

Defending against a petition for Section 10(j) relief under the National Labor Relations Act: Lessons from the trenches

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Section 10(j) of the National Labor Relations Act ("NLRA") provides the National Labor Relations Board ("NLRB") with the ability to seek temporary injunctive relief in federal district court against employers accused of unfair labor practices ("ULPs").¹

For those unfamiliar with a 10(j) case, the initial shock of receiving a petition from the NLRB can be unsettling. An injunction can undo the challenged business decision in the interim and may last years while the underlying unfair labor practice complaint winds its way through the NLRB's notoriously slow-moving litigation process. Indeed, an unspoken objective behind a 10(j) petition has been to prod a party towards settlement to avoid federal court litigation.

While the NLRB enjoys the advantage of controlling the timing and design of its 10(j) case, employers are not powerless to defend themselves. Below is a brief discussion about what a 10(j) case is, why employers should care, and four lessons the authors have learned after litigating more than a dozen 10(j) cases and prevailing in most of them, including before the U.S. Supreme Court in *McKinney v. Starbucks*. Those lessons are:

- (1) The NLRB Controls the Timing of its 10(j) Case but You Control Your Reaction to the NLRB's petition.
- (2) The NLRB's 10(j) Pleadings Seldom Tell the Full Story so Consider Whether to Request Discovery and an Evidentiary Hearing As Part of Your 10(j) Defense.
- (3) Do Not Assume the Court is Familiar with 10(j) or Labor Law and Challenge the NLRB's Recital of its Own Decisions Where Appropriate.
- (4) An Adverse Recommended Order and Decision from an Administrative Law Judge ("ALJ") Does Not Automatically Make 10(j) Relief Just and Proper.

What is a Section 10(j) petition?

Section 10(j) of the NLRA allows the Board members in Washington, D.C. (the "Board"),² following the issuance of an unfair labor practice complaint, to ask a federal district court to issue a temporary injunction restoring the status quo that existed prior to commission of alleged ULPs.

Proponents of Section 10(j) say it is a necessary tool because the NLRB's standard remedies may be ineffective by the time a ULP case completes the ordinary course of agency litigation, which includes a hearing before an ALJ of the NLRB, exceptions (i.e., internal appeal) to the ALJ's recommended order to the Board, and sometimes an appeal of the Board's order to a U.S. Court of Appeals.

To win a 10(j) case, the NLRB must convince a federal district court that an interim injunction is "just and proper." Prior to *McKinney v. Starbucks*, 602 U.S. 339 (2024), the standard for deciding "just and proper" varied by circuit. Some circuits applied the typical standard for preliminary injunctions found in *Winter v. Natural Resources Defense Council Inc.*, 555 U.S. 7 (2008), while others applied something different and highly deferential to the NLRB's opinion of its own case.

An unspoken objective behind a 10(j) petition has been to prod a party towards settlement to avoid federal court litigation.

The result was a patchwork approach and, often, a lower bar to obtain a 10(j) injunction, under which the previous General Counsel touted that she was successful in over 90 percent of 10(j) cases. The Supreme Court in *McKinney* changed that patchwork approach by holding that the *Winter* standard applies to Section 10(j) cases in all jurisdictions.

Therefore, following *McKinney*, obtaining a Section 10(j) injunction requires the NLRB to establish four elements: (1) it is likely to succeed on the merits of its claims, (2) irreparable harm will occur in the absence of an injunction, (3) the balance of equities tips in favor of an injunction, and (4) an injunction is in the public's interest. If granted, the injunction remains in place for the duration of the NLRB's administrative proceedings, i.e., until the Board issues a final order.

Why should employers care about 10(j) cases?

Section 10(j) cases typically seek to undo a decision or action by the employer. For instance, a 10(j) petition may seek to temporarily reinstate an employee discharged for misconduct, require an employer to bargain with a union that was improperly certified, or temporarily undo a business decision like the relocation of work. Section 10(j) seeks to undo the strategic decision-making and balancing of risks in which employers and unions often engage as part of labor relations.

