Michigan Law Review

Volume 56 | Issue 1

1957

Labor Law - Labor-Management Relations Act- Extent of Discretion Exercised by District Courts in Issuing Temporary Injunctions Against Alleged Unfair Labor Practice

John A. Beach S.Ed.
University of Michigan Law School

LABOR LAW—LABOR-MANAGEMENT RELATIONS ACT—EXTENT OF DISCRETION EXERCISED BY DISTRICT COURTS IN ISSUING TEMPORARY INJUNCTIONS AGAINST ALLEGED UNFAIR LABOR PRACTICES—The Labor-Management Relations Act[1] gives federal district courts jurisdiction to grant injunctions in two different situations, notwithstanding the general policy against granting injunctions in labor disputes not involving fraud or violence set by the Norris-LaGuardia Act.[2] The grant of limited injunctive jurisdiction given by section 208[3] in one situation, national emergencies, will not be discussed. This comment will deal only with the other, the grant of jurisdiction in sections 10(j) and (*l*)[4] to enjoin alleged unfair labor practices at the request of the National Labor Relations Board's regional officer, pending a disposition of the charges by the Board. This jurisdiction may be invoked whenever the district court deems such relief "just and proper," and this phrase can be as crucial to the outcome of a labor dispute as it is vague as a standard for issuing the injunction. The purpose of this com-

1 61 Stat. 136 (1947), 29 U.S.C. (1952) §141 to §159.
2 47 Stat. 70 (1932), 29 U.S.C. (1952) §101 to §115.
3 61 Stat. 155 (1947), 29 U.S.C. (1952) §178.
4 61 Stat. 149 (1947), 29 U.S.C. (1952) §160(j), (*l*).

ment is therefore to examine the facts which a court will require before it deems injunctive relief "just and proper."

I

The act's provisions for district court injunctions depart from the Norris-LaGuardia and Wagner Act[5] policy of avoiding injunctions, which have long been an anathema to labor organizations as a weapon in labor disputes.[6] The act's proponents in Congress deemed injunctive jurisdiction necessary in view of the problem of time-consuming Board procedures in an area where "time is usually of the essence. . . ."[7] Injunctions, when issued, are effective only until the Board has ruled on the charges.[8] The Board remains the exclusive arbiter of unfair labor practice charges[9] subject to court of appeals review, and the district courts in injunction proceedings do not purport to make a final determination on the merits.

The congressional proponents spoke of the injunctive remedies as being necessary to protect the public interest, not to vindicate private rights.[10] In this connection, it now seems settled that only the Board through its regional officer,[11] and not private parties, can obtain such injunctive relief from the district courts.[12] But, as pointed out by Justice Jackson in *Garner v. Teamsters Union*[13] in another context, there is no clear distinction between "public"

5 49 Stat. 449 (1935).

6 LeBaron v. Printing Specialties and Paper Converters Union, (S.D. Cal. 1948) 75 F. Supp. 678 at 681, affd. (9th Cir. 1949) 171 F. (2d) 331, cert. den. 336 U.S. 949 (1949). See "The Labor Management Relations Act and the Revival of the Labor Injunction," 48 COL. L. REV. 759 (1948). Cf. FRANKFURTER AND GREENE, THE LABOR INJUNCTION (1930).

7 S. Rep. 105, 80th Cong., 1st sess., p. 8 (1947).

8 See Garner v. Teamsters Union, 346 U.S. 485 at 489 (1953).

9 See Amazon Cotton Mill Co. v. Textile Workers Union of America, (4th Cir. 1948) 167 F. (2d) 183.

10 ". . . [T]he Board, acting in the public interest and not in vindication of purely private rights, may seek injunctive relief in the case of all types of unfair labor practices and . . . shall also seek such relief in the case of strikes and boycotts defined as unfair labor practices." S. Rep. 105, 80th Cong., 1st sess., p. 8 (1947).

11 Section 10(j) grants power to petition for temporary relief to the "Board," while §10(*l*) provides for petitions by the regional officer or attorney. The regional officer or attorney is in fact the petitioner under both sections, however, the Board having delegated this function to him. See NLRB Statement of Procedure, 29 C.F.R. (1956 Supp.) §101.32. This delegation was upheld in Evans v. International Typographical Union, (S.D. Ind. 1948) 76 F. Supp. 881.

