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## The Ultimate Hangup on the NLRA: Denial of Section 10(J) Injunctive Relief for La Conexion Familiar

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### THE ULTIMATE HANGUP ON THE NLRA: DENIAL OF SECTION 10(J) INJUNCTIVE RELIEF FOR LA CONEXION FAMILIAR

LYSA M. SALTZMAN\* AND ANTONIO SALAZAR-HOBSON\*\*

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\* Lysa M. Saltzman, J.D., 1996, California Western School of Law. Special thanks to my co-author, Antonio Salazar-Hobson for making this project possible; Professor Ellen Dannin for making me aware of the plight of the LCF workers and Pamela Wilson for her invaluable support.

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*“Join with your brothers and sisters  
and strike out against  
humiliation and indignity”*

Cesar Chavez<sup>1</sup>

### INTRODUCTION

On July 14, 1994, Sprint Corporation (“Sprint”) fired all 235 employees of La Conexion Familiar (“LCF”),<sup>2</sup> a Latino long distance telephone service, and closed the facility. The firing and closure occurred barely one week before employees were scheduled to vote in a union representation election at this San Francisco based subsidiary. At the time of the closure the Communications Workers of America, AFL-CIO (“CWA”), enjoyed overwhelming support of the workforce. Had the election gone forward and succeeded, it would have marked the first time any division within Sprint’s world-wide long distance market unionized. In response to Sprint’s action, with the assistance of the CWA and NLRB-workers, workers at LCF embarked on a quest for justice. The NLRB’s first action was to request injunctive relief in federal district court, which was denied.

The denial of injunctive relief was followed by a two-month trial before National Labor Relations Board Administrative Law Judge Gerald Wacknov (“ALJ”). In an August 30, 1995 opinion the ALJ upheld a finding that Sprint had committed more than fifty violations of section 8(a)(1) of the National Labor Relations Act. During the two month trial Judge Wacknov commented that, “I don’t think I’ve had a case with so many instances of that sort of violations of the National Labor Relations Act in a long time.”<sup>3</sup> Nevertheless, the ALJ ordered no remedy beyond a mere posting of notice of Sprint’s unlawful conduct.<sup>4</sup> This article examines the ramifications on workers, unions, and federal labor laws when a multi-billion dollar company is found guilty of a multitude of federal unfair labor practices, yet emerges unscathed for want of an effective remedy.

Section 10(j) of the National Labor Relations Act (“NLRA”), enables the General Counsel of the National Labor Relations Board (“NLRB” or “Board”) to petition a federal district court for injunctive relief from an unfair labor practice.<sup>5</sup> Typically, 10(j) injunctive relief is sought by the NLRB prior to a

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1. Dick Meister, *For Ailing United Farm Workers, Is There Life After 30?*, THE SAN ANTONIO LIGHT, Nov. 13, 1992, at D5.

2. “La Conexion Familiar” means “The Family Connection” in Spanish.

3. See CWA NEWS (Communication Workers of America, Washington, D.C.), Aug. 31, 1995.

4. Arizona Congressman Ed Pastor aptly stated that this ruling “would be laughable were it not so heartless.” Ed Pastor, *Op-Ed Article*, S.F. CHRON., Jan. 12, 1996, at E1.

5. 29 U.S.C. § 160(j) (1988). Section 10(j) provides:

The Board shall have power, upon issuance of a complaint . . . charging that any person has engaged in or is engaging in an unfair labor practice, to petition any

trial and a final determination that an unfair labor practice has been committed. When an employer terminates its employees in an effort to thwart a union election, it infringes upon the employees' section 7 right to "self-organization, to form, join or assist labor organizations." Such action also chills those employees and others from exercising such rights in the future.<sup>6</sup> Like other harms warranting injunctive relief, failure to immediately remedy obstruction of a union election may leave employees with no effective opportunity to gain a meaningful remedy after the substantive issues have been resolved. If not remedied immediately, there may never be an appropriate remedy after the substantive issues have been resolved. A section 10(j) injunction restores the status quo ante in the workplace, halting any injustice that would otherwise be ignored and unremedied pending final determination by the Board, a lengthy process infamous for delay.

Although section 10(j) allows for injunctive relief, the statute provides little guidance to the courts for determining when such injunctions are appropriate. As a result, over the years the courts have developed various standards of interpretation based on the statutory language and legislative history of the NLRA. Among the courts of appeal, two general standards governing the application of section 10(j) have emerged.<sup>7</sup> One standard embraces the traditional equitable criteria test, the standard used by some courts issuing injunctions in other areas of the law.<sup>8</sup> The other standard focuses on the "frustration of the Act [NLRA]" and is far more lenient.<sup>9</sup> Recently, however, the Ninth Circuit Court of Appeal strayed from these two established approaches by promulgating a balancing of the equities test.<sup>10</sup>

Soon after the announcement of the Ninth Circuit's new test, Sprint's closure of LCF offered the District Court for the Northern District of California the first opportunity to apply it. In *Miller v. LCF, Inc.*, the NLRB sought to enjoin Sprint Corporation from the retaliatory termination of its employees and closing down its affiliate facility, LCF in response to employee efforts to unionize.<sup>11</sup> The Board presented overwhelming evidence that Sprint had committed scores of unfair labor practices under

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district court of the United States . . . within any district wherein the unfair labor practice . . . 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 have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

*Id.*

6. 29 U.S.C § 157 (1988). Section 7 provides in pertinent part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . ." *Id.*

7. Leslie A. Fahrenkopf, *Striking the "Just and Proper Balance:" A Call for Traditional Equitable Criteria for Section 10(j) Injunctions*, 80 VA. L. REV. 1159, 1171 (1994).

8. See *Kinney v. Pioneer Press*, 881 F.2d 485 (7th Cir. 1989).

9. See *Arlook v. S. Lichtenburg & Co.*, 952 F.2d 367 (11th Cir. 1992).

10. *Miller v. California Pac. Medical Ctr.*, 19 F.3d 449, 459-60 (9th Cir. 1994) (en banc).

11. *Miller v. LCF, Inc.*, 147 L.R.R.M. 2911 (N.D. Cal. 1994).

sections 8(a)(1) and 8(a)(3) of the NLRA.<sup>12</sup> Notwithstanding this evidence, the district court denied the order.<sup>13</sup> As a result, LCF remains closed and most of the 235 former employees remain unemployed today.<sup>14</sup>

This article examines the use of 10(j) injunctions with particular attention to whether the district court in *LCF, Inc.*, properly denied the NLRB's 10(j) petition for injunctive relief in light of the new test developed by the Ninth Circuit. Part I briefly reviews the legislative history of section 10(j) and examines the NLRB's use of section 10(j) injunctions. Part II addresses the different standards applied by the circuits, focusing particularly on the new Ninth Circuit test.

Part III analyzes the district court's decision in *LCF, Inc.* and its consequences. In particular, this article addresses the continuing ramifications of the federal court's assessment of the evidence supplied by the LCF workers and CWA. The ripple effect of the federal district court's decision is demonstrated by the ALJ's subsequent decision rendered after a two-month trial. The ALJ upheld over fifty violations of federal labor laws, while at the same time denying appropriate remedial action.<sup>15</sup> This ripple effect culminated with the historic Department of Labor ("DOL") hearing of February 27, 1996, the first held pursuant to the labor side agreements of the North American Free Trade Agreement ("NAFTA").<sup>16</sup>

Finally, the conclusion suggests that for section 10(j) to function properly, courts must be willing to cast aside outdated concepts of the relative rights of business and labor. Further, courts must enforce the intent of the NLRA in an era of digital communications and powerful multinational companies.

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12. The NLRB commented that the approximately 1000 pages of accompanying evidence was the largest 10(j) filing in the history of the agency. 29 U.S.C. §158(a)(1), (3) (1994). Section 8(a)(1) provides that it shall be an unfair labor practice for an employer to "interfere with, restrain, or coerce in the exercise of" their section 7 right to organization. Section 8(a)(3) provides that it shall be an unfair labor practice for an employer to discriminate in "regard to hire or tenure of employment . . . to discourage membership in any labor organization." *Id.*

13. *LCF, Inc.*, 147 L.R.R.M. at 2918.

14. See *One Year After the Closing: Where are the Workers?*, WORKER ABUSE AT SPRINT (Communications Workers of America, Washington, D.C) Oct., 1995.

15. In an interview for the Daily Labor Report NLRB General Counsel Fred Feinstein stated that "this is the kind of situation for which section 10(j) was intended." *NLRB Seeks Injunction to Reopen Subsidiary when Latino Workers Lost Jobs*, DAILY LAB. REP., Sept. 19, 1994, at D14.

16. The North American Agreement on Labor Cooperation (NAALC) is designed to improve working conditions and living standards in the United States, Mexico, and Canada as NAFTA promotes more trade and closer economic ties among the three countries. NAALC also provides oversight mechanisms to ensure that domestic labor laws are enforced by each country. Pursuant to NAALC each country has a National Administrative Office (NAO) designed to administer the labor side agreement and consult with each signatory on labor matters. The NAO is responsible for reviewing public submissions on labor law matter, holding public hearings and issuing public reports. The purpose of the public hearing is to determine whether the information presented substantiates allegations that the country in question is failing to enforce its own labor laws. The Mexican Telephone Workers Union filed a complaint with the (NAO) in Mexico. Then the Mexican Secretary of Labor and Social Welfare, Javier Bonilla Garcia, called for Ministerial Consultations with U.S. Secretary of Labor Reich to discuss Sprint's violations of its employees' rights. The public hearing was scheduled to take place after the initial trial.

## I. SECTION 10(J): A HISTORICAL PERSPECTIVE

A. *Evolution of Section 10(j)*

Prior to 1932, injunctions were commonly used by employers to suppress union organization. Employers viewed union activity, and indeed any form of collective action, as an interference with industry's right to freely engage in commerce.<sup>17</sup> The courts overwhelmingly condemned labor unions and favored the employer's rights by regularly granting injunctions to halt union activity.

