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CHARGING PARTIES LEFT OUT: INTERVENTION IN SECTION 10(j) NATIONAL LABOR RELATIONS ACT INJUNCTION PROCEEDINGS

Introduction

Employer Incorporated illegally fires two of its employees, Jean and Hannah, because they distributed union authorization cards during their lunch period.¹

Jean and Hannah file unfair labor practice charges with a regional office of the National Labor Relations Board (hereinafter NLRB or Board), which investigates their allegations that the employer violated the National Labor Relations Act (herein NLRA or Act).² The Board's General Counsel begins administrative proceedings against the employer by issuing an unfair labor practice complaint. The Board also petitions a federal district court for a preliminary injunction reinstating Jean and Hannah to their jobs pending the administrative proceeding. As charging parties, are Jean and Hannah entitled to intervene in the federal court action seeking equitable relief? Federal district courts have differed over whether charging parties may intervene in preliminary injunctive relief proceedings brought by the National Labor Relations Board. This Note will advocate the minority approach, which holds that charging parties may intervene as of right in such proceedings.

The NLRB is the federal administrative agency charged with protecting the rights that the NLRA guarantees certain employees.³ An employee discharged for supporting a labor union has

1. Under *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 (1945), employers subject to the National Labor Relations Act may not restrict employees from soliciting union membership outside working time absent special circumstances. Employees also have the right to distribute union literature outside working time and working areas although on company property. See 1 *THE DEVELOPING LABOR LAW* 89-90 (Patrick Hardin et al. eds., 3d ed. 1992) and cases cited therein.

2. 29 U.S.C. §§ 151-69 (1988). Section 7 of the Act provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection . . ." 29 U.S.C. § 157 (1988).

3. See 29 U.S.C. § 153 (1988). The Act protects those who fit within its definition of "employee." Coverage excludes agricultural employees, employees who perform domestic services at their employer's home, those employed by a parent or spouse, supervisory employees, independent contractors, employees subject to the Railway Labor Act, and those employed by entities that are not subject to the Act, such as public employers or employers not engaged in commerce. *Id.*

recourse with the NLRB.⁴ Likewise, when a union discriminates against one whom it represents, or coerces an employee in the exercise of his or her right to refrain from union activities, the Board has jurisdiction to remedy the violation.⁵ The General Counsel of the NLRB is the appointed defender of the rights guaranteed under the NLRA.⁶ The General Counsel protects employees' rights through the Board's administrative processes. These processes include an investigation, followed by an administrative trial if a complaint issues, appellate review by the Board in Washington, D.C., and, if necessary, review or enforcement of a Board order by an appropriate United States court of appeals.⁷ This potentially lengthy administrative process may, however, be an inadequate remedy if employees' rights may be harmed irreparably while the case is pending.⁸

Where an employer discharges a group of union supporters in order to stem an organizing drive, it threatens the Section 7 rights of all bargaining unit members to organize and act in concert for mutual aid and protection.⁹ If not remedied immediately, an illegal firing¹⁰ may have far reaching coercive effects upon other employees' right to organize. If the Board ultimately is convinced that the employer discriminated against employees on account of their exercise of Section 7 rights, it can order the employer to cease and desist from violating the Act and to reinstate the workers with back

4. In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959), the Supreme Court explained that "[w]hen an activity is arguably subject to § 7 or § 8 of the Act, the States as well as federal courts must defer to the exclusive competence of the National Labor Relations Board . . ." Section 8(a)(3) of the Act makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3) (1988); see also JEFFREY A. NORRIS & MICHAEL J. SHERSIN, JR., *HOW TO TAKE A CASE BEFORE THE NLRB* 313 (6th ed. 1992).

5. See *Garmon*, 359 U.S. at 245; 29 U.S.C. §§ 157, 158(b) (1988); NORRIS & SHERSIN, *supra* note 4, at 313 (NLRB has exclusive power to prevent employees and labor organizations from engaging in unfair labor practices).

6. See 29 U.S.C. §§ 153(d), 160 (1988); see also Norris & Shersin, *supra* note 4, at 35-37; *infra* notes 30, 38-39, 44-53 and accompanying text.

7. See generally 2 *THE DEVELOPING LABOR LAW*, *supra* note 1, at 1790-1800; *infra* part I.A-B.

8. See *infra* notes 82-83 (discussing length of Board's processes and the potential adverse effects).

9. See *supra* note 2.

10. Section 8(a)(1) and (a)(3) make it an unfair labor practice for an employer to coerce employees in the exercise of their right to bargain collectively or to discriminate with regard to hire or terms or conditions of employment on account of union support. See 29 U.S.C. § 158(a)(1), (a)(3) (1988).

pay.¹¹ Years might pass before the issuance and enforcement of a final Board order, however.¹² Thus, the threat of these sanctions sometimes is only a slight deterrent to employers, compared with the potential increases in labor costs if employees unionize.¹³ Moreover, a remedy imposed only after the defeat of an organizing campaign generally allows employers to retain the primary benefit gained from their illegal actions, that is, the defeat of the union.¹⁴ The Board's ultimate power to fashion relief in such a case, therefore, requires that a more immediate order be issued. Section 10(j) of the Act¹⁵ empowers the Board to seek such preliminary relief. It provides in pertinent part:

The Board shall have power, upon issuance of a complaint . . . charging that any person has engaged 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.¹⁶

Historically, the Board has instituted Section 10(j) proceedings very rarely, but since April 1994, the Board has brought them with greater frequency.¹⁷

There are several possible explanations for the Board's recent unprecedented Section 10(j) activity. Without question, President

11. See 29 U.S.C. § 160(c) (1988).

12. See *infra* note 82 (discussing passage of time during pendency of Board unfair labor practice proceedings).

13. For examples of employers engaging in obviously illegal activities and resisting the Board's remedies, see *infra* note 20.

14. The Board sometimes can provide a modicum of relief in this regard. Under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Board can order an employer to bargain with the union even without an election if the union at one time represented an uncoerced majority of bargaining unit members and if the employer's actions had been so destructive of Section 7 rights as to make a fair election impossible. However, this plainly is a high standard. Moreover, if the employer engages in discrimination prior to the union acquiring authorization by a majority of bargaining unit members, the Board will not issue a bargaining order even though an employer's illegal conduct may meet the "outrageous and pervasive" standard set forth in *Gissel Gourmet Foods, Inc.*, 270 N.L.R.B. 578, 586 (1984).

15. 29 U.S.C. § 160(j) (1988).

16. *Id.*

17. The Board filed sixty-two § 10(j) petitions between March and September of 1994, compared with annual totals ranging from twenty-six to forty-two between 1990 and 1993. *NLRB Cites Successes; FDA is Challenged*, NAT'L L.J., Dec. 12, 1994, at A16. The NLRB General Counsel's fourteen requests to petition for Section 10(j) relief during May 1994, was the most such requests ever made by a General Counsel in a single month. See *Remarks of NLRB Chairman Gould to the Commonwealth Club, San Francisco*, BNA DAILY LABOR REPORT, June 13, 1994, at E2.

Clinton's appointments of William B. Gould IV and Fred Feinstein as Chairman and General Counsel, respectively, of the NLRB are the most immediate and direct causes of the increased Section 10(j) caseload. Chairman Gould advocated the increased use of Section 10(j) even before he was appointed to his current post.¹⁸ Additionally, General Counsel Feinstein is perceived to hold a more proactive and employee-oriented perspective than his predecessors.¹⁹ Thus, political change in the Board's personnel has been an important factor in the agency's increased use of Section 10(j).

It is important to note that the decision by Chairman Gould and General Counsel Feinstein to use Section 10(j) more often than in the past may merely be the inevitable result of an objective analysis of the current state of affairs. The Board's inability to deter violations of the Act²⁰ has prompted many onlookers to express frustra-

18. In his 1993 book, *AGENDA FOR REFORM*, then Professor Gould characterized the Board's scant use of Section 10(j) from 1982 through 1992 as "profoundly puzzling" and stated that Section 10(j) "warrants attention, perhaps, in the form of more rigorous guidelines that exhort the Board to seek injunctive relief." WILLIAM B. GOULD IV, *AGENDA FOR REFORM* 161 (1993).

Incidentally, *AGENDA FOR REFORM* was a widely discussed topic in Chairman Gould's Senate confirmation hearings. See Louis Freedberg, *Stanford Professor OK'd for NLRB Post*, *SAN FRANCISCO CHRON.*, Mar. 3, 1994, at A3. The book advocates more assertive law enforcement by the Board, and this was a primary reason for the narrowness of the margin (58-38) by which he was confirmed. *Id.*

19. The *New York Times* quoted Greg Tarpinian of the Labor Research Association of New York as saying that "[General Counsel] 'Feinstein and the rest of the team are people that believe in unions. That's a major shift.'" Barbara P. Noble, *At Work; At the Labor Board*, *New Vigor*, *N.Y. TIMES*, Sept. 4, 1994, § 3, at 21. The *Times* also quoted Amalgamated Clothing and Textile Workers Union Southern regional director Bruce Raynor as saying that even during the first few months of General Counsel Feinstein's tenure, the Board had been "'much more aggressive about enforcing the law.'" *Id.* General Counsel Feinstein termed the increased utilization of Section 10(j) injunctive proceedings the "cornerstone" of his administration of the Act. *NLRB Cites Successes; FDA is Challenged*, *NAT'L L.J.*, Dec. 12, 1994, at A16 (quoting General Counsel Feinstein's report of litigation activity).

Prior to becoming Chairman of the NLRB, William Gould speculated that NLRB General Counsels during the Reagan and Bush Administrations simply did not have the interest in Section 10(j) proceedings that previous General Counsels did. See Gould, *supra* note 18, at 161.

20. The Board's power to prevent violations of the Act is remedial in nature, not punitive. See *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 11 (1940); *NORRIS & SHERSIN*, *supra* note 4, at 441; see also Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 *MICH. L. REV.* 419, 506 (1992) (citing *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 208 (1941) (Stone, J., concurring)). Moreover, the Board considers some types of damages to be too speculative to award in individual cases. See, e.g., *Tildee Products, Inc.*, 194 N.L.R.B. 1234, 1235 (1972) (Board declining to estimate what contract terms an employer would have agreed to had it bargained in good faith and otherwise obeyed the law, on remand from D.C. Circuit, which had concluded that initial Board remedy

tion with the Board's remedial scheme.²¹ Besides the fact that

was inadequate to compensate damaged party). For example, increased wages or benefits that an entire work force might have gained but for an employer's use of illegal methods to defeat an organizing drive are great by comparison to the lost wages of a few discharged employees, but can not be calculated in individual cases. *Id.* at 1235.

The deficiency in the Board's remedial powers is perhaps most significant in the context of union organizing, where the stakes are likely the highest. By comparing the total number of votes cast for unions in NLRB elections with the number of employees illegally discharged on account of their pro-union activity, Richard Freeman and James Medoff estimated that one in twenty employees favoring a union during 1984 organizing campaigns was fired illegally; roughly one employee per NLRB representation election conducted that year. RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 233 (1984). More recent NLRB statistics bear out the Freeman and Medoff conclusion. The NLRB's Fifty-Seventh Annual Report shows that 3,811 discharged employees were offered reinstatement to their jobs pursuant to unfair labor practice cases closed in 1992. *See* 57 NLRB ANN. REP. 127 (1992). Of the representation cases initiated by labor unions for collective bargaining representative certification that the Board closed in 1992, there were 3,094 elections. *See* 57 NLRB ANN. REP. 127 (1992).