12 Food Basket v. Amalgamated Meat Cutters, (W.D. Ky. 1954) 124 F. Supp. 463. If a private party obtains an injunction in a state court, however, federal district courts have no jurisdiction to enjoin the state proceedings [Amalgamated Clothing Workers of America v. Richman Brothers, 348 U.S. 511 (1955)] unless the Board has taken cognizance of the charges: Capital Service, Inc. v. NLRB, 347 U.S. 501 (1954); NLRB v. Swift & Co., (8th Cir. 1956) 233 F. (2d) 226.

13 346 U.S. 485 (1953).

and "private" rights, particularly in this area where "free flow of commerce" is postulated as the public good, and where almost any economic activity is deemed to "affect commerce" within the meaning of the act.[14] Since the impetus for Board action must come from a private party who charges that an unfair labor practice has been committed, and since the charging party is allowed to present evidence at court hearings on petitions for an injunction,[15] it is probable that the "public rights" at issue in injunction proceedings find their strongest advocates in private disputants acting in their own interests. In fact, it will be seen that the statutory scheme goes far to render the Board an automaton as to section 10 (*l*) petitions.

Before examining the courts' approaches to the act's "just and proper" standard for relief, some aspects of the procedural setting of sections 10 (j) and (*l*) should at least be mentioned. Section 10 (j) arms the Board's regional officer with power to petition for a temporary injunction against any unfair labor practice, whether committed by employer or union, but only "upon issuance of a complaint."[16] The regional officer is under no compulsion to file such a petition, and in practice they are rare. Only twenty-eight have been filed during the first nine and one half years of the act's operation, and eight of these were withdrawn before court action.[17] It is apparent that the section 10 (j) petition is being utilized as an extraordinary remedy after strict administrative screening. So utilized, such petitions have been granted in all but two cases.[18]

Section 10 (*l*) makes it mandatory for the regional officer to petition for an injunction whenever a violation of section 8 (b) (4) (A), (B), or (C) is charged (secondary boycotts, sympathy strikes, and attempts by one union to compel recognition as bar-

[14] See Shore v. Building & Construction Trades Council, (3d Cir. 1949) 173 F. (2d) 678; 8 A.L.R. (2d) 731 (1949); Slater v. Denver Building & Construction Trades Council, (10th Cir. 1949) 175 F. (2d) 608.

[15] See Douds v. Wine, Liquor & Distillery Workers Union, (S.D. N.Y. 1948) 75 F. Supp. 447.

[16] See Jaffee v. Newspaper & Mail Deliverers' Union, (S.D. N.Y. 1951) 97 F. Supp. 443.

[17] A letter from the Office of the General Counsel of the NLRB discloses this as well as the further fact that §10(j) petitions are sought in less than 1% of cases where complaints are filed.

[18] Brown v. Pacific Telephone & Telegraph Co., (N.D. Cal. 1954) 26 CCH LAB. CAS. ¶68,549 (employer agreed to preserve status quo by recognizing certified bargaining representative in two-week interval before Board hearing); Graham v. Boeing Airplane Co., (W.D. Wash. 1948) 15 CCH LAB. CAS. ¶64,604 (employer not obliged to bargain with union which had lost status under the act by striking without 60-day notice).

gaining representative when another has been certified). The section also empowers him to file such a petition, if appropriate,[19] after a charge of violation of section 8 (b)(4) (D) (jurisdictional disputes).[20] The mandatory nature of 10 (*l*) petitions has made them much more common than their discretionary counterparts under section 10 (j).[21] Under section 10 (*l*) the request for an injunction is made before any complaint is ever issued, but the regional officer must make a preliminary investigation[22] sufficient to satisfy himself that there is "reasonable cause to believe such charge is true and that a complaint should issue." Under the statutory mandate there is no opportunity for screening by the regional officer with a view toward inquiring whether or not injunctive relief is necessary or desirable; he can refrain from seeking the injunction only if he concludes that no complaint should issue.[23]

II

To what extent does the act leave the courts free to apply traditional equitable principles in granting or denying relief? Arguing from the apparent *carte blanche* conferred by the statute upon the court to grant "such relief as it deems just and proper," some of the cases denying injunctions expressly announce that usual equitable principles are applicable.[24] The more general attitude, however, has been that: "The relief provided is entirely statutory. The common law requirements do not apply. The statu-

19 The act contemplates that jurisdictional disputes underlying §8(b) (4) (D) charges will be settled quickly by the Board pursuant to §10(k), making a preliminary injunction unnecessary in most cases. See Herzog v. Parsons, (D.C. Cir. 1950) 181 F. (2d) 781.