The NLRB frequently seeks a 10(j) injunction based off untested affidavits the NLRB collected during its investigation of a ULP charge. These affidavits cast the employer in a negative light and become publicly available once filed as part of a 10(j) petition. In turn, labor uses this as an opportunity to publicly disparage the employer and the employer's brand and advance its organizing or bargaining strategy.

First lesson: The NLRB controls the timing of its 10(j) case but you control your reaction to it.

A potential 10(j) case is reviewed by the NLRB's Injunction Litigation Branch, the General Counsel of the NLRB, and the Board before being filed. This means the NLRB controls important aspects of its 10(j) case, including choosing the evidence it will present to the court (and that which it will not and attempt to shield) and the timing of its petition.

- **Notice During the Investigation Phase:** Typically, a Regional Director of the NLRB will notify the parties to a ULP charge that the case is being examined for possible 10(j) relief and invite the parties to submit evidence or their positions on whether injunctive relief is warranted. Notably, this does not mean a 10(j) petition is inevitable.
- **Notice Following the Issuance of a Complaint:** Once approved by the Board, but before the 10(j) petition is filed, the NLRB frequently notifies the charged party that it intends to file a 10(j) petition in federal court unless settlement is reached. This is when you can be confident that a 10(j) petition is coming.

Pre-filing notice of a 10(j) petition is one of the early critical junctures in a 10(j) case because it requires making settlement decisions before getting a full picture of the 10(j) case. An employer may request a courtesy copy of the 10(j) pleadings and supporting affidavits and assess them against each of the *Winter* elements. Also remember that settlement opportunities will almost always be available if that is the right strategic move so avoid the temptation to jump at the first offer and/or make uninformed emotional decisions.

Second lesson: The NLRB's 10(j) pleadings seldom tell the full story so make discovery and a live hearing part of your 10(j) defense.

A page from the NLRB's playbook is to file a motion asking the court to decide the 10(j) case solely on the NLRB's affidavits and administrative record (if one exists) supposedly for the

sake of expediency. The NLRB takes the position that it is not required to produce or reveal exculpatory evidence. Consistent with that approach, the NLRB carefully reveals only what it deems favorable evidence from its investigation file and the administrative record often omits relevant contrary evidence.

For example, the administrative record often includes evidence that is only pertinent to one *Winter* factor: likelihood of success on the merits. The administrative record may also be limited because of the NLRB's application of privileges that federal courts do not recognize. Relatedly, the NLRB's supporting briefs may focus on Board law while ignoring conflicting but controlling federal appellate court decisions that may make other evidence relevant. Thus, the NLRB's 10(j) papers never tell a complete or accurate story.

Expedited discovery and a live hearing are available in a 10(j) case. They subject the NLRB's allegations (and sometimes the NLRB's own officials) to the crucible of discovery and cross-examination in federal court under the Federal Rules, not the Board's rules. One key to getting expedited discovery and/or a hearing granted in a 10(j) case is to thoroughly brief the issue, providing examples of 10(j) cases where expedited discovery was granted (there are plenty) to counter the NLRB's arguments that expedited discovery is unavailable, unusual, or inappropriate.

The authors of this article have successfully moved to obtain such discovery in nearly every 10(j) case they have handled. This includes over a dozen times obtaining discovery in 10(j) cases filed prior to *McKinney* — and successfully thwarting the previous General Counsel's injunction petitions in every one of those 10(j) cases between 2021–2024 prior to *McKinney*. And *McKinney* helps the argument that expedited discovery may be appropriate.

A 10(j) case almost always involves limited inquiry into the activity of non-parties that the NLRB treats as protected under its case law, such as the degree of employee support for a union before and after the alleged ULPs occurred.