For an example of how far an entity can go in resisting Board remedies, see *Autoprod, Inc.*, 265 N.L.R.B. 331 (1982). In *Autoprod*, the Board noted that "[t]he Respondent's flagrant misconduct . . . caps a decade of contumacy and flagrant disregard of its employees' rights under the Act during which the Respondent has flouted court-enforced orders of the Board and persistently ignored its statutory obligations." *Autoprod, Inc.*, 265 N.L.R.B. at 331. The Board ordered *Autoprod* to pay the Board's costs of litigating and preparing the case, departing from the "traditional forms of relief [which, under the circumstances, the Board found to be] inadequate as a means of effectuating the policies of the Act." *Id.* at 333. The Board took this extreme action only after ten years of remedial frustration, however. *See id.*

For another example of the insufficiency of the Board's remedial scheme to prevent repeated violations of the Act, see *Tildee Products*, 194 N.L.R.B. at 1236-37. In *Tildee Products*, employees chose a union as their collective representative pursuant to an NLRB-conducted representation election. *Tildee Products*, 194 N.L.R.B. at 1236-37. Thereafter, the employer filed frivolous objections to the election and refused to bargain with the union. *Id.* The Board upheld the election results and ordered the employer to bargain. *Id.* On appeal of the Board's order, the District of Columbia Circuit remanded the case to the Board to impose a different remedy, on grounds that the original Board remedy encouraged frivolous litigation. *Id.* (citing *Int'l Union of Electrical, Radio and Machine Workers v. NLRB*, 426 F.2d 1243, 1251 (D.C. Cir.), *cert. denied*, 400 U.S. 950 (1970)). On remand, the Board ordered the employer to reimburse the union for certain of its litigation costs and expenses. *See Tildee Products*, 194 N.L.R.B. at 1236-37.

Tildee Products and *Autoprod* mark only the outer limits of how far a respondent can go in resisting the Act before the Board will take extraordinary remedial action.

21. *See, e.g.*, FREEMAN & MEDOFF, *supra* note 20, at 233; THOMAS GEOGHEGAN, *WHICH SIDE ARE YOU ON?* 252-53 (1991); Charles Morris, *The NLRB in the Dog House - Can an Old Board Learn New Tricks?* 24 SAN DIEGO L. REV. 9 (1987); Paul Weiler, *Promises to Keep Securing Workers' Rights to Self-organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983).

Board remedies are non-punitive in nature,²² the Board's requirement that all related unfair labor practice charges against a single employer be tried concurrently²³ has likely been a substantial reason why traditional Board remedies have been ineffective and why the current Board has resorted to Section 10(j) petitions to preserve its remedial power.

If the employer in our hypothetical example feared that the reinstatement of Jean and Hannah might resurrect the union organizing campaign, the employer could delay the Board's administrative proceedings by undertaking a second series of firings based upon employees' union support. In such a case, the Board's General Counsel would stay the proceeding in Jean's and Hannah's case in order to include the new unfair labor practice allegations in its pending complaint. An investigation and amendment of the complaint would follow before the administrative trial would resume. If pro-union sentiments still existed near the close of trial on the amended complaint, the employer could undertake yet another series of unfair labor practices. These practices also would need to be charged, investigated, incorporated into the pending complaint, and tried. Only after an initial decision on the consolidated complaint, review by the Board, and circuit court enforcement, could the employer be compelled to reinstate Jean and Hannah. This hypothetical fact pattern illustrates a classic case where preliminary

22. See *Republic Steel*, 311 U.S. at 10; NORRIS & SHERSIN, *supra* note 4, at 441; see also *Dau-Schmidt*, *supra* note 20, at 506 (citing *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 208 (1941) (Stone, J., concurring)).

23. In *Jefferson Chemical Co.*, 200 N.L.R.B. 992, n.3 (1972), the Board set forth the general rule that unfair labor practice complaints will be barred procedurally if the General Counsel knew or should have known about an alleged unfair labor practice prior to the close of administrative trial in an earlier related unfair labor practice case against the same respondent and declined to incorporate the new charges into the pending complaint. Because the *Jefferson Chemical* doctrine governs a procedural aspect of the General Counsel's case preparation, the central holding in that case has not often been revisited in the twenty years since the rule was first promulgated. In order to put the issue before the Board again, the General Counsel would have to neglect to amend a pending complaint despite knowledge of a related unfair labor practice. If the General Counsel were to lose such a case before the Board, the subsequent unfair labor practice complaint would be dismissed altogether, allowing no relief for the aggrieved parties. Rather than take this chance, the General Counsel, understandably, will stay the pending proceeding in order to insure that some remedy will be available at the end of the administrative process. Thus, the outer limits of the *Jefferson Chemical* doctrine have not been established by the Board, nor are they likely to be because of the doctrine's unusual nature.

injunctive relief is necessary to protect the Board's ultimate remedial powers.²⁴

The Board has maintained its traditionally high success rate in Section 10(j) cases during the recent wave of petitions, obtaining preliminary injunctive relief in thirty of the thirty-six cases that were instituted under General Counsel Feinstein and resolved by September 30, 1994.²⁵ Because Section 10(j) injunctive relief issues only when a court determines that such an order is necessary to insure the effectiveness of the Board's remedial powers, the continued high success rate of Section 10(j) petitions indicates that the Board's increased Section 10(j) activity is not an extreme reaction, but merely a reasoned response to the Board's remedial difficulties and to private actors' disregard of Board orders. Increasingly aggressive anti-union employer behavior may be another reason for the Board's increased use of Section 10(j).²⁶

Whatever the cause of the Board's increased Section 10(j) activity, the scant jurisprudence governing Section 10(j) petitions will be developed extensively in the coming years if the current volume of Section 10(j) cases persists. This Note will focus on unfair labor practice procedures and on whether charging parties, those who file unfair labor practice charges with the Board, may intervene as of right in Section 10(j) proceedings pursuant to Federal Rule of Civil Procedure 24(a)(2).

Part I will discuss the Board's enforcement framework and the role charging parties play at each of the three possible stages of unfair labor practice proceedings: (i) pre-complaint proceedings,

24. For one example of a repeated series of unfair labor practices delaying resolution of pending allegations, see *S. Lichtenberg & Co.*, 1991 NLRB Lexis 450 (ALJ decision 1991). In *Lichtenberg*, administrative trial was adjourned and resumed numerous times over a period of years so that the General Counsel could incorporate new allegations of unfair labor practices. See *id.*

25. See *NLRB Cites Successes; FDA is Challenged*, NAT'L L.J., Dec. 12, 1994, at A16 (quoting General Counsel Feinstein's report of litigation activity).

26. In *WHAT DO UNIONS DO?*, Richard Freeman and James Medoff charted the instances of Employer Unfair Labor Practices, Section 8(a)(3) charges, and reinstatements of workers as compared to the number of representation elections conducted by the NLRB. FREEMAN & MEDOFF, *supra* note 20, at 232 (1984). Their study revealed that although the number of NLRB elections held annually decreased slightly from 1970 through 1980, all the other categories at least doubled, with the number of workers ordered reinstated increasing more than four-fold. *Id.* The Freeman and Medoff work hypothesizes that employers' recognition that Board remedies can be avoided has caused the more aggressive anti-union tactics. *Id.* In an anecdotal commentary, Thomas Geoghegan makes the same hypothesis. See Geoghegan, *supra* note 21, at 252-56. Moreover, the growth of union-busting consulting firms has no doubt contributed to employers' willingness to flout the Act and the Board. *Id.*; FREEMAN & MEDOFF, *supra* note 20, at 230-36.

(ii) post-complaint proceedings for permanent relief,²⁷ and (iii) preliminary injunctive relief proceedings. Part II will discuss Federal Rule of Civil Procedure 24(a)(2) and the criteria it sets forth for non-statutory intervention as of right. Part III will analyze whether Rule 24(a)(2) entitles charging parties to intervene as of right in Section 10(j) district court proceedings. Part IV will conclude that courts that have denied charging parties' Rule 24(a)(2) motions to intervene have misapplied the controlling law.

I. Unfair Labor Practice Procedure

Section 7 of the Act²⁸ guarantees employees the right to engage in self-organization and other activities for the purpose of collective bargaining or other mutual aid and protection. The section also guarantees employees the right to refrain from engaging in such activities.²⁹ The Board's General Counsel enforces these rights through the framework established in Sections 8 and 10 of the Act.³⁰ Section 8(a) describes employer unfair labor practices and Section 8(b) describes union unfair labor practices.³¹ Administrative proceedings brought through Section 10 of the Act to prevent violations of Section 8(a) or 8(b) are referred to as unfair labor practice proceedings, as distinct from representation proceedings, through which the Board resolves questions concerning representation.³²

27. For purposes of this Note, "permanent relief" refers to relief that is permanent in that it will not be altered subsequently by further administrative proceedings (*i.e.*, a final Board order), as distinct from preliminary relief, which remains in effect only pending the issuance of a final Board order.

28. 29 U.S.C. § 157 (1988).

29. *See id.*

30. 29 U.S.C. §§ 158, 160 (1988).

31. 29 U.S.C. § 158 (1988). Additionally, Section 8(e) makes it an unfair labor practice for any labor organization or any employer to enter into an agreement restricting with whom the employer does business. The most common unfair labor practice cases involve alleged violations of Section 8(a) and 8(b), however. This Note, therefore, will not discuss the provisions of Section 8(e) in detail.

32. *See* 29 U.S.C. § 159 (1988). The Board's administrative framework is essentially divided into two areas: representation proceedings and unfair labor practice proceedings. Where employees wish to be represented by a union (or to cease such representation), they can petition the Board for an election to determine the bargaining unit's representation status. The Board thereafter will conduct an investigation and hearings as to what bargaining unit is appropriate and determine if there is a sufficient showing of interest to warrant holding an election. The Board conducts representation elections and thereafter may hold administrative hearings on objections to conduct that may have affected the results of the election. Finally, the Board will certify the election results and parties indirectly may appeal the representation proceedings by committing unfair labor practices and contesting the Board representa-

The Board's administrative framework in the unfair labor practice setting bears similarities both to civil and criminal actions, but it is not wholly analogous to either. Like civil actions, administrative unfair labor practice proceedings commence only if an aggrieved party officially charges that a violation has occurred.³³ Moreover, any relief obtained through the administrative processes generally goes to the party wronged by the violations,³⁴ and such party has the opportunity to participate and be represented by counsel at administrative hearings and appeals and at any court review of the administrative order.³⁵ In these aspects, unfair labor practice cases resemble civil litigation. Additionally, there are no criminal penalties for violating the Act,³⁶ and the standard of proving violations is the "preponderance" of the evidence.³⁷

On the other hand, formal unfair labor practice administrative proceedings cannot actually be brought by private parties but only by the Board's General Counsel,³⁸ whose role as an advocate of employees' and the public's interest is analogous to that of a prosecutor in criminal cases. On account of the General Counsel's extensive discretion as to the scope of a proceeding,³⁹ the victims of unfair labor practices lack control of the case against those who have wronged them, as do victims of crime.

The National Labor Relations Act enforcement framework differs from the administrative schemes of other federal agencies.

tion case determinations during circuit court review of the unfair labor practices. The Board's Statements of Procedures sets forth the procedural guidelines for unfair labor practice cases and for representation cases. Compare 29 C.F.R. § 101.2 (1994) with 29 C.F.R. § 101.17 (1994). For a full discussion of representation case procedure, see NORRIS & SHERSIN, *supra* note 4, at 55-300.