In response to constant efforts by labor activists, Congress in 1932 passed the Norris-LaGuardia Act, limiting the authority of federal courts to intervene in labor disputes.<sup>18</sup> Congress intended to restore balance in the resolution of labor-management disputes by curbing the power of the federal court to issue preliminary injunctions against union organization.<sup>19</sup> As a result of this anti-injunction legislation, the labor movement grew tremendously during the 1940s and early 1950s.<sup>20</sup> In the years following World War II, unions began staging widespread strikes and demonstrations, solidifying community support for unions. After the return of American soldiers from World War II, massive industrial growth coupled with widespread union organization, prompted Congress to undertake a reevaluation of national labor policies. In 1947, a strong Republican Congress passed the Taft-Hartley amendments to the 1935 NLRA, which were intended to curtail the power of organized labor.<sup>21</sup>

The Taft-Hartley amendments added sections 10(j) and (l) to the NLRA. These provisions returned authority to the federal judiciary to intervene in labor disputes. Sections 10(j) and 10(l) demonstrate the political tension between the pro- and anti-union views of judicial intervention. These sections allow the courts to enjoin unfair labor practices pending final order by the NLRB.

Both sections were intended to be an exception to the general rule that federal district courts lacked jurisdiction to enjoin labor disputes. As such, these sections were not to be used in typical unfair labor practice cases.<sup>22</sup> Section 10(l) was designed to remedy specific unfair labor practices, primarily

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17. Fahrenkopf, *supra* note 7, at 1161-62; *See also* BENJAMIN J. TAYLOR & FRED WITNEY, LABOR RELATIONS LAW 7 (6th ed. 1992).

18. Norris-LaGuardia Act, Pub. L. No. 71-65, 47 Stat. 70 (1932).

19. Fahrenkopf, *supra* note 7, at 1162.

20. *Id.* Between 1940 and 1945 labor unions grew from about five million members to fifteen million.

21. Fahrenkopf, *supra* note 7, at 1163. *See also* 29 U.S.C. § 160(j), (l); THEOPHIL C. KAMM HOLZ & STANLEY R. STRAUSS, PRACTICE AND PROCEDURE BEFORE THE NATIONAL LABOR RELATIONS BOARD 100-04 (1980).

22. *See* D'Amico v. United States Serv. Indus., Inc., 867 F. Supp 1075, 1081 (D.D.C. 1994).

secondary boycotts.<sup>23</sup> It mandated injunctive relief, requiring the Board's General Counsel to petition a federal district court for interim relief in certain circumstances.<sup>24</sup>

Section 10(j) is broader and provides injunctive relief for any type of unfair labor practice charge. It is only a discretionary remedy, however, and is subject to vigorous review by the Board. There was extensive controversy between the House and Senate as to the primary purpose of section 10(j) before it was added to the Taft-Hartley Act.<sup>25</sup> The House argued the public interest would be better served by allowing private parties to enforce violations of the Act.<sup>26</sup> The Senate, on the other hand, "felt that the public interest would be best served by investing the Board with exclusive discretion to seek temporary injunctive relief."<sup>27</sup> Ultimately, Congress compromised by adopting both sections 10(j) and (l). The measure returned temporary remedial power in labor disputes to the judiciary "so that the alleged illegal conduct would not render the labor violations unremediable and make the final resolution by the Board a nullity."<sup>28</sup>

The NLRB Manual on section 10(j) injunctions states in relevant part as follows:

What distinguishes a 10(j) case from other unfair labor practice cases is the threat of remedial failure. This threat may be demonstrated by the nature and extent of the alleged violations, the circumstances surrounding the violations, and the anticipated and actual impact of the unremedied violations or "chill" upon statutory rights that is expected to continue until a Board order issues.<sup>29</sup>

In enacting section 10(j) Congress recognized that as a result of extensive administrative hearings and litigation to enforce Board orders, the Board had been unable to correct unfair labor practices before substantial injury occurred.<sup>30</sup> Prior to the advent of temporary injunctions, employers could violate the NLRA and achieve an unlawful objective prior to facing any legal consequences. This made it "impossible or not feasible to restore or preserve

23. KAMMHOLZ & STRAUSS, *supra* note 21, at 100-04.

24. *Id.*

25. Fahrenkopf, *supra* note 7, at 1164. See also Note, *Temporary Injunctions Under Section 10(j) of the Taft Hartley Act*, 44 N.Y.U. L. REV. 181, 190-91 (1969).

26. Fahrenkopf, *supra* note 7, at 1164.

27. *Id.*

28. *D'Amico v United States Serv. Indus., Inc.*, 867 F. Supp 1075, 1081 (D.D.C. 1994) (quoting S. Rep. No. 105, 80th Cong., 1st Sess. 8, 27 (1947)).

29. John D. Doyle, Jr., *Charging Parties Left Out: Intervention In Section 10(j) National Labor Relations Act Injunction Proceedings*, 22 FORDHAM URB. L.J. 833, 848-50 (1995) (quoting *National Labor Relations Board Manual on Section 10(j) Injunctions*, May 1994 Internal NLRB Memoranda).

30. *D'Amico*, 867 F. Supp. at 1081 n.3 (quoting S. Rep. No. 105, 80th Cong., 1st Sess. 8, 27 (1947)).

the status quo, pending litigation.”<sup>31</sup> The Senate Report on section 10(j) noted:

Time is usually of the essence [in labor disputes] and . . . the relatively slow procedure of Board hearing and order, followed many months later by an enforcing decree of the circuit court of appeals, falls short of achieving the desired objectives—the prompt elimination of the obstructions to the free flow of commerce and encouragement of the practice and procedure of free and private collective bargaining.<sup>32</sup>

By adding section 10(j) as an available remedy, Congress essentially put some teeth into the bite of the NLRA.

Courts have held that section 10(j) relief is an “extraordinary remedy, to be sought by the Board and granted by the district court only under very limited circumstances.”<sup>33</sup> The NLRB itself recognizes that 10(j) injunctions are to be sought only in the most extraordinary cases.<sup>34</sup> The extensive procedure required for seeking 10(j) relief in federal court reflects its extraordinary nature.<sup>35</sup>

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31. *Id.*

32. S. Rep. No. 105, 80th Cong., 1st Sess. 8, 27 (1947), cited in *Miller v. California Pac. Medical Ctr.*, 19 F.3d 449, 455 (9th Cir. 1994) (en banc).

33. *Arlook v. S. Lichtenburg & Co.*, 952 F.2d 367, 374 (11th Cir. 1992).

34. Jerry M. Hunter, General Counsel of the National Labor Relations Board 1990, *Memorandum GC 95-5: Summary of Operations Fiscal Year 1990*, 1991 WL 536524 (N.L.R.B.G.C.). The Office of the General Counsel of the NLRB is composed of five major divisions. The Division of Advice processes requests for section 10(j) injunctions. In fiscal year 1990, the Board received 157 requests for injunctive relief, yet only authorized 41 of the petitions to be filed in district court (26%). Of the cases brought to a conclusion during that same year the NLRB was successful in 94% of the cases, achieving either a satisfactory settlement or victory in litigation. This evidence demonstrates that cases approved for § 10(j) petitions tend to prevail on the merits.

35. The NLRB typically files a petition for interim relief in federal district court, simultaneously with the Board’s issuance of an unfair labor practice complaint. NATIONAL LABOR RELATIONS BOARD, CASEHANDLING MANUAL (PART ONE): UNFAIR LABOR PRACTICE PROCEEDINGS, §§ 10310-10312 (1989). The decision to institute 10(j) action may be initiated by request of the party filing the unfair labor practice charge with the Board or by the Board itself upon investigation and review of the matter. *Id.* § 10310.1. When a regional office concludes from its investigation that interim relief is necessary to accomplish the goals of the NLRA, the Regional Director or Regional Attorney sends a memorandum recommending section 10(j) relief to the General Counsel’s Division of Advice for approval. *Id.* If the Division of Advice agrees that injunctive relief is appropriate, it prepares a memoranda for the General Counsel to review. *Id.* Then, if the General Counsel agrees that an injunction is warranted, the memoranda is forwarded to the five-member Board for authorization. *Id.* All five members of the Board review the case and then decide whether to authorize a petition. Catherine Hougman Helm, *The Practicality of Increasing the Use of NLRA section 10(j) Injunctions*, 7 INDUS. RE. L.J. 594, 607 (1985). At each one of these stages, experienced, knowledgeable attorneys and agents of the Board review the case to determine whether there is reasonable cause to believe that the respondent is violating the Act and that the requested temporary injunctive relief pending Board adjudication is just and proper. See Rosemary M. Collyer, *National Relations Board Office of the General Counsel: Report on Utilization of Section 10(j) Injunction Proceedings October 1, 1984 - September 30, 1988*, Apr. 3, 1989, 1989 NLRB, GCM LEXIS 131, at 6.

### B. NLRB Use of Section 10(j) Injunctions

During the first fourteen years section 10(j) relief was available, the NLRB rarely filed petitions with the courts, in some years filing no more than one.<sup>36</sup> By 1980, the number of petitions filed had increased to between forty-five and sixty petitions per year.<sup>37</sup> Between 1984 and 1988, the Division of Advice<sup>38</sup> received an average of 130 cases per year from the NLRB's regional offices, requesting review for a section 10(j) petition.<sup>39</sup> Of those requests, the General Counsel submitted an average of 33 cases to the NLRB per year, seeking authorization for petition.<sup>40</sup> The Board authorized petitions in 161 of the 168 cases presented to it<sup>41</sup> and logged a "success rate" of 89%, with 133 successful cases out of the 150 cases resolved.<sup>42</sup> Rosemary Collyer, General Counsel of the NLRB during that period, attributed the successful use of section 10(j) injunctions to the NLRB's "continued careful selection process" of cases approved for petition.<sup>43</sup>

In fiscal year 1990, the Board received 157 requests for injunctive relief from the General Counsel, yet authorized petitions in only 41 of those cases.<sup>44</sup> The NLRB successfully prosecuted 94% of the cases brought to a conclusion during that same year, achieving either a satisfactory settlement or victory in litigation.<sup>45</sup> In 1994, under new General Counsel Fred Feinstein, the Board dramatically increased its use of section 10(j) petitions.<sup>46</sup> Despite seeking petitions with increased frequency, the Board has maintained its high success rate.<sup>47</sup> This demonstrates that the NLRB carefully selects cases appropriate for injunctive relief and almost always prevails on the merits.

Because courts are hesitant to consider section 10(j) petitions, it might be expected that such petitions would generally be denied. But as these statistics show, courts have tended to grant interim relief.<sup>48</sup> The NLRB's continuous

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36. Helm, *supra* note 35, at 610, 654.

37. *Id.* at 610.

38. The Division of Advice is the department of the NLRB which reviews requests from regional officers seeking injunctive relief.