Historically, the NLRB has filed as part of its 10(j) case affidavits concerning the alleged negative toll the alleged ULPs had on union support and then objected to expedited discovery testing the allegations in those affidavits on grounds that Board law, in particular *Guess?, Inc.*, 339 NLRB 432 (2003), prohibits it.

However, courts have rejected the notion that they are bound by *Guess?, Inc.* and have granted expedited discovery requests that are tailored to address only the issues in the 10(j) case. They have also imposed limited protective orders (such as attorneys' eyes only) to address legitimate confidentiality concerns.

Third lesson: Do not assume the court is familiar with 10(j) case law and challenge the NLRB's recital of law where appropriate.

Fewer than 20 Section 10(j) petitions were filed in each of the last five years, which is to say they do not come across a

court's docket very often. That makes educating the court on the law especially important. For example, the NLRB frequently argues in 10(j) cases that courts owe special deference to its theory of the case, findings of fact, and interpretations of law.

That notion, however, was rejected by the Supreme Court in *McKinney*. The Supreme Court rejected deference to the NLRB's litigating position.³ Therefore, do not take the NLRB's recital of law at face value. Challenge it where appropriate so that the court is aware of the relevant case law.

Fourth lesson: An adverse recommended order and decision from an ALJ does not automatically make 10(j) relief just and proper.

It can be deflating to be faced with both a 10(j) petition and an adverse ALJ decision on the underlying ULPs. However, the court does not have to defer to an ALJ's decision. Additionally, ALJ decisions only implicate one element of the four under *Winter*, which is likelihood of success on the merits.

For example, union organizing drives lose support for many reasons that have nothing to do with alleged ULPs. For instance, even after signing a union authorization card, employees may change their mind about having to pay union dues, they may have issues with the union's organizing tactics, or they may conclude for myriad other reasons that unionization is not for them, all subjects, among others, appropriate for addressing in discovery and at a 10(j) hearing that are not addressed in ALJ decisions.

When the evidence shows employees lost interest in union representation for reasons other than the alleged ULPs, it would not be, to use the language of Section 10(j), just and proper for an injunction to issue to reinvigorate an organizing drive that stalled for legitimate reasons.

Therefore, do not allow the 10(j) inquiry to be overwhelmed by the significance of an adverse ALJ decision. Courts may be interested in whether a party facing a 10(j) petition filed

timely exceptions appealing the ALJ decision to the Board, why a party believes the ALJ decision was improperly decided, whether evidence on the merits may be discovered that was unavailable in and contradicts key points made at the administrative proceeding, and whether evidence may be discovered related to the remaining three *Winter* factors.

In particular, an employer may be able to make use of evidence reflecting the legitimate reasons why employees stopped supporting the union or stopped engaging in protected concerted activity, or even showing the alleged ULP energized rather than hindered the organizing effort.

What to expect during the second Trump Administration related to the use of 10(j).

When it comes to the NLRB's use of 10(j), a good gauge of what to expect from President Trump's second NLRB might be to examine how the NLRB operated during his first administration. Following President Trump's first inauguration, the NLRB filed close to 60 Section 10(j) petitions.

Tellingly, on September 5, 2025, the NLRB's Acting General Counsel issued Memorandum GC 25-11 touting the continued use of 10(j) petitions. This means that employers should not realistically expect the NLRB to stop using Section 10(j) anytime soon and that employers must stay vigilant to the possibility of facing a 10(j) petition.

Notes:

¹ 29 U.S.C. §160(j).

² "NLRB" is used to denote the agency. "Board" is used to denote the five-member body of the NLRB that decides cases and authorizes the NLRB's GC to file a Section 10(j) petition seeking equitable relief.

³ *McKinney*, 602 U.S. at 351 ("But, none of the views advanced in a §10(j) petition represent the Board's formal position — they are simply the preliminary legal and factual views of the Board's in-house attorneys who investigated and initiated the administrative complaint. And, deference to what is nothing more than an agency's convenient litigating position is entirely inappropriate.") (internal quotations removed).

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