actual harm caused by unwanted unions would "be minimal at best, . . .

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commerce require the § 10(j) court to balance the harms to the employer, the employees, the union, and the public. *See* notes 25-28 *supra* and accompanying text.

This balancing of potential harms is also present in the traditional equitable criteria for a temporary injunction. A court deciding the propriety of temporary injunctive relief will examine: (1) the threat of irreparable harm to the petitioner absent relief; (2) the potential for the creation of counterbalancing irreparable harm to respondent; (3) harm to third parties; and (4) the petitioner's probability of success on the merits. *See, e.g.*, Washington v. Walker, 529 F.2d 1062, 1065 (7th Cir. 1976); Conservation Council of North Carolina v. Costanzo, 528 F.2d 250, 252 (4th Cir. 1975); Gulf & Western Indus. v. Great Atlantic & Pacific Tea Co., 476 F.2d 687, 692 (2d Cir. 1973); Asher v. Laird, 475 F.2d 360, 362 (D.C. Cir. 1973); Allison v. Froehlke, 470 F.2d 1123, 1126 (5th Cir. 1972).

The Supreme Court has outlined the role of equitable components in the criteria for a statutory injunction in Hect Co. v. Bowles, 321 U.S. 321 (1944). The *Hect* court called upon district courts to act "in accordance with their traditional [equitable] practices, as conditioned by the necessities of the public interest which Congress has sought to protect." 321 U.S. at 330. The Court used the term "public interest" to mean the policies that Congress intended the statutory injunction to promote. 321 U.S. at 331. Thus, the fact that an injunction is authorized by statute requires the affected court to exercise its equitable discretion "in light of the large objectives of the [statute authorizing the injunction]." 321 U.S. at 331. Two courts have implicitly relied on *Hect* in formulating their § 10(j) criteria. *See* Seeler *ex rel.* NLRB v. Trading Port, Inc., 517 F.2d 33, 39-40 (2d Cir. 1975); Gottfried *ex rel.* NLRB v. Mayco Plastics, Inc., 472 F. Supp. 1161, 1165 (E.D. Mich. 1979) (recognizing that "public interest" stands for the policies that Congress designed the NLRA to promote), *aff'd. mem.*, 615 F.2d 1360 (6th Cir. 1980).

A court, then, may consider both equitable considerations and the policies that Congress designed § 10(j) to further in determining the propriety of a temporary bargaining order. The equitable considerations fill in the gaps that the legislative history and the NLRA's declarations of Congressional purpose have left in the meaning of § 10(j). *See* Westen & Lehman, *Is There Life For* Erie *After Death of Diversity?*, 78 MICH. L. REV. 311, 330-36 (1980).

73. NLRB v. Gissel Packing Co., 395 U.S. 575, 614 (1969).

74. *Gissel*, 395 U.S. at 602.

75. The *Gissel* court reached this conclusion after an extensive discussion of the reliability of authorization cards:

> The acknowledged superiority of the election process, however, does not mean that cards are thereby rendered totally invalid, for where an employer engages in conduct disruptive of the election process, cards may be the most effective—perhaps the only—way of assuring employee choice. As for misrepresentation, in any specific case of alleged irregularity in the solicitation of the cards, the proper course is to apply the Board's customary standards . . . and rule that there was no majority if the standards were not satisfied. It does not follow that because there are some instances of irregularity, the cards can never be

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.' "[76] Finally, the Court noted in *Gissel*, as a factor lessening the potential harm to employees, that the bargaining order is a

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used; otherwise, an employer could put off his bargaining obligation indefinitely through continuing interference with elections.

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The . . . complaint that the cards are too often obtained through misrepresentation and coercion must be rejected also in view of the Board's present rules for controlling card solicitation, which we view as adequate to the task where the cards involved state their purpose clearly and unambiguously on their face.

395 U.S. at 602-04.

The Supreme Court also indicated that

[u]nder the [doctrine of Cumberland Shoe Corp., 144 N.L.R.B. 1268 (1963), *affd.*, 351 F.2d 917 (6th Cir. 1965)], if the card itself is unambiguous *(i.e.,* states on its face that the signer authorizes the Union to represent the employee for collective bargaining purposes and not to seek an election), it will be counted unless it is proved that the employee was told that the card was to be used *solely* for the purpose of obtaining an election.

395 U.S. at 584 (emphasis in original). The Court expressly upheld the Board's *Cumberland Shoe* rule. 395 U.S. at 606. Under *Cumberland Shoe* and its progeny, the facially misleading nature of the authorization card or the effects of a union's coercion in obtaining signatures during the organizational drive would lead the Board to decide whether to count certain cards. *See, e.g.*, NLRB v. S.S. Logan Packing Co., 386 F.2d 562 (4th Cir. 1967); Levi Strauss & Co., 172 N.L.R.B. 732 (1968); Cumberland Shoe Corp., 144 N.L.R.B. 1268 (1963), *affd.*, 351 F.2d 917 (6th Cir. 1965). Even where the Board finds that the union engaged in a pattern of misrepresentation or coercion, it will not invalidate all of the cards; rather, it invalidates only those cards that the company proves were signed because of threats or misunderstanding of purpose. Snow & Sons, 134 N.L.R.B. 709, 710 (1961), *enforced* 308 F.2d 687 (9th Cir. 1962).

The empirical evidence supports the Court's conclusion that signed cards accurately reflect the sentiments of the employees who sign. *See* J. GETMAN, S. GOLDBERG, & J. HERMAN, UNION REPRESENTATION ELECTIONS: LAW AND REALITY 132-33 (1976).

76. *Gissel*, 395 U.S. at 612-13 n.33 (quoting Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38, 135 (1964)).

A court ordering § 10(j) relief is, however, more likely to inflict this harm. The *Gissel* Court expressed its confidence in the Board's ability to determine the validity of cards in adjudicatory proceedings. *See* note 75 *supra*. But the court considering a § 10(j) petition must decide based on an assessment of validity made by the *prosecutorial*, rather than the adjudicatory, branch of the NLRB. *See* notes 5 & 11 *supra*.

Nevertheless, the potential for this harm should not be significant. The prosecutorial branch is also expert in making this determination. *See* note 132 *infra*. Moreover, the court considering the § 10(j) petition will probably have the record of the proceedings before the administrative law judge. *See* note 136 *infra*. This record would contain the evidence on which the Board would ultimately determine the validity of the cards. Therefore, the court would make its decision on information just as reliable as that upon which the Board's decision is based.

If the court refused to order bargaining by concluding that the Board, not the court, must ultimately determine the validity of the cards, it would erect a *per se* rule against bargaining orders. *See* notes 50 *supra* and 128 *infra*. The authorization card issue should not give rise to a *per se* rule against bargaining, because such a rule would undermine the deterrent effect of § 10(j) bargaining orders. *See* note 58 *supra*. A *per se* rule would allow an employer to remove its unfair labor practices from the ambit of § 10(j) relief simply by questioning the validity of authorization cards. This immunity would give the employer an incentive to commit unfair labor practices rather than to seek a representational election. The employer could then gain an increment of time in which the probability of its reaching a collective bargaining agreement was zero.

temporary measure.[77] Section 10(j) relief is even less enduring because it dissolves when the Board renders its decision.[78] Thus, section 10(j) relief would not irreparably injure employee interests and therefore would not destroy the effectiveness of the Board's final order.

b. Potential Harms to the Employer

A section 10(j) bargaining order can harm the employer in two ways. First, the order may replace a campaign and election.[79] The order would then prevent the employer from presenting to the employees its case against unionization and from ascertaining through an election whether a majority of the employees really does support the union. Second, the employer and the union may enter into a collective bargaining agreement pursuant to the section 10(j) bargaining order, only to have the Board later rule that *Gissel* does not obligate the employer to bargain.

The employer's potential loss of access to the electoral process should not weigh against the issuance of a temporary bargaining order. Ordinarily, an employer may lawfully refuse to bargain when confronted with a recognition demand from a union possessing a card majority and may insist that the union petition for a representational election.[80] Under *Gissel*, the employer forfeits access to the electoral process only if it instead responds by launching a salvo of severe unfair labor practices.[81] This Note contends that courts can properly order section 10(j) relief only if the case gives rise to a high

77. "There is, after all, nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a representation petition." *Gissel*, 395 U.S. at 613.

78. *See* note 83 *infra*. For other ways by which the courts can minimize the duration of a § 10(j) injunction, see note 84 *infra*.

79. The unfair labor practices may lead the union to withdraw its petition for an election. The Board's *Gissel* bargaining order eliminates the election. If the union brings its case after losing an election, the Board's *Gissel* bargaining order eliminates the rerun election. *See* notes 41-46 *supra* and accompanying text.

80. "[A]n employer is not obligated to accept a card check as proof of majority status, under the Board's current practice, and he is not required to justify his insistence on an election by making his own investigation of employee sentiment and showing affirmative reasons for doubting the majority status." *Gissel*, 395 U.S. at 609. Moreover, "unless an employer has engaged in an unfair labor practice that impairs the electoral process, a union with authorization cards purporting to represent a majority of the employees, which is refused recognition, has the burden of taking the next step in invoking the Board's election procedure." Linden Lumber Division, Summer & Co. v. NLRB, 419 U.S. 301, 310 (1974).