39. Collyer, *supra* note 35, at 6.

40. *Id.* Those 33 cases amounted to 26% of the requests made by regional offices. *Id.*

41. *Id.*

42. *Id.* The "success rate" is the percentage of 10(j) court victories and settlements out of the total authorized section 10(j) cases.

43. *Id.* at 4.

44. See Hunter, *supra* note 34.

45. *Id.*

46. *NLRB Cites Successes; FDA is Challenged*, NAT'L L.J., Dec. 12, 1994, at A16. The Board filed 62 section 10(j) petitions between March and September 1994.

47. *Id.* Of the cases resolved by September 30, 1994, in 30 out of 36 cases, injunctive relief was granted.

48. See *supra* notes 43-48 and Helm, *supra* note 35, at 635. Between 1975 and 1979 the Board had a 81% success rate of section 10(j) petitions. Between 1980 and 1983 the Board had a 87% success rate. Between 1984 and 1988 the Board had a 89% success rate.

success rates heighten the credibility of the Board's petitions by demonstrating that the agency only selects those cases truly worthy of extraordinary relief. When section 10(j) interim relief is administered properly by the courts it serves as "a major weapon in the Board's arsenal in vindicating the purposes and remedial policies of the Act."<sup>49</sup>

## II. SECTION 10(J): JUDICIAL STANDARDS

### A. Overview

Although the Taft-Hartley Act restored authority to the judiciary to issue injunctions, it provided no express standard for courts to apply in determining whether interim relief was warranted. The statutory language of section 10(j) provides little guidance on how to formulate such a standard. The courts were thus forced to develop their own criteria as cases were brought before them, relying only on the language of section 10(j) and scant legislative history. As a result, various conflicting standards have evolved among the courts of appeals which the Supreme Court has yet to resolve.<sup>50</sup>

### B. General Standards

Initially, courts required the NLRB to satisfy a two-prong test before granting injunctive relief. First, the Board had to demonstrate there was "reasonable cause" to believe the respondent had engaged in unfair labor practices as defined by the NLRA. Many attorneys at the NLRB and in private practice have observed that district judges are less than receptive to section 10(j) petitions.<sup>51</sup> Judges generally view an injunction as an extraordinary remedy and are consequently reluctant to order affirmative relief on a mere showing of "reasonable cause," the standard invoked by the NLRB in its petitions.<sup>52</sup> In addition, some judges resent having their dockets disrupted by a petition hearing. Others are inexperienced with the NLRA section 10(j) standards, or labor law in general, or are predisposed to oppose union interference.<sup>53</sup> Furthermore, although courts are required to give deference to NLRB expertise in 10(j) petitions, they are often hesitant to do so.<sup>54</sup> The "reasonable cause" requirement, although not included in the language of section 10(j), was adopted by the courts from section 10(l). The federal courts

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49. Collyer, *supra* note 35, at 10.

50. Fahrenkopf, *supra* note 7, at 1170, 1175. The Supreme Court had granted certiorari for *McLeod v. General Electric*, 336 F.2d 847 (2d Cir. 1966), *vacated*, 385 U.S. 533 (1967), but the case became moot before the Court could rule on the merits. Fahrenkopf, *supra* note 7, at 1175.

51. Helm, *supra* note 35, at 631.

52. *Id.*

53. *Id.*

54. See *NLRB v. Town and Country Elec., Inc.*, 116 S. Ct. 450, 453 (1995).

generally agreed that "reasonable cause" was satisfied if the Board's request was "not insubstantial or frivolous."<sup>55</sup>

The second requirement the NLRB must satisfy to gain injunctive relief is that interim relief is "just and proper" under the circumstances.<sup>56</sup> The "just and proper" prong comes directly from the language of section 10(j). The content of this standard has generated conflict among the various circuits with two general standards emerging from past cases. They are, (1) the traditional equitable criteria test, and (2) frustration of the Act.<sup>57</sup>

The first standard holds that the "just and proper" inquiry incorporates the traditional equitable criteria test that courts use to determine whether an injunction should issue in other areas of the law. This test balances "the hardships, the likelihood of winning on the merits, irreparable harm, and the public interest" to determine whether temporary relief is "just and proper."<sup>58</sup> An important aspect of the traditional equitable criteria test is that by requiring the court to balance the likelihood the NLRB will prevail on the merits, this test effectively eliminates the significance of the first prong of the two-prong test. If the NLRB must show a likelihood of prevailing on the merits, the "reasonable cause" prong's showing that the petition is not frivolous becomes meaningless.<sup>59</sup>

The alternate standard, "frustration of the Act," is far more lenient. It requires only that the NLRB show a need for interim relief "to prevent frustration of the remedial purpose" of the NLRA and to preserve the Board's ultimate remedial powers.<sup>60</sup> Courts adopting this standard argue that the traditional equitable principles used to determine whether injunctions are proper for private relief are inappropriate for "addressing a statutory injunction intended to remedy public wrongs."<sup>61</sup> The Taft-Hartley Act vested federal courts with limited injunctive authority to assure the effective

55. Fahrenkopf, *supra* note 7, at 1171 (quoting *Boire v. International Bhd. of Teamsters*, 479 F.2d 778, 787 (5th Cir. 1973), *cert. denied*, 426 U.S. 934 (1976)). See also John Leubsdorf, *The Standard for Preliminary Injunction*, HARV. L. REV. 525, 526 (1978).

56. Fahrenkopf, *supra* note 7, at 1160. See also *Gottfried v. Mayco Plastics, Inc.*, 472 F. Supp. 1161, 1164 (E.D. Mich. 1979), *aff'd per curiam*, 615 F.2d 1360 (6th Cir. 1980).

57. For an indepth analysis of the split among the circuits with regard to "just and proper" standards see Fahrenkopf, *supra* note 7.

58. *Id.* at 1160. The United States Courts of Appeal for the First, Second, and Seventh Circuits have adopted the traditional equitable criteria standard. See *Kinney v. Pioneer Press*, 881 F.2d 485 (7th Cir. 1989); *Maram v. Universidad Interamericana de Puerto Rico*, 722 F.2d 953 (1st Cir. 1983); *Silverman v. 40-41 Realty Assocs.*, 668 F.2d 678 (2d Cir. 1982).

59. Fahrenkopf, *supra* note 7, at 1160. In *Kinney*, Judge Frank H. Easterbrook rejected the "reasonable cause" prong as a matter of statutory interpretation. *Kinney*, 881 F.2d at 488-89. "Reasonable Cause" was not included in the language of section 10(j) whereas it does appear in section 10(l). See e.g., *Miller v. California Pac. Medical Ctr.*, 19 F.3d 449, 456 (9th Cir. 1994) (en banc).

60. Fahrenkopf, *supra* note 7, at 1177. The United States Courts of Appeal for the Third, Sixth, Eighth, Tenth and Eleventh Circuits have adopted this standard. See *Pascarell v. Vibra Screw*, 904 F.2d 874 (3d Cir. 1990); *Fleischut v. Nixon Detroit Diesel*, 859 F.2d 26 (6th Cir. 1988); *Minnesota Mining & Mfg. Co. v. Meter*, 385 F.2d 265 (8th Cir. 1967); *Angle v. Sacks*, 382 F.2d 655 (10th Cir. 1967); *Arlook v. S. Lichtenburg & Co.*, 952 F.2d 367 (11th Cir. 1992).

61. Fahrenkopf, *supra* note 7, at 1174.

enforcement of Board remedies for unfair labor practices defined by section 8(a) of the NLRA.<sup>62</sup> In contrast, the traditional equitable criteria test applied to private party injunctions allows for broader judicial discretion. The limited judicial authority provided under the Taft-Hartley is more akin to the standard used for determining administrative injunctions. This standard encourages deference to administrative findings, establishes a presumption in favor of granting injunctive relief,<sup>63</sup> and more accurately reflects the congressional intent of section 10(j).

### C. The Ninth Circuit Approach

The Ninth Circuit Court of Appeals recently announced a new, third standard for granting section 10(j) injunctions. The court's formula in *Miller v. California Pacific Center* strayed from precedent by creating a new test which adopted elements from the two existing standards applied by courts of appeal.<sup>64</sup> The new test collapses the "reasonable cause" prong and the "just and proper" prong of the old Ninth Circuit test into a single query. Under the *Miller* analysis, the court applies traditional equitable criteria to determine whether failure to grant an injunction would frustrate the remedial purpose of the NLRA.<sup>65</sup> The court in *Miller* stated:

We therefore hold that in determining whether interim relief under section 10(j) is "just and proper," district courts should consider traditional equitable criteria. They must do so, however, through the prism of the underlying purpose of section 10(j), which is to protect the integrity of the collective bargaining process and to preserve the Board's remedial power while it processes the charge.<sup>66</sup>

The new standard espoused by the Ninth Circuit is more like the equitable criteria test favored by some circuits, and raises the burden the NLRB must meet to obtain an injunction.<sup>67</sup>

In 1994, the NLRB sought a 10(j) preliminary injunction in the case of *Miller v. California Pacific Medical Center*, to restore nurses employed by Children's Hospital of San Francisco to the union-represented collective bargaining status they held before the hospital merged with non-unionized

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62. See *Miller v. LCF, Inc.*, 147 L.R.R.M. (BNA) 2911 (N.D. Cal. 1994).

63. Fahrenkopf, *supra* note 7, at 1175. See also Randal L. Gainer, 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 (1981).

64. Compare *Miller v. California Pac. Medical Ctr.*, 19 F.3d 449 (9th Cir. 1994) (en banc) with *Aguayo v. Tomco Carburetor*, 853 F.2d 744 (9th Cir. 1988).

65. Fahrenkopf, *supra* note 7, at 1661 (quoting *California Pac. Medical Ctr.*, 19 F.3d at 459-60).

66. *California Pac. Medical Ctr.*, 19 F.3d at 459-60.