20 Notice must be given to respondents under both subsections (j) and (*l*), except that subsection (*l*) gives the court jurisdiction to issue a temporary restraining order, good for no more than five days, without any prior notice to respondent, upon an allegation that "substantial and irreparable injury to the charging party will be unavoidable" without such relief. For principles governing the granting of temporary restraining orders, see NLRB, THIRTEENTH ANNUAL REPORT 88 (1948).

21 From the employer's viewpoint, the provision for mandatory petition puts a premium on framing charges that will fall within §8(b) (4). See remarks of (then) General Counsel Denham, NLRB Release of Sept. 23, 1947, at 15, 16.

22 As to the type of preliminary investigation required, see LeBaron v. Kern County Farm Labor Union, (S.D. Cal. 1948) 80 F. Supp. 151 at 157, 158. As to procedure followed by the regional officer under §10(j) and (*l*), see 29 C.F.R. (1956 Supp.) §§101.32, 101.33.

23 It is interesting to note that under §10(*l*), the regional officer would seem to have discretion to refrain from filing a petition if he concludes that a complaint should not issue pursuant to the charges. Under §3(d), the courts cannot order the issuance of a complaint. Hourihan v. NLRB, (D.C. Cir. 1952) 201 F. (2d) 187, cert. den. 345 U.S. 930 (1953).

24 Elliott v. Amalgamated Meat Cutters, (W.D. Mo. 1950) 91 F. Supp. 690, app. dismissed (8th Cir. 1951) 189 F. (2d) 965; Sperry v. Denver Building & Construction Trades Council, (D.C. Col. 1948) 77 F. Supp. 321; Humphrey v. Local 294, Teamsters, (N.D. N.Y. 1950) 17 CCH LAB. CAS. ¶65,539.

tory scheme is complete in itself."[25] The courts typically limit themselves to the narrower inquiry of whether there is reasonable cause to believe that the union is committing the unfair labor practice, granting injunctive relief upon a finding of reasonable cause without any further balancing of interests.

A. *"Reasonable Cause To Believe" as the Test for an Injunction*

A finding by the district court that there is reasonable cause to believe an unfair labor practice has been or is being committed as charged clearly is a *sine qua non* for injunctive relief. Most cases denying relief do so on the ground that there is no such reasonable cause.[26] It is proper, however, to inquire whether this is or should be the exclusive test for injunctive relief.

The only suggestion of such a limited test that can be gleaned from the statute itself appears in section 10 (*l*), where the regional officer is directed to *petition* for injunctive relief if he feels there is reasonable cause to believe the charges are true. The statutory test for actual *issuance* of the injunction is the same in both subsections (j) and (*l*)—such relief as the court "deems just and proper." Yet there is definite language in a number of cases limiting the scope of inquiry to a mere review of whether the regional officer had such reasonable cause. Thus, the recent case of *Le Bus v. Locals 406, etc., Operating Engineers*[27] states:

> "It may well be . . . that these facts do not demonstrate a violation of Subsection (4) (A) and (B) of Section 8 (b) of the Act. But it is not necessary for this court to make that determination. Since the facts here clearly demonstrate that there is reasonable cause to believe that a violation of the Act may have been committed, it is the duty of this court to maintain the status quo by enjoining the questioned activity until its legality can be definitively passed on by the exercise of the expertise of the National Labor Relations Board. . . . This court's statutory authority is exhausted when it finds, as it does, that on the showing made here, the evidence points in the direction of illegality."

[25] Douds v. Local 294, Teamsters, (N.D. N.Y. 1947) 75 F. Supp. 414 at 418. See also Douds v. Anheuser-Busch, (D.C. N.J. 1951) 99 F. Supp. 474.

[26] See, e.g., Douds v. Metropolitan Federation of Architects, (S.D. N.Y. 1948) 75 F. Supp. 672; Douds v. Local 50, Bakery and Confectionery Workers International Union, (2d Cir. 1955) 224 F. (2d) 49.

[27] (E.D. La. 1956) 145 F. Supp. 316 at 321, 322. See the same language used by the same court in LeBus v. General Truck Drivers, Chauffeurs, (E.D. La. 1956) 141 F. Supp. 673 at 677.