81. "An employer, as the Supreme Court has held, has a right to an election so long as he does not fatally impede the election process. Once he has so impeded the process, he has forfeited his right to a Board election and must bargain with the union on the basis of other clear indications of employees' desires." Trading Port, Inc., 219 N.L.R.B. 298, 301 (1975) (footnote omitted). To prove that the employer committed unfair labor practices, the union must demonstrate that the employer was aware of the union's organizational drive. NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

probability that the Board will ultimately issue a *Gissel* bargaining order.[82] Thus, a court ordering section 10(j) relief will not inflict a unique harm on the employer, because, under the standard proposed in this Note, the Board's order will probably result in a forfeiture anyway.

The second and more troublesome harm arises from the possibility that the employer and the union may enter into a collective bargaining agreement only to have the Board later decide that the employer has no duty to bargain. In the interim, the employer may have increased compensation or benefits because of bargaining into which it should not have been forced.

Nevertheless, this potential problem should not tip the section 10(j) balance against temporary bargaining orders for three reasons. First, the possibility of the harm materializing should be minimal if a court grants section 10(j) relief only if there is a high probability that the Board will ultimately issue a *Gissel* order. Second, the interval in which harm could occur should be minimal. The employer should be able to demand, without violating its duty to bargain in good faith, that the interim bargaining agreement terminate if the Board ends the bargaining relationship by overruling a previously issued section 10(j) bargaining order.[83] Any harm would thus be confined to the interval between the conclusion of the agreement and the issuance of the Board's final order. Moreover, the duration of this interval will be minimized since the Board expedites cases for which it has obtained section 10(j) relief.[84]

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82. *See* notes 130-36 *infra* and accompanying text. The Board's screening process has led it to seek § 10(j) bargaining orders only in situations in which a *Gissel* bargaining order would be justified. *See* note 20 *supra* and accompanying text; note 134 *infra*.

83. *See* note 85 *infra*.

The Board's order automatically terminates the § 10(j) injunction. The Supreme Court held in a case arising under § 10(l) of the Act, 29 U.S.C. § 160(l) (1976), that Congress designed § 10(l) to provide relief only until the Board's disposition of the alleged unfair labor practices. Sears, Roebuck & Co. v. Carpet Layers Union, 397 U.S. 655, 659 (1970).

The *Sears* Court based its decision on the legislative history of § 10(l): "The legislative history makes clear that the purpose of enacting § 10(l) in 1947 was simply to supplement the pre-existing § 10(e) power of the Board by authorizing injunctive relief prior to Board action." 397 U.S. at 658. This rationale applies to § 10(j) as well because the portion of the legislative history quoted by the court refers expressly to both §§ 10(j) and 10(l). 397 U.S. at 658-59 n.5 (quoting S. REP. No. 105, 80th Cong., 1st Sess. 27 (1947)).

Since *Sears*, the only two courts to face the issue have held that a § 10(j) injunction lapses upon the Board's order. Barbour v. Central Cartage, Inc., 583 F.2d 335 (7th Cir. 1978); Johansen v. Queen Mary Restaurant Corp., 522 F.2d 6 (9th Cir. 1975).

84. Such cases receive priority throughout the administrative proceedings over all other cases except those under §§ 10(l) and 10(m) of the NLRA. 29 C.F.R. § 102.94 (1983). Moreover, the injunction may terminate prior to the Board's decision if, for example, the administrative law judge dismisses the case.

The court may also limit the duration of the § 10(j) injunction, thereby reducing the amount of time in which the union can secure a collective bargaining agreement prior to the Board's decision. The Third Circuit, for example, has imposed a series of time limits on all § 10(j) injunctions, corresponding to the various stages of the administrative proceedings. *See* Eisenberg *ex rel.* NLRB v. Hartz Mountain Corp., 519 F.2d 138, 144 (3rd Cir. 1975). The

Third, any harm arising in this interval will be reparable. The harm that the employer would suffer during this interim period would consist of the economic concessions obtained by the union in the collective bargaining agreement. This harm need not be irreparable, because the employer should be able to demand, without violating its duty to bargain in good faith, terms that would relieve the employer from its obligation to honor these concessions where the Board later decides that the employer is not obligated to bargain.[85] The increased benefits from an interim agreement could be conditionally paid. For example, the employer could pay any marginal increase in wages into an escrow account pending the Board's final disposition of the *Gissel* question.[86] Thus, the employer may guard itself against irreparable interim harm arising from particular concessions.

An additional risk arises if the parties disagree over the appropriate bargaining unit.[87] The NLRB would ordinarily determine the

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Second Circuit modified a § 10(j) injunction, requiring its automatic termination if the administrative law judge did not render a decision within two months or the Board within four months. Kaynard *ex rel.* NLRB v. Mego Corp., 633 F.2d 1026, 1035 (2d Cir. 1980).

85. In Kaynard *ex rel.* NLRB v. Palby Lingerie, Inc., 625 F.2d 1047, 1054 (2d Cir. 1980), the NLRB had not determined the appropriate bargaining unit with finality at the time of the 10(j) proceeding. Thus, the employer faced the risk of entering into an agreement with a union that might not represent all of the employees subject to the agreement. The court noted that the employer could protect itself from this risk in the collective bargaining agreement: "[A]ny agreement can contain a condition subsequent to take into account the possibility of the Board's rejecting the Regional Director's unit determination . . . ." 625 F.2d at 1054. Similarly, in Ferguson-Steere Motor Co., 111 N.L.R.B. 1076, 1079 (1955), the Board held that the employer's "insistence that the continued effectiveness of any new agreement be conditioned upon the result of its declaratory judgment action" in federal court did not violate § 8(a)(5) of the NLRA (refusal to bargain collectively with representatives of the employees).

86. The money in this account would go back to the employer if the Board did not order bargaining. If the collective bargaining agreement requires the employer to make contributions for fringe benefits, the employer should be able to demand that the employees temporarily make these contributions. The employer would have to establish an escrow account into which it would pay for fringe benefits as required by the agreement. If the Board ordered bargaining, the employer would reimburse the employees from the escrow account.

Moreover, the decision of the court considering the § 10(j) petition should not turn on speculation as to whether the employer will be able to obtain the time limit, *see* text at note 83 *supra*, and escrow accounts. *Cf.* American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 317 (1965) (The Board does not have "a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining power."); NLRB v. Insurance Agents' Intl. Union, 361 U.S. 477, 497 (1960) (The Board does not have the authority to act "as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands."). Because the Board lacks the authority to balance the bargaining strengths of the parties, a federal district court should not grant or deny § 10(j) relief based on speculation as to the employer's ability to extract certain terms. *Cf.* note 69 *supra* (Board has expertise and delegated authority that courts lack).

87. The courts are split over the propriety of § 10(j) bargaining orders when the NLRB has not yet determined the appropriate bargaining unit with finality. *Compare* Kaynard *ex rel.* NLRB v. Palby Lingerie, Inc., 625 F.2d 1047 (2d Cir. 1980) *and* Levine *ex rel.* NLRB v. C & W Mining Co., 610 F.2d 432 (6th Cir. 1979) (§ 10(j) bargaining order granted), *with* Taylor *ex rel.* NLRB v. Circo Resorts, Inc., 458 F. Supp. 152 (D. Nev. 1978) (§ 10(j) bargaining order denied).

bargaining unit before a representational election.[88] But the NLRB may not be able to make such a decision before the section 10(j) proceeding takes place. In such cases, a temporary bargaining order might obligate the employer to bargain with a union that does not lawfully represent all of the employees, since the final bargaining unit might differ from the one that the section 10(j) order encompasses. In situations of this sort the district court should stay section 10(j) proceedings until the NLRB has determined the appropriate bargaining unit. The resulting delay would be relatively short.[89]

Ultimately, a section 10(j) bargaining order might be appropriate

88. 29 U.S.C. § 159(b) (1976); 29 C.F.R. § 101.17 (1983).

89. The justification for a stay lies in the procedures by which the NLRB determines bargaining units. The NLRA vests the Board with the authority to determine the unit that the union represents as a bargaining agent. 29 U.S.C. § 159(b) (1976). The Board "is authorized to delegate to its regional directors its powers under [§] 159 of this title to determine the unit appropriate for the purpose of collective bargaining . . . ," 29 U.S.C. § 153(b) (1973), and has, in fact, done so. NLRB, NLRB RULES AND REGULATIONS AND STATEMENTS OF PROCEDURE, SERIES 8 § 102.67(a) (1979) [hereinafer cited as RULES AND REGULATIONS].