33. See 29 U.S.C. § 160(b) (1988).

34. Specifically, Section 10(c) permits the Board to "take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." 29 U.S.C. § 160(c) (1988). In an exceptional case, the Board once ordered a respondent to compensate the Board for its expenses in preparing and litigating the case because the respondent had, for ten years, continually and flagrantly ignored its statutory responsibilities, and the Board's court enforced orders. See *Autoprod, Inc.*, 265 N.L.R.B. 331, 332 (1982). This is not an ordinary remedy, however. *Id.*

35. See *infra* notes 56-62, 68, 78-79 and accompanying text.

36. The Board's powers are remedial in nature, not punitive. See *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10 (1940); NORRIS & SHERSIN, *supra* note 4, at 441. Repeated violations of the Act, where such violations have previously been enjoined by a court could eventually result in criminal contempt sanctions, but such penalties would be for violation of the injunction rather than violation of the Act.

37. 29 U.S.C. § 160(c) (1988).

38. See 29 U.S.C. §§ 153(d), 160(a) (1988).

39. See 29 U.S.C. § 153(d) (1988).

Under the Equal Employment Opportunities Commission (hereinafter EEOC) framework, for example, through which many of the federal civil rights laws are enforced, private parties have independent rights to sue in federal court even where the EEOC maintains that no law has been violated.⁴⁰ Additionally, because the federal civil rights laws authorize widespread private enforcement of their provisions, affected private parties enjoy full rights of participation, appeal and control against those who have illegally wronged them.⁴¹ In the labor law context, by contrast, both under the NLRA and under some sections of the Labor-Management Reporting and Disclosure Act of 1959, federal agencies such as the Board or the Secretary of Labor have full discretion as to whether to prosecute alleged violations of law.⁴² Accordingly, private parties' rights to participate and appeal once the appropriate federal

40. See 42 U.S.C. § 2000e-5(f)(1) (1988) (providing a private right of action to individuals aggrieved by violations of Title VII in addition to empowering the EEOC to deter violations and prosecute civil actions against offenders); *General Tel. Co. v. EEOC*, 446 U.S. 318, 326 (1980) (where EEOC brings suit in vindication of private rights, the private parties whose rights are at stake may intervene).

41. Title VII of the Civil Rights Act of 1964, as amended, empowers the EEOC to deter individual acts of illegal discrimination against specific persons by instituting suit under § 706, 42 U.S.C. § 2000e-5(f)(1) (1988); the EEOC also may institute suit under § 707, 42 U.S.C. § 2000e-6 (1988) against entities engaged in a pattern or practice of illegal discrimination.

Where the EEOC brings suit pursuant to § 706, it does so in vindication of private rights although there is also a public interest component to the EEOC's representation. *General Tel. Co.* 446 U.S. at 325-326. For this reason, the Supreme Court has noted that aggrieved persons may intervene in § 706 actions instituted by the EEOC. *Id.* at 326.

On the other hand, where the EEOC brings suit pursuant to § 707 because a respondent is engaged in an illegally discriminatory pattern or practice, the EEOC's suit is purely in the public interest, and private parties do not necessarily have the right to intervene. See *United States v. Allegheny-Ludlum Indus.*, 517 F.2d 826 (5th Cir. 1975). Section 707 actions brought by the EEOC, however, generally do not have preclusive effects on private parties who may assert § 706 claims alleging individual acts of discrimination. *Id.*

One court that denied an applicant's motion to intervene in a § 707 action expressly relied upon the fact that the private party had continuing free access to adequate private remedies. *Id.* at 844-45. Moreover, that court distinguished § 707 cases from the labor law context where private parties do not always enjoy free access to adequate private remedies but rather must rely upon federal agencies to enforce their statutory rights. *Id.* at 845 n.21.

42. See *infra* notes 44-54 and accompanying text (discussing the NLRB's exclusive authority to enforce NLRA rights); notes 164-68 (discussing the exclusive authority of the Secretary of Labor to initiate suit to set aside elections conducted in violation of the Labor Management Reporting and Disclosure Act provisions).

agency has undertaken to prosecute the alleged violations have been subject to litigation.⁴³

A. Pre-Complaint Proceedings

An unfair labor practice case begins when an individual or entity aggrieved by conduct allegedly violative of the Act lodges a charge with a regional office of the NLRB.⁴⁴ A timely charge triggers a Board investigation into the allegations and is a prerequisite for the charging party ultimately to obtain relief.⁴⁵ Upon receiving a charge, the Board regional office files it, docketing it and assigns it a case number.⁴⁶ Yet, official Board proceedings against a charged party do not begin merely by the filing of a charge.⁴⁷

After receiving the charge, a Board regional office investigates on behalf of the Board's General Counsel to determine whether it will issue an unfair labor practice complaint.⁴⁸ A complaint is the formal pleading that begins an official administrative proceeding against the charged party.⁴⁹ While charging parties usually take part in the investigation by giving affidavits and offering position letters that outline pertinent facts and make legal argument, charg-

43. See *Trbovich v. United Mine Workers*, 404 U.S. 528 (1972) (resolving intervention issue in Title IV Labor Management Reporting and Disclosure Act case); *Pascarella v. Vibra Screw*, 904 F.2d 874 (3d Cir. 1990) (permitting intervention in § 10(j) case but not discussing grounds therefor in reported opinion); *Advertisers Mfg. Co. v. NLRB*, 677 F.2d 544 (7th Cir. 1982) (same); *Solien v. Miscellaneous Drivers & Helpers Union, Local No. 610*, 440 F.2d 124, 132 (8th Cir. 1971) (affirming district court's denial of intervention in § 10(l) case); *Wilson v. Liberty Homes*, 500 F. Supp. 1120 (W.D. Wis. 1980), *aff'd as modified*, 108 L.R.R.M. (BNA) 2699 (7th Cir. 1981), *vacated as moot*, 673 F.2d 1333 (7th Cir. 1981) (denying intervention in § 10(j) case); *Scott v. Toyota of Berkely, Inc.*, 106 L.R.R.M. 2070 (N.D. Cal. 1980) (permitting intervention in § 10(j) case but not discussing grounds therefor in reported opinion); *Seeler v. Williams*, 97 L.R.R.M. (BNA) 2765 (N.D.N.Y. 1977) (same); *Squillacote v. UAW Local 578*, 383 F. Supp. 491, 492-493 (E.D. Wis. (1974) (denying intervention in § 10(j) case); *Boire v. Pilot Freight Carriers*, 86 L.R.R.M. (BNA) 2976 (M.D. Fla. 1974), *aff'd*, 515 F.2d 1185 (5th Cir. 1975) (same); *Youngblood v. Scottex*, 80 L.R.R.M. (BNA) 2619 (N.D. Tex. 1972) (granting intervention in § 10(j) case); *Reynolds v. Marlene Indus.*, 250 F. Supp. 722 (S.D.N.Y. 1966) (denying intervention in § 10(j) case); *Penello v. Burlington Indus.*, 54 L.R.R.M. (BNA) 2165 (W.D. Va. 1963) (same); *Phillips v. United Mine Workers*, 218 F. Supp. 103 (E.D. Tenn. 1963) (same).

44. 29 C.F.R. § 101.2 (1994).

45. See 29 U.S.C. § 160(b) (1988); 29 C.F.R. § 101.4 (1994). Additionally, the charge must be in writing and signed and must set forth the full name and address of the person making the charge, the full name and address of the person against whom the charge is made, and a clear and concise statement of the facts constituting alleged unfair labor practices affecting commerce. 29 C.F.R. §§ 101.2, 102.11 (1994).

46. 29 C.F.R. § 101.2 (1994).

47. See 29 U.S.C. § 160(b) (1988).

48. 29 C.F.R. § 101.4 (1994).

49. See 29 U.S.C. § 160(b) (1988).

ing parties have few enforceable rights at this stage.⁵⁰ If the regional office declines to issue a complaint, the charging party may seek review by the Appeals Office of the Board's General Counsel.⁵¹ The charging party's participation in the General Counsel's review, however, is generally limited to providing position letters.⁵² Moreover, if the General Counsel decides not to issue a complaint, the decision is not subject to review.⁵³ Because Board unfair labor practice proceedings against a charged party officially do not begin until a complaint issues, a refusal by the Board's General Counsel to issue a complaint effectively ends the charging party's case before it commences. Provided that a complaint does issue, however, the charging party becomes virtually a full partner with the Board's General Counsel in all subsequent proceedings for permanent relief, with extensive rights to participate and appeal.⁵⁴

B. Post-Complaint Proceedings for Permanent Relief

Once the Board issues a complaint, it schedules the case for a hearing before an Administrative Law Judge (herein ALJ).⁵⁵ At the hearing, the charging party is allowed to be present;⁵⁶ to be represented;⁵⁷ to call, examine, and cross-examine witnesses;⁵⁸ to introduce documentary evidence into the record;⁵⁹ to state objections;⁶⁰ to offer legal argument orally at the close of hearing;⁶¹ and

50. See NORRIS & SHERSIN, *supra*, note 4 at 332.

51. The charging party has fourteen days from service of a regional director's letter refusing to issue a complaint to appeal the refusal to the Appeals Office of the General Counsel. See NORRIS & SHERSIN, *supra* note 4, at 332 (citing 29 C.F.R. § 102.19(a) and NLRB CASEHANDLING MANUAL ¶ 10122.4).

52. A party taking appeal also may request the opportunity to personally present its view of the facts and law to the General Counsel, *see* 29 C.F.R. § 102.19(b) (1994), but such requests are discouraged and are granted only within the General Counsel's discretion. See NORRIS & SHERSIN *supra*, note 4, at 336; 29 C.F.R. § 102.19(b) (1994).

53. See *Machinists v. Lubbers*, 681 F.2d 598 (9th Cir. 1982), *cert. denied*, 459 U.S. 1201 (1983); *Pacific Southwest Airlines, Inc. v. NLRB* 587 F.2d 1032 (9th Cir. 1980); *see also Vaca v. Sipes*, 386 U.S. 171, 182 (1967) (stating, in dicta, that the General Counsel's decision not to issue a complaint is unreviewable); *Rockford Ready-Mix Co. v. Zipp*, 482 F. Supp. 489 (N.D. Ill. 1979) (holding that a mandamus action will not lie against a regional director to compel the issuance of a complaint).

54. See *infra* notes 56-64, 78-79 and accompanying text.

55. 29 C.F.R. § 102.15 (1994).

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. 29 C.F.R. § 102.41 (1994).

61. 29 C.F.R. § 102.8, .42.

to file a post-hearing brief.⁶² During the administrative trial, the Federal Rules of Evidence and Civil Procedure are adhered to "so far as practicable."⁶³ The ALJ is both the trier of fact and, in the first instance, the interpreter of law.⁶⁴ After the hearing, the ALJ submits Findings of Fact, Conclusions of Law, and a Proposed Order⁶⁵ to the Board.⁶⁶

The ALJ decision automatically becomes the decision of the Board if no party objects to it.⁶⁷ Any party may, however, file exceptions to the ALJ's decision and a supporting brief with the Board,⁶⁸ obliging the Board to issue an appropriate order after review of the transcript and the ALJ's findings.⁶⁹ The Board will reverse an ALJ's findings of fact only if they are not supported by the record,⁷⁰ but the Board does not accord deference to the ALJ's legal determinations. A Board order is the final administrative determination on the merits of an unfair labor practice case.⁷¹ The Board may adopt, reject or modify the ALJ's findings and recommendations.⁷² The final Board order may dismiss the complaint or, in the alternative, require the party that violated the Act to cease and desist from its illegal behavior and take appropriate affirmative action.⁷³ The remedies available include reinstating illegally discharged employees, with or without back pay.⁷⁴ Board orders

62. *Id.*

63. 29 U.S.C. § 160(b) (1988); 29 C.F.R. § 102.39 (1994).