The injunctive function under the act has been analogized to "the historic function of the grand jury, where it must determine probable cause for a man to be tried." Such a determination compels a "stopgap" injunction pending Board determination of the merits.[28] There are also a great many cases in which an injunction was granted without any grounds other than the existence of reasonable cause being offered, although the court used no express language to limit the scope of the inquiry.[29] One early and much cited case, however, *Douds v. Local 294, Teamsters*,[30] while granting an injunction on a prima facie showing, recognized that the mandate in section 10 (*l*) to *petition* for relief is "not the measure of the proof required before this court may grant such relief." The court mentioned that "the purpose of the statute and interests involved in its enforcement" must be considered. Nevertheless, a fair summary of the majority of cases would be that the statutory test of "just and proper" is satisfied whenever the court agrees that the regional officer had reasonable cause to believe that the unfair labor practice charges were true. This approach was carried to its logical conclusion in *Roumell v. United Association of J. and A.*[31] where the court in granting an injunction made the following statement: "All that is before this Court for decision is whether or not there is reasonable cause to believe that the conduct of respondents here constitutes an unfair labor practice as it is spelled out in §8 (b) (4) (A) of the Act. If there is injustice in applying the statute to this situation the remedy is not in the courts. . . ." Therefore, despite the fact that the court is authorized to grant

28 Consentino v. International Longshoremen's Assn., (D.C. Puerto Rico 1954) 126 F. Supp. 420 at 423. Other cases expressly limiting the inquiry to "reasonable cause to believe" (often expressed as a "prima facie case"): Douds v. Confectionery and Tobacco Jobbers Employees Union, (S.D. N.Y. 1949) 85 F. Supp. 191 at 196; Styles v. Local 760, IBEW, (E.D. Tenn. 1948) 80 F. Supp. 119 at 122; LeBaron v. Kern County Farm Labor Union, (S.D. Cal. 1948) 80 F. Supp. 151 at 158; Jaffee v. Henry Heide, Inc., (S.D. N.Y. 1953) 115 F. Supp. 52 at 57 [§10(j) petition]; Sperry v. Building Material & Construction, (D.C. Neb. 1956) 149 F. Supp. 243. Cf. LeBus v. International Woodworkers of America, (M.D. Ala. 1956) 142 F. Supp. 875; Douds v. Business Machine & Office Appliance Mechanics Conference Board, Local 459, (S.D. N.Y. 1954) 122 F. Supp. 43; Yager v. International Union of Operating Engineers, Local 12, (S.D. Cal. 1955) 133 F. Supp. 362.

29 See, e.g., Kennedy v. Teamsters, Local 688, (E.D. Mo. 1956) 29 CCH LAB. CAS. ¶69,812; Douds v. Bonnaz, Hand Embroiderers, Local 66, (S.D. N.Y. 1954) 124 F. Supp. 919; Madden v. General Teamsters, Local 126, (E.D. Wis. 1956) 141 F. Supp. 459; Douds v. Knit Goods Workers, (E.D. N.Y. 1954) 27 CCH LAB. CAS. ¶68,802; Irving v. Carpenters Local 12, (N.D. N.Y. 1953) 24 CCH LAB. CAS. ¶67,890; Shore v. General Teamsters, (W.D. Pa. 1950) 18 CCH LAB. CAS. ¶65,684; McMahon v. Local 600, Truck Drivers, (E.D. Mo. 1953) 123 F. Supp. 303.

30 (N.D. N.Y. 1947) 75 F. Supp. 414 at 418-419.

31 (E.D. Mich. 1957) 151 F. Supp. 706 at 708.

only such relief as it deems "just and proper," it here refused to consider alleged "injustice" in making its determination.

This approach may be defended on the basis that Congress strongly disapproved of secondary boycotts, etc., violating section 8(b)(4), and showed this by making the petition for injunctive relief in such cases mandatory.[32] Such a reading of legislative policy is expressed in *Le Baron v. Printing Specialties and Paper Converters Union*.[33] However, the tendency to grant injunctions upon a finding of reasonable cause (or a prima facie case) has also appeared in some section 10(j) cases,[34] even though the argument of special congressional disapproval of particular unfair labor practices involved, present in section 10(*l*) cases, is not available.