The Regional Director's decision is subject to the Board's review, RULES AND REGULATIONS, *supra*, at § 102.67(b), although the Board is not *required* to review the decision. RULES AND REGULATIONS, *supra*, at § 102.67(c). The bargaining unit will be unsettled at the time of the § 10(j) hearing only if the Board has decided to review the Regional Director's decision. The Regional Director should be able to render his decision on the appropriate bargaining unit prior to the § 10(j) proceeding. The median time required to process representation cases, the category that includes disputes over the appropriate bargaining unit, *see* NLRB, FORTY-FOURTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 261 (1979) [hereinafter cited as ANNUAL REPORT], is far less than the median time required to issue a complaint for unfair labor practices. For example, in 1979 it took the office of the Regional Director a median time of 39 days to make its decision in representational cases; in contrast, it took the Regional Director a median time of 45 days to issue a complaint for unfair labor practices after a party had filed a charge. ANNUAL REPORT, *supra*, at 12, 17. Thus, the Regional Office should be able to rule on the bargaining unit shortly after the Regional Director petitions for § 10(j) relief, even if the Director has simultaneously issued a complaint for unfair labor practices. The Regional Director will have even more time to determine the appropriate bargaining unit if the court considering the § 10(j) petition stays the proceedings until the hearing before the administrative law judge is complete. *See generally* note 136 *infra*. In 1977, the median time between the issuance of a complaint and the close of the administrative hearing was 90 days. Nolan and Lehr, *supra* note 5, at 51.

If the Board does choose to review the Regional Director's decision, it will do so only because the Regional Director's decision is outside the parameters of established labor policy.

> The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:
> (1) That a substantial question of law of policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.
> (2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
> (3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
> (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

RULES AND REGULATIONS, *supra*, at § 102.67(c). Therefore, to avoid straying outside the parameters of established labor policy, *see* notes 130-136 *infra* and accompanying text, the court considering a § 10(j) petition should not order temporary bargaining until the Board has determined the appropriate bargaining unit with finality. The court should keep in mind the fact that if the Board determines the bargaining unit before it adjudicates the case, a temporary bargaining order could prevent irreparable harm from occurring in the interval between the

even if it did irreparably injure the employer. The issue would then become one of balancing the relative harms to the employer and the union. The irreparable harm that the union and the employees suffer

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Board's decision on the unit and the Board's decision on the case. *See* notes 67-70 *supra*. For these reasons, a stay is superior to a refusal to order temporary bargaining.

The Board's review of the Regional Director's decision would not significantly delay the § 10(j) proceedings. First, the problem seldom arises. The NLRB's records do not permit exact calculations because bargaining unit decisions fall within the category of representational decisions. *See* ANNUAL REPORT, *supra*, at 261. But in 1979, of the Board's 1,820 decisions that adjudicated contested cases, only 147 could have involved a dispute over the bargaining unit. *See* ANNUAL REPORT, *supra*, at 20. This conclusion follows from a comparison of the Board's criteria for reviewing the Regional Director's decisions on bargaining units with the breakdown of cases in the Annual Report. The Annual Report specifies three categories of decisions: (1) Decisions pursuant to transfers to the Board for initial consideration from the Regional Directors; (2) Decisions pursuant to review of the Regional Directors' determinations; and (3) Decisions pursuant to objections and/or challenges by the parties. Since the Board's review of decisions on bargaining units is discretionary, only the first two categories could contain disputes over bargaining units. *See* RULES AND REGULATIONS, *supra*, at § 102.67(c). For 1980, the comparable fraction was 145 cases out of 1,857. NLRB, FORTY-FOURTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD, *cited in* LABOR RELATIONS YEARBOOK (BNA) (1981) 266. For 1979, the comparable fraction was 138 cases out of 1,762. NLRB, FORTY-THIRD ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 18 (1978). Because the Board rarely reviews the Regional Director's decision on bargaining units, a stay, if needed at all, would probably be quite short.

Second, to the extent that review is required, the issue would quickly be brought to the Board's attention because a party must request review within ten days of the Regional Director's decision. RULES AND REGULATIONS, *supra*, at § 102.67(b). Third, the Board could expedite its review of the Regional Director's determination in a § 10(j) case, since so few cases are involved and since the Board's procedures clearly contemplate consideration of this issue apart from the adjudication of unfair labor practices. RULES AND REGULATIONS, *supra*, at §§ 102.67(c)-(j); *see also* Boire *ex rel.* NLRB v. Pilot Freight Carriers, Inc., 515 F.2d 1185, 1189 (5th Cir. 1975) (Board announced decision in unit clarification dispute before resolving unfair labor practices question), *cert. denied*, 427 U.S. 934 (1976). Finally, the possibility of marginal delay will be even less if the court grants a stay pending the completion of the hearings before the adminstrative law judge. *See* note 136 *infra*.

A stay in the § 10(j) proceeding pending the Board's determination would be superior to other ways in which the courts have responded to the question of a contested bargaining unit. The Sixth Circuit simply ignored the issue in ordering bargaining in Levine *ex rel.* NLRB v. C & W Mining Co., 610 F.2d 432 (6th Cir. 1979). *See* Kaynard *ex rel.* NLRB v. Palby Lingerie, Inc., 625 F.2d 1047, 1055 (2d Cir. 1980). The Second Circuit ordered bargaining despite the fact that the Board had apparently decided to review the Regional Director's decision. 625 F.2d at 1054. The Second Circuit approved of bargaining because a "substantial basis [existed] for the Regional Director's unit determination." 625 F.2d at 1055. This "substantial basis" test is inappropriate in cases where the Board has decided to review the Regional Director's determination of the bargaining unit. In precisely such cases, a "substantial basis" for the Regional Director's determination will be lacking, because the Regional Director will have determined the unit without guidance from the Board's previous decisions and summary affirmances.

On the other hand, at least one court that apparently would have otherwise been willing to issue a temporary bargaining order refused to do so because the NLRB had not determined the appropriate bargaining unit with finality. Taylor *ex rel.* NLRB v. Circo Resorts, Inc., 458 F. Supp. 152, 157 (D. Nev. 1978). Such denial runs the risk of creating a *per se* rule against § 10(j) bargaining orders in cases in which the employer disputes the bargaining unit. A *per se* rule, however, is unjustifiable. *See* note 127 *infra*. Whereas a stay would allow for a final decision on the bargaining unit and would thus eliminate that dispute from the § 10(j) proceeding, a *per se* rule would enable some employers to escape temporary bargaining orders merely by objecting to the Regional Director's determination of the bargaining unit. The prospect of temporary bargaining would thus turn on the timing of the § 10(j) proceeding *vis-a-vis* the Regional Director's hearing on the bargaining unit.

in the *Gissel* situation absent a section 10(j) bargaining order[90] outweighs the minimal, temporary, reparable harm and even the irreparable harm to the employer that section 10(j) relief might produce.[91] Thus, the balance of affected interests favors the issuance of a section 10(j) bargaining order.

4. *Preservation of the Status Quo: A Comparison of Risks*

A section 10(j) order is also appropriate because it would preserve the status quo, thereby ensuring the effectiveness of the Board's final order. This conclusion becomes clear through an examination of the possible outcomes that the courts and the Board could produce in a *Gissel* situation and a comparison of the risks that each of these outcomes imposes on affected parties.

The courts have agreed that preservation of the status quo is the goal of section 10(j) relief,[92] but they have stated this conclusion in different ways. Some courts have defined the status quo as "the last uncontested status which preceded the pending controversy."[93] Other courts have defined it as "the status quo as it existed before the onset of unfair labor practices."[94] Although these two different definitions do not necessarily entail different results,[95] the meaning of

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90. *See* notes 59-65 *supra* and accompanying text.

91. The balance of interests would still favor the § 10(j) bargaining order. First, the likelihood of an unconditional collective bargaining agreement is low, since, by supposition, the employer's unfair labor practices have weakened the union's bargaining strength. *See* note 86 *supra*. Second, the court considering the § 10(j) petition must discount the potential irreparable harm to the employer by the probability that the Board will ultimately not issue a *Gissel* bargaining order. *See* note 72 *supra*. The risk that the Board will not issue a subsequent bargaining order has been very low in cases where the courts have granted § 10(j) bargaining orders. *See* note 134 infra. The courts can ensure that this risk remains low by ordering temporary bargaining only in situations similar to those for which the Board has previously issued *Gissel* bargaining orders. *See* notes 130-36 *infra* and accompanying text. Third, the systemic interest in deterring unfair labor practices also weighs in favor of the courts' placing the risk of irreparable harm on the employer. The risk provides an incentive for employers to fight unionization through the electoral process rather than through unfair labor practices.

92. *See, e.g.,* Trading Port, Inc., 517 F.2d 33, 38 (2d Cir. 1975); Boire *ex rel.* NLRB v. Pilot Freight Carriers, Inc., 515 F.2d 1185, 1193 (5th Cir. 1975), *cert. denied,* 426 U.S. 934 (1976); Minnesota Mining and Mfg. Co. v. Meter *ex rel.* NLRB, 385 F.2d 265, 270 (8th Cir. 1967); Angle v. Sacks *ex rel.* NLRB, 382 F.2d 655, 660 (10th Cir. 1967). The courts have relied on the legislative history of 10(j) in reaching this conclusion:

> Since the Board's orders are not self-enforcing, it has sometimes been possible for persons violating the Act to accomplish their unlawful objective before being placed under any legal restraint and thereby to make it impossible or not feasible *to restore or preserve the status quo* pending litigation.

