UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

TERESA POOR, Regional Director of Region 29 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD Petitioner v. STARBUCKS CORPORATION Respondent	MOTION TO TRY PETITION FOR TEMPORARY INJUNCTION UNDER SECTION 10(J) OF THE ACT ON THE BASIS OF ADMINISTRATIVE RECORD, INCLUDING HEARING TRANSCRIPT AND EXHIBITS 22--CV--

To the Honorable Judges of the United States District Court for the Eastern District of New York:

Comes now Teresa Poor (Petitioner), Regional Director for Region 29 of the National Labor Relations Board (the Board) and moves this Court to try the Petition for Temporary Injunction Under Section 10(j) of the National Labor Relations Act (the Act), as amended, 29 U.S.C. § 160(j), on the basis of the evidentiary record developed during the administrative hearing in Board Case Nos. 29-CA-292741, 29-CA-294928, 29-CA-298919, 29-CA-299049, 29-CA-300213, 29-CA-300564 and 29-RC-290364, including the official transcript and Exhibits. This proceeding is before the Court on the Petition filed by the Petitioner contemporaneously with this Motion seeking a temporary injunction pending the disposition of the matters involved herein before the Board, based on the Amended Second Consolidated Complaint in Case Nos. Case Nos.

29-CA-292741, 29-CA-294928, 29-CA-298919, 29-CA-299049, 29-CA-300213, 29-CA-300564 and 29-RC-290364, alleging that Starbucks Corporation (Respondent) has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act. A hearing on the merits was conducted before Board Administrative Law Judge Jeffrey P. Gardner on October 19, 20, 21, 24, 25, 26, 27, 31 and November 3, 2022.

As demonstrated by well-settled law and standards set forth below, Petitioner suggests that trying this case on the basis of the evidentiary record developed during the administrative hearing, which includes the transcript of sworn testimony[1] and exhibits[2] will both expedite the proceeding and conserve the resources of the Court and the parties.

Section 10(j) of the Act authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. This provision embodies Congress' recognition that, because the Board's administrative proceedings often are protracted, absent interim relief, a respondent in many instances could accomplish its unlawful objective before being placed under any legal restraint, and it could thereby render a final Board order ineffectual. The legislative history establishing this Congressional intent is cited in *Sharp v. Webco Indus., Inc.,* 225 F.3d 1130, 1136 (10th Cir. 2000) and *Angle v. Sacks,* 382 F.2d 655, 659-660 (10th Cir. 1967). Section 10(j) was intended to prevent the potential frustration or nullification of the Board's remedial authority caused by the passage of time inherent in Board administrative litigation.[3]

[1] The full transcript of sworn witness testimony in the administrative hearing are attached to this motion and identified as Exhibit P.

[2] The exhibits admitted into evidence at the administrative hearing are attached to this motion and identified as Exhibit Q (Q(i) (Board Exhibits) and Q(ii) (Respondent Exhibits).

[3] *Angle*, 382 F.2d at 659.

I. THE SECOND CIRCUIT'S TWO-PRONG ANALYSIS TO RESOLVE SECTION 10(J) PETITIONS

In analyzing whether to grant Petitioner's 10(j) petition, a District Court in the Second Circuit must consider only two issues: (1) whether the Board demonstrated that there is "reasonable cause to believe that unfair labor practices have been committed," and if so, (2) whether temporary injunctive relief is "just and proper."[4]

A. The Reasonable Cause Standard Requires Substantial Deference to Petitioner's Findings and Conclusions

Petitioner satisfies the reasonable cause standard by coming forward with evidence "sufficient to spell out the likelihood of a violation.[5]" Petitioner's burden in satisfying the reasonable cause standard is minimal and requires only a very low threshold of proof.[6]

Second Circuit Courts pay substantial deference to the Regional Director's position in 10(j) proceedings such that the Courts generally decline to grant injunctive relief based upon finding a lack of reasonable cause only where the "NLRB's legal or factual theories are fatally flawed."[7]

B. The District Court Analysis of the Just and Proper Prong of the 10(j) Analysis Also Requires Deference to the Board

The second prong of the Second Circuit analysis for relief under Section 10(j) of the Act is whether granting injunctive relief would be "just and proper."[8] When considering the "just and

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[4] *Kaynard v. Palby Lingerie, Inc.,* 625 F.2d 1047, 1051-52 (2d. Cir. 1980); *Silverman v. Major League Baseball Player Relations Committee, Inc.,* 67 F.3d 1054, 1059 (2d Cir. 1995).