64. *See* 29 C.F.R. § 102.45(a) (1994).

65. *See* 29 U.S.C. § 160(c) (1988); 29 C.F.R. § 102.45(a) (1994).

66. *See* 29 C.F.R. § 102.45(a).

67. 29 C.F.R. § 102.48(a) (1994).

68. 29 C.F.R. § 102.46(a) (1994).

69. 29 U.S.C. § 160(c) (1988); 29 C.F.R. § 102.48(b) (1994).

70. The Board adopted this policy in *Standard Dry Wall Products*, 91 N.L.R.B. 544 (1950), *enfd.*, 188 F.2d 362 (3d Cir. 1951), reasoning that because the ALJ has the opportunity to observe demeanor evidence during testimony, the Board is ill-equipped to review the ALJ's credibility determinations. The Board still follows this doctrine, citing *Standard Dry Wall Products* at footnote 1 of virtually every opinion in which a party has objected to an ALJ's factual findings. *See, e.g., Acme Die Casting*, 315 N.L.R.B. 30 (1994).

71. Subsequent to the issuance of a final Board order, further proceedings regarding compliance with the Board order sometimes are necessary. However, questions as to whether the Act was violated initially can no longer be disputed at the compliance stage. For a full discussion of compliance proceedings, see *NORRIS & SHERSIN*, *supra* note 4, at 465-94.

72. 29 C.F.R. § 101.12(a) (1994).

73. 29 U.S.C. § 160(c) (1988); 29 C.F.R. § 101.12(a) (1994).

74. 29 U.S.C. § 160(c).

are not self-enforcing, however, and review is taken directly to an appropriate United States court of appeals.⁷⁵

Circuit courts generally defer to the Board's administrative expertise, recognizing that the NLRA invests the Board with wide ranging discretion to interpret and administer the Act.⁷⁶ Nevertheless, the circuit courts provide meaningful review of the Board's determinations.⁷⁷ Any party to the Board proceeding may appeal an adverse determination to an appropriate United States circuit court⁷⁸ and may intervene in circuit court review proceedings even where the Board determination was favorable to it.⁷⁹

Thus, the law is well-settled as to charging parties' participation rights at the pre-complaint stage and at the post-complaint permanent relief stage. Charging parties have very limited formal rights of participation and appeal of the Board's General Counsel's discretionary decision of whether to issue a formal unfair labor practice complaint.⁸⁰ Nonetheless, charging parties enjoy extensive

75. See 29 U.S.C. § 160(e), (f) (1988). The Board may petition for enforcement "in any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein [the entity which allegedly committed an unfair labor practice] resides or transacts business." 29 U.S.C. § 160(e) (1988).

A party aggrieved by a final Board order may obtain review "in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia." 29 U.S.C. § 160(f) (1988).

76. Section 10(e) of the Act provides that "[t]he findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." 29 U.S.C. § 160(e) (1988). For a discussion of this standard and courts' interpretation of it, see 2 THE DEVELOPING LABOR LAW, *supra* note 1, at 1886-90 and authorities cited therein.

In reviewing determinations of law, courts are required to give substantial weight to the Board's judgment, especially where the Board clearly articulates its reasoning and the question of law at issue involves interpretation or administration of the Act. See 2 THE DEVELOPING LABOR LAW, *supra* note 1, at 1890-93 and authorities cited therein.

77. The Taft-Hartley amendments to the Act added Section 10(e)'s provision that the Board's factual determinations be conclusive only if supported by "substantial" evidence "on the record considered as a whole," see 29 U.S.C. § 16 (1988) in order to insure more scrutinizing circuit court review of the Board's factual determinations than had been prevalent theretofore. See 2 THE DEVELOPING LABOR LAW, *supra* note 1, at 1886-87 (citing *Universal Camera v. N.L.R.B.* 340 U.S. 474 (1951)). The Act does not require circuit courts to accord the Board's legal determinations even that much deference. See 2 THE DEVELOPING LABOR LAW, *supra* note 1, at 1890-93 and authorities cited therein.

78. 29 U.S.C. § 160(f) (1988).

79. See *UAW Local 283 v. Scofield*, 382 U.S. 205, 208 (1965).

80. See *supra* part I.A.

rights of participation and appeal in all permanent relief proceedings after the complaint issues.⁸¹

C. Preliminary Injunctive Relief Proceedings

The administrative proceedings outlined above frequently take years before there is a final Board order and court enforcement.⁸² Such a delay can undermine the Board's ultimate ability to fashion an appropriate remedy.⁸³ For example, employees who were illegally fired may have moved on to a new job or a new area by the time the Board considers a final order.⁸⁴ By then, reinstatement could be impractical and, in any event, the firings' coercive effects on other employees likely would be irreversible. Accordingly, the Act empowers the Board to protect its remedial powers by seeking preliminary injunctive relief in federal district court.⁸⁵ Section 10(j) of the Act grants the Board a general right to petition for preliminary injunction in unfair labor practice cases.⁸⁶ Section 10(l) provides additional authorization for the Board to seek preliminary relief in certain types of unfair labor practice cases.⁸⁷ Although there are differences between Section 10(j) and Section

81. See *supra* part I.B.

82. Analysis of the Board's reports reveals that the annually calculated median elapsed time between filing and the issuance of a final Board order in unfair labor practice cases ranged from 273 days to 395 days during the period 1984 to 1989. See GOULD, *supra* note 18, at 159. In cases the Board termed as "major" cases, it took the Board a median of 736 days in fiscal year 1989 and a median of 691 days in fiscal year 1990 to process the case from filing to a final Board order. *Id.* Of course, final Board orders are subject to circuit court review. See *supra* notes 72-75 and accompanying text. Thus, even longer periods of time elapsed before relief was granted in many of those cases.

83. In fact, section 10(j) was enacted precisely because of the lengthy administrative process and the threat it poses to the Board's remedial authority. The legislative history reveals Congressional concern that "[i]t has sometimes been possible for persons violating the Act to accomplish their illegal purpose before being placed under any legal restraint and thereby to make it impossible or not feasible to restore or preserve the status quo." 2 THE DEVELOPING LABOR LAW, *supra* note 1, at 1819 (quoting S. REP. NO. 105, 80th Cong., 1st Sess. 27 (1947)).

84. Of the 3,811 discharged employees offered reinstatement pursuant to unfair labor practice cases closed during 1992, 595 declined to return. 57 NLRB ANN. REP. 127 (1992). Of the 3,023 employees offered reinstatement pursuant to unfair labor practice cases closed during 1991, 569 declined to return. 56 NLRB ANN. REP. 163 (1991). The likelihood that a discharged employee will accept an offer of reinstatement no doubt decreases with the passage of time between discharge and the offer of reinstatement.

85. See 29 U.S.C. § 160(j), (l) (1988).

86. 29 U.S.C. § 160(j).

87. 29 U.S.C. § 160(l).

10(l),⁸⁸ the injunctive relief provisions are similar.⁸⁹ This Note will focus on Section 10(j) proceedings, and will discuss the provisions of Section 10(l) only where they are pertinent to the courts' and the Board's interpretation of Section 10(j).

1. *Background of Section 10(j)*

Section 10(j) was enacted in 1947 as part of the Taft-Hartley Act, which amended the NLRA in part and added the Labor-Management Relations Act (herein LMRA) to the federal labor law statutory scheme.⁹⁰ Section 10(j) did not alter the substantive labor law;⁹¹ it merely provided an additional enforcement mechanism for special cases where the normal administrative framework is inadequate to remedy violations. Section 10(j) is an exception to the general rule that federal district courts lack jurisdiction to enjoin labor disputes⁹² and should not be used in typical unfair labor practice cases. Rather, as the Board Manual on Section 10(j) injunctions states:

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.⁹³

Accordingly, courts have recognized that Section 10(j) relief is "an extraordinary remedy, to be requested by the Board and granted

88. Pertinent to the intervention analysis, Section 10(l) provides that charging parties may "appear by counsel and present any relevant testimony" at proceedings for injunctive relief brought under it, while Section 10(j) has no corresponding provision. 29 U.S.C. § 160(l) (1988); see 29 U.S.C. § 160(j) (1988). Additionally, Section 10(l) of the Act requires the Board to prioritize charges that a union has engaged in a secondary boycott, and the section specifically directs the Board to seek injunctive relief in those circumstances. See 29 U.S.C. § 160(l).

89. See 29 U.S.C. § 160(j), (l).

90. 61 Stat. 146 (1947).

91. Other portions of the Taft-Hartley Act did have this effect, such as the amendment of Section 7 and creation of Section 8(b), which entrusted the NLRB with regulating certain union practices. See 29 U.S.C. §§ 157, 158(b) (1988).

92. See Section 1, Norris-LaGuardia Act, 29 U.S.C. § 101 (1988).

93. NATIONAL LABOR RELATIONS BOARD MANUAL ON SECTION 10(j) INJUNCTIONS, May, 1994 Internal National Labor Relations Board Memoranda reprinted with portions deleted, under Freedom of Information Act at 1994, Daily Labor Report No. 150 (BNA), special supplement S-4 (Aug. 8, 1994). The Board's Section 10 (j) Manual is a statement of procedures and policies for Board agents to follow in "identifying, investigating and litigating all types of Section 10(j) cases." Report of the NLRB General Counsel, 1994 Daily Labor Report (BNA) No. 226 (Nov. 28, 1994).

by the district court only under very limited circumstances."⁹⁴ One court termed Section 10(j) "an extraordinary tool" because it requires decisive judicial action "before a full airing of the facts and a careful consideration of the law."⁹⁵

When the Board files a Section 10(j) petition for preliminary injunctive relief, the district court serves notice upon the party against whom the injunction is sought and, "thereupon, shall have jurisdiction to grant the Board such temporary relief or restraining order as it deems just and proper."⁹⁶ Courts employ a two-part test in determining whether to award Section 10(j) injunctive relief. The test considers (i) whether the Board has reasonable cause to believe the Act has been violated, and (ii) whether such relief is "just and proper" within the meaning of the Section.⁹⁷

The "reasonable cause to believe" prong generally requires only a "low standard of proof."⁹⁸ In order to satisfy this prong, the Board need not convince the court either that its legal theory is correct or that the respondent actually engaged in the alleged activities.⁹⁹ Rather, the Board only needs to show that its theory of liability "is substantial and not frivolous,"¹⁰⁰ and that there is sufficient evidence for "a rational fact finder, considering the evidence in the light most favorable to the Board"¹⁰¹ to conclude that the facts are as the Board alleges. Thus, the first prong of the test accords substantial deference to the Board's decision to petition for Section 10(j) relief.

The "just and proper" prong, on the other hand, requires district courts to use discretion in assessing the justness and propriety of equitable relief.¹⁰² As a result, Section 10(j) hearings typically fo-

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

95. *Kinney v. Int'l Union of Operating Eng'rs, Local 150*, 994 F.2d 1271, 1277 (7th Cir. 1993).

96. 29 U.S.C. § 160(j).

97. The United States Court of Appeals for the Seventh Circuit considers only whether relief is "just and proper." *Kinney v. Pioneer Press*, 881 F.2d 485 (7th Cir. 1989). Every other circuit to consider the issue uses the two part test, however. See 2 THE DEVELOPING LABOR LAW, *supra* note 1, at 1819-20 and cases cited therein.

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

99. See *Gottfried v. Frankel*, 818 F.2d 485, 493 (6th Cir. 1987); see also *Arlook v. S. Lichtenberg & Co.*, 952 F.2d 367, 371 (11th Cir. 1992); *Pascarella v. Vibra Screw*, 904 F.2d 874, 882 (3d Cir. 1990).