In most section 10(j) cases, however, the court actually inquires into the relative need for an injunction, discussing whether irreparable injury to the public and the charging party would ensue if the injunction were denied. The greater incidence of such inquiry in these cases may be due to the fact, already mentioned, that section 10(j) petitions are filed in less than one percent of unfair labor practice cases. Typically, they have been filed only where some emergency is involved, such as the coal mining crises of 1948 and 1950,[35] a serious threat of widespread unemployment in Puerto Rico,[36] a threat to publication of newspapers throughout the nation,[37] or the threat of a coastal shipping tie-up.[38]

Courts which look only to "reasonable cause" as a basis for granting injunctive relief are not completely agreed on the meaning of that elastic term. Thus a court may recognize a strong possibility that no unfair labor practice was committed, but may yet find "reasonable cause" if "the evidence points in the direction of

32 S. Rep. 105, 80th Cong., 1st sess., pp. 8, 27 (1947).

33 (S.D. Cal. 1948) 75 F. Supp. 678, affd. (9th Cir. 1949) 171 F. (2d) 331, cert. den. 336 U.S. 949 (1949)

34 Jaffee v. Henry Heide, Inc., (S.D. N.Y. 1953) 115 F. Supp. 52 at 57. Cf. Douds v. ILA Independent, (S.D. N.Y. 1956) 147 F. Supp. 103. Such a test for §10(j) injunctions, if consistently followed, would in effect put it in the regional officer's power to bring about an injunction against any unfair labor practice. In practice, §10(j) petitions have been rare. See note 17 supra.

35 Madden v. International Union, UMW, (D.C. D.C. 1948) 79 F. Supp. 616; Penello v. International Union, UMW, (D.C. D.C. 1950) 88 F. Supp. 935.

36 Curry v. Union de Trabajadores de la Industria, (D.C. Puerto Rico 1949) 86 F. Supp. 707.

37 Evans v. International Typographical Union, (S.D. Ind. 1948) 76 F. Supp. 881.

38 Douds v. ILA Independent, (S.D. N.Y. 1956) 147 F. Supp. 103. Cf. Brown v. National Union of Marine Cooks and Stewards, (N.D. Cal. 1951) 104 F. Supp. 685, granting a §10(j) injunction on facts short of dire public necessity, but stressing that an injunction is not a mere matter of course.

illegality," as in the *Operating Engineers* case quoted above. On the other hand, a court may construe "reasonable cause to believe" more strictly, as did Judge Wyzanski in *Alpert v. United Steelworkers of America, AFL-CIO*:[39] ". . . I cannot say that a Court such as this is persuaded that it is reasonable to believe that, if the facts as finally developed by the Board coincide precisely with the facts as developed here, the Board would order, or the Court [of Appeals] would sustain an order directing, the Union to desist. . . .".

Even more stringent was the language in *Douds v. Local 50, Bakery and Confectionery Workers International Union*:[40] "The issuance of a preliminary injunction is a drastic step which should not lightly be undertaken, and in the absence of some clear proof that the respondent has sought to induce or encourage the employees [in violation of section 8 (b) (4) (C)], the preliminary injunction must be denied." The uncertain meaning of "reasonable cause" has received judicial comment,[41] and it is possible that equitable factors are subconsciously considered by a judge in determining what facts are sufficient to show "reasonable cause."

B. *Cases Recognizing Discretion Beyond "Reasonable Cause To Believe"*

A number of cases do expressly mention the existence of discretion in the district court to determine whether or not an injunction would be "just and proper," assuming that there is cause to believe the unfair labor practice charges true. Some courts merely advert to such discretion and then grant the injunction almost automatically, with little or no actual weighing of interests and policies.[42] Regardless of whether or not such inquiry is made, it has become a standard formality for a great many courts to include a sentence under their conclusions of law reproducing or patterned after Judge Swygert's language in *Evans v. International Typographical Union*:[43] "To preserve the issues presented for their orderly determination by the Board as provided in the Act, and to avoid irreparable injury to the interests of the public, em-

[39] (D.C. Mass. 1956) 141 F. Supp. 447 at 453.

[40] (S.D. N.Y. 1955) 127 F. Supp. 534 at 537, affd. (2d Cir. 1955) 224 F. (2d) 49.

[41] Brown v. Retail Shoe & Textile Salesmen's Union, (N.D. Cal. 1950) 89 F. Supp. 207 at 210.