S. REP. NO. 105 at 27, *reprinted in* LEGISLATIVE HISTORY, LMRA, at 433, *supra* note 25 (emphasis added). Although the statement refers literally to § 10(e) proceedings, it applies to § 10(j) as well. *See* note 25 *supra*.

93. Minnesota Mining and Mfg. Co. v. Meter *ex rel.* NLRB, 385 F.2d 265, 273 (8th Cir. 1967) (quoting Westinghouse Elec. Corp. v. Free Sewing Machine Co., 256 F.2d 806, 808 (7th Cir. 1958)).

94. Seeler *ex rel.* NLRB v. Trading Port, Inc., 517 F.2d 33, 38 (2d Cir. 1975); *accord* Levine *ex rel.* NLRB v. C & W Mining Co., 610 F.2d 432, 437 (6th Cir. 1979).

95. The two definitions are not logically incompatible and do not necessitate different re-

the phrase "status quo" has produced conflict among the courts. In fact, the conventional wisdom about section 10(j) suggests that the split over the propriety of section 10(j) *Gissel* bargaining orders stems from confusion over what temporal status such orders are to restore.[96] In *Boire ex rel. NLRB v. Pilot Freight Carriers*,[97] for exam-

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sults, because the two definitions can refer to the same interval of time. Suppose a valid majority of employees sign authorization cards during the union's organizational drive. The employer demands that the union petition for a representational election. *See* note 80 *supra*. Both sides conduct a campaign, and a representational election is held. The union loses the election and files charges with the Regional Director. After an investigation, the Regional Director issues a complaint against the employer alleging that during the campaign the employer engaged in unfair labor practices that made a fair election unlikely. The Regional Director seeks from the Board an order requiring the employer to bargain with the union based on the union's card majority. In the administrative proceedings, the employer does not contest the card majority. Instead, the employer denies that it engaged in any unfair labor practices and that even if it did, their effects were not sufficiently severe under *Gissel* to trigger an obligation to bargain. *See* notes 41-46 *supra* and accompanying text. Therefore, the employer contends, the most the Board should order is a second election. The "pending controversy," *see* note 93 *supra* and accompanying text, before the Board consists of a question of fact and two questions of policy. The question of fact is whether certain events occurred. The two questions of policy are, first, whether, assuming certain events occurred, those events constituted unfair labor practices and, second, whether the effects of those unfair labor practices were sufficiently severe to make a fair election unlikely. *See* note 128 *infra*.

Since the employer does not deny that a valid majority of the employees signed authorization cards, the last uncontested status includes the interval between the time at which the employees signed the cards and the time at which the alleged unfair labor practices occurred. This interval, the "last uncontested status which preceded the pending controversy," *see* note 93 *supra* and accompanying text, ends precisely when the events alleged to be unfair labor practices occurred and includes the status quo "as it existed before the onset of the unfair labor practices." Therefore, the two ostensibly different definitions of the status quo do not necessarily demarcate mutually exclusive intervals of time.

In fact, in the first two appellate cases involving § 10(j) *Gissel* bargaining orders, the courts used these ostensibly different definitions of the status quo but cited the same case, Minnesota Mining and Mfg. Co. v. Meter *ex rel.* NLRB, 382 F.2d 265 (8th Cir. 1967), in support of their definitions. *Compare* Seeler *ex rel.* NLRB v. Trading Port, Inc., 517 F.2d 33, 38 (2d Cir. 1975) (drawing from the effect of the ruling in *Minnesota Mining*), *with* Boire *ex rel.* NLRB v. Pilot Freight Carriers, Inc., 515 F.2d 1185, 1194 (5th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976) (quoting directly from the *Minnesota Mining* court).

The Fifth Circuit has, however, demarcated a time period different from that of the status quo "as it existed before the onset of unfair labor practices." Boire *ex rel.* NLRB v. Pilot Freight Carriers, Inc., 515 F.2d 1185, 1194 (5th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976). After defining the status quo as the "last uncontested status which preceded the pending controversy," the court equated the word "controversy" with the employees' signing of the authorization cards. 515 F.2d at 1194. Under this definition, the status quo ends just prior to the signing of cards. The other definition of the status quo, the status quo "as it existed before the onset of unfair labor practices" does not have a definite beginning point. Therefore, it could overlap with the status quo prior to the signing of cards. The courts, however, have not construed it to overlap. *See* cases cited at note 99 *infra* (status quo begins after signing of cards). In short, the courts have construed the definitions of the status quo to demarcate different intervals of time, even though the language of the definitions does not compel this result.

96. *See, e.g.*, Pettibone, *The Sec. 10(j) Bargaining Order in Gissel-Type Cases*, 27 LAB. L.J. 648, 660 (1976); Note, *Section 10(j) of the National Labor Relations Act: Increased Exercise of Federal Jurisdiction Over Labor Disputes*, *supra* note 34, at 424-45; Note, *The Use of Section 10(j) of the Labor-Management Relations Act in Employer Refusal-to-Bargain Cases*, *supra* note 34, at 854; Note, *Section 10(j) of the National Labor Relations Act: A Legislative, Administrative and Judicial Look at a Potentially Effective (But Seldom Used) Remedy*, *supra* note 34, at 1043;

ple, the Fifth Circuit manipulated the phrase "pending controversy," to advance an untenable definition of the status quo. By finding that the signing of union authorization cards precipitated the "controversy," the *Pilot Freight* court in effect penalized the union for the employer's unlawful conduct.[98] Other courts have used "preservation of the status quo" as a conclusory label and have created the erroneous impression that preservation requires the court simply to turn back the wheels of time.[99]

Indeed, the courts have persistently defined the status quo as a set of conditions existing at some previous time[100] without addressing

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34 A.L.R. FED. 818, 824 (1977); *see also* Levine *ex rel.* NLRB v. C & W Mining Co., 610 F.2d 434, 437 (6th Cir. 1979).

97. 515 F.2d 1185 (5th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976).

98. *See* 515 F.2d at 1194. The organizational drive of the union, as long as the union does not coerce or mislead employees into signing cards, does not amount to a "controversy" or a labor dispute. Section 7 of the NLRA, 29 U.S.C. § 157 (1976), grants employees the rights "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining . . . ." In equating the legitimate organizational efforts of the union with a legal "controversy," thereby casting an aura of disapprobation over the union's right to solicit support, the *Pilot Freight* court ran roughshod over the policies that the NLRA promotes and the rights it establishes.

An interpretation of the word "controversy" as meaning the issue of whether the union had obtained a card majority is also implausible in this case. In the § 10(j) proceeding, the employer did not contest the validity of the card majority, and the employer did not demand that the union petition for a representational election. 515 F.2d at 1190-91.

Thus, the Fifth Circuit, in defining the status quo as "the last uncontested status which preceded the pending controversy," 515 F.2d at 1194, manipulated the word "controversy" so as to ignore the union's card majority. If a court applying this definition of the status quo chooses to ignore a union's card majority, it will always refuse to issue a bargaining order. *See, e.g.*, Fuchs *ex rel.* NLRB v. Steel-Fab, Inc., 356 F. Supp. 385, 387 (D. Mass. 1973) ("[T]he status quo presently is one where the Union does not represent the [employer's] employees.").

99. Courts defining the status quo "as it existed before the onset of unfair labor practices," *see* note 94 *supra*, have ordered bargaining in recognition of the card majority that existed before the unfair labor practices. These courts have ignored the fact that such an order imposes a set of reciprocal rights and duties that did not previously exist. *See, e.g.*, Seeler *ex rel.* NLRB v. Trading Port, Inc. 517 F.2d 33, 38-39 (2d Cir. 1975) ("[I]t is essential not to freeze the present situation, but rather to 're-establish the conditions as they existed before the employer's unlawful campaign.' Those previous conditions constitute the status quo which the courts should restore through the issuance of a bargaining order under § 10(j).") (quoting *Gissel*, 395 U.S. at 612); Levine *ex rel.* NLRB v. C & W Mining Co., 465 F. Supp. 690, 694 (N.D. Ohio) ("In issuing a bargaining order, the Court is preserving the status quo as it existed just before the start of the unfair labor practices."), *modified*, 610 F.2d 432 (6th Cir. 1979); Taylor *ex rel.* NLRB v. Circo Resorts, Inc., 458 F. Supp. 152, 156 (D. Nev. 1978) ("[A]n interim bargaining order returns the parties to a point in time when the union had majority support; a point in time before the union's strength was dissipated by employer unfair labor practices.") As long as the court ignores the imposition of a new bargaining obligation, this definition of the status quo will always justify a bargaining order.