[5] *Danielson v. Joint Board of Coat, Suit and Allied Garment Workers' Union,* 494 F.2d 1230, 1243 (2d Cir. 1974) (internal quotations omitted).

[6] *Eisenberg v. Wellington Hall Nursing Home, Inc..*, 651 F.2d 902, 905 (3d Cir. 1981).

[7] *See e.g.*, *Mattina v. Ardsley Bus. Corp.,* 711 F. Supp. 2d 314, 318-319 (S.D.N.Y. 2010) (In determining whether reasonable cause exists, a district court should show "[a]ppropriate deference… to the judgment of the NLRB, and… should decline to grant relief only if convinced that the NLRB's legal or factual theories are fatally flawed"); *J.R.L. Food Corp*., 196 F.3d 334, 335 (2d Cir. 1999) (*quoting Silverman v. Major League Baseball Player Relations Comm., Inc*., 67 F.3d 1054, 1059 (2d Cir. 1995)).

[8] *Kaynard v. Palby Lingerie, Inc.,* 625 F.2d at 1051-52.

proper" prong, the Second Circuit has found 10(j) relief appropriate where serious unfair labor practices would render the Board's processes "totally ineffective" by precluding a meaningful remedy, where interim relief is the only effective means to preserve or restore the status quo as it existed prior to the commission of the unfair labor practices, or where the passage of time might otherwise allow respondent to accomplish its unlawful objective before being placed under legal restraint.[9]

Even while the Court has somewhat more discretion when considering the "just and proper" prong of the 10(j) petition than regarding the "reasonable cause" prong," that discretion is also circumscribed, as the just and proper analysis "… is not an avenue by which [the district court] can decide the merits of the underlying unfair labor practice charge."[10]

II. A FULL EVIDENTIARY HEARING IS NOT NECESSARY FOR THE DISTRICT COURT TO DECIDE WHETHER TO GRANT INJUNCTIVE RELIEF

Based on the Petitioner's relatively "insubstantial burden of proof" and the deference owed to the Board, it is not necessary for the District Court to conduct a full evidentiary hearing on the allegations to enable it to conclude whether Petition has established "reasonable cause.[11]"

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[9] *See, Kaynard v. Mego Corp.*, 633 F.2d 1026, 1175 (2d Cir. 1980) (finding unfair labor practices would preclude a meaningful remedy); *Seeler v. The Trading Port, Inc*., 517 F.2d 33, 38 (2d Cir. 1975) (interim relief only effective means to preserve the status quo ante); *Kaynard v. Palby Lingerie, Inc.,* 625 F.2d at 1051-55 (passage of time permitting respondent to accomplish its unlawful objective).

[10] *Dunbar v. Landis Plastics, Inc.,* 977 F.Supp. 169, 176 (N.D.N.Y. 1997), citing *Silverman v. Imperia Foods, Inc.,* 646 F. Supp. 393, 398 (S.D.N.Y. 1986) ("[I]njunction proceedings in federal court must not evolve into a hearing on the merits of the unfair labor practice charges because the District Court must not usurp the [Board's] role").

[11] *Dunbar v. Landis Plastics, Inc.,* 977 F.Supp. 169, 176 (N.D.N.Y. 1997); *Kaynard v. Independent Routemen's Association,* 479 F.2d 1070, 1072 (1973) (finding reversible error where the District Court went beyond the "reasonable cause" inquiry into the ultimate merits of the charge); *SEC v. Frank,* 388 F.2d 486, 490-493 (2d Cir. 1968). *See also*, *Gottfried v. Frankel,*818 F.2d 485, 493-94 (6th Cir. 1987) (addressing specifically petitions filed under Section 10(j) of the Act); *San Francisco-Oakland Newspaper Guild v. Kennedy,* 412 F.2d 541, 546 (9th Cir. 1969).