67. *Id.*

Pacific Presbyterian Medical Center.<sup>68</sup> The merged entity had summarily declared both facilities to be non-union after the merger. The district court, applying the two-prong “frustration of the remedial purpose of the Act test” granted the Board’s petition for an injunction.<sup>69</sup> The district court rejected the hospital’s argument that an injunction should issue only after a finding of irreparable harm and likely success on the merits.<sup>70</sup>

On appeal, a panel of the Ninth Circuit reversed and departed from previous case law to hold that when determining whether injunctive relief is “just and proper,” the traditional equitable criteria test should be applied.<sup>71</sup> The Ninth Circuit then decided to hear the case en banc in order to clarify the judicial standard applicable to reviewing petitions for section 10(j) injunctive relief.<sup>72</sup> The Ninth Circuit en banc decided to abandon the previous standard and adopt a modified traditional equitable criteria test. This test factors “the purpose of interim relief and preservation of the Board’s remedial power into the traditional framework that informs our equity jurisdiction.”<sup>73</sup>

The court reasoned that, because Congress did not specifically state in section 10(j) that there be “reasonable cause” to believe a labor violation occurred, as it deliberately did in section 10(l), Congress did not intend the two sections to be treated similarly.<sup>74</sup> Requiring a showing of “reasonable cause” is “confusing,” the court said, because it causes the court to focus on the preliminary investigation instead of on the likelihood of success on the merits, as required by traditional equitable principles.<sup>75</sup> The Ninth Circuit held it can reasonably be inferred that the NLRB would not petition for a section 10(j) injunction if it did not believe it had “reasonable cause.” Hence, the emphasis is not on the “reasonable cause” prong but rather on whether an injunction is “just and proper.”<sup>76</sup> The Ninth Circuit thus eliminated what heretofore had been the first prong of the test for granting section 10(j) relief.<sup>77</sup>

In assessing whether the NLRB has met its burden under this new standard, the Ninth Circuit instructed that, “it is necessary to factor in the district court’s lack of jurisdiction over unfair labor practices, and the deference accorded to NLRB determinations by the courts of appeals.”<sup>78</sup> In its decision the Ninth Circuit referred to several other cases, including

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68. *Id.* at 449.

69. *Miller v. California Pac. Medical Ctr.*, 788 F. Supp. 1112 (N.D. Cal. 1992).

70. *Id.* at 1115 n.1.

71. *Miller v. California Pac. Medical Ctr.*, 991 F.2d 536 (9th Cir. 1993).

72. *California Pac. Medical Ctr.*, 19 F.3d at 451.

73. *Id.* at 456.

74. *Id.* at 457.

75. *Id.*

76. *Id.*

77. *Kinney v. Pioneer Press*, 881 F.2d 485, 491 (7th Cir. 1989).

78. *California Pac. Medical Ctr.*, 19 F.3d at 457 (quoting *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 829 (1984)).

Supreme Court decisions, which emphasize that the judgment of the NLRB is entitled to considerable deference.<sup>79</sup>

The court also observed that the NLRB, rather than the district court, has primary responsibility for declaring federal labor law policy.<sup>80</sup> “Even on an issue of law, the district court should be hospitable to the views of the General Counsel, however novel.”<sup>81</sup> Finally, the court held that the NLRB can make a “threshold showing” of the likelihood of success on the merits by producing “some evidence” to support the alleged unfair labor practice charge, together with an *arguable* legal theory.<sup>82</sup> The new language of the Ninth Circuit’s decision struck a middle course without impinging upon the deference traditionally accorded the NLRB. The new test attempts to balance the strengths and weaknesses of both the “traditional equitable criteria” test and the “frustration of the Act’s remedial purpose” test.

However, after announcing this new standard, the Ninth Circuit did not ultimately have to decide whether injunctive relief was warranted in *Miller v. California Pacific Medical Center*. By the time the Ninth Circuit rendered its decision, the NLRB had already successfully prosecuted the underlying unfair labor practices, making the injunction issue moot.<sup>83</sup>

Nearly eight months after the Ninth Circuit established this new standard, the district court for the Northern District of California had the first opportunity to apply the “modified traditional equitable criteria test” in *Miller v. LCF, Inc.*<sup>84</sup> The district court, however, denied injunctive relief. In the opinion of the authors, the decision is inexplicable, given the compelling case of egregious unfair labor practices which present a model of the circumstances section 10(j) was intended to remedy.

### III. *LCF, INC.*

#### A. *Background*

On July 14, 1994, one week before employees were to vote in an NLRB election on representation by the CWA, Sprint fired all 235 workers at LCF and shut down the facility. LCF, a San Francisco based wholly-owned

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79. *Id. See e.g.*, *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979); *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982); *Danielson v. Joint Bd. of Coat Suit & Allied Garment Workers’ Union*, 494 F.2d 1230, 1245 (2d Cir. 1974).

80. *California Pac. Medical Ctr.*, 19 F.3d at 460.

81. *Id.*

82. *Id.* (*emphasis added*)

83. *Id.* at 461. Although the dissent agreed with the new test espoused by the majority, it criticized the majority for failing to apply the newly articulated test to the case at hand. *Id.* at 461 (Schroeder, J., dissenting). It also stated that under this new standard on remand, the District Court “would have no option other than to enter a preliminary injunction.” *Id.* The District Court’s decision and the panel’s opinion were both vacated by this decision. *See Miller v. California Pac. Medical Ctr.*, 788 F. Supp. 112 (N.D. Cal. 1992); *Miller v. California Pac. Medical Ctr.*, 991 F.2d 536 (9th Cir. 1993).

84. 147 L.R.R.M. (BNA) 2911 (N.D. Cal. 1994).

subsidiary of Sprint, operated as a reseller of Sprint's long distance services. LCF also provided customer services to Spanish language customers throughout the West and Midwest.<sup>85</sup>

Sprint, a holding company based in Kansas City, Missouri, owns Sprint Long Distance, Sprint/United local telephone companies in 17 states, and Sprint Cellular.<sup>86</sup> Sprint Long Distance, formed in 1986, is currently the nation's third largest long distance company. Sprint holds approximately 10% of the market, after AT&T and MCI.<sup>87</sup> It is also the second largest telecommunications contractor to the federal government, and the long distance carrier for the Labor Department.<sup>88</sup>

In December 1992, Sprint purchased LCF, an independent corporation which had been reselling Sprint long distance services since its inception in 1990. Sprint and LCF became affiliated business enterprises sharing common directors, ownership, and management.<sup>89</sup> They also share a common labor policy, and buy and sell services to each other.<sup>90</sup>

In February 1994, organizers from the CWA met with LCF workers to address workers' concerns regarding non-payment of earned commissions, lack of notice of changed work schedules, restrictions on water consumption and bathroom breaks, and wage disparities compared to other Sprint telemarketers.<sup>91</sup> Soon after the meeting, a workers committee was formed and a union organizing drive began.

Within a month, Sprint bombarded LCF employees with an anti-union campaign aimed at discouraging union activity and maintaining the facility's non-union status.<sup>92</sup> As part of its anti-union efforts, Sprint circulated its "Union Free Management Guide" to Sprint managers. The guide outlines methods for undermining efforts by workers to organize throughout all of Sprint's world-wide operations.<sup>93</sup> From the outset, a centerpiece of Sprint's anti-union campaign at LCF was the explicit threat that the facility would close were employees to vote in CWA as their representative. The NLRB later found that LCF managers and supervisors repeatedly threatened that LCF

85. Anna Hamilton Phelan, *The Ultimate Hang-Up for Phone Workers*, L.A. TIMES, Aug. 29, 1995, at B9.

86. *Id.*

87. Kevin Kelly, *Sprint Picks up Pace*, BUS. WEEK, Sept. 5, 1994, at B4.

88. *Id.*

89. Brief of Counsel for the General Counsel of the National Labor Relations Board Region 20 at 49-50, LCF, Inc., No. 20-CA-26203, 1995 NLRB LEXIS 488 (Aug. 30, 1995).

90. *Id.* at 1.

91. Bill Adler, *Breaking La Conexion*, TEX. OBSERVER, Sept. 2, 1994, at 1.

92. Although workers at Sprint's local telephone companies have been represented by CWA and the International Brotherhood of Electrical Workers for decades, Sprint Long Distance is completely non-union and aggressively anti-union. See *Wired for Justice*, CWA NEWSLETTER (Friends of Sprint Workers, Washington, D.C.), May 1993.

93. Phelan, *supra* note 85; see also CWA NEWS (Communication Workers of America, Washington, D.C.), July 20, 1994.

would shut down if the CWA was chosen as the employees' bargaining representative.<sup>94</sup>

Despite continued harassment, threats and interrogations by management, a large majority of the 177 predominately female Latina telemarketers at LCF signed union cards authorizing CWA representation.<sup>95</sup> By mid-March, employees were wearing pro-union t-shirts and buttons to work.<sup>96</sup>

On June 3, 1994, the CWA filed a representation petition with the NLRB seeking an election covering the LCF telemarketing and customer service employees. On that same day, more than 100 of the 177 LCF employees in the CWA's petition for bargaining unit recognition wore t-shirts to work indicating their support for the CWA. In response, LCF management continued threats that the facility would close if a union was selected. Supervisors continued to interrogate employees about their union activities, and management reminded workers that Sprint was a non-union company and intended to remain that way.<sup>97</sup>

In the midst of this discord, Sprint hired Maury Rosas, former Vice President and General Manager of the Latino and Asian Market Group for Pacific Bell and a prominent figure in the Los Angeles Latino Community, to be President of LCF.<sup>98</sup> Rosas sold his home in Los Angeles and relocated his family to San Francisco to accept the position. Rosas later testified at the NLRB trial that when he was hired to run the LCF facility, he had no knowledge that Sprint was considering the closure of LCF.<sup>99</sup> President Rosas discovered Sprint's intentions for the first time on July 5, 1994, when he was informed that closure of LCF was one of the options due to be considered at the next day's Sprint/LCF Board meeting.<sup>100</sup> Rosas testified he was stunned by this news, not only because he had just been hired, but also because the information would have prompted him to handle the first month of operations differently had he known of Sprint's intentions sooner.<sup>101</sup>

In addition to hiring Rosas, Sprint completed a \$850,000 renovation of the LCF facility, including construction of an employee cafeteria and

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94. LCF, Inc., No. 20-CA-26203, 1995 NLRB LEXIS 988, at \*11-13 (Aug. 30, 1995).

95. Jeff Peline, *Sprint Misdials With Hispanic Subsidiary*, S.F. CHRON., Sept. 23, 1995, at A1.

96. See Brief of Counsel for the General Counsel of the National Labor Relations Board Region 20, at 2, LCF, Inc., No. 20-CA-26203, 1995 NLRB LEXIS 988 (Aug. 30, 1995).

97. *Id.* See also *Judge Affirms Charges of Illegal Worker Abuse by Sprint Corp. During Union Drive at Sprint/La Conexion Familiar in San Francisco*, CWA NEWS, Aug. 31, 1995. In an August 31, 1995, opinion by Administrative Law Judge Gerald Wacknov, Sprint was found to have committed more than 50 § 8(a)(1) violations. During the two month trial Judge Wacknov commented that, "I don't think I've had a case with so many instances of that sort of violations of the National Labor Relations Act in a long time."