100. That courts have used a temporal framework is not suprising, even if not helpful. The legislative history suggests a temporal framework for the § 10(j) status quo drawn by analogy from the § 10(e) status quo. "Since the Board's orders are not self-enforcing, it has sometimes been possible for persons violating the act to accomplish their unlawful objective before being placed under any legal restraint and thereby to make it impossible or not feasible to restore or preserve the status quo pending litigation." S. REP. No. 105 at 27, *reprinted in* LEGISLATIVE HISTORY, LMRA at 433, *supra* note 25. Although this language applies to § 10(j), it refers to

the reason why the status quo must be preserved. Although this temporal framework may be appropriate in some cases,[101] it fails in the *Gissel* situation. Before the occurrence of the alleged unfair labor practices, a majority of employees will have indicated their support for the union via authorization cards, but the reciprocal rights and duties of an employer-union bargaining relationship will not exist. By the time the section 10(j) hearing takes place, the union may no longer have the support of a majority of the employees. A status quo defined in temporal terms thus creates a dilemma for the court considering a section 10(j) petition. If the court does not order bargaining, it will fail to recognize the previously existent card majority, a majority that, according to the Supreme Court, deserves protection.[102] But if the court does order bargaining, it imposes previously nonexistent reciprocal rights and duties on both the employer and the union.[103] Thus, the court cannot place all of the parties in the

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§ 10(e). *See* note 25 *supra*. Because Congress designed § 10(e) to prevent harm between the Board's order and subsequent enforcement litigation, the phrase "pending litigation" refers to the interval between the Board's order and the judicial enforcement decree. The § 10(e) status quo, then, is the legal position of the parties as established by the Board's order. By analogy, the § 10(j) status quo would be the position of the parties prior to the commission of unfair labor practices. The analogy comes from Congress' symmetrical treatment of the interval between unfair labor practices and the Board's adjudication and the interval between the Board's adjudication and judicial enforcement. *See* note 25 *supra*.

The analogy, however, does not work. The purpose of § 10(e) is to preserve the effectiveness of the Board's order pending judicial enforcement. *See* note 25 *supra*. Because the Board's order has established the legal positions of the parties, preservation of the effectiveness of the Board's order also preserves the positions of the parties. Because the remedial purpose of § 10(e) converges with the legal positions of the parties, a temporal framework for § 10(e) makes sense.

The § 10(j) setting is different. The Board has not yet established the legal positions of the parties. These positions might not be the same as those that existed prior to the unfair labor practices. For example, the Board could order bargaining, imposing a set of rights and duties that did not previously exist. Whereas § 10(e) operates retrospectively to restore the efficacy of the Board's order, § 10(j) operates prospectively to preserve it. *See* note 25 *supra*; text at note 105 *infra*. Consequently, in the § 10(j) setting, preservation of the effectiveness of the Board's order need not preserve the legal positions of the parties, because the Board's order has not yet even established those positions. The remedial purpose of § 10(j) does not converge with the positions of the parties prior to the § 10(j) proceeding. Therefore, the analogy breaks down. A temporal framework for the § 10(j) status quo does not make sense.

101. For example, reinstatement of a wrongfully discharged employee preserves the status quo as between employer and employee.

102. *See* notes 41-46 *supra* and accompanying text.

103. *See* Kaynard v. Lawrence Rigging, Inc., 80 L.R.R.M. (BNA) 2600, 2605 (E.D.N.Y. 1972).

The court in Boire *ex rel.* NLRB v. Pilot Freight Carriers, Inc., 515 F.2d 1185 (5th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976), properly recognized the dilemma between protecting the union's majority support and imposing a bargaining relationship:

> No matter how this court decides the interim bargaining issue, one of the parties stands to be "hurt." If [the employer is] required to bargain with the [union] now, our order might prove highly prejudicial to the employers' interests if the Board later determines the union does not enjoy representative status. Similarly, if we fail to require bargaining *pendente lite*, the union will have lost several months of representational services it could have performed on behalf of the employees . . . . Faced with Scylla and Charybdis, we choose to await the Board's pronouncement.

positions that they held before the alleged unfair labor practices.[104]

In contrast to this deficient, temporal framework, the remedial purpose of section 10(j) gives prescriptive value to the goal of preserving the status quo. Congress designed section 10(j) to prevent the infliction of intervening irreparable harm that would render the Board's final order ineffective.[105] Because section 10(j) operates *prospectively* to insure the effectiveness of the Board's order, the notion that it should preserve the position of the parties prior to that order is not necessarily correct. Rather, section 10(j) relief properly preserves the status quo to the extent that it establishes conditions under which the Board can issue an effective final order.[106]

To determine what these conditions are, a court considering a section 10(j) petition must compare the risks inherent in the outcomes that the court's and the Board's decisions might produce. The court has two options: to issue or not to issue a temporary bargaining order. The Board, in its administrative proceedings, also has two options: to issue or not to issue a *Gissel* bargaining order. Thus, four outcomes are ultimately possible: (1) neither the court nor the Board orders bargaining; or (2) both the court and the Board order bargaining; or (3) the court does not order bargaining, but the Board does; or (4) the court orders bargaining, but the Board does not. In attempting to preserve the status quo, the court should consider whether the Board's final order will be effective in each of these four possible outcomes.

The comparative risks in these four cases favor a section 10(j) bargaining order. Outcomes (1) and (2) pose no problems. In outcome (1), the union is not entitled to protection from whatever loss of support it may have suffered from the absence of section 10(j) relief.[107] In outcome (2), the employer will not have suffered any harm from which it is entitled to protection pending the Board's de-

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515 F.2d at 1194. Given this recognition, an explanation for the *Pilot Freight* result better than that provided by the court's prestidigitation with the word "controversy" emerges. *See* note 98 *supra*. The court may have decided that the risk of imposing a temporary bargaining relationship on the parties outweighed the risk of the employees' loss of support for the union.

104. *Cf.* F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION 201 (1930) (Speaking about temporary injunctions against strikes, the authors observe that such an "injunction cannot preserve the so-called *status quo*; the situation does not remain in equilibrium awaiting judgment upon full knowledge.").

105. *See* notes 22-25 *supra* and accompanying text.

106. Congress intended to prevent irremediable violations of the NLRA. *See* note 26 *supra*. If the Board cannot remedy violations, its adjudication is useless. Congress labelled the conditions under which the Board's order would be ineffective as destruction of the status quo. *See* note 25 *supra*. Therefore, preservation of the status quo requires conditions under which the Board can effectively adjudicate the case.

107. This result would obtain only if the Board decided that the unfair labor practices did not meet the *Gissel* standard of severity. *See* notes 41-46 *supra* and accompanying text.

cision,[108] and the court's order will have prevented irreparable diminution of the union's bargaining strength.[109] Thus, the court need not consider harms accruing from an order consistent with the Board's final order.

The crucial comparison of risks arises for the two possible outcomes in which the court's decision differs from the Board's. Where the court does not order bargaining, but the Board does (outcome 3), the court will have failed to prevent irreparable diminution of the union's strength, a harm that the Board has concluded will destroy the effectiveness of its *Gissel* order.[110]

Against this harm, the court must weigh the injuries that section 10(j) would produce if the Board later decided not to order bargaining (outcome 4). In this situation, a court would have to determine whether its section 10(j) relief would prevent the Board from effectively ordering that the employer is not obligated to bargain with the union.

Because a bargaining order does not compel the parties to reach an agreement,[111] the effects of the section 10(j) relief would depend on whether the union and the employer actually reach a collective bargaining agreement prior to the Board's decision. If the parties do not reach an agreement prior to the Board's decision, the Board's order dissolving the section 10(j) injunction[112] should effectively repair any harm to the employer. The only injury that the temporary bargaining order might impose on the employer would be an increase in employee support for the union. The employer might, as a consequence, be more susceptible to another organizational drive than he would have been in the absence of section 10(j) relief. But this increased susceptibility to unionization does not constitute a harm from which the employer is entitled to legal protection.[113] The

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108. *See* notes 10 & 60 *supra*. This outcome has occurred in every case in which the appellate court sustained the district court's § 10(j) bargaining order. *See* notes 117 & 134 *infra*.

109. *See* note 68 *supra*.

110. *See* notes 67-70 *supra* and accompanying text.

111. Collective bargaining involves

> the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

29 U.S.C. § 158(d) (1982). "[T]he Act . . . does not contemplate that unions will always be secure and able to achieve agreement even when their economic position is weak, or that strikes and lockouts will never result from a bargaining impasse." H.K. Porter Co. v. NLRB, 397 U.S. 99, 109 (1970).

112. *See* note 83 *supra*.

113. The temporary bargaining order may have increased the union's support, either through the mere presence of a bargaining agent or through the union's actual or perceived attainment of benefits. But given that the NLRA is designed to facilitate the employees' free choice of bargaining representatives and to protect the collective bargaining process, *see* 29

employer will be more susceptible only if the employees perceive the union as having effectively represented them while the parties bargained.[114] Under these circumstances, the employees' desire for a union falls within the ambit of the NLRA's protection,[115] since the NLRA establishes the employees' right to designate a union as their bargaining representative.[116] The employer cannot claim that the Board's final order is ineffective merely because it does not permit the employer to eradicate the employees' desire for a union.

If, on the other hand, the parties have entered into a collective bargaining agreement by the time the Board determines that the employer has no duty to bargain, an additional harm will materialize. The collective bargaining agreement will probably have increased the employees' compensation at the employer's expense.[117] This possibility does not, however, prevent the bargaining relationship from terminating without irreparably harming the employer, since the employer should be able to insist that the duration of the agreement and the transfer of its benefits be conditioned on the issuance of a *Gissel* bargaining order.[118]

Thus, the acid test for determining whether a section 10(j) order will establish a set of conditions under which the Board can enter an effective order arises when the Board's final decision differs from that of the court hearing the section 10(j) petition. The Board has determined that, absent section 10(j) relief, the union in a *Gissel* situation will suffer irreparable harm.[119] The harm that a temporary bargaining order imposes on an employer, on the other hand, dissolves along with the Board's termination of the section 10(j) injunction and the collective bargaining agreement.[120] The comparative

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U.S.C. § 151 (1976), the small harm that the employer suffers because the union has been able to showcase its effectiveness does not warrant much solicitude.

