STATE OF CALIFORNIA
DECISION OF THE EDUCATIONAL
EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 110, Charging Party, vs. FRESNO UNIFIED SCHOOL DISTRICT, Respondent.	Case No. S-CE-55
	EERB Order No. IR-1
JEFFERSON CLASSROOM TEACHERS ASSOCIATION, CTA/NEA, Charging Party, vs. JEFFERSON SCHOOL DISTRICT, Respondent.	Case No. SF-CE-33

ORDER DENYING REQUESTS THAT EERB
GENERAL COUNSEL PETITION THE
SUPERIOR COURT FOR INJUNCTION

The Educational Employment Relations Board hereby declines to direct the General Counsel to seek temporary relief pursuant to Government Code Section 3541.3(j) in the above-captioned cases.

Educational Employment Relations Board

by

STEPHEN !BARBER
Executive Assistant to the Board
6/15/77

Reginald Alleyne, Chairman, concurring:

In both cases, employee organizations request that the EERB petition a court for temporary relief or a restraining order. Both employee organizations rely on Government Code Section 3541.3(j). General Counsel denied the request in Fresno. This appeal followed. In Jefferson, the request was addressed to the Executive Director, who referred it to the Board. The General Counsel made no ruling in that case.

I

I believe that the Fresno request was properly denied by the General Counsel and that the request made in Jefferson should be denied by the Board. Government Code Section 3541.3(j) provides:

> Upon issuance of a complaint charging that any person has engaged in or is engaging in an unfair practice, the Board may petition the court for appropriate temporary relief or restraining order.

The April 25, 1977 letter from SEIU's attorney in the Fresno case states that "the language of [EERA] Section 3541.3(j) derives directly from Section 10(j) of the NLRA" and that pursuant to Firefighters Union v. City of Vallejo[1], we should construe the EERA the way the courts construe the NLRA. Actually, if we follow NLRB practice, as suggested by SEIU counsel, we should determine that our General Counsel correctly refused to seek an injunction as requested.

Section 10(j) of the NLRA provides:

> (j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

Under NLRA Section 10(j), injunction proceedings in the federal district courts are governed by general principles of equity and hence require that the General Counsel show (1) irreparable injury to the party who would benefit from the injunction if the injunction is not granted; (2) that the beneficiary of the injunction has no adequate remedy at law; or (3) extraordinary circumstances. These equity standards apply in NLRA injunction proceedings against employers under NLRA Section 10(j) and also in

[1] 12 Cal. 3d 608, 617, 87 LRRM 2453 (1974).

injunction proceedings against unions under NLRA Section 10(1).[2]

Because of the general equity standards in injunction cases, more injunctions are sought and granted against unions than are sought and granted against employers. When a union is accused of violating a section of the NLRA prohibiting certain forms of picketing, the nature of the picketing or secondary boycott is such that an adequate remedy at law is sometimes not available to the party who would be the beneficiary of the General Counsel's injunction request under NLRA Section 10(1).

The theory is that unlawful picketing could destroy an employer's business before the unfair practice procedure requiring a hearing and appeal to the NLRB could be completed.

In contrast, the injunction against an employer, like those requested in these cases, is seldom sought by the NLRB's General Counsel because the availability of an unfair practice hearing and eventually a cease and desist order, with a monetary award in appropriate cases, is ordinarily regarded as adequate to make injunctive relief unwarranted.

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[2] NLRA Section 10(1) provides in part:

> (1) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law. •..

NLRB statistics on the number of injunctions requested and granted against employers and unions tend to reveal the differences between injunction requests in actions against employers and those against unions. In its fiscal year 1975, the NLRB received a total of 31,253 unfair labor practice charges of which 20,311 were filed against employers. Of the 20,311 charges against employers, the NLRB's General Counsel sought injunctive relief in 13 or 0.064% of those cases. Of the 10,822 charges filed against unions, the NLRB's General Counsel sought injunctive relief in 324 or 3% of the cases filed.[3] The NLRB's Annual Report does not indicate the nature of the facts in the 13 cases in which injunctive relief was sought against employers under Section 10(j) of the NLRA but the facts in such cases are usually quite extraordinary.[4] Further indication of the extraordinary nature of the injunction against an employer in an NLRB unfair practice case is the small number of cases in which injunctions are granted by the courts. In the 13 cases in which the NLRB's General Counsel sought injunctions against employers in 1975,