100. *Gottfried*, 818 F.2d at 493; see also *S. Lichtenberg*, 952 F.2d at 371; *Vibra Screw*, 904 F.2d at 882.

101. *S. Lichtenberg*, 952 F.2d at 371; see also *Gottfried*, 818 F.2d at 493; *Vibra Screw*, 904 F.2d at 882.

102. Courts have differed on the proper application of this standard. See 2 THE DEVELOPING LABOR LAW, *supra* note 1, at 1821. Most circuits hold that a showing

cus on this all-important "just and proper" prong of the analysis. Full administrative hearings will follow whether or not an injunction issues. For this reason, Section 10(j) hearings are abbreviated and do not require strict adherence to the Federal Rules of Evidence.¹⁰³ Courts often take live testimony, but they may consider other evidence, such as affidavits¹⁰⁴ and any administrative record or decision.¹⁰⁵

Charging parties have the most to gain from relief granted pursuant to Section 10(j),¹⁰⁶ and they often desire to participate in the district court proceedings to present evidence and argue that a preliminary injunction should be issued. Additionally, the rights to appeal and to participate at circuit court review proceedings may be contingent on participation at the district court level.¹⁰⁷ The participation rights of charging parties at the district court level of Section 10(j) proceedings, therefore, are important as a practical matter.

that preliminary injunctive relief is necessary to prevent frustration of the Board's remedial power is sufficient to satisfy the "just and proper" prong. *Id.* The Second Circuit requires a showing that Section 10(j) relief is necessary to preserve the status quo or to prevent irreparable harm, while the Third Circuit requires that the relief requested be in the public interest, and the Seventh Circuit applies traditional equitable principles to determine whether petitioned for Section 10(j) relief is just and proper. *Id.* and cases cited therein.

103. The court, in its discretion, may even proceed without an evidentiary hearing. See Norris & Shersin, *supra* note 4, at 550 and cases cited therein.

104. See Norris & Shersin, *supra* note 4, at 550 and cases cited.; see also Squillacote v. UAW Local 578, 383 F. Supp. 491, 493 (E.D. Wis. 1974) (deciding that the court may grant or deny injunctive relief under the Act based upon the parties' affidavits).

105. See Seeler v. Trading Port, Inc., 517 F.2d 33, 40 n.11 (2d Cir. 1975) ("On remand, the district court should consider not only the transcript of the hearing . . . but also the findings which have since been made by the administrative law judge, who heard the evidence and observed the demeanor of the witnesses." (citation omitted)); Eisenberg v. Honeycomb Plastics Corp., 125 L.R.R.M. (BNA) 3257, 3262 (D. N.J. 1987) ("the administrative record therefore constitutes an ample statement of the factual allegations so far as they are required for 10(j) purposes") Schneid v. Apple Glass Co., 123 L.R.R.M. (BNA) 2329, 2331 (N.D. Ill. 1986) (decision to issue a 10(j)injunction based "upon [the] Administrative Law Judge[s] Decision and Order."); .

106. Because the Board's remedies are designed to make aggrieved parties whole, see *supra* notes 20, 34 and 74 and accompanying text, any Section 10(j) relief can be expected to benefit charging parties.

107. See Sears, Roebuck & Co. v. Carpet, Linoleum, Soft Tile & Resilient Floor Covering Layers, Local Union No. 419, 410 F.2d 1148, 1151 (10th Cir. 1969) (declining to consider issues raised on appeal by charging party in Section 10(l) proceedings where charging party had not intervened at the district court level and therefore was not a party litigant); McLeod v. Business Machine & Office Appliance Mechanics Conference Bd., Local 459, 300 F.2d 237, 242-43 (2d Cir. 1962) (same).

2. Participation by Charging Parties

The language of Section 10(j) provides that the "Board shall have power" to seek preliminary relief, but it does not specifically indicate whether a private party may petition for an injunction under the Act.¹⁰⁸ The Supreme Court addressed this issue in *Amalgamated Clothing Workers v. Richman Bros.*¹⁰⁹ In *Richman Bros.*, a corporation had instituted a state court lawsuit to prohibit a union from picketing its premises.¹¹⁰ The union then brought an action in federal district court to enjoin the corporation's prosecution of the state court action, contending that the NLRA preempted state court jurisdiction over the matter.¹¹¹ On appeal, the Supreme Court held that even if the NLRA preempted the state court suit, the federal court lacked jurisdiction to enjoin continuation of the state court suit because only the Board or its duly authorized agent may bring an action for injunctive relief under the NLRA.¹¹² The Court considered that Congress had been specific in granting the Board the power to seek injunctions under the Act and concluded that Board institution of Section 10(j) or Section 10(l) proceedings was the sole means by which a federal court could grant preliminary injunctive relief under the Act.¹¹³ In so concluding, the Court noted that "to find exclusive authority for relief vested in the Board and not in private parties accords with other aspects of the Act."¹¹⁴ The Court thereby recognized that the Board's exclusive discretion to bring Section 10(j) proceedings in the preliminary relief stage is closely analogous to the General Counsel's exclusive discretion in the pre-complaint stage.¹¹⁵ Thus, the general rule in the federal labor law scheme is that private parties may not initiate official proceedings against an entity that has violated the Act, but rather a federal agency must take the initial decisive action of commencing proceedings.

Although *Richman Bros.* clearly established that private parties may not institute proceedings for injunctive relief under the NLRA, it did not address the question of whether charging parties may intervene in such proceedings once the Board has brought

108. 29 U.S.C. § 160(j).

109. 348 U.S. 511, 512 (1955).

110. *See id.* at 512.

111. *Id.* at 513.

112. *Id.* at 517.

113. *Id.*

114. *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511, 517 (1955) (citation omitted).

115. *See supra* notes 38-39, 51-53 and accompanying text.

them. While nothing in the text of Section 10(j) specifically permits or prohibits intervention,¹¹⁶ charging parties have relied upon Federal Rule of Civil Procedure 24(a)(2) for the proposition that they have the right to intervene in Section 10(j) proceedings brought by the Board.¹¹⁷

II. Rule 24(a)(2)

Federal Rule of Civil Procedure 24(a)(2), which governs non-statutory intervention as of right, provides that one has the right to intervene in a pending action if one claims an interest in the subject matter of the action that "may" not be adequately represented by existing parties and the disposition of the action may as a practical matter impair or impede the applicant's ability to protect its interest.¹¹⁸ The 1966 amendments to the Federal Rules set forth Rule 24(a)(2) in substantially its present form.¹¹⁹ This revised Rule 24(a)(2) combined the pre-1966 Rules 24(a)(2) and 24(a)(3),¹²⁰ streamlining the requirements for intervention¹²¹ to comport with

116. See 29 U.S.C. § 160(j).

117. See, e.g., *Wilson v. Liberty Homes*, 500 F. Supp. 1120 (W.D. Wis. 1980), *aff'd as modified*, 108 L.R.R.M. (BNA) 2699 (7th Cir. 1981), *vacated as moot*, 673 F.2d 1333 (7th Cir. 1981); *Youngblood v. Scottex*, 80 L.R.R.M. (BNA) 2619 (N.D. Tex. 1972); *Reynolds v. Marlene Indus.*, 250 F. Supp. 722 (S.D.N.Y. 1966).

118. Specifically, Rule 24(a)(2) provides:

(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action:

(2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

FED. R. CIV. P. 24(a).

119. See 3B JAMES W. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 24.01 (2d ed. 1993). The 1966 Rule used the terms "his ability" and "his interest." *Id.* In 1987, Congress replaced these terms with the gender neutral terms "the applicant's ability" and "the applicant's interest." *Id.*

120. The pre-1966 Rule 24(a)(2) provided for intervention of right whenever "the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action." 3B JAMES W. MOORE ET AL., *supra* note 119, ¶ 24.01. Pre-1966 Rule 24(a)(3) additionally entitled applicants to intervene as of right whenever "the applicant is or may be so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof." *Id.*

121. The Advisory Committee notes explain that the "bound by a judgment in the action" language of the pre-1966 Rule 24(a)(2) was an undesirable standard. See FED. R. CIV. P. 24 advisory committee's note to 1966 amendment. The Committee noted that such a standard, if read in the literal *res judicata* sense, would defeat intervention unnecessarily in some cases, such as class actions. *Id.* Additionally, the Committee

the amendments to other Rules.¹²² The advisory committee noted that the revised Rule 24(a)(2) replaced the old Rule's formalistic requirements with an overriding concern for practical considerations.¹²³ The requirements of Rule 24(a)(2) are susceptible to several possible interpretations. MOORE'S FEDERAL PRACTICE sets forth a four-part test for determining whether an applicant may intervene as of right under Rule 24(a)(2).¹²⁴ This Note will use a slightly modified version of Professor Moore's test to evaluate courts' application of Rule 24(a)(2) in the Section 10(j) context.¹²⁵ Under this analysis, an applicant may intervene only if (1) no substantive statute precludes such intervention; (2) the applicant claims a sufficient interest in the proceedings; (3) the applicant's ability to protect its interest may be impaired absent intervention; and (4) the existing parties' representation of the applicant's interest may somehow be inadequate.¹²⁶

noted that the language of the pre-1966 Rule 24(a)(3) "unduly restricted" intervention by requiring that the applicant have an interest in "property" in the custody or control of the court. *Id.* Courts often read this "property" requirement loosely, conceptualizing fictitious "funds" within their control, so as to insure that the Rule would be applied justly. *Id.* (citing *Formulabs, Inc. v. Hartley Pen Co.*, 275 F.2d 52 (9th Cir. 1960) as an example of such loose construction). The "property" requirement therefore was deleted and the remaining provisions of the pre-1966 Rule 24(a)(3) were incorporated into the present Rule 24(a)(2). See FED. R. CIV. P. 24 advisory committee's note to 1966 amendment.

122. Rule 19 (joinder of parties needed for just adjudication) and Rule 23 (class actions) were amended contemporaneously with Rule 24. FED. R. CIV. P. 24 advisory committee notes & 1966 amendment. The Advisory Committee understood intervention of right to be a counterpart to Rule 19(a)(2)(i). *Id.* The Committee reasoned that any party whose protectable interest makes it a necessary party for just adjudication under Rule 19 ought to have the right to intervene in the action on its own motion. *Id.* Additionally, the Committee explained that pre-1966 Rule 24(a)(2)'s requirement that an applicant for intervention be "bound" by the disposition of the action was inconsistent with amended Rule 23(c)(3). *Id.* Revised Rule 24(a)(2), therefore, does not require that an applicant be "bound" by the disposition of the action. *Id.*

123. The Advisory Committee explained that "If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene." FED. R. CIV. P. 24 advisory committee's note to 1966 amendment.

124. 3B JAMES W. MOORE ET AL., *supra* note 119, ¶ 24.07[1].

125. Under Moore's test, an application must "(1) be timely, (2) show an interest in the subject matter of the action, (3) show that the protection of the interest may be impaired by the disposition of the action, and (4) show that the interest is not adequately represented by an existing party." *Id.* This Note's discussion will assume that the timeliness requirement is met in each case and will substitute in the analysis another requisite for Rule 24(a)(2) intervention, one so axiomatic that it was not included in Professor Moore's test: that the governing substantive statute not preclude intervention.