114. *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 612-13 n.33 (1969).

115. Congress enacted the LMRA to encourage collective bargaining and 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 negotiating the terms and conditions of their employment or other mutual aid or protection." 29 U.S.C. § 151 (1976).

116. *See* note 4 *supra*.

117. No employer has ever suffered this harm. With one exception, the Board has issued *Gissel* bargaining orders in all cases for which the courts have issued § 10(j) bargaining orders. *See, e.g.,* Circo Resorts, Inc., 244 N.L.R.B. 880, 888-89 (1979); Old Angus, Inc., 212 N.L.R.B. 539, 539 (1974); cases cited in note 134 *infra*. The one exception is Liberty Homes, Inc., 257 N.L.R.B. No. 169, 108 L.R.R.M. (BNA) 1074, 1076 (1981). The Board dismissed the charges against the employer before the appellate court decided the § 10(j) appeal. The appellate court vacated the § 10(j) bargaining order as moot. Wilson *ex rel.* NLRB v. Liberty Homes, Inc., 109 L.R.R.M. (BNA) 2492, 2493 (7th Cir. 1982) (referring to an unpublished order of November 19, 1981). The parties did not reach a bargaining agreement prior to the Board's decision. 108 L.R.R.M. at 1076 n.10.

118. *See* notes 83-86 *supra* and accompanying text.

119. *See* notes 67-70 *supra* and accompanying text.

120. *See* notes 83-86 *supra* and accompanying text.

risks of irreparable harm always weigh decisively in favor of a temporary bargaining order to ensure that the Board's final order will be effective.[121] Thus, even where the Board eventually refuses to issue a bargaining order, section 10(j) relief will have preserved the status quo. The section 10(j) bargaining order, then, will always be just in the *Gissel* situation.

B. *Proper Relief: The Delegation Limitation*

Although a temporary bargaining order is always "just" in a *Gissel* situation,[122] it is proper only in situations that indicate, based on the Board's past decisions, a high probability that the Board will eventually issue a *Gissel* bargaining order. This limit on the propriety of section 10(j) relief stems from the fact that Congress delegated the authority to formulate labor policy to the Board, not to the courts.[123]

In recognition of this delegation, some courts have been reluctant to issue any section 10(j) relief other than to order the discontinuance of unfair labor practices.[124] Fearing that preliminary affirmative relief would usurp the Board's delegated authority, these courts claim to be "impotent to adjudicate the controlling substantive issues."[125]

This formulation of the delegation limitation contains two flaws. First, the court considering the section 10(j) petition does not adjudicate any issue with finality. Because section 10(j) relief does not bar any subsequent administrative proceedings on the issue,[126] the Board is free to reach a conclusion contrary to that of the district court. Second, the "preliminary decisions" test is overbroad. Even courts issuing only cease and desist orders must make a preliminary decision on the existence of unfair labor practices, and a distinction between this preliminary decision and others cannot be justified.[127]

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121. *See* notes 90-91 *supra* and accompanying text.

122. That is, the goals of the NLRA will be frustrated without a § 10(j) bargaining order and the equitable balance of harms will always favor such relief. *See* text following note 51 & notes 55-121 *supra* and accompanying text.

123. *See* cases cited in notes 50 & 69 *supra*.

124. *See* cases cited in note 50 *supra*.

125. Kaynard *ex rel.* NLRB v. Steel Fabricators Assn., 95 L.R.R.M. (BNA) 2015, 2019 (E.D.N.Y. 1976); *see* cases cited in note 50 *supra*.

126. *See* NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 681-83 (1951) (referring to § 10(l)). The court in Boire *ex rel.* NLRB v. Pilot Freight Carriers, Inc. 515 F.2d 1185, 1194 (5th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976), noted that "were we to order bargaining on the record before this court, our decision would rest on the assumption that [the employer] had actually commmitted unfair labor practices—an assumption we are unwilling to make." But the assumption is unnecessary, because a temporary bargaining order does not prevent the Board from eventually ordering an election instead of a *Gissel* bargaining order. The court considering the § 10(j) petition does not impose the restrictions of res judicata or collateral estoppel on the Board.

127. Because § 10(j) relief precedes the Board's adjudication, every § 10(j) court will have

This formulation of the delegation limitation also has the effect of erecting a *per se* rule against section 10(j) bargaining orders; a court that refuses to rule on preliminary policy decisions that the Board must ultimately make would never issue such relief.[128] This outcome would frustrate the purposes of the NLRA.[129]

A superior formulation of the delegation limitation would re-

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to make preliminary decisions on matters which only the Board can adjudicate with finality. For example, every § 10(j) court must make preliminary determinations both on the question of the existence of unfair labor practices and on the other questions of policy that comprise the petitioner's legal theory. *See* note 16 *supra* and note 128 *infra*. No reason exists for distinguishing the question of unfair labor practices from the other questions in the legal theory. In both cases, the § 10(j) court must make policy, *i.e.*, it must make a prescriptive judgment based on legal standards as applied to facts. *See* note 128 *infra*. And in both cases, the temporary relief involved is designed to protect the effectiveness of the Board's order. *See* notes 22-28 *supra* and accompanying text. Therefore, the § 10(j) courts should not treat other questions in the petitioner's legal theory differently from the question of unfair labor practices by using the former to erect a *per se* rule against § 10(j) bargaining orders.

128. The Board will order bargaining only if it determines that three elements are met: first, that the union obtained a valid card majority in its organizational drive; second, that unfair labor practices occurred, and third, that the severity of the unfair labor practices justifies a *Gissel* bargaining order. *See* notes 41-46 *supra* and accompanying text.

The first element poses a question of fact and a question of policy. The question of fact concerns the contents of the cards and the circumstances under which they were solicited. The question of policy is whether the cards satisfy the Board's standards. *See* note 75 *supra*. The second element, whether the conduct in question constitutes unfair labor practices, poses a question of fact and a question of policy. The question of fact is whether certain events occurred. The question of policy is whether those events constitute unfair labor practices. The third element, whether the unfair labor practices meet the *Gissel* standard of severity, poses a question of policy, requiring a prescriptive judgment based on the *Gissel* legal standard and the facts.

In a § 10(j) proceeding, the petitioner contends, on the three questions of policy posed by the three elements, that (1) subsequent to the union's obtaining a valid card majority, (2) the employer committed unfair labor practices (3) sufficiently severe to justify a *Gissel* bargaining order.

Thus, the § 10(j) petitioner's policy determinations overlap with the decisions the Board must make in deciding whether to issue a *Gissel* bargaining order. A court refusing to rule on preliminary policy decisions that the Board must ultimately make would never grant a § 10(j) bargaining order.

The Fifth Circuit may well have established such a *per se* rule:

> [C]ertification of the union as bargaining representative [is a matter] generally left to the administrative expertise of the Board.
>
> . . . .
>
> While courts have not hesitated to issue interim bargaining orders where a pre-established bargaining relationship is being eroded by unfair labor practices, the considerations are very different when the union's representative status has not been certified.

Boire *ex rel.* NLRB v. Pilot Freight Carriers, Inc., 515 F.2d 1185, 1192, 1194 (5th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976) (citations omitted). The requirement of the Board's certification of the union would create a *per se* rule against § 10(j) bargaining orders in *Gissel* situations, since the Board would certify the union only as a result of its administrative adjudication. *See* Levine *ex rel.* NLRB v. C & W Mining Co., 610 F.2d 432, 436 (6th Cir. 1979); notes 38-41 *supra* and accompanying text. The *Pilot Freight* court, however, did not actually announce a *per se* rule: "Additional reasons underlie our decision to refrain from commanding temporary bargaining." 515 F.2d at 1194. Nevertheless, the Fifth Circuit's reluctance to make preliminary decisions on matters that the Board must ultimately decide is one of the reasons for the split between the Fifth Circuit and the Second and Sixth Circuits over § 10(j) bargaining orders.

129. *See* notes 55-70 *supra* and accompanying text.

quire the section 10(j) petitioner to show a high probability that the Board will ultimately issue a *Gissel* bargaining order.[130] This showing, based on past decisions of the Board, would preserve the Board's delegated authority to make labor policy.[131] The court considering the section 10(j) petition would not make new labor policy; rather, it would order bargaining only where the Board's previous adjudications had already established the severity of unfair labor practices required to justify a *Gissel* bargaining order.[132] A section

130. The elements of the § 10(j) petitioner's legal theory correspond to the elements necessary for a *Gissel* bargaining order. *See* note 128 *supra*.