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[3]NLRA Section 10(j) injunctions may be sought against employers or unions but NLRA Section 10(1) injunctions are limited to cases against unions. The injunction figures are derived from the 1975 Annual Report of the National Labor Relations Board, Table 20, p. 251, which shows Section 10(j) and Section 10(1) injunctions with the sections of the NLRA alleged to have been violated listed under each section. The figure 13 for the number of injunctions sought against employers is derived by subtracting the 8(b) or union violations from the total of 8(a) (employer) and 8(b) violations. The total number of injunctions requested against unions is derived from the table by adding the total number of 10(1) injunctions to the number of 8(b) injunctions listed in Section 10(j).

[4]Federal appellate courts have uniformly rejected the view that probable cause that the NLRA has been violated is, alone, sufficient to justify injunctive relief. See McCleod v. General Electric Co., 336 F. 2d 847, 63 LRRM 2065, (CA. 8, 1966), remanded to determine whether issue moot, 385 U.S. 533, 64 LRRM 2129 (1967); NLRB v. Aerovox Corp., 389 F. 2d 477, 67 LRRM 2158 (CA. 4, 1967); Minnesota Mining & Mfg. Co. v. Meter, 385 F. 2d 265, 66 LRRM 2444, 2448 (CA. 8, 1967); Angle v. Sacks, 382 F. 2d 655, 66 LRRM 2111 (CA. 10, 1967). A case discussing the general topic, distinguishing NLRA Sections 10(j) and 10(1) and general temporary restraining order standards is Squillacote v. Food Workers Union, 92 LRRM 2089 (CA. 7, 1976), particularly pages 2095-2097.

injunctions were granted in two cases. In the 324 cases in which injunctions were sought against unions, injunctions were granted in 102 cases.

Fresno and Jefferson appear to be routine refusal-to-bargain cases. In each case an adequate remedy at law is available to the charging party through the normal unfair practice procedures available under the EERB's rules. In Jefferson, the facts alleged as a basis for the charge took place almost one year ago. The charge was filed on November 15, 1976. The injunction request was made six and a half months later. As counsel for the employer notes, it is inconsistent to maintain that there are extraordinary circumstances warranting injunctive relief when the charging party waits six and a half months to request injunctive relief. The charge amounts to an allegation that the length of the school year is within the scope of negotiations within the meaning of Government Code Section 3543.2. I believe that a scope of negotiations charge is peculiarly amenable to resolution through our unfair practice procedures. The Fresno case also appears to be a refusal-to-bargain charge that does not warrant injunctive relief under ordinary equity standards.[5]

II

There are further reasons why the request for injunctive relief ought to be denied. I do not accept as valid the assumption of the union's attorney in the Fresno case that the NLRA and the EERA are parallel on the matter of injunctive relief by the Board. Section 10(j) of the NLRA parallels EERA Section 3541.3(j), with the exception of a reference in NLRA Section 10(j) to NLRA Section 10(b)

[5]Since the General Counsel never acted upon the injunction request made in the Jefferson case, it is technically not properly before us. However, since the issue is properly before us in the Fresno case, the disposition by the Board in the Fresno case should appropriately serve as the disposition by the Board in the Jefferson case.

which, when read with NLRA Section 3(d), specifically authorizes the NLRB's General Counsel to issue a complaint against "any person" charged with an unfair labor practice under the NLRA. The EERA contains no such provision.

There is a reference to the issuance of a complaint in Government Code Section 3541.3(j), as previously discussed. Another EERA reference to a complaint appears in the statute of limitations section on unfair practices, Government Code Section 3541.5(a), which provides that the Board shall not "issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." It seems apparent that the draftsmen of the EERA, in looking for statute-of-limitations language, went directly to the NLRA and lifted the statute-of-limitations language from Section 10(b) of the NLRA, which provides: "No complaint shall issue based upon any unfair practice occurring more than six months prior to the filing of the charge with the Board...."