126. See *supra* note 125.

A. General Requirements for Non-Statutory Intervention as of Right

1. No Statutory Preclusion

Where Rule 24(a)(2) intervention would frustrate the purposes of the pertinent substantive statutory law, courts will not allow an applicant to intervene even if he satisfies the Rule's other requirements. Thus, in *Trbovich v. United Mine Workers*,¹²⁷ for example, the Supreme Court granted *certiorari* to determine whether the relevant statute barred intervention.¹²⁸ The Court proceeded with additional Rule 24(a)(2) analysis only after first determining that the substantive statute did not preclude such consideration.¹²⁹ Where, for example, a statute provided that certain entities were not to be parties to a certain type of suit, such an entity could not intervene pursuant to Rule 24(a)(2) because it would frustrate Congressional intent.¹³⁰

2. Sufficiency of Interest

The exact level at which an interest becomes "sufficient" for Rule 24(a)(2) purposes has not been delineated precisely.¹³¹ In many cases, an applicant's interest in the subject matter of an action will be apparent, and the court will not need to inquire further to establish that the interest is sufficient.¹³² On the other hand, an interest that is not related to the matter before the court does not give rise to a right of intervention under Rule 24(a)(2).¹³³ Whether an applicant would have had standing to petition the court for re-

127. 404 U.S. 528, 530 (1971).

128. *Trbovich* involved interpretation of the Title IV of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 481-83 (1988). Title IV sets forth rules for conducting union elections and establishes an enforcement procedure for those rules, which empowers the Secretary of Labor to investigate alleged improprieties and to sue to set aside union elections conducted in violation of the Title. *See id.*; *see also infra* notes 153-85 and accompanying text for a full discussion of the *Trbovich* court's application of Rule 24(a)(2) to the Title IV framework.

129. *Trbovich*, 404 U.S. at 530.

130. The district and circuit courts in the *Trbovich* case held that Title IV of the LMRDA, 29 U.S.C. §§ 481-483 (1988), precluded intervention by charging parties under Rule 24(a)(2), although the Supreme Court reversed this holding on appeal. *Trbovich*, 404 U.S. at 530, 538. Courts have also ruled that Section 10(j) precludes Rule 24(a)(2) intervention by charging parties. *Wilson v. Liberty Homes*, 500 F. Supp. 1120 (W.D. Wis. 1980), *aff'd as modified*, 108 L.R.R.M. (BNA) 2699 (7th Cir. 1981), *vacated as moot*, 673 F.2d 1333 (7th Cir. 1981); *Penello v. Burlington Indus.*, 54 L.R.R.M. (BNA) 2165 (W.D. Va. 1963).

131. *See* 3B JAMES W. MOORE ET AL., *supra* note 119, ¶ 24.07[2].

132. *Id.*

133. *Id.*

lief initially is one factor to consider in determining whether the applicant's interest is sufficient under Rule 24(a)(2).¹³⁴ For example, in *United States v. Imperial Irrigation District*,¹³⁵ the United States Court of Appeals for the Ninth Circuit noted that, although an applicant need not have the standing necessary to initiate a lawsuit in order to intervene, a mere interest in establishing a legal precedent is not sufficient under Rule 24(a)(2).¹³⁶

3. Potential Impairment of Ability to Protect Interest

Rule 24(a)(2) intervention is appropriate only if an applicant's ability to protect his or her interest may be impaired or impeded as a practical matter by the disposition of the action.¹³⁷ This requirement can be interpreted in two ways. Under one reading, the requirement would be met only where the applicant has an enforceable present interest that could be affected adversely by the action.¹³⁸ Charging parties may not institute preliminary injunction proceedings, and, therefore, they arguably do not have an enforceable present interest in the subject matter of Section 10(j) proceedings.¹³⁹ Additionally, charging parties generally stand only to benefit from Section 10(j) proceedings, rather than be damaged by them.¹⁴⁰ Therefore, they would not be able to intervene as of right under this analysis.

An alternative approach considers not whether the applicant for intervention necessarily can be affected adversely by the proceedings, but merely whether, as a practical matter, the proceedings are important to the applicant. Thus, the issue would be whether the disposition of the action may substantially affect the applicant's in-

134. *Id.* Where a party would have had standing to bring suit initially, its interest certainly is sufficient within the meaning of Rule 24(a)(2). *See id.* A party who lacked standing to bring suit initially may nonetheless have a sufficient interest under Rule 24(a)(2), however. *See* 3B JAMES W. MOORE ET AL., *supra* note 119, ¶ 24.07[2].

135. 559 F.2d 509 (9th Cir. 1977), *rev'd and vacated on other grounds*, 447 U.S. 352 (1980).

136. *See id.*

137. FED. R. CIV. P. 24(a)(2).

138. Notably, under the pre-1966 Rule 24(a)(3), intervention required that an applicant stood to "be adversely affected" by the disposition of an action. 3B JAMES W. MOORE ET AL., *supra* note 119, ¶ 24.01. The 1966 amendment eliminated the "adversely affected" requirement in incorporating former Rule 24(a)(3) into the present Rule 24(a)(2). *See id.*

139. *See Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511, 517 (1955).

140. *See supra* note 106 and accompanying text.

terest, either beneficially or adversely.¹⁴¹ Under this interpretation, a charging party, who usually stands to be the primary beneficiary of any Section 10(j) injunctive relief, clearly satisfies the potential impairment step of the Rule 24(a)(2) analysis.

In practicality, the non-issuance of preliminary relief usually will have a substantial adverse impact on the charging party. Thus, a charging party generally would satisfy the potential impairment prong of the intervention analysis under this approach.

The Supreme Court adopted this latter reading of Rule 24(a)(2) in *Trbovich v. United Mine Workers*.¹⁴² Under the Supreme Court's reading of Rule 24(a)(2), the "sufficiency of interest" inquiry subsumes the "potential impairment of interest" prong of the analysis as a matter of practical application,¹⁴³ at least in the context of suits brought by government agencies.¹⁴⁴ The *Trbovich* test¹⁴⁵ accords with the concern expressed by the Federal Rules Advisory Committee in its notes to the 1966 amendments of Rule 24, that absentees should be allowed to intervene where they "would be substantially affected in a practical sense by the determination made in an action."¹⁴⁶ The *Trbovich* Court's analysis there-

141. This emphasis on the practical importance of proceedings to an applicant accords with the Advisory Committee's concern that "[i]f an absentee would be substantially affected in a practical sense by the determination made in the action, he should, as a general rule, be entitled to intervene." FED. R. CIV. P. 24 advisory committee's note to 1966 amendment.

142. 404 U.S. 528, 538 (1972).

143. *Trbovich*, the Court first considered the threshold question of whether intervention was precluded by the substantive statute. *See id.* at 530-36. Then, the Court used a simple two-part test, holding that "Rule 24(a)(2) gives one a right to intervene if (1) he claims a sufficient interest in the proceedings, and (2) that interest is not 'adequately represented by existing parties.'" *Id.* at 538. Essentially, *Trbovich* thereby read out the "potential impairment of interest" prong of Professor Moore's analysis. *Compare id.* (two-step analysis) with 3B JAMES W. MOORE ET AL., *supra* note 119, ¶ 24.07[1] (setting forth a four-part test).

144. The *Trbovich* Court did not limit its analysis to cases involving government agencies. *See Trbovich*, 404 U.S. at 538. However, *Trbovich* was a case brought by the Secretary of Labor in vindication of private statutory rights. *Id.* at 539; *see also infra* note 158 and accompanying text (discussing the facts of *Trbovich*). Moreover, the logic of the Court's test, in practical application, is particularly compelling in the context of suits brought by government agencies. If private party X brings a suit against private party Y and private party Z stands to benefit incidentally if X wins, but can not be made worse off in any event, there is no practical reason why Z should be allowed to intervene because his rights are not at issue. On the other hand, if a government agency brings suit against Y in vindication of Z's statutory rights, practical concerns militate in favor of intervention even though Z may not have had the right to bring suit initially and even though there may not be a possibility that Z can be made worse off as a result of the action.

145. *See supra* note 143 and accompanying text.

146. FED. R. CIV. P. 24 advisory committee's note to 1966 amendment.

fore focuses on whether an action is important to an applicant as a practical matter, rather than on the formalistic distinction between whether the action is important because it might make the applicant worse off as opposed to better off.¹⁴⁷ The *Trbovich* case will be discussed in greater detail below.¹⁴⁸

4. Adequacy of Representation by Existing Parties

The applicant for intervention bears the burden of showing that existing parties' representation of the applicant's interest is or "may be" inadequate, but this burden is "minimal."¹⁴⁹ Inadequacy of representation can be shown, for example, by evidence of collusion between the representative and an opposing party, by evidence that the representative has or represents some interest adverse to that of the applicant, or by evidence that the representative has somehow been lax in representing the applicant's interest.¹⁵⁰ An applicant satisfies this inadequacy of representation requirement where a government agency, acting partly in vindication of private rights, is the purported representative of the applicant's interest.¹⁵¹ Thus, the standard for Rule 24(a)(2) intervention may be less restrictive when one of the existing litigants is a government agency than when only private parties are involved.¹⁵²

147. See *supra* notes 140-42 and accompanying text (discussing the *Trbovich* analysis); *infra* part II.B (same). This construction is not inconsistent with the "impair or impede" language of Rule 24. Even though an applicant might stand only to be made better off by a pending action, the applicant's ability to protect that interest in becoming better off, as a practical matter will be impaired if the government agency loses its attempt to vindicate the applicant's private rights.

148. See *infra* part II.B.

149. See 3B JAMES W. MOORE ET AL., *supra* note 119, ¶ 24.07[4] n.6 (quoting *Trbovich*, 404 U.S. at 538 n.10).

150. See 3B JAMES W. MOORE ET AL., *supra* note 119, ¶ 24.07[4].

151. See *Trbovich v. United Mine Workers*, 404 U.S. 528, 539 (1972). Where a state is a party to a suit involving its sovereign interest, on the other hand, courts presume that it will represent all citizens' interests adequately. See 3B JAMES W. MOORE ET AL., *supra* note 119, ¶ 24.07[4] (citing *United States v. Hooker Chems. & Plastics, Inc.*, 749 F.2d 968 (2d Cir. 1984)).

Where an applicant for intervention has recourse to plenary private remedies, however, its interest in the proceeding may be insufficient for Rule 24 (a)(2) purposes. See *United States v. Allegheny-Ludlum Indus.*, 517 F.2d 826, 844 (5th Cir. 1975).

152. See *supra* note 140 and accompanying text. Under *Trbovich*, courts' primary consideration is the practical importance of the action to the applicant rather than formalistic consideration of whether the action is likely to make the applicant better off or worse off. See *supra* note 139; compare the two-part *Trbovich* test, 404 U.S. at 530, with Moore's four-part test, 3B JAMES W. MOORE ET AL., *supra* note 119, ¶ 24.07[1]. As is noted *supra* note 144, the *Trbovich* Court's simplified test is not specifically restricted to suits involving government but it is particularly sensible in that context.