[42] See, e.g., Douds v. New York Local Union 10, Production, Maintenance and Operating Employees, (E.D. N.Y. 1954) 120 F. Supp. 221.

[43] (S.D. Ind. 1948) 76 F. Supp. 881 at 894.

ployees, and employers, it is appropriate, just, and proper that, pending final adjudication by the Board [an injunction should be issued]."

Other courts, however, have undertaken to weigh the facts,[44] following the view expressed by the Tenth Circuit:[45] "It is not the inflexible duty of the court in every case of this kind to grant a temporary injunction to remain in force and effect until the Board makes its final adjudication. . . . The court has a reasonable permissive range for the exercise of its discretion in the granting of injunctive relief appropriate to the particular circumstances presented, or in withholding its writ."

If the district courts are to exercise a discretion more comprehensive than reviewing the reasonable cause to believe that an unfair labor practice has been committed, two factors mentioned by the courts should be explored. A great deal of language appears in the cases to the effect that section 10(j) and (*l*) injunctions have the purpose of maintaining the status quo in the interval before the Board can make final disposition of the charges.[46] Despite the popularity of this language, it is difficult to gain much aid from it in assessing whether an injunction should or should not be granted. The fact is that labor disputes are fluid and may involve constantly changing relationships. As of what time should the status be frozen by injunction? To say that the "status" existing between the disputants does not include the particular mode of exerting pressure upon which the unfair labor practice is based is to use a mere verbal cover for the conclusion

44 Douds v. International Longshoremen's Assn., (E.D. N.Y. 1956) 31 CCH LAB. CAS. ¶70,162; Douds v. Wine, Liquor & Distillery Workers Union, (S.D. N.Y. 1948) 75 F. Supp. 447; Douds v. Milk Drivers & Dairy Employees Local 680, (D.C. N.J. 1955) 133 F. Supp. 336; Brown v. Retail Shoe & Textile Salesmen's Union, (N.D. Cal. 1950) 89 F. Supp. 207; Styles v. Local 74, Carpenters, (E.D. Tenn. 1947) 74 F. Supp. 499 (controversy moot); note 24 infra.

45 United Brotherhood of Carpenters v. Sperry, (10th Cir. 1948) 170 F. (2d) 863 at 869. In affirming the injunction, which had been granted under the belief that the Board would act within two months, the court at p. 869 invited the district court on remand to determine whether the injunction should be perpetuated in view of the fact that ten months had already elapsed without Board action.

46 "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. 105, 80th Cong., 1st sess., p. 27 (1947). See Schauffler v. United Assn. of Journeymen, Local 420, (3d Cir. 1955) 218 F. (2d) 476; Brown v. National Union of Marine Cooks and Stewards, (N.D. Cal. 1951) 104 F. Supp. 685; Building & Construction Trades Council v. LeBaron, (9th Cir. 1949) 181 F. (2d) 449 (denying motion to suspend district court's injunction pending appeal).

that the *actual status* should be *changed* by removing such pressure until the Board can decide the case. If it is urged that the pressure may be so drastically effective that one side must surrender in the dispute before the Board has had a chance to decide whether the practice is improper, it should also be recognized that the other side may have this same advantage after the injunction has been granted.[47] This is particularly true in view of the long period of time sometimes required by the Board to decide a case.[48] In any event, before granting an injunction, it should at least be considered that an injunction does more to alter the "status quo" for one side's benefit than to maintain it. In one interesting case the court dismissed a section 10 (*l*) petition to enjoin a union from fining its members who were employees of secondary parties for handling goods of the primary employer-disputant, despite a clear violation of section 8 (b) (4) (B). The grounds given were that an injunction would not really maintain the status quo because individual union members could and would voluntarily refrain from handling such goods.[49] Normally, however, merely announcing a purpose to maintain the status quo would not seem to take one very far toward deciding whether or not an injunction is merited.