Government Code Section 3541.5(a) also provides that the EERB shall not issue a complaint against conduct also prohibited by provisions of the collective bargaining agreement, until the grievance provisions of the agreement are exhausted if they are applicable. That language was taken from the NLRB's decision in Collyer Insulated Wire[6] and subsequent cases implementing the grievance-arbitration-deferral rules set out in the Collyer case. The principal objective of the Legislature in copying NLRA and NLRB language in respect to the statute of limitations and arbitration deferral, respectively, was to place those two concepts in the EERA. I think nothing more was intended. Otherwise, the Legislature would have gone further in spelling out the prosecutorial role of the EERB General Counsel, as does the NLRA in describing the NLRB's General Counsel.

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[6]192 NLRB 837, 77 LRRM 1931 (1971).

The functions of the NLRB's General Counsel as a prosecutor are explicitly stated in Section 3(d) of the NLRA, where it is provided that the General Counsel "shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10, and in respect of the prosecution of such complaints before the Board...." To maintain the independence of the NLRB as a neutral agency, the Congress sharply separated the decision-making function of the NLRB and the prosecutorial functions of the NLRB's General Counsel by making both members of the NLRB and the NLRB's General Counsel appointees of the President. To maintain the independence of NLRB administrative law judges from the prosecutorial function of the NLRB's General Counsel, the NLRA, in Section 3(d), provides: "The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal

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assistants to Board members) ...." [Emphasis added.][8] In contrast, the EERB's General Counsel is not independently appointed by the Governor but, under Government Code Section 3541(e), is appointed by the EERB. As an appointee of the EERB, he is an agent of the EERB, and under EERB rules serves, among other things, as the EERB's principal hearing officer.

With no statutory division of decision-making authority and prosecutorial authority in the EERA, it will not be possible for the EERB to maintain its neutrality and at the same time to direct its appointed General Counsel to seek injunctions in unfair practice cases capable of being effectively decided through the EERB hearing process. Also, the routine prosecution of independent governmental entities, like school boards, by another agency of government, like the EERB, is so unusual that in my view only a clear and unequivocal command of the Legislature could authorize it.

For these reasons, I would sustain the denial of the request that we seek an injunction in the Fresno case and direct the General Counsel to so notify the parties in the Jefferson case. I would limit our attempts to seek injunctions to those cases in which an injunction is necessary to protect our jurisdiction and our processes.

[7]NLRA Sections; 3(d) and 3(a).

[8]The title "trial examiner" has been changed to "administrative law judge."

For example, if an employer or employee organization physically attempted to stop the EERB from holding a hearing, I think that would be an appropriate case for the General Counsel to seek injunctive relief. Also, once an EERB cease and desist order issued, I would favor an injunction in appropriate cases, such as those where an employer or employee organization was about to take action that would make the EERB cease and desist order ineffective.[9] In cases not of that general nature, parties in EERB cases are free to attempt to seek injunctions in the Superior Court without asking the EERB to seek an injunction for them. Union counsel in Fresno and Jefferson, in particular, are free to take their injunction requests directly to the Superior Court, a step a union could not take in an NLRA case, since the NLRB's General Counsel, as the moving party in all NLRA unfair practice complaint cases, is the only party who has standing to seek an NLRA Section 10(j) or 10(1) injunction.

Reginald Alleyne, Chairman

Jerilou H. Cossack, Member, concurring:

In these companion cases exclusive representatives filed requests for the Board

[9]See NLRB v. Interstate Equipment Co., _____F._____, 74 LRRM 2003, (CA. 7, 1970), interpreting NLRA Section 10(e), authorizing judicial review of NLRB orders and application for "appropriate temporary relief or restraining order." Our comparable Gov. Code Sec. 3542 contains no provision for "temporary relief or a restraining order" in connection with enforcement of our orders, a serious omission unless, as I believe, Gov. Code Sec. 3541.3(j) may be read as having that effect.

to seek temporary relief, pursuant to Government Code Section 3541.3(j), to restrain their respective employers from implementing alleged unilateral actions. In both cases, unfair practice charges were timely filed and the complaints are pending. The Jefferson School District adopted its 1976-1977 calendar June 30, 1976, the day before the Educational Employment Relations Act was fully in effect and the day before the official school year was to begin. Over five months later, November 15, 1976, the Jefferson Classroom Teachers Association (Association) filed its unfair practice charge, alleging the District took unilateral action by increasing the length of the school year by one week. After the answer was filed and an informal conference held, a formal hearing was scheduled for March 29, 1977. Two continuances were granted with the consent of both parties, with the hearing actually held beginning April 28, 1977. By agreement of the parties, posthearing briefs are due July 8, 1977. On June 3, 1977, the Association filed its request for this Board to seek temporary relief.