131. A pattern emerges from the Board's *Gissel* decisions. This pattern enables the court considering the § 10(j) motion to predict with a high degree of accuracy whether the Board will issue a *Gissel* bargaining order. A pattern can clearly emerge if the cases present recurring fact situations. As the cases cited in notes 59 & 117 *supra* and 134 *infra* indicate, the situations leading to petitions for § 10(j) bargaining orders display remarkable similarity. They typically involve the employer's discharge of card signers, interrogations, threats of closing, and surveillance of the union's organizational efforts. Similarity exists even though, according to the Board, there is "no *per se* rule that the commission of any unfair labor practice will automatically result in... the issuance of an order to bargain." NLRB v. Gissel Packing Co., 395 U.S. 575, 615 (1969). Courts themselves have recognized the recurring nature of unfair labor practices. *See, e.g.*, Kaynard *ex rel.* NLRB v. Palby Lingerie, Inc., 625 F.2d 1047, 1054 (2d Cir. 1980) (" 'textbook case' ") (quoting Regional Director of NLRB's Region 29); Barbour v. Central Cartage, Inc., 583 F.2d 335, 336 (5th. Cir. 1978) ("textbook series of unfair labor practices"); NLRB v. Armcor Indus., Inc., 535 F.2d 239, 240 (3d Cir. 1976) ("The scenario of this proceeding has been played frequently on the industrial scene."); Gottfried *ex rel.* NLRB v. Mayco Plastics, Inc., 472 F.Supp. 1161, 1163 (E.D. Mich. 1979), ("classic sorts of unfair labor practices"), *affd. without opinion*, 615 F.2d 1360 (6th Cir. 1980). Moreover, with one exception, they have erred only in predicting that the Board would not issue a *Gissel* bargaining order when the Board in fact did. *See* notes 117 *supra* and 134 *infra*.

132. This formulation of the delegation limitation requires the court considering the § 10(j) petition to determine whether the employer's unfair labor practices fall within the bounds of established labor policy for *Gissel* bargaining orders. *See* note 131 *supra*. To make this determination, the court must compare its case to past Board *Gissel* cases. If the situation is one for which the Board has not yet clearly established a labor policy as to whether a *Gissel* order should issue, the delegation limitation forbids the § 10(j) court from making even a preliminary policy decision. But if the case falls within the bounds of established labor policy, the § 10(j) court need not fear that it might violate the delegation limitation. It will not usurp the Board's delegated authority to make labor policy, because the Board's past decisions have already established the policy for those unfair labor practices.

The delegation limitation automatically forbids § 10(j) bargaining orders for those novel situations in which the Board's decision will be difficult to predict. In *Gissel*, for example, the Supreme Court acknowledged in dicta the possibility that in "exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices, the Board could order bargaining even though the union had never obtained a card majority. 395 U.S. at 613-14. In 1982 the Board, for the first time, ordered bargaining without a card majority. Conair Corp., 261 N.L.R.B. No. 178, 110 L.R.R.M. (BNA) 1161 (1982). The employer's unfair labor practices included:

> Numerous threats of plant closure, discharge, and loss of benefits; numerous promises of increased or new benefits; coercive interrogation of employees; numerous acts of soliciting employee grievance with promises to remedy the same; grants of numerous benefits to employees; creating the impression of surveillance; the failure to give timely reinstatement to 36 unfair labor practice strikers; and the outright discharge and refusal to reinstate 16 other unfair labor practice strikers.

110 L.R.R.M. (BNA) at 1163. The labor policy for bargaining orders in cases in which the union does not obtain a card majority is embryonic. It will develop and become established only as the Board decides more cases. Until the Board does so, however, the courts considering § 10(j) petitions will not be able to predict, on the basis of the Board's past decisions, which cases justify a bargaining order in the absence of a card majority. Until the Board establishes

10(j) bargaining order issued under this high probability standard[133] would fall within the bounds of the delegation limitation because it would fall within the bounds of established labor policy.[134] The re-

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a pattern, the § 10(j) court should not venture outside the parameters of the established labor policy by ordering bargaining where the union has never obtained a card majority.

Theoretically, the delegation limitation also applies to the petitioner's contention that the union obtained a valid card majority, since this determination poses a question of labor policy. But practically, the labor policy on cards is so extensively established, *see* note 75 *supra*, that the question of validity often turns solely on the facts. Not surprisingly, therefore, the § 10(j) courts faced with a dispute over the validity of the card majority have used the reasonable cause standard to judge the factual claims of validity. *See* Hirsch *ex rel.* NLRB v. Trim Lean Meat Prods., 479 F. Supp. 1351, 1358 (D. Del. 1979); Kaynard v. Lawrence Rigging, Inc., 80 L.R.R.M. (BNA) 2600, 2602 (E.D.N.Y. 1972).

Little turns on which standard the courts use. Cards raise questions of fact, but the factfinding preceding the § 10(j) hearing should enable the court to identify the rare cases where the determination on the existence of the card majority falls outside the bounds of established labor policy. First, the Regional Director must make a preliminary investigation of the cards before seeking § 10(j) relief. *See* notes 5 & 41-46 *supra* and accompanying text. Thus, the court considering the § 10(j) petition has the benefit of the fact-finding expertise of the prosecutorial branch of the NLRB. The recurring nature of card situations enables the § 10(j) court to predict whether the Board will find a valid card majority.

Moreover, the court considering the § 10(j) petition may also have access to the record compiled in the Administrative Law Judge hearings, which gives the court high quality information to decide on the cards. The record also obviates the need for judicial factfinding in an area covered by the expertise of the adjudicatory branch of the NLRB. *See* note 136 *infra*. Finally, if a novel question concerning the validity of cards does arise, the § 10(j) court should refuse to issue the bargaining order.

133. This condition is also one of the traditional equitable criteria for a temporary injunction. *See* note 72 *supra*.

134. The delegation limitation functions as a check on the prosecutorial discretion of the General Counsel in seeking, and on the Board in authorizing, § 10(j) petitions. The limitation should insure that the Board's screening guidelines prevent it from seeking temporary bargaining orders for unfair labor practices lacking the severity requisite to the issuance of a *Gissel* bargaining order.

The Board's current guidelines, *see* note 20 *supra*, conform to the delegation limitation. These guidelines have led the Board to seek § 10(j) bargaining orders only in cases involving alleged unfair labor practices that were severe enough to justify the Board's subsequent issuance of *Gissel* bargaining orders. *See, e.g.*, Kaynard *ex rel.* NLRB v. Palby Lingerie, Inc., 625 F.2d 1047, 1050, 1053-54 (2d Cir. 1980) (discharges, interrogations, surveillance, threats of closing, discriminatory job assignments); Levine *ex rel.* NLRB v. C & W Mining Co., 610 F.2d 432, 434-35 (6th Cir. 1979) (discharges, interrogations, surveillance, threats of closing, discriminatory job assignments); Seeler *ex rel.* NLRB v. Trading Port, Inc., 517 F.2d 33, 35 (2d Cir. 1975) (mass discharge of union supporters); Boire *ex rel.* NLRB v. Pilot Freight Carriers, Inc., 515 F.2d 1185, 1190-91 (5th Cir. 1975) (discharges, discriminatory changes in compensation), *cert. denied*, 426 U.S. 934 (1976); Wilson v. Liberty Homes, Inc., 108 L.R.R.M. (BNA) 2688, 2690-91 (W.D. Wis. 1980) (mass discharge of union supporters), *order vacated as moot and opinion withdrawn as moot*, 109 L.R.R.M. (BNA) 2492 (7th Cir. 1982); Gottfried *ex rel.* NLRB v. Mayco Plastics, Inc., 472 F. Supp. 1161, 1162-63 (E.D. Mich. 1979) (mass discharges of union supporters, interrogations, surveillance, discriminatory job assignments, and changes in compensation), *aff'd. mem.*, 615 F.2d 1360 (6th Cir. 1980); Hirsch *ex rel.* NLRB v. Trim Lean Meat Prods., 479 F. Supp. 1351, 1351-53 (D. Del. 1979) (mass discharge, interrogations, threats of closing, surveillance); Smith *ex rel.* NLRB v. Old Angus, Inc., 81 L.R.R.M. (BNA) 2936, 2941 (D. Md. 1972) (discharge, surveillance); Fuchs *ex rel.* NLRB v. Steel-Fab, Inc., 356 F. Supp. 385, 387 (D. Mass. 1973); Kaynard v. Lawrence Rigging, Inc., 80 L.R.R.M. (BNA) 2600, 2600-01 (E.D.N.Y. 1972) (discharges, interrogation).

The facts of these cases and their subsequent disposition before the Board indicate that a difference in severity of the unfair labor practices cannot explain the split over § 10(j) *Gissel* bargaining orders. The Fifth Circuit declined to distinguish the cases on their facts when it

sulting limitation would prevent the federal district courts from using section 10(j) petitions to make new labor policy.[135] The high

faced a petition for rehearing on its denial of a § 10(j) bargaining order in *Pilot Freight*, 515 F.2d at 1185. The petitioner contended that the *Pilot Freight* court had failed to consider the Second Circuit's issuance of a § 10(j) bargaining order in *Trading Port* 517, F.2d at 33. The Fifth Circuit, in denying the motion for rehearing, did not try to distinguish the cases on their facts. Instead, the Fifth Circuit indicated that the dispute was legal, not factual, by stating that it had considered *Trading Port* "but did not totally agree with it. To the extent that our reasoning differs from the Second Circuit's rationale we decline to follow it." Boire *ex rel.* NLRB v. Pilot Freight Carriers, Inc., 521 F.2d 795, 795 (5th Cir. 1975).