The traditional equitable requirement of a showing that irreparable injury will ensue without an injunction, which persists in the Norris-LaGuardia Act,[50] appears in the present statutory scheme only in connection with temporary ex parte restraining orders under section 10 (*l*). Therefore, its absence as an express requirement for the principal injunctions under both subsections (j) and (*l*) would seem to negate any such prerequisite, particularly since "the statutory scheme is complete in itself."[51] It should be noted that this lone reference in the ex parte injunction provision is to irreparable injury to the *charging party,* underscoring

[47] For instance, in an alleged secondary boycott situation, if the injunction is not granted, the contractor may be required to procure materials from a supplier to whom the union does not object before the Board can pass on the question. Conversely, if an injunction is granted, the contractor may finish the project using materials furnished by the objectionable supplier before the Board has been able to determine whether the union in fact violated §8(b) (4) (A).

[48] For criticism of the Board in this regard, see Douds v. Wood, Wire and Metal Lathers International Assn., (3d Cir. 1957) 245 F. (2d) 223, note 45 supra.

[49] Elliott v. Amalgamated Meat Cutters, (W.D. Mo. 1950) 91 F. Supp. 690, app. dismissed (8th Cir. 1951) 189 F. (2d) 965.

[50] 47 Stat. 70 (1932), 29 U.S.C. §101 to §115 (1952).

[51] See note 25 supra.

the point made above that the "public rights" vindicated under the act can assume distinctly private dimensions.[52]

These two factors, then, cannot properly be considered in granting an injunction, and the court is left to balance the interests of the alleged violator on the one hand with the public on the other. It would appear doubtful that a circuit court would disturb a district court finding, based on a weighing of conflicting interests, that injunctive relief was not "just and proper." The scope of review would seem to be limited to determining whether the refusal to grant relief was a proper exercise of judicial discretion.[53] Nevertheless, the Ninth Circuit, in reversing a district judge's refusal to grant a section 10 (j) injunction because he erroneously found no "reasonable cause," cast some doubt on the use of usual equitable principles in denying injunctive relief.[54] Moreover, in *Douds v. International Longshoremen's Assn.*[55] the Second Circuit reversed a discretionary refusal to grant a section 10 (*l*) injunction. Judge Medina, speaking for the court, found that the district judge's admonition that the parties should have arbitrated their disagreement was a "mere diversion," and further stated:[56] "It was not for the District Court to pass upon the 'public interest or necessity.' These matters had already been decided by Congress when it passed the Act." This appears to miss the point. While Congress did forbid certain unfair labor practices as against the public interest, it nevertheless left it to the district courts to provide only that relief deemed "just and proper" as to parties who were only *reasonably believed* to have violated the act. The Second Circuit notwithstanding, it is difficult to see how this can be done without exercising discretion according to some rational standard which takes account of factors in addition to the probability that the statute is being violated.

52 See Garner v. Teamsters Union, 346 U.S. 485 at 489 (1953), where Justice Jackson speaks of the Board's power under §10(j) ". . . to seek from the United States District Court an injunction to prevent irreparable injury *to petitioners* [the private employer] while their case was being considered. . . ." Emphasis supplied.

53 See Schauffler v. Highway Truck Drivers & Helpers, (3d Cir. 1956) 230 F. (2d) 7 at 9, where Judge Goodrich stated that as to a case where an injunction *was* granted below, the scope of review was limited to determining whether "the finding of a reasonable cause is not clearly erroneous under 52 (a), Fed. Rules of Civ. Proc., 28 U.S.C., and whether the form of relief granted shows a proper exercise of judicial discretion."

54 Brown v. Pacific Telephone & Telegraph Co., (9th Cir. 1955) 218 F. (2d) 542 at 544, 545. In Slater v. Denver Building & Construction Trades Council, (10th Cir. 1949) 175 F. (2d) 608, a refusal to grant a 10(*l*) injunction was reversed on the grounds, however, that the district judge had erroneously found interstate commerce not to be affected.

55 (2d Cir. 1957) 242 F. (2d) 809, reversing (S.D. N.Y. 1956) 31 CCH LAB. CAS. ¶70,162.

56 242 F. (2d) at 811, 812.

C. *Public Interest as a Requirement*

Interests of the public at large—perhaps more realistically described in most labor disputes as interests of the community involved—are always legitimate considerations in the exercise of equitable powers. Where present, elements of public interest and/or statutory policy may well encourage injunctive relief, as pointed out by the Supreme Court in *Hecht Co. v. Bowles* in reviewing a denial of an injunction under the Emergency Price Control Act of 1942: "The Administrator does not carry the sole burden of the war against inflation. The courts also have been entrusted with a share of that responsibility. And their discretion under §205 (a) must be exercised in light of the large objectives of the Act. For the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief in these cases."[57] It is equally pertinent to the present discussion that the Court in the *Hecht* case held that the district courts retained traditional equitable discretion to balance interests and to deny injunctive relief, despite statutory language making a much stronger case for mandatory relief than the act's "just and proper" clause. The *Hecht* case has been cited in several proceedings under section 10 (j) and (*l*), and was relied on by the district court in the case later reversed by the Second Circuit.