In the Fresno Unified School District charge, the Service Employees International Union alleged that on March 10, 1977, the District unilaterally changed its vacation scheduling procedure, imposing a cut-off date of May 15. The SEIU unfair practice charge was filed April 11, 1977; a hearing was scheduled for June 23. On May 16, SEIU requested temporary relief. May 19 the District extended the cut-off date to June 1.

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[1] Gov. Code Sec. 3541.3 states:

> The board shall have all of the following powers and duties:
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> (j) To bring an action in a court of competent jurisdiction to enforce any of its orders decisions or rulings or to enforce the refusal to obey a subpoena. Upon issuance of a complaint charging that any person has engaged in or is engaging in an unfair practice, the board may petition the court for appropriate temporary relief or restraining order.

Other statutory references are to the Government Code.

Among criteria necessary to secure a temporary restraining order from a superior court are irreparable injury and inadequate remedy at law. The issuance of a temporary restraining order or preliminary injunction is not a determination of the merits of a case; however it is the duty of the court to consider the likelihood the plaintiff would ultimately prevail. The court must also balance the injury to the defendant from granting temporary relief and the injury to the plaintiff from refusing it. Continental Baking Co. v. Katz, 68 Cal. 2d 512, 67 Cal. Rptr. 761 (1968); State Board of Barber Examiners v. Star, 8 Cal. App. 3d 736, (1970); Weingand v. Atlantic Savings & Loan, 1 Cal. 3d 806 (1970). Courts are free to refuse to issue a TRO where the ultimate outcome is doubtful. 65 Cal. App. 698 (1924).

Temporary relief may be sought under the National Labor Relations Act[2] "upon issuance of a complaint...charging that any person has engaged in an unfair labor practice...." Such action will be taken only where there has been a clear and flagrant violation of the NLRA. Johnston v. Wellington, 49 LRRM 2536 (1961).

In the Fresno request, no allegation was even made that the charging party would suffer irreparable injury if temporary relief was not available. In the Jefferson request, we are faced with an allegation of unilateral action which arose prior to the full implementation date of the EERA. On a determination of the merits of the case, it is possible that there would have been no duty to negotiate in good faith prior to July 1, 1976. If the District had no obligation beyond the Winton Act[3] there may be no unfair practice violation and therefore no way for the charging party to prevail.

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[2] 29 U.S.C. Sec. 160(j).

[3] Formerly, Ed. Code Secs. 13080 et seq., repealed by Stats 1975, Ch. 961, Sec. 1.

Assuming, arguendo, that the District's action on June 30, 1976, was an unfair practice, does it warrant extraordinary relief now, almost one year later? The record indicates the Association and the teachers were aware of the District's action to extend the school year to June 24, 1977. It is hard to find irreparable injury in regard to plans made for the week of June 20-24 when the teachers have been on notice for almost one year that they would be expected to report for work that week. Furthermore, at no time did the District indicate that it had altered its position to require this attendance.

In both these cases, the alleged unfair practices do not fall in the category of exceptional or extraordinary situations requiring extraordinary relief. The unfair practice procedure of this Board should be able to accommodate the parties. While I believe we can and should avail ourselves of the opportunity to seek temporary relief in the courts, it is not an action to be taken without sufficient cause. These cases do not provide that cause.

I disagree with the Chairman in his view of the role of the general counsel. I believe the Educational Employment Relations Act (EERA) contemplates a prosecuting general counsel. Section 3541.3(i) authorizes this Board to "investigate unfair practice charges or alleged violations" of the EERA. Section 3541(e) provides for a general counsel to assist the Board "in the performance of its functions...."

I do not find it necessarily a conflict of interest nor necessarily a violation of Board neutrality for the general counsel to seek temporary relief pursuant to Section 3541.3(j). It is the purpose of the EERA to "promote the improvement of personnel management and employer-employee relations." If we should determine it is necessary to implement Section 3543.1(j) in order to achieve our statutory purpose, we should be free to do so.

Jerilou H. Cossack, Member