B. Rule 24(a)(2) in the Federal Labor Law Scheme

The Secretary of Labor (herein Secretary) initiated the case of *Trbovich v. United Mine Workers*¹⁵³ pursuant to Title IV of the Labor-Management Reporting and Disclosure Act of 1959,¹⁵⁴ (herein LMRDA), seeking to set aside a union election. The LMRDA establishes substantive rules that govern union elections and provides a comprehensive enforcement procedure for those rules.¹⁵⁵ Under LMRDA Title IV, a union member aggrieved by election conduct must first seek internal remedies within the union but, thereafter, "may file a complaint with the Secretary of Labor who 'shall investigate' the complaint."¹⁵⁶ If there is probable cause to believe that a violation has occurred, the Secretary may bring a lawsuit in a district court to set aside the election.¹⁵⁷

In *Trbovich*, an aggrieved union member filed a complaint with the Secretary of Labor, and the Secretary subsequently brought suit pursuant to LMRDA Title IV, challenging the results of a union election.¹⁵⁸ The union member then moved to intervene pursuant to Rule 24(a)(2).¹⁵⁹ The district court denied the motion, ruling that because the LMRDA delegated the power to challenge a union election in court exclusively to the Secretary, the union member was barred from intervening.¹⁶⁰ The court of appeals affirmed.¹⁶¹ After analyzing the requirements for intervention, the

Additionally, the "adequacy of representation" analysis is less restrictive of intervention where a government agency is the purported representative of the applicant's interest because agencies do not necessarily adhere to their stated positions and because where an agency brings suit in vindication of private rights as well as in the public interest, the adequacy of its representation of the private party's interest naturally is questionable. See *Trbovich*, 404 U.S. at 537-38; 3B JAMES W. MOORE ET AL., *supra* note 119, ¶ 24.07[4]. In any event, the standard for establishing that existing parties' representation may be inadequate is "minimal." *Trbovich*, 404 U.S. at 538 n.10.

153. 404 U.S. 528 (1972).

154. 29 U.S.C. §§ 401-531 (1988).

155. See *Trbovich* 404 U.S. at 531 (citing LMRDA, 29 U.S.C. §§ 481, 482). Other provisions of the LMRDA guarantee union members the rights of free speech and assembly and the right to sue their union, 29 U.S.C. §§ 411-415 (1988), establish reporting and disclosure rules regarding unions' governing documents and financial activities, 29 U.S.C. §§ 431-441 (1988), establish rules governing the imposition and administration of trusteeship by unions over their subordinate organizations, 29 U.S.C. §§ 461-466 (1988), and impose fiduciary responsibilities upon union officers, 29 U.S.C. §§ 501-504 (1988).

156. *Trbovich*, 404 U.S. at 531 (quoting LMRDA, 29 U.S.C. § 482).

157. See *Trbovich*, 404 U.S. at 531.

158. *Id.* at 529.

159. *Id.*

160. *Id.* at 530.

161. *Id.*

Supreme Court remanded the case to the district court with instructions to grant the union member's Rule 24(a)(2) motion to intervene.¹⁶² The Court examined each of the four requirements for Rule 24(a)(2) intervention in reaching its decision.

1. *No Statutory Preclusion*

At the outset, the Court considered whether the governing substantive statute precluded intervention altogether.¹⁶³ LMRDA Title IV gives the Secretary the "exclusive" right to bring suit to set aside elections already conducted,¹⁶⁴ while the enforcement framework with regard to elections already conducted assigns private parties only the *de minimis* role of filing a complaint with the Secretary after first exhausting internal union remedies.¹⁶⁵ Moreover, Congress's avowed purpose for assigning private parties such a minor role in Title IV's enforcement framework was to insulate unions from non-meritorious private lawsuits.¹⁶⁶ Specifically, the *Trbovich* Court noted that Congress intended to prevent private parties "from pressing claims not thought meritorious by the Secretary, and from litigating in forums or at times different from those chosen by the Secretary."¹⁶⁷ For this reason, the Supreme Court, in *Calhoon v. Harvey*,¹⁶⁸ had held that the LMRDA prohibits private parties from bringing lawsuits for the purpose of setting aside a union election. Nevertheless, the *Trbovich* Court concluded that Title IV does not prohibit *intervention* by private parties unless intervention would frustrate the purposes of that Title entirely.¹⁶⁹

The Court then took into account that intervention would not subject defendants to any great inconvenience and that nothing in the statute specifically prohibited intervention,¹⁷⁰ and therefore determined that the Title could accomplish its purposes even if union members intervened in actions brought by the Secretary.¹⁷¹

162. See *Trbovich*, 404 U.S. at 530.

163. *Id.* at 532-37.

164. 29 U.S.C. § 483 (1988).

165. See *Trbovich v. United Mine Workers*, 404 U.S. at 531 (citing LMRDA, 29 U.S.C. § 482). A bona-fide candidate for union office may bring suit privately to enforce Title IV's pre-election requirements, however. See *Calhoon v. Harvey*, 379 U.S. 134, 140 n.13 (1964) (citing LMRDA § 401(c)).

166. See *Trbovich*, 404 U.S. at 530-36 (discussing legislative history).

167. *Trbovich*, 404 U.S. at 536.

168. 379 U.S. 134, 140 (1964).

169. See *Trbovich*, 404 U.S. at 536.

170. *Id.*

171. *Id.*

Accordingly, the Court proceeded with the Rule 24(a)(2) analysis.¹⁷²

2. *Sufficiency of Interest*

The Court then determined that the union member's interest in the subject matter of the action was sufficient for purposes of Rule 24(a)(2).¹⁷³ The Court made it clear that the individual's interest stemmed from the fact that it was *his rights* that were at issue in the lawsuit, and it was *he* who stood to benefit if the Secretary prevailed.¹⁷⁴ The Court pointed out that although the Act did not give the individual a separate right of suit, it did give him rights to be enforced by the Secretary.¹⁷⁵ Thus, the Court concluded that the applicant's interest was sufficient for Rule 24(a)(2) purposes because the Secretary had brought suit in vindication of the applicant's statutory rights.¹⁷⁶

3. *Potential for Impairment*

The *Trbovich* Court's test for Rule 24(a)(2) intervention has only two prongs.¹⁷⁷ The Court flatly stated "Rule 24(a)(2) gives one a right to intervene if (1) he claims a sufficient interest in the proceedings, and (2) that interest is not 'adequately represented by existing parties.'"¹⁷⁸ While the Rule requires that the applicant be "so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect [the applicant's] interest,"¹⁷⁹ the *Trbovich* Court's two-part test treats potential impairment of the applicant's interest as a factor in determining whether the interest is substantial.¹⁸⁰ The applicant in *Trbovich* did not have the right to bring suit, and he stood only to benefit from the disposition of the action.¹⁸¹ Nevertheless, the Court held that the requirements for Rule 24(a)(2) intervention were met.¹⁸² The Court clearly recognized that, because the applicant's statutory rights were the basis of the litigation, the appli-

172. *Id.*

173. *Id.* at 538-39.

174. *See Trbovich*, 404 U.S. at 538.

175. *Id.* at 539.

176. *Id.*

177. *Id.* at 538.

178. *Trbovich*, 404 U.S. at 538 (quoting FED. R. Crv. P. 24(a)).

179. FED. R. Crv. P. 24(a)(2).

180. *See Trbovich*, 404 U.S. at 538.

181. *Id.* at 530-31.

182. *Id.* at 539.

cant's ability to protect his interest in having those rights enforced, *a fortiori*, could be impaired by the outcome of the action.

4. *Inadequacy of Representation*

Turning to the inadequacy of representation prong of the Rule 24(a)(2) intervention analysis, the Court explained that the Secretary acts as a "lawyer" for purposes of enforcing individuals' Title IV rights, and that this alone was enough to show that the Secretary's representation of the applicant's interest "may be" inadequate within the meaning of Rule 24(a)(2).¹⁸³ The Court noted that the inadequate representation "requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal."¹⁸⁴ The Court therefore held that the applicant had satisfied the inadequate representation prong of its test.¹⁸⁵

III. Application of Rule 24(a)(2) to Section 10(j) Proceedings

Because of the similarities between Section 10(j) NLRA proceedings and Title IV LMRDA proceedings, one might expect that Rule 24(a)(2) entitles charging parties to intervene in Section 10(j) proceedings just as they can in Title IV LMRDA proceedings. However, the majority¹⁸⁶ of courts to rule directly on the issue have denied charging parties' Rule 24(a)(2) motions to intervene in Section 10(j) proceedings. One court,¹⁸⁷ on the other hand, held that Rule 24(a)(2) entitled the charging party to intervene in a Section 10(j) proceeding. Additionally, in some Section 10(j) cases, charging parties have intervened without the court's published opinion

183. *Trbovich*, 404 U.S. at 538-39 (quoting FED. R. Civ. P. 24(a)). It is important to keep in mind that an existing parties' representation of the applicant's interest need not necessarily be inadequate for Rule 24(a)(2) intervention to be appropriate, so long as there is at least the possibility that the applicant's interest "may be" inadequate.

184. *Trbovich*, 404 U.S. at 538 n.10.

185. *See id.* at 539.

186. *Wilson v. Liberty Homes*, 500 F. Supp. 1120 (W.D. Wis. 1980), *aff'd as modified*, 108 L.R.R.M. (BNA) 2699 (7th Cir. 1981), *vacated as moot*, 673 F.2d 1333 (7th Cir. 1981); *Squillacote v. UAW Local 578*, 383 F. Supp. 491, 492-93 (E.D. Wis. 1974); *Boire v. Pilot Freight Carriers*, 86 L.R.R.M. (BNA) 2976 (M.D. Fla. 1974), *aff'd*, 515 F.2d 1185 (5th Cir. 1975); *Reynolds v. Marlene Indus.*, 250 F. Supp. 722 (S.D.N.Y. 1966); *Penello v. Burlington Indus.*, 54 L.R.R.M. (BNA) 2165 (W.D. Va. 1963); *see also Solien v. Miscellaneous Drivers & Helpers Union, Local No.610*, 440 F.2d 124, 132 (8th Cir. 1971) (affirming district court's denial of intervention in Section 10(l) case); *Phillips v. United Mine Workers*, 218 F. Supp. 103 (E.D. Tenn. 1963) (denying intervention in Section 10(l) case).

187. *Youngblood v. Scottex*, 80 L.R.R.M. (BNA) 2619 (N.D. Tex. 1972).

specifically addressing whether Rule 24(a)(2) entitled them to intervene as of right.¹⁸⁸

Charging parties desire to intervene in Section 10(j) proceedings in order to offer evidence and argument in favor of the issuance of injunctive relief and in order to secure appeal rights in the event that relief is denied at the district court level.¹⁸⁹ However, because of the relative infrequency with which Section 10(j) cases have been brought until recently and because charging parties generally will not urge intervention so emphatically as to appear at serious odds with the Board, there is no over-abundance of reported cases on the issue. Intervention issues routinely arise in Section 10(j) cases though,¹⁹⁰ and courts have disagreed about the proper intervention analysis to use.¹⁹¹

A. The Majority Approach

Five reported district court opinions have denied charging parties' Rule 24(a)(2) motions to intervene in Section 10(j) proceedings, some of them basing their denials on more than one

188. See, e.g., *Pascarell v. Vibra Screw*, 904 F.2d 874 (3d Cir. 1990); *Advertisers Mfg. Co. v. NLRB*, 677 F.2d 544 (7th Cir. 1982); *Scott v. Toyota of Berkely, Inc.*, 106 L.R.R.M. 2070 (N.D. Cal. 1980); *Seeler v. Williams*, 97 L.R.R.M. (BNA) 2765 (N.D.N.Y. 1977).

189. See *supra* notes 106-07 and accompanying text.

190. See, e.g., *Clark v. Fieldcrest Cannon, Inc.* transcript of June 23, 1994 hearing, Civil No. 4:94 cv00308 (M.D.N.C. June 23, 1994) (denying labor union's Rule 24 (a) (2) motion to intervene in Section 10 (j) proceeding but granting labor union's alternative motion to appear as *amicus curiae*); *Garner v. MacClenny Products, Inc.*, Case No. 94-604-CIV-J 20 (M.D. Fla. 1994) (labor union permitted to appear as *amicus curiae* in Section 10 (j) case); *Arlook v. S. Lichtenberg & Co.*, Civil No. CVI 90-226 (S.D. Ga. 1990) (NLRB opposes labor union's Rule 24 (a) (2) motion to intervene in Section 10 (j) proceeding but does not object to the union's alternative motion to participate as *amicus curiae*; see also *Pascarell v. Vibra Screw*, 904 F.2d 874 (3d Cir. 1990) (labor union appears as intervenor in Section 10 (j) case although published opinion does not address the intervention issue).