Only one other reported case actually relying on the absence of public interest factors in denying injunctive relief has been found[58] which was not rendered moot by the time the petition was filed.[59] Other cases have announced that public interest fac-

[57] 321 U.S. 321 at 331 (1944).

[58] Douds v. Local 24368, United Wire & Metal Workers Union, (S.D. N.Y. 1949) 86 F. Supp. 542. The charging party was a manufacturer under contract to supply ornamental sink fronts for a public State Island housing project during a housing shortage. When a union attempted to assign its status as certified bargaining representative to respondent union, the manufacturer refused to bargain with respondent, whereupon a strike and picketing ensued. The court recognized that representative status was not assignable and that respondent was violating §8(b) (4) (C), but said, at p. 545, that an injunction "would be neither just nor proper" because the ornamental sink fronts were not essential to the housing project, and because the Board had failed to settle the representation question promptly, despite the "ample facilities at its command" to do so. Graham v. Washington-Oregon Shingle Weaving District Council, (W.D. Wash. 1952), discussed briefly in NLRB, SEVENTEENTH ANNUAL REPORT 267 (1952), but otherwise unreported, denied relief on grounds of absence of substantial public interest where few employees were affected and no interruption of business or employment was shown. See also NLRB, NINETEENTH ANNUAL REPORT 150 (1954).

[59] A number of cases where relief was denied and public interest was mentioned involved violations that were mooted, e.g., Douds v. Wine, Liquor & Distillery Workers Union, (S.D. N.Y. 1948) 75 F. Supp. 447, or that appeared unlikely to recur. Some of the latter situations were retained on the court docket for reopening if violations re-

tors would be considered in rendering a decision, but in all the requisite public interest in granting the injunction was found. Illustrative of these is *Le Baron v. Los Angeles Building & Construction Trades Council,*[60] where Judge Yankwich emphasized that the district court's discretion remained even after reasonable cause to believe the charges true was found, and further remarked:

> ". . . [T]he inquiry in a particular case should be whether the public good will be served by using its [the act's] coercive powers. That calls for a balancing of interests, in the light of the social aims to be attained. Courts should, and do, hesitate to issue temporary injunctions pending the final determination of a lawsuit, when such action would, in effect, settle the controversy. Here, the issuance of the injunction would not mean such determination. . . ."

The court mentioned the public consequences of holding up construction of a giant turbine, involving hundreds of workers, at a time of power shortage in southern California.

Conclusion

A demonstrated existence of "public interest" factors, beyond facts bringing the case within the commerce requirements of the act and establishing the probability of a violation, is not considered a prerequisite to an injunction under section 10 (*l*) petitions in most cases. Such a requirement has been imposed, however, in a few cases, and the Supreme Court has yet to decide the issue. It is submitted that such factors are pertinent to the court's exercise of discretion, and that a court can determine if injunctive relief is truly "just and proper" only after such a consideration. The stronger tendency to weigh public interest factors in section 10 (j) proceedings provides an example which should be followed under section 10 (*l*).

John A. Beach, S. Ed.

curred, e.g.: McMahon v. District Council of United Brotherhood of Carpenters & Joiners, (E.D. Mo. 1954) 26 CCH LAB. CAS. ¶68,785; Douds v. Milk Drivers & Dairy Employees Local 680, (D.C. N.J. 1955) 133 F. Supp. 336; Humphrey v. Local 294, Teamsters, (N.D. N.Y. 1950) 17 CCH LAB. CAS. ¶65,539.

[60] (S.D. Cal. 1949) 84 F. Supp. 629 at 636-637, affd. (9th Cir. 1950) 185 F. (2d) 405. See also Cosentino v. District Council of Ports of Puerto Rico, (D.C. Puerto Rico 1952) 107 F. Supp. 235; Brown v. Roofers & Waterproofers Union, (N.D. Cal. 1949) 86 F. Supp. 50; §10(j) cases cited in notes 35 and 38 supra.