The weight of judicial authority establishes that Second Circuit courts may properly base their temporary injunction determinations upon the evidentiary record of sworn testimony given before a Board administrative law judge, subject to cross-examination and admitted exhibits adduced during the underlying administrative proceeding.[12]

Finally, neither Rule 43(c) nor Rule 65 of the Federal Rules of Civil Procedure requires oral testimony in this type of temporary injunction proceeding, and such procedures do not deny a fair hearing or due process to Respondent.[13]

Based on the above cited precedent, it is appropriate for the Honorable Court to accept the hearing transcript and exhibits admitted during the administrative hearing as proper evidence in support of the Petition.

With respect to the "reasonable cause" prong in the 10(j) analysis, the parties have already litigated the underlying merits of the unfair labor practice allegations in a nine-day trial before an Administrative Law Judge, during which the parties had full opportunity to present witnesses, cross examine witnesses and submit all relevant documentary evidence in support of their positions. Accordingly, it is respectfully submitted that the District Court has ample evidence in the administrative record to fulfill its limited role of deciding whether Petition has "reasonable

[12] *Kaynard v. Palby Lingerie, Inc.,* 625 F.2d at 1051-52 (2d. Cir. 1980) (affirming a preliminary injunction under Section 10(j) of the Act that was granted based on the hearing transcript and exhibits adduced before the administrative law judge in the underlying administrative proceeding). *See also*, *Gottfried v. Frankel,* 818 F.2d at 493; *Fuchs v. Hood Industries, Inc.,* 590 F.2d 395, 398 (1st Cir. 1979) (transcript generated during hearing before the administrative law judge "could be of considerable assistance in expediting the work of the [district] court"); *see also*, *Sharp v. Webco Industries Inc*., 225 F.3d 1130, 1134 (10th Cir. 2000) (injunction based upon affidavits); *Fernbach ex re. N.L.R.B v. Raz Dairy, Inc.*, 881 F. Supp. 2d 452, 456-460 (S.D.N.Y. 2012) (based on affidavits).

[13] *Silverman v Red & Tan Charters, Inc.*, 93 CIV. 6353 (LMM), 1993 WL 498062 (S.D.N.Y. Nov. 30, 1993) (declining to find that Rule 65 requires the holding of an evidentiary hearing on a Section 10(j) petition).

cause" to believe that an unfair labor practice has been committed—particularly because of the substantial deference that the District Court owes Petitioner in making such determination.[14]

With respect to the second prong of the 10(j) analysis, factual matters relevant to whether injunctive relief is "just and proper" in this case were fully presented during the administrative trial, as the ongoing deleterious impacts of Respondent's alleged unfair labor practices, which establish the irreparable harm requiring the injunctive relief sought in the Petition herein, are relevant to certain remedies sought by the Board General Counsel in the administrative case before the Board. Thus, Petitioner avers that the administrative record developed before Administrative Law Judge Gardner contains all the evidence that this Court should consider in determining whether the injunctive relief sought herein is "just and proper" under the relevant standard.

III. CONCLUSION

In conclusion, consideration of the Petition based on the administrative hearing transcript and exhibits will avoid the inherent delay that would result from permitting discovery and/or scheduling and conducting a full evidentiary hearing, will avoid duplicative litigation, will facilitate a speedy decision, and will conserve this Honorable Court's and the parties' time and resources. Such procedure fully comports with the statutory priority that should be given to this proceeding under 28 U.S.C. Sec. 1657(a) and the original Congressional intent that establishes injunctive relief under Section 10(j) of the Act.[15]

Thus, Petitioner respectively moves this Court to try the Petition for Temporary Injunction based on the administrative record in the underlying administrative hearing, including the transcript and exhibits.

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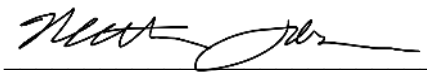
[14] *J.R.L. Food Corp.*, 196 F3d 334 at 335 (cases cited therein).

[15] *See I Legislative History LMRA 1947,* 414, 433 (Government Printing Office 1985).

Respectfully submitted on November 30, 2022.



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