As a further indication that factual differences in unfair labor practices cannot explain the split over § 10(j) *Gissel* bargaining orders, the Fifth Circuit upheld the Board's *Gissel* bargaining order in a case involving many of the same unfair labor practices as *Pilot Freight*. *See* Bandag, Inc. v. NLRB, 583 F.2d 765, 771 (5th Cir. 1978). *Bandag* indicates that the Fifth Circuit probably would have upheld the Board's *Gissel* bargaining order in *Pilot Freight* had the case come before it. This likelihood is yet another reason why a difference in the severity of unfair labor practices cannot explain the split over § 10(j) *Gissel* bargaining orders. In fact, even in the cases in which the courts denied § 10(j) bargaining orders, the Board ultimately issued *Gissel* bargaining orders. *See* Great Chinese-American Sewing Co., 222 N.L.R.B. 1670, 1670-71 (1977), *aff'd.* 578 F.2d 251, 256 (9th Cir. 1978); Newton Joseph, 225 N.L.R.B. 294 (1976); Pilot Freight Carriers, Inc., 223 N.L.R.B. 286 (1976); Steel-Fab, Inc., 212 N.L.R.B. 363 (1974); Lawrence Rigging, Inc., 202 N.L.R.B. 1094 (1973).

The Board has also issued *Gissel* orders in every case in which the appellate court has sustained the district court's § 10(j) bargaining order. *See* Palby Lingerie, Inc., 252 N.L.R.B. 176, 177 (1980); C & W Mining Co., 248 N.L.R.B. 270, 274 (1980) Trading Post, Inc., 219 N.L.R.B. 298, 300-01 (1975); *see also* cases cited in note 117 *supra*; *cf.* Barbour v. Central Cartage, Inc., 583 F.2d 335, 336 (7th Cir. 1978) (§ 10(j) order vacated as moot because Board had issued a *Gissel* bargaining order by the time of the appellate decision.).

Finally, in limiting petitions for § 10(j) *Gissel* bargaining orders to situations similar to those for which the Board has ordered bargaining, the § 10(j) petitioner, though acting in a prosecutorial capacity, draws on the expertise of the Board as an adjudicatory agency. As an adjudicatory agency, the Board is entitled to great judicial deference. *See* note 69 *supra*. The Board, of course, explicitly follows the Supreme Court's requirements, *see* notes 41-46 *supra* and accompanying text, in its administrative adjudication, *see, e.g.*, Steel-Fab, Inc., 212 N.L.R.B. 363, 365 (1974), and the Board has stringently upheld the *Gissel* requirement on the severity of the effects of unfair labor practices. *See* note 81 *supra*.

135. The Second Circuit has refused to issue § 10(j) orders where to do so would lead it outside the bounds of established labor policy. The Second Circuit has couched its analysis in terms of "deference" to the § 10(j) petitioner. If the petition requires the court to act outside the bounds of established labor policy, the court refuses to "defer" to the petitioner's policy determinations. The label "deference" should not mask the fact that the Second Circuit uses the "data" of past Board decisions to predict what the Board will ultimately do in the case before the court. *See* Silverman *ex rel.* NLRB v. 40-41 Realty Assocs., 668 F.2d 678, 681 (2d Cir. 1982) ("deference is especially appropriate in [§] 10(j) cases when the prevailing legal standard is clear and the only dispute concerns the application of that standard to a particular set of facts.").

In *40-41 Realty*, the Regional Director sought a § 10(j) order permitting picketing under conditions the permissibility of which had never been adjudicated. In denying the order, the court contrasted the deference due the Board in cases in which the labor policy is well established with cases in which the Board attempts to venture outside the parameters of settled labor policy. With respect to the latter, the court noted that

> [W]hen the Regional Director asks a court to fashion a § 10(j) remedy to [permit the picketing in question], he inverts the traditional relationship between administrative agency and court: the court is asked to make the initial ruling as to the propriety of a novel and unprecedented application of the statute, and thereafter the Board will apply its expertise to the issues presented.

668 F.2d at 681 (footnote omitted). Similarly, the court in Blyer *ex rel.* NLRB v. New York Coat, Suit, Dress, Rainwear and Allied Workers' Union, 522 F. Supp. 723 (S.D.N.Y. 1981) observed that

probability requirement would also minimize the risks inherent in the issuance of a section 10(j) bargaining order by insuring that such relief will almost always be granted in cases where the Board subsequently issues a *Gissel* bargaining order.[136]

CONCLUSION

The section 10(j) bargaining order is always just in the *Gissel* situation. It promotes the twin goals of the NLRA, protection of the free flow of commerce and of the collective bargaining process, by deterring and redressing unfair labor practices in a way that the

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In the run-of-the-mill unfair labor practice case, as to which the NLRB has had time to develop standards and experience and to consider the policy ramifications of its position, a court should give great deference to the Board's determination. But in a case of first impression, in which the NLRB is using its preliminary-injunction power to develop new law, far less deference is appropriate.

522 F. Supp. at 727; *see also* Hendrix *ex rel.* NLRB v. International Union of Operating Engrs. Local 571, 592 F.2d 437, 442-43 (8th Cir. 1979); Humphrey v. International Longshoremen's Association, 548 F.2d 494, 498 (4th Cir. 1977).

136. *See* notes 82-86, 110-118 *supra* and accompanying text.

Accurate prediction through comparison of past Board *Gissel* cases should prove feasible for three reasons. First, the cases display recurring factual patterns. *See* note 131 *supra*. Second, the briefs of the parties can facilitate the comparison, since the § 10(j) and *Gissel* elements overlap. *See* note 128 *supra*. Third, the court considering the § 10(j) petition should have high quality information from which to decide whether the petitioner is acting within the bounds of established labor policy on the questions of severity and authorization cards. The § 10(j) court should be able to examine the same factual record that the Board uses to make its final decision: the record of the proceedings before the administrative law judge. *See* note 5 *supra*.

A court considering a § 10(j) petition usually has before it the record, containing all of the evidence introduced by the parties, of the proceedings before the administrative law judge. *See, e.g.*, Kaynard *ex rel.* NLRB v. Palby Lingerie, Inc., 625 F.2d 1047, 1050-51 (2d Cir. 1980); Seeler *ex rel.* NLRB v. Trading Port, Inc., 517 F.2d 33, 36 (2d Cir. 1975); Fuchs *ex rel.* NLRB v. Steel-Fab, Inc., 356 F.Supp. 385, 387 (D. Mass. 1973).

Questions of fact, embraced by the reasonable cause standard, *see* notes 14-21 *supra* and accompanying text, have not troubled the courts even where the administrative law judge's record has been unavailable. In Gottfried *ex rel.* NLRB v. Mayco Plastics, Inc., 472 F. Supp. 1161, 1162 (E.D. Mich. 1979), *aff'd. mem.*, 615 F.2d 1360 (6th Cir. 1980), the employer conceded the issue of reasonable cause to believe unfair labor practices have occurred. In Levine *ex rel.* NLRB v. C & W Mining Co., Inc., 610 F.2d 432, 435 (6th Cir. 1979), the parties presented conflicting evidence directly to the court instead of through the record of the proceedings before the administrative law judge. But even though the employer contended that there was conflicting evidence, it did not "seriously [argue] that the finding of reasonable cause was clearly erroneous." In Boire *ex rel.* NLRB v. Pilot Freight Carriers, Inc., 515 F.2d 1185, 1191 (5th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976), the parties also presented conflicting evidence directly to the district court instead of through the record of the proceedings before the administrative law judge. Nevertheless, the appellate court had little trouble in concluding that the district court's findings of fact were not clearly erroneous and that its legal conclusions were correct.

Moreover, the Board has indicated its willingness to accept a stay of § 10(j) proceedings until the hearing before the administrative law judge is complete. Fuchs *ex rel.* NLRB v. Hood Indus., 590 F.2d 395, 396 & n.2 (1st Cir. 1979); *see also* Kaynard *ex rel.* NLRB v. Palby Lingerie, Inc., 625 F.2d 1047, 1050-51 (2d Cir. 1980) (Judge postponed consideration of the § 10(j) petition pending completion of the hearing before the administrative law judge. Parties then stipulated that the transcript of testimony and the exhibits introduced in the administrative hearing would constitute the record in the § 10(j) proceeding.). A stay would assure the § 10(j) court of access to the record compiled in the proceedings before the administrative law judge.

Board's final order cannot. By preventing irreparable harm to the union and its supporters while inflicting only reparable harm on other parties, the section 10(j) bargaining order preserves the status quo, establishing a set of conditions under which the Board's final order will be effective. But a district court should not grant section 10(j) relief absent an additional showing that there is a high probability that the Board will eventually issue a *Gissel* order. This requirement properly preserves the Board's delegated authority to make labor policy.