98. Brief of Counsel for the General Counsel of the National Labor Relations Board Region 20, at 133, LCF, Inc., No. 20-CA-26203, 1995 NLRB LEXIS 988 (Aug. 30, 1995).

99. *Id.* at 133, 173-74.

100. *Id.*

101. *Id.* at 134, 174.

additional telemarketing space, in the month prior to the closure.<sup>102</sup> Sprint was also preparing for implementation of the final phase of its new marketing program, "Aqui Contigo," which began in May and was generating increased sales.<sup>103</sup>

Yet, on July 14, 1994, Rosas announced over a loudspeaker that the facility would be closing at once, purportedly as a result of serious financial losses. The 235 employees were instructed to immediately collect their belongings. Workers were then searched by company security guards before being ordered out of the premises.<sup>104</sup> The action was wholly unprecedented and sudden. Unlike employees at other facility closures by Sprint, all the LCF employees were terminated without 60 days advance notice.<sup>105</sup> Instead, they were given sixty days severance pay.<sup>106</sup>

While Sprint paid for its LCF workers to stay at home, customer calls were re-routed to Sprint's Customer Service Center in Dallas, Texas. Sprint had shifted the LCF's workload to Dallas within an hour of the LCF closing.<sup>107</sup> The sudden influx of Spanish speaking calls required the Dallas facility to mobilize employees and hire additional workers to meet the increased workload.<sup>108</sup>

The NLRB union representation election at LCF had been scheduled for July 22.<sup>109</sup> Had the CWA won the election—a strong likelihood judging from the consistent expressions of worker support—it would have marked the first ever union certification at a Sprint long distance facility anywhere within its world-wide operations.<sup>110</sup>

102. *Id.* at 140.

103. *Id.* at 132. "Aqui Contigo" means "here with you" in Spanish.

104. Susan Ferrias, *S.F. Firm Closes Just Before Union Vote*, S.F. EXAMINER, July 15, 1995, at A1, A16.

105. Brief by the Charging Parties, Exceptions to the Decision of the Administrative Law Judge, at 32, LCF, Inc., No. 20-CA-26203, 1995 NLRB LEXIS 988 (Aug. 30, 1995). Sprint closed another facility in Nashville, Tennessee at the same time it closed LCF. Sprint required its Nashville employees to work out the full 60 days.

106. *Id.* Pursuant to the WARN Act employers of 100 or more employees must give 60-day advance notice before plant closings. See *Plant Closings: The Complete Resource Guide*, 2 LABOR RELATIONS WEEK 43 at 1, Nov. 1988. As a result of receiving payment under the WARN Act, the former employees of LCF were denied California unemployment benefits. The California Department of Unemployment held that the penalties paid by Sprint for its violation of the WARN Act made workers ineligible for unemployment benefits. Furthermore, the fired employees had penalties imposed on them by the unemployment insurance department which accused them of lying on their applications when the workers stated that the plant closure fines they received from Sprint were not wages. Interview with Maria Blanco, Associate Professor of Law, Golden Gate University School of Law and Associate Director of the Women's Employment Rights Clinic, February 27, 1996.

107. Brief by the Charging Parties, Exceptions to the Decision of the Administrative Law Judge, at 10, LCF, Inc., No. 20-CA-26203, 1995 NLRB LEXIS 988 (Aug. 30, 1995).

108. *Id.* at 10, 32.

109. Brief of Counsel for the General Counsel of the National Labor Relations Board Region 20, at 9, LCF, Inc., No. 20-CA-26203, 1995 NLRB LEXIS 988 (Aug. 30, 1995).

110. *Wired for Justice*, CWA NEWSLETTER (Friends of Sprint Workers, Washington, D.C.), May, 1993.

The San Francisco Examiner reported LCF workers were shocked and devastated by the sudden closure. Some “workers burst into tears, at least one woman fainted and paramedics were summoned after the closure. . . .”<sup>111</sup> Sprint representatives told employees and CWA representatives that the decision to close had been made on July 6, 1994, at the LCF Board of Directors meeting, after Directors reassessed the facility’s financial performance.<sup>112</sup>

The abrupt closing of LCF triggered a surge of domestic and international protests against Sprint. In addition to filing unfair labor practice charges against Sprint, the CWA initiated a media campaign urging Sprint’s long distance spokeswoman, Candice Bergen, to speak out against Sprint’s action.<sup>113</sup> Sixty-four members of Congress co-signed a letter to Sprint’s chairman, William T. Esrey, expressing concern over the unfair labor charges and calling on Sprint to settle the case immediately.<sup>114</sup> On an international level both Germany and Mexico denounced Sprint’s actions.<sup>115</sup>

### *B. The Section 10(j) Petition: Miller v. LCF, Inc.*

On September 12, 1994, following a two month investigation into the CWA charge, the NLRB issued an unfair labor practice complaint alleging that Sprint had illegally closed LCF in an effort to thwart unionization in violation of section 8(a)(3) of the NLRA.<sup>116</sup> The NLRB complaint also alleged approximately 50 other section 8(a)(1) violations.<sup>117</sup> Two weeks later, after receiving authorization from the Board, the NLRB’s regional office petitioned the United States District Court for the Northern District of California for injunctive relief ordering Sprint to immediately reopen LCF

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111. Ferrias, *supra* note 104, at A1.

112. Brief of Counsel for the General Counsel of the National Labor Relations Board Region 20, at 32-34, LCF, Inc., No. 20-CA-26203, 1995 NLRB LEXIS 988 (Aug. 30, 1995).

113. Jon Pattee, *Sprint and the Shut Down of La Conexion Familiar*, 23 LAB. RES. REV., at 16 (1995).

114. *Id.*

115. *Id.* See also Testimony of Veronika Altmeyer, Member of Management Executive Committee of the Deutsche Postgewerkschaft, German Post and Telephone Workers Union, February 27, 1996. Deutsche Telekom AG, the national German phone company and its French counterpart, France Telecom, entered into a \$4.2 billion global alliance with Sprint. On December 15, 1994, the Supervisory Board of Deutsche Telekom AG passed a resolution establishing rules of conduct for participants in Deutsche Telekom AG global ventures. The resolution provided that respect for union representation be a basic operating principle for all joint ventures, in accordance with the principle of freedom of association established by the constitution of the International Labor Organization.

116. The Board devoted nearly 30 days of investigation, involving multiple investigators and attorneys, prior to proceeding with the 10(j) in this matter.

117. *NLRB Seeks Injunction to Reopen Sprint Subsidiary Where Latino Workers Lost Jobs*, DAILY LAB. REP., Sept. 19, 1994, at D14.

and reinstate all 235 workers pursuant to section 10(j) of the National Relations Labor Act.<sup>118</sup>

At the time the NLRB filed the petition, it had sworn affidavits from numerous LCF employees asserting that managers had repeatedly threatened workers with discharge if they engaged in union activity. Moreover, the NLRB presented evidence that LCF President Rosas told employees on the evening of the closing that the CWA union organizing campaign was a significant factor in LCF's decision to close. Although the NLRB's investigation was not completed at the time of filing, NLRB attorneys believed there was more than adequate evidence to warrant interim relief pending final disposition by the Board.

Notwithstanding this evidence, the district court concluded that the final investigation of the Board was not yet complete and there were lingering factual disputes asserted by Sprint. The district court declined to accord the NLRB deference in resolving conflicting factual evidence.<sup>119</sup> This proved to be the fatal flaw in the district court's application of the new Ninth Circuit standard. In the authors' opinion, the district court misinterpreted the Ninth Circuit's direction regarding the degree of deference accorded to the NLRB in a section 10(j) petition.<sup>120</sup> This analysis prompted the district court to deny the NLRB deference in resolving factual disputes. Instead, the court substituted its own credibility assessments for those of the NLRB's, disregarding the direction of the Ninth Circuit.

In *California Pacific Medical Center*, the Ninth Circuit recognized that Congress, upon vesting the courts with jurisdiction to grant preliminary injunctions when "just and proper," intended the courts to "exercise judgment" in determining what is just and proper as opposed to "simply sign[ing] off on Board requests."<sup>121</sup> The Ninth Circuit explained that the NLRA does not require the courts to merely defer to the Board's section 10(j) request. However, the courts are obliged to afford deference to Board determinations when they evaluate "the likelihood of success on the merits."<sup>122</sup> It is important to note that the Ninth Circuit's decision was not intended to make it more difficult for the NLRB to prevail in section 10(j) petitions. Rather, by collapsing the "reasonable cause" prong into the "just and proper" inquiry, the Ninth Circuit "conform[ed] the analysis more closely

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118. *Miller v. LCF, Inc.*, 147 L.R.R.M. (BNA) 2911 (N.D. Cal. 1994). The CWA made a strategic decision not to be a charging party in the 10(j) petition because they wanted it to be a case of the federal government walking into court to enforce the law and the national labor policy.

119. *Id.* at 2914.

120. *Id.*

121. *Miller v. California Pac. Medical Ctr.*, 19 F.3d 449, 458 (9th Cir. 1994).

122. *Id.* at 458-59. Recently, the United States Supreme Court noted that "interpretations of the Board . . . will be upheld if reasonably defensible" and that "the Boards reviews are entitled to the greatest deference" because Congress delegated to the Board "primary responsibility for developing and applying national labor policy." *NLRB v. Town and Country Elec., Inc.*, 116 S. Ct. 450, 453 (1995).

to the statutory language.”<sup>123</sup> The elements of the standard remain the same, only the application by the court changes.

Rather than evaluating the evidence in accordance with the standard espoused by the Ninth Circuit, the district court in *LCF, Inc.* tilted in the opposite direction. Judge Walker viewed the evidence through glasses colored by his own judicial propensity.<sup>124</sup> The court took it upon itself to discredit all witnesses provided by the Board and to embellish Sprint’s defense.<sup>125</sup> First, the district court had to decide whether the Board was likely to succeed on the merits of both the section 8(a)(1) violations (threats, interrogation, surveillance) and the section 8(a)(3) violation (closing LCF and terminating the employees to prevent unionization). If the court had found the Board met its burden, it would then have to decide whether injunctive relief was “just and proper.”

A problem arises in fashioning the type of interim relief sought in this type of case. If the court found that the Board met its burden only for the 8(a)(1) violations, it could not order Sprint to reopen the LCF facility because the “injunction must be narrowly tailored to address the specific unfair labor practice that the Board seeks to remedy.”<sup>126</sup>

A typical remedy for a section 8(a)(1) violation is a “notice posting.” This is a largely empty gesture whereby the employer merely advises employees that they enjoy certain rights under federal labor law and that the employer will do nothing to curtail those rights. Only a section 8(a)(3) violation would normally support the much more significant relief of an order to reopen a facility. Practically speaking, it would be virtually impossible to remedy the section 8(a)(3) violations absent an order to reopen because there is no other facility in which to reinstate all of the 235 unlawfully terminated employees, most of whom are native Spanish speakers with limited English proficiency.

Furthermore, where a facility has been closed, it is difficult for the Board to enforce even its minimal posting requirement applicable to section 8(a)(1) violations because there is no viable means for posting a notice advising employees of their rights. Although notices can be mailed to the employee’s last known address, such a mailing would have limited effect in this case, because so many employees had relocated after the closure.

Congress recognized in 1947 that a refusal to grant interim relief translates into a frustration of the NLRA’s purpose.<sup>127</sup> By the time of final Board disposition, typically two or more years after the unfair practice, it is far too late to require Sprint to reopen a facility that has been inoperative for

123. *California Pac. Med. Ctr.*, 19 P.3d at 458-59.

124. See JAMES B. ATTLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 2-8 (1983).

125. *LCF, Inc.*, 147 L.R.R.M. (BNA) 2911, 2914-17 (C.D. Cal. 1994).

126. *Id.* at 2914 (quoting *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 700 (8th Cir. 1965)).

127. S. REP. NO. 105, 80th Cong., 1st Sess. 8, 27 (1947).

over a year. Although the fiscal impact of an order to reopen would be modest relative to Sprint's multi-billion dollar assets, the issue of the dispersed workers would remain a problem. In this regard, evidence indicated that a large pool of adequately trained workers in the San Francisco area could readily fill the positions of former employees who did not return.<sup>128</sup> Thus, the dispersal of some of the affected workers would not have presented an insurmountable bar to reopening the LCF facility.<sup>129</sup>

Denial of the injunction in this case deprived the Board of its power to correct unfair labor practices. Sprint accomplished its "unlawful objective before being placed under any legal restraint, and thereby mak[ing] it impossible or not feasible to restore or preserve the status quo."<sup>130</sup> This outcome is precisely the result Congress intended the section 10(j) injunction to prevent.<sup>131</sup>

When the Board's Regional Director in San Francisco sought approval from the General Counsel for section 10(j) injunctive relief in this case, he was well aware of the burden he would have to meet. The NLRB had to establish a prima facie case that Sprint closed LCF to prevent the CWA from eroding a perfect non-union record at Sprint long distance operations.<sup>132</sup> The Division of Advice, the General Counsel and the Board knew their burden under the new Ninth Circuit standard, and based on their knowledge, experience, and expertise, agreed that injunctive relief was warranted under the circumstances. General Counsel Fred Feinstein stated that "this is the kind of situation for which section 10(j) was intended."<sup>133</sup> The statistics provided by the NLRB indicate that there is no need for the NLRB's credibility to be an issue for the courts.<sup>134</sup> Apparently, these considerations were of little merit to the district court.

### C. The Likelihood of Prevailing on the Merits

Instead of struggling with the dilemma of how much deference to grant the NLRB, the district court cast the section 8(a)(1) allegations aside as

128. Brief of Counsel for the General Counsel of the National Labor Relations Board Region 20, at 257, No. 20-CA-26203, 1995 NLRB LEXIS 988 (Aug. 30, 1995).

129. As of February 1996, more than one year after the original complaint was filed, the case is still being adjudicated by the NLRB.

130. S. REP. No. 105, 80th Cong., 1st Sess. 8, 27 (1947).

131. *Id.*

132. *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), *enforced* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

133. *NLRB Seeks Injunction To Reopen Sprint Subsidiary Where Latino Workers Lost Jobs*, *supra* note 117, at D14.

134. *See* Hunter, *supra* note 34. The Division of Advice processes requests for section 10(j) injunctions. In fiscal year 1990, the Board received 157 requests for injunctive relief, yet only authorized 41 of the petitions to be filed in district court (26%). Of the cases brought to a conclusion during that same year the NLRB was successful in 94% of the cases; achieving either a satisfactory settlement or victory in litigation. This evidence demonstrates that cases approved for § 10(j) petitions tend to prevail on the merits.

irrelevant, even though Sprint failed to present any evidence rebutting their validity.<sup>135</sup> This enabled the court to focus solely on the section 8(a)(3) violation, the most difficult to establish. In order to meet its burden, the Board had to show that Sprint's motivation in closing LCF was not financial, but rather aimed at retaliating against its employees for their union activities.<sup>136</sup> Once the Board established that "protected conduct was a motivating factor" in Sprint's decision to close LCF, the burden shifted to Sprint to show that the same action would have occurred even in the absence of union activity.<sup>137</sup>

The district court found that the NLRB did not make out a prima facie showing of Sprint's pretextual motives, and as a result denied the section 10(j) petition. The court reached its decision in spite of the un rebutted evidence of innumerable threats by LCF management to close the facility in retaliation for the employees' unionization efforts. Nor was the court persuaded by the timing of the closure, on the eve of the election.<sup>138</sup> It was similarly unmoved by substantial evidence that, prior to the CWA organizing drive, Sprint had been preparing to aggressively advance the operations of LCF in the coming months.<sup>139</sup>

The NLRB, in support of its position, offered affidavits from several LCF employees of various rank. One affiant was Rosie Orozco, an accounts payable specialist. Ms. Orozco stated that on July 14, 1994, the day of the closing, LCF President Maury Rosas told her at a farewell dinner that the union was one of the reasons Sprint closed the plant.<sup>140</sup> The district court excluded all the testimony as hearsay. Furthermore, the court declared the evidence not probative because the affiants were "disgruntled former employee[s] of respondent with no personal knowledge of Sprint's motives, who could be rehired as a result of the NLRB proceeding."<sup>141</sup> The Judge found that "these circumstances call for little weight to be accorded this evidence."<sup>142</sup>

In determining whether the evidence presented by the Board was sufficient, case law requires the court to adhere to the standard that "questions of credibility of witnesses are for the trial examiner . . . who heard and saw the witnesses. . . ."<sup>143</sup> Issues of credibility are to be decided by the

135. *Miller v. LCF, Inc.*, 147 L.R.R.M. (BNA) 2911, 2913 (N.D. Cal. 1994).

136. *See* *NLRB v. Transportation Management, Corp.*, 462 U.S. 393, 398 (1983); *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), *enforced* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

137. *Wright Line*, 251 NLRB at 1089.

138. *LCF, Inc.*, 147 L.R.R.M. (BNA) at 2915.

139. *Id.* at 2916.

140. *Id.* at 2914.

141. *Id.* at 2915.

142. *Id.*

143. *NLRB v. Elias Bros. Big Boy Inc.*, 327 F.2d 421, 425 (6th Cir. 1964).

administrative law judge or the Board when it adjudicates the case.<sup>144</sup> In this instance, the district court made its own rulings on credibility, rather than observe the traditional deference accorded to the NLRB.<sup>145</sup> It is the opinion of these authors that the court's blanket discrediting of the LCF employees in favor of Sprint's position can only be characterized as unwarranted judicial activism.

The court also discounted evidence of LCF's hostility towards unionization. Furthermore, it rejected the NLRB's argument that the timing of Sprint's closure constituted circumstantial evidence of Sprint's unlawful motive. The district court instead found Sprint's documentation of poor financial performance persuasive.<sup>146</sup> Sprint presented evidence that between January and March 1994, LCF lost 10,000 of its 130,000 customers. Sprint also cited a May 1994 LCF Board of Director's meeting where directors expressed concern about LCF's poor financial performance, and projected losses of \$3.9 million in 1994.

The NLRB rebutted Sprint's financial justifications as pretextual. The Board demonstrated that Sprint attributed LCF's decline in customer base to poor management.<sup>147</sup> Sprint brought in Maury Rosas to address this deficiency. Sales had increased since Rosas' arrival. Sprint did not inform Rosas that the Board of Directors was considering closing the facility within a month.<sup>148</sup>

Sprint, moreover, spent almost one million dollars to renovate the LCF executive suite and to construct a new employee cafeteria in the period leading up to the facility's closing.<sup>149</sup> This work was completed less than one month prior to LCF's abrupt closure.<sup>150</sup> Additionally, Sprint knew when it purchased LCF that the company was projected to show losses for five years.<sup>151</sup> Finally, there were scores of new hires during the last two months, and new employees were brought aboard as late as the day of the closure.<sup>152</sup>

Nevertheless, the court found the NLRB not qualified to second-guess Sprint's business judgments, and chastised the NLRB for failing to substantiate its criticisms with expert testimony from an accountant or business consultant.<sup>153</sup> The court acted in spite of the fact that NLRB case law has

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144. *Id.* at 424.

145. *Id.* at 425.

146. *Miller v. LCF, Inc.*, 147 L.R.R.M. (BNA) 2911, 2915-16 (N.D. Cal. 1994).

147. Brief by the Charging Parties, Exceptions to the Decision of the Administrative Law Judge, at 24-25, *LCF, Inc.*, No. 20-CA-26203, 1995 NLRB LEXIS 988 (Aug. 30, 1995).

148. *Id.*

149. Brief of Counsel for the General Counsel of the National Labor Relations Board Region 20, at 140-42, *LCF, Inc.*, No. 20-CA-26203, 1995 NLRB LEXIS 988 (Aug. 30, 1995).

150. *Id.* at 139-140.

151. *Id.* at 52-54.

152. *Id.* at 141-142.

153. *Miller v. LCF, Inc.*, 147 L.R.R.M. (BNA) 2911, 2914 (N.D. Cal. 1994).

long held that in rebutting the NLRB's case, "the employer cannot simply present a legitimate reason for its actions, but must also persuade by a preponderance of the evidence that the same action would have been taken even in the absence of the protected conduct."<sup>154</sup>

Contrary to the court's characterization, when evidence indicates the employer's actions were taken for reasons which violate the NLRA, the NLRB is not deemed to be second-guessing the employer's judgment.<sup>155</sup> Rather, the NLRB is fulfilling its duty to pursue an unfair labor practice action to enforce the law.<sup>156</sup>

The court also appeared to lose sight of the fact that the section 10(j) request was merely an interlocutory procedure. The court's charge was to determine the *likelihood* that the NLRB would prevail on the merits.<sup>157</sup> According to the Ninth Circuit's direction in *California Pacific Medical Center*, the district court owed "great deference to the Board's understanding of the facts underlying its decision to apply for an injunction, and to the Board's interpretation of the law."<sup>158</sup> Statements made by former LCF management could have been admitted as admissions of a party opponent to support Sprint's pretextual motives.<sup>159</sup> Furthermore, Sprint's motive to violate section 8(a)(3), was demonstrated by circumstantial evidence. The Board "produced evidence to support the unfair labor practice charge, together with an arguable legal theory of pretextual motive, thus making a "threshold showing of likelihood of success" as required by the new Ninth Circuit standard.<sup>160</sup> A proper application of the Ninth Circuit standard to the evidence compelled a finding that the NLRB was likely to prevail on the merits.

#### D. Balancing the Hardships

Even under the district court's finding that the Board had demonstrated only a fair chance of succeeding on the merits, a balancing of the hardships supported an order for injunctive relief. The public interest in protecting the remedial power of the Board and ensuring that Sprint's unlawful practice did not succeed before the charge was adjudicated, supported a decision in the Board's favor.<sup>161</sup> The district court was quick to note that the balancing

154. Hospital San Rafael, 308 N.L.R.B., 605, 607 (1992).

155. NLRB v. Savoy Laundry, Inc., 327 F. 2d 370, 372 (2d Cir. 1964). The Board noted that, "the crucial factor is not whether the business reasons cited by [the employer] were good or bad, but whether they were honestly invoked and were, in fact, the cause of the change." *Id.* at 371.

156. *Id.*

157. Miller v. California Pac. Medical Ctr., 19 F.3d 449, 462 (9th Cir. 1993) (Schroeder, J., dissenting).

158. *Id.*

159. FED. R. EVID. 801(d)(2).

160. *California Pac. Medical Ctr.*, 19 F.3d at 460.

161. See e.g., *id.*

inquiry was within its "sole discretion."<sup>162</sup> However, it neglected to consider the Ninth Circuit's direction that, "in exercising [its] sound discretion, courts of equity should pay particular regard for the public consequences" intended to be protected by the section 10(j) injunction.<sup>163</sup>

The district court denied the section 10(j) injunction because it concluded that reopening an "unprofitable" operation would impose a hardship on Sprint.<sup>164</sup> These hardships included reassembling equipment, returning the rerouted Spanish language customers and reconciling paid out severance compensation.<sup>165</sup> Nonetheless, the record does not establish that LCF was "unprofitable," nor was the district court the proper forum to adjudicate the merits of the underlying case.<sup>166</sup>

The NLRB argued that a review of all the evidence demonstrated that not only was LCF not "unprofitable," but that Sprint used unprofitability as the pretext to close LCF and prevent unionization.<sup>167</sup> By summarily assuming that LCF was "unprofitable," the district court made an adjudication on the merits, rather than focusing on the likelihood of success.

The foremost hardship that a section 10(j) injunction is designed to protect is the denial or frustration of the public interest.<sup>168</sup> If an injunction is not issued and the NLRB prevails on the merits, the passage of time can render the Board's remedy inadequate.<sup>169</sup> By failing to enjoin Sprint's

162. *Miller v. LCF, Inc.*, 147 L.R.R.M. (BNA) 2911, 2917 (N.D. Cal. 1994) (quoting *California Pac. Medical Ctr.*, 19 F.3d at 459).

163. *California Pac. Medical Ctr.*, 19 F.3d at 459 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)).

164. *LCF, Inc.*, 147 L.R.R.M. (BNA) at 2417. See also *Federal Judge Rejects NLRB Request for 10(j) Injunction Against Sprint*, DAILY LAB. REP., Nov. 23, 1994 at D11.

165. Returning rerouted customers to LCF would not pose a hardship to Sprint in light of the fact that telecommunications technology enables Sprint to reroute customers within an hour, as did its original rerouting of LCF customers to Dallas.

166. *NLRB v. Elias Bros. Big Boy Inc.*, 327 F.2d 421 (6th Cir. 1964).

167. According to Dr. Kate Bronfenbrenner, Director of Labor Education Research, New York State School of Industrial and Labor Relations, Cornell University,

Sprint's actions during this period [of union campaigning] represent an all too familiar pattern of aggressive union avoidance on the part of American private sector employers. The judges's decision in this case is also representative of a labor law that, in both its standards and enforcement, provides weak and ineffectual protection of the 'right to organize free of coercion and intimidation' which is its stated mission to uphold. . . . [I]t is no surprise that less than half the NLRB elections held each year . . . result in union victory, and that less than a third of all workers who attempt to organize under the NLRA.

Dr. Kute Bronfenbrenner, Testimony at the U.S Department of Labor Public Forum (Feb. 27, 1996).

168. *Miller v. California Pac. Medical Ctr.*, 19 F.3d 449, 454 (9th Cir. 1993).

169. Although the Board would probably prevail on a full restoration remedy, See e.g., *Mid-South Bottling Co. v. NLRB*, 876 F.2d 458 (5th Cir. 1989), in light of the low income status of a majority of the former LCF employees, it is likely that many of them will have relocated or obtained other jobs.

unlawful actions, the integrity of the collective bargaining process and the ability of the Board to redress the violation were destroyed in this case.

The 235 former LCF employees have suffered a grave injustice. But an even greater injustice will be perpetrated if companies are permitted to violate employees' express section 7 rights by engaging in unlawful anti-union tactics such as those found by the administrative law judge who heard the LCF case. As a result of the outcome in the LCF case, employees throughout the nation will be chilled from participating in union activities.<sup>170</sup>

The NLRB is responsible for shaping the national labor policy. The district court is empowered to make that policy known and give it force by sending a message to employers that they cannot flagrantly violate the law under a quasi-legitimate business excuse.<sup>171</sup> In the wake of today's political environment, the courts need to aggressively apply existing law to achieve the necessary deterrent effect.<sup>172</sup>

The NLRB did not appeal the denial of the section 10(j) petition even though it believed it had a strong case. The primary reason an appeal was not filed was that the NLRB hearing before an administrative law judge in the underlying unfair labor practice case had already begun by the time the court announced its decision. The NLRB reasoned that by the time an appeal of the district court's 10(j) decision could be heard, the entire issue of Sprint's culpability and the remedy to be applied would already have been decided, rendering moot the question of the preliminary injunction.<sup>173</sup>

#### *E. The NLRB Trial Before the Administrative Law Judge*

On August 30, 1995, after a two month trial, the administrative law judge in the NLRB proceeding held that Sprint violated all section 8(a)(1) allegations with which it had been charged "by its various and abundant unlawful and threatening statements to employees."<sup>174</sup> The administrative law judge also found that the NLRB had indeed satisfied its prima facie case that the closure of LCF was motivated by anti-union considerations. However, he held that Sprint met its exculpatory burden by showing the closure was the

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170. Sprint workers throughout the nation have feared retaliation for organizing. See Stanely Holmes, *Workers: Pattern of Abuse at Sprint*, ROCKY MTN. NEWS, Oct. 23, 1994, at A1.

171. See Phil Comstock & Maier B. Fox, *Employer Tactics and Labor Law Reform*, in RESTORING THE PROMISE OF AMERICAN LABOR LAW 90 (Sheldon Friedman et al. eds., 1994).

172. See Kate L. Bronfenbrenner, *Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform*, in RESTORING THE PROMISE OF AMERICAN LABOR LAW 75, 86-89 (Sheldon Friedman et al. eds., 1994).

173. Also, union officials at the CWA felt that the language of the District Court's decision was relatively strong against them.

174. LCF, Inc., No. 20-CA-26203, 1995 NLRB LEXIS 988, at \*91 (Aug. 30, 1995). At the hearing Sprint conceded to 148 stipulations of fact, or uncontested admissions. Sprint Vice President for Employee Relations, Carl Doerr, admitted under penalty of perjury that he fabricated evidence to make it appear that Sprint had not closed the facility to stop union activity because he felt that the company did not have a strong case.

result of adequate business considerations.<sup>175</sup> In so finding, the administrative law judge ordered Sprint only to cease and desist from any future anti-union activity at its closed facility, an empty mandate.

The administrative law judge summarized his finding regarding the 8(a)(1) violations with regard to the closure of LCF:

It is undenied that LCF employees have been bombarded with statements by local LCF managers and supervisors that LCF, a business then recently purchased by Sprint, would be closed if the Union got in. Further, following such threats and other unlawful conduct, the facility was closed just eight days prior to a scheduled Board election, which, the evidence strongly indicates, would have resulted for the first time in the certification of the Union as the employees collective bargaining representative in a Sprint long distance facility. Then, immediately upon the closure of the facility, the President of LCF is alleged to have admitted that the closure was union-related. And finally, after the closure, the Board was provided with evidence that a high ranking Sprint official had "manufactured" a document specifically designed to exculpate Sprint, which document was represented to the Board during the course of its investigation.<sup>176</sup>

The administrative law judge further stated that "the foregoing [is] compelling *prima facie* evidence that the closure of LCF was motivated by unlawful considerations. . . ."<sup>177</sup>

This finding by the ALJ emphasizes the critical importance of the two Sprint/LCF Board meetings which immediately preceded LCF's closure. At the May 1994 Board meeting many alternatives were considered, including potential closure. At the same time, all relevant legitimate considerations reviewed by the Sprint/LCF Board pointed to a lengthy future which would be built on the recent productivity gains of LCF. By the July 6th Sprint/LCF Board meeting, the employer was well aware that CWA had overwhelming support. In addition, LCF supervisors testified at the NLRB trial that by the end of June, their managers at LCF had come to the conclusion that CWA was going to win the election.<sup>178</sup>

Sprint/LCF knew that the significant financial turn-around documented by full May and June 1994 figures, the significant upward trends in all financial categories and the meeting of previously stated financial goals, contradicted its financial justifications for the abrupt closure of LCF. Sprint's own budget figures indicate that sales per hour increased in both May and June.<sup>179</sup> The rate of customers changing service was below the average rate for the last four months. Gross revenues for the months of April, May

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175. *Id.*

176. *Id.* at \*74.

177. *Id.* "[T]he General Counsel has presented a *prima facie* case that the closure of LCF on July 14 was motivated by anti-union considerations." *Id.* at \*91.

178. Brief by the Charging Parties, at 97-101, LCF, Inc., No. 20-CA-26203, 1995 NLRB LEXIS 988 (Aug. 30, 1995).

179. *Id.* at 149-151.

and June exceeded the projected figures considered at the May 4 Sprint/LCF Board meeting. Yet at the NLRB trial, Sprint dismissed these improvements in LCF's productivity, claiming the economic gains were inadequate.

#### *F. Assessment of ALJ Decision*

The administrative law judge received testimony from the second highest ranking labor official in Sprint's worldwide operations, Carl Doerr. Doerr worked for Sprint for almost thirty years, and except for one other executive individual who reported directly to Sprint's CEO, Vice President Doerr was responsible for overseeing all labor relations, including oversight of LCF.<sup>180</sup> Doerr testified in the NLRB proceeding that he had falsified evidence in the instant proceeding.<sup>181</sup> He further acknowledged that he did so because he was not convinced Sprint had a sufficient defense against the unfair labor charges.<sup>182</sup> He claimed at trial that by April of 1994, months prior to the CWA's filing of its petition, he had advised Sprint of a likely representation election and the need for Sprint to establish a "paper trail."<sup>183</sup> This falsified letter was piously highlighted in Sprint's own responses to the Board. Fortunately, according to Sprint, the author refused to remain a party to this deceit once he became aware that the fabricated letter was being used to substantiate Sprint's position during a formal federal government investigation. Thus, contended Sprint, the author notified Sprint of the circumstances relating to the falsified letter and Sprint subsequently withdrew it.

In spite of the acknowledged strength of the evidence of unlawful motivation for the LCF closure, and of the inconsistencies in Sprint's economic justifications, the administrative law judge accepted Sprint's position that the closure was based on financial considerations. He concluded there was overwhelming evidence that Sprint had valid and compelling economic reasons for the closure.<sup>184</sup> In a near echoing of the district court's opinion, issued while the NLRB trial was underway, the administrative law judge held that "the NLRB is certainly in no position to substitute its business judgment for the expertise of the Respondent."<sup>185</sup>

The decisions of the administrative law judge and the district court have permitted the first runaway shop on the electronic superhighway to go forward. These decisions signalled employers there is little to fear when they use technology to deprive workers of their right to organize and defeat unions within an electronic heartbeat.

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180. Brief by the Charging Parties, Exceptions to the Decision of the Administrative Law Judge, at 31, LCF, Inc., No. 20-CA-26203, 1995 NLRB LEXIS 988 (Aug. 30, 1995).

181. Brief by the Charging Parties, NLRB v LCF and Sprint, 78, Case No. 20-CA-26203, Aug. 30, 1995.

182. *Id.* at 76-85.

183. LCF, Inc., No. 20-CA-26203, 1995 NLRB LEXIS 988, at \*71 (Aug. 30, 1995).

184. *Id.* at \*85.

185. *Id.* at \*87.

*G. The Impact of LCF  
on the Telecommunications Industry*

The impact of the district court and the ALJ decisions threaten to accelerate the declining work standards in our society. The recent enactment of the Telecommunications Bill by Congress heralds a new competitive age in telecommunications. These reforms have been touted as creating new jobs in the growing information sector of our economy.

Telecommunications represents the only U.S. private sector service industry with a middle-income wage standard and comprehensive benefits.<sup>186</sup> Historically, telecommunications has been the model of a high-wage, high-skill industry. Advanced technology, a skilled work force and a union wage standard have translated into productivity improvements and rising wages and benefits for telecommunications workers.

Annual average earnings of non-supervisory telecommunications workers are \$37,500, twice the average annual earnings of other service sector workers.<sup>187</sup> Researchers attribute these high wages to the high rate of unionization in the telecommunications industry.<sup>188</sup> If workers in the fast changing information industry are deprived of the right to organize free from threats of plant closures and job losses, the result will be a downward pressure on worker wages and benefits in the industry.

Today, non-union telecommunications companies such as Sprint are pursuing a low wage, minimal benefits compensation package, to compete with other companies. New technologies and regulatory changes provide opportunities for telecommunications employers to follow the low wage, non-union, business strategies of the rest of the service sector. Furthermore, the "information super-highway" enables telecommunication employers to thwart unionization efforts by closing shop under false pretenses and transferring work, without losing clients or profit. Ultimately, only the workers lose.

*H. NAFTA Hearing*

The *LCF, Inc.* case has attracted international attention, in large part because it suggests that telecommunications industry giants can defeat unions

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186. Janice Wood, Testimony of Janice Wood, Vice President, CWA District 9 (Feb. 27, 1996).

187. *Id.* According to a 1994 study by the Institute for Women's Policy Research, women comprise half the telecommunications workforce and on average earn \$27,040 annually in non-supervisory positions. This is twice the average earnings of non-supervisory women workers in the service sector. Similarly, minority workers in telecommunications earn almost twice as more annually than in other service industry jobs.

188. Roger I. Abrams, *Post-Modern Labor Management Relations: The Southern Bell/Communications Workers Strategic Alliance*, 12 HOFSTRA LAB. L.J. 321-25 (1995). See also Samuel Estreicher, *Labor Law Reform In a World of Competitive Product Markets*, 69 CHI. KENT L. REV. 3, 12 (1993).

by using high technology to instantaneously transfer work from one locale to another.

Recognizing the potential implication for telecommunications workers worldwide, Mexico for the first time invoked a provision of the NAFTA agreement calling for hearings on the case. In petitioning for the hearing, held February, 1996, in San Francisco, Mexico alleged that the United States failed to enforce its own labor laws in the handling of the LCF case.<sup>189</sup> The NAFTA hearing provided an international forum for the CWA and former LCF employees to testify before representatives of the United States, Mexican and Canadian governments regarding their unlawful treatment at the hands of Sprint.<sup>190</sup> The parties also addressed the failure of the United States to fashion an appropriate remedy for Sprint's conduct, in light of the more than fifty violations of federal labor law proven in the LCF administrative law proceeding.<sup>191</sup>

Mexican officials noted that the NAFTA provisions, which are designed to ensure the uniform enforcement of each country's respective labor laws, were not applied at any point during the Sprint/LCF proceedings. Phillip Bowyer, General Secretary of the Postal, Telegraph and Telephone International (PTTI)<sup>192</sup> stated:

The Sprint case, in my view, is one of, if not the most, outrageous examples of the violations of workers' right to form a union to occur in our industry world-wide. Even more shocking is that the entire law enforcement apparatus of the U.S. Federal Court system [has] proven inadequate or unwilling to either prevent or remedy the flagrant violation of basic trade union rights by Sprint.<sup>193</sup>

The PTTI's view is shared by the International Confederation of Free Trade Unions (ICFTU). The ICFTU conducted a "1995 Survey of Violations of Trade Union rights," which concluded that in the United States,

[w]orkers often have no effective redress in the face of abuses by employers. Inadequate remedies available to workers who have been fired illegally for trade union activity, and ineffective penalties against employers who

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189. *NAFTA: CWA Tells Committee That Labor Law Failed to Protect Sprint Workers*, DAILY LAB. REP., Feb. 28, 1996, at D12.

190. The official topic of the hearing was "The Effect of Sudden Plant Closings on the Principle of Freedom of Association and The Right To Organization," but the crux of the hearing focused on Sprint's action. Sprint did not send a representative to testify on its behalf, however, it did submit a statement.

191. Both authors of this article attended the NAFTA hearings in San Francisco on February 27, 1996.

192. PTTI represents 4.6 million workers in 223 affiliated trade unions in 117 countries, in the telecommunications, information, postal and electricity industries.

193. Philip Bowyer, testimony before U.S. Dept of Labor Pub. Forum on the effects of sudden plant closures and its impact on the principle of freedom of association and the right of workers to organize (Feb. 27, 1996).

illegally fire them, place severe obstacles in the path of workers seeking to join trade unions.<sup>194</sup>

The unprecedented NAFTA proceedings examined the denial of 10(j) injunctive relief, the administrative law judge's failure to find unlawful closure under section 8(a)(3) of the NLRA, and pending rulings on exceptions briefs filed by the NLRB regional office, the Communications Workers of America, and Sprint. Eighteen of the twenty-one speakers expressed the overwhelming sentiment that while the NLRA and the North American Agreement on Labor Cooperation guarantee all necessary labor protections, including the right to organize, neither statute provides appropriate remedies to deter anti-union behavior and prevent companies from closing down facilities and shattering workers lives under the guise of global competition. The outcome of the DOL/NAFTA public hearings is to be announced in a public report due to be issued by the National Administrative Office at the end of summer, 1996.<sup>195</sup>

### CONCLUSION

The NLRB is currently appealing the administrative law judge's decision to the five-member Board. NLRB counsel hope to prevail on the section 8(a)(3) violation, and gain more substantial penalties against Sprint. A more appropriate remedial order would have found in favor of the Section 8(a)(3) charge and ordered the reopening of the LCF facility in 1994.

Based on the more than fifty unfair labor practices found, minimum relief demands a make whole remedy whereby employees are paid their lost wages. A just order would mandate that, in the absence of reopening, Sprint should provide former LCF employees with comparable jobs and financial assistance for relocating.

When used properly by both the NLRB and the courts, section 10(j) injunctions can powerfully deter employers from engaging in unfair labor practices and avoiding substantial penalties. If the Board continues to be selective in the cases it authorizes for section 10(j) relief, the NLRB will maintain its credibility in court and bolster its arguments for granting relief. By adhering to the policies articulated by the NLRA, and affording the appropriate deference to the Board in carrying out the Act's purpose, district courts can enforce the nation's labor law policy. This in turn will deter avid violators and empower employees seeking to exercise their section 7 rights.

The district court had the perfect opportunity to send this message to the public when the NLRB sought interim relief against Sprint. Unfortunately, the court construed the Ninth Circuit's new modified traditional equitable criteria

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194. *Id.*

195. To receive a copy of the transcripts from the DOL hearing or the final NAO report contact the NAO at (202)501-6653.

test as a safeguard designed to inhibit injunctive relief pending Board adjudication.

On the contrary, by modifying the “reasonable cause” standard, the Ninth Circuit simply conformed the analysis more closely to the statutory language while maintaining ample consideration of the NLRA’s underlying purpose. *La Conexion Familiar* was a ripe case for section 10(j) relief. However, the court failed to recognize its importance. As long as the law encourages Sprint and other employers to violate employees’ rights, it will become harder and harder “to join together and strike out against humiliation and indignity.”<sup>196</sup>

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196. Meister, *supra* note 1.