191. Compare *Youngblood v. Scottex*, 80 L.R.R.M. (BNA) 2619 (N.D. Tex. 1972) (granting charging parties motion to intervene); *Pascarell v. Vibra Screw*, 904 F.2d 874 (3d Cir. 1990) (permitting intervention but not discussing grounds therefor in reported opinion); *Advertisers Mfg. Co. v. N.L.R.B.*, 677 F.2d 544 (7th Cir. 1982) (same); *Scott v. Toyota of Berkely, Inc.*, 106 L.R.R.M. 2070 (N.D. Cal. 1980) (same) and *Seeler v. Williams*, 97 L.R.R.M. (BNA) 2765 (N.D.N.Y. 1977) (same) with *Wilson v. Liberty Homes*, 500 F. Supp. 1120 (W.D. Wis. 1980), *aff'd as modified*, 108 L.R.R.M. (BNA) 2699 (7th Cir. 1981), *vacated as moot*, 673 F.2d 1333 (7th Cir. 1981) (denying charging party's motion to intervene); *Squillacote v. UAW Local 578*, 383 F. Supp. 491, 492-93 (E.D. Wis. 1974) (same); *Boire v. Pilot Frieght Carriers*, 86 L.R.R.M. (BNA) 2976 (M.D. Fla. 1974), *aff'd*, 515 F.2d 1185 (5th Cir. 1975) (same); *Reynolds v. Marlene Indus.*, 250 F. Supp. 722 (S.D.N.Y. 1966) (same) and *Penello v. Burlington Indus.*, 54 L.R.R.M. (BNA) 2165 (W.D. Va. 1963) (same).

ground.¹⁹² Two courts denied intervention on grounds that the provisions of Section 10(j) preclude consideration of the Section 24(a)(2) analysis.¹⁹³ Another court concluded that the charging party's interest in the proceeding was insufficient for Rule 24(a)(2) intervention purposes.¹⁹⁴ Two courts concluded that Rule 24(a)(2) intervention would be inappropriate in any event because the charging party's ability to protect its interest did not stand to be impaired or impeded by the pending action.¹⁹⁵ Finally, four of the five courts to deny intervention concluded that the Board's representation of the charging party's interest was adequate under Rule 24(a)(2).¹⁹⁶

1. Statutory Preclusion

Although the intervention discussed herein is premised on the Federal Rules of Civil Procedure rather than on the provisions of Section 10 of the NLRA, intervention obviously would be impermissible notwithstanding Rule 24(a)(2) if Section 10(j) specifically prohibited it.¹⁹⁷ In *Wilson v. Liberty Homes*,¹⁹⁸ the Western District of Wisconsin concluded that Section 10(j) prohibits Rule 24(a)(2) intervention. The *Wilson* court noted that whereas Section 10(l) provides that the charging party may "appear by counsel and present any relevant testimony," in preliminary injunction actions instituted by the Board,¹⁹⁹ Section 10(j) does not specifically grant charging parties any rights of participation.²⁰⁰ The court therefore inferred that Congress intended to exclude charging parties "from any form of participation in § 10(j) actions."²⁰¹

192. *Wilson v. Liberty Homes*, 500 F. Supp. 1120 (W.D. Wis. 1980), *aff'd as modified*, 108 L.R.R.M. (BNA) 2699 (7th Cir. 1981), *vacated as moot*, 673 F.2d 1333 (7th Cir. 1982); *Squillacote v. UAW Local 578*, 383 F. Supp. 491, 492-93 (E.D. Wis. 1974); *Boire v. Pilot Freight Carriers*, 86 L.R.R.M. (BNA) 2976 (M.D. Fla. 1974), *aff'd*, 515 F.2d 1185 (5th Cir. 1975); *Reynolds v. Marlene Indus.*, 250 F. Supp. 722 (S.D.N.Y. 1966); *Penello v. Burlington Indus., Inc.*, 54 L.R.R.M. (BNA) 2165 (W.D. Va. 1963).

193. See *Wilson v. Liberty Homes*, 500 F. Supp. 1120, 1123 (W.D. Wis. 1980), *aff'd as modified*, 108 L.R.R.M. (BNA) 2699 (7th Cir. 1981), *vacated as moot*, 673 F.2d 1333 (7th Cir. 1982); *Penello*, 54 L.R.R.M. (BNA) at 2165.

194. See *Squillacote v. UAW Local 578*, 383 F. Supp. 491, 492-93 (E.D. Wis. 1974).

195. See *Wilson*, 500 F. Supp. at 1123; *Reynolds v. Marlene Indus.*, 250 F. Supp. 722 (S.D.N.Y. 1966).

196. See *Squillacote*, 383 F. Supp. at 492-93; *Boire*, 86 L.R.R.M. (BNA) at 2978; *Reynolds*, 250 F. Supp. at 722; *Penello*, 54 L.R.R.M. (BNA) at 2165.

197. See *supra* notes 127-30, and accompanying text.

198. 500 F. Supp. 1120, 1123 (W.D. Wis. 1980), *aff'd as modified*, 108 L.R.R.M. (BNA) 2699 (7th Cir. 1981), *vacated as moot*, 673 F.2d 1333 (7th Cir. 1982).

199. 29 U.S.C. § 160(l).

200. See 29 U.S.C. § 160(j).

201. *Wilson*, 500 F. Supp. at 1124.

The conclusion that charging parties may not participate in Section 10(j) proceedings is bolstered by the conclusions of other courts that even Section 10(l) does not grant charging parties the right to intervene. In *Hirsch v. Building & Construction Trades Council*,²⁰² the United States Court of Appeals for the Third Circuit denied a charging party's motion to intervene in a Section 10(l) case. The *Hirsch* court noted that, because Section 10(l) (like Section 10(j)) is an exception to the general rule that federal courts may not enjoin labor disputes,²⁰³ it should be construed narrowly.²⁰⁴ The court concluded that although Section 10(l) entitles charging parties to "appear by counsel and present any relevant testimony," it does not entitle them to intervene.²⁰⁵

In *Penello v. Burlington Industries*,²⁰⁶ the Western District of Virginia determined that intervention would interfere with the exclusive jurisdiction of the Board to prosecute unfair labor practices. Partially for this reason, the *Penello* court denied the charging party's motion to intervene.²⁰⁷ It is important to note that both the *Wilson* and *Penello* analyses go a step beyond concluding that the statute *does not grant* charging parties the right to intervene. The cases actually hold that the statute precludes intervention in Section 10(j) proceedings under any circumstances.

2. Sufficiency of Interest

In *Reynolds v. Marlene Industries*,²⁰⁸ the Southern District of New York determined that Rule 24(a)(2) "presupposes a right in

202. 530 F.2d 298, 307-08 (3d Cir. 1976).

203. See *Hirsch v. Building & Construction Trades Council*, 530 F.2d 298, 307-08 (3d Cir. 1976) (citing Norris-LaGuardia Act, 29 U.S.C. § 101).

204. See *Hirsch*, 530 F.2d at 307-08.

205. *Id.*; see also *Sears, Roebuck & Co. v. Carpet, Linoleum, Soft Tile & Resilient Floor Covering Layers, Local Union No. 419*, 410 F.2d 1148, 1151 (10th Cir. 1969) (declining to consider issues raised on appeal by charging party in Section 10(l) proceedings where charging party had not intervened and therefore was not a party litigant); *McLeod v. Business Machine & Office Appliance Mechanics Conference Bd., Local 459*, 300 F.2d 237, 242-43 (2d Cir. 1962) (same). In addition, in *Solien v. Miscellaneous Drivers & Helpers Union, Local No. 610*, 440 F.2d 124 (8th Cir. 1971), the United States Court of Appeals for the Eighth Circuit affirmed a district court's denial of Rule 24(a)(2) intervention in a Section 10(l) case. As is discussed *infra* notes 216, 257-58 and accompanying text, the *Solien* court's stated reasons for affirming the district court's denial of intervention are of questionable continuing validity. The fact that a circuit court denied intervention under Section 10(l) despite the fact that the Section guarantees charging parties some rights of participation, however, is somewhat supportive of the notion that Section 10(j) prohibits intervention.

206. 54 L.R.R.M. (BNA) 2165 (W.D. Va. 1963).

207. *Id.*

208. 250 F. Supp. 722 (S.D.N.Y. 1966).

the applicant to maintain a claim in this court for relief."²⁰⁹ Given this premise, the court held that because charging parties lack the right to initiate Section 10(j) proceedings,²¹⁰ they also lack a sufficient interest to intervene as of right under Rule 24(a)(2).²¹¹ The *Reynolds* court, therefore, denied intervention.²¹²

In *Squillacote v. UAW Local 578*,²¹³ the court stated that "intervention as of right presupposes that an applicant has a right to maintain a claim for the relief sought."²¹⁴ The *Squillacote* court therefore denied the charging party's motion to intervene as well.²¹⁵ The *Squillacote* court's analysis is suspect, however, because it relies primarily upon cases that were decided before the Supreme Court's decision in *Trbovich* and before important changes were made to Rule 24(a)(2).²¹⁶ The *Squillacote* court made no attempt to reconcile its determination that an applicant must have the right to maintain a claim for relief in court in order to intervene under Rule 24(a)(2) with the Supreme Court's contrary holding granting the Rule 24(a)(2) motion to intervene of an applicant who had no right to maintain a claim in court for the relief sought.²¹⁷

209. *Id.* at 724.

210. *See id.* at 723 (citing *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511, 517 (1955)).

211. *See Reynolds v. Marlene Indus.*, 250 F. Supp. 722, 724 (S.D.N.Y. 1966).

212. *Id.*

213. 383 F. Supp. 491, 492-93 (E.D. Wis. 1974).

214. *Id.* (citing *Solien v. Miscellaneous Drivers & Helpers Union, Local No. 610*, 440 F.2d 124 (8th Cir. 1971)).

215. *Squillacote*, 383 F. Supp. at 492.

216. The *Squillacote* court relied upon *Solien v. Miscellaneous Drivers & Helpers Union, Local No. 610*, 440 F.2d 124, 132 (8th Cir. 1971), for the proposition that the Rule presupposes a right to maintain a claim in court. *See Squillacote*, 383 F. Supp. at 492 (citing *Solien*, 440 F.2d at 132). In *Solien*, the Eighth Circuit had relied upon *Reynolds* for the proposition that an applicant may intervene pursuant to Rule 24(a)(2) only if he or she could have brought the suit initially. *See Solien*, 440 F.2d at 132 (citing *Reynolds v. Marlene Indus.*, 250 F. Supp. 722, 724 (S.D.N.Y. 1966)).

Notably, *Reynolds* was decided under the former Rule 24(a)(2) and before *Trbovich*. *Reynolds* was decided in 1966 under the former Rule 24(a), under which an applicant could intervene only if the applicant potentially could be "bound by a judgment in the action." *Reynolds*, 250 F. Supp. at 723 (quoting FED. R. CIV. P. 24(a)(2)). *Trbovich* was decided in 1972 under the revised Rule 24(a)(2), which presently exists in substantially the same form. *See Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.9 (1972) (quoting FED. R. CIV. P. 24(a)(2), which has changed since the time *Trbovich* was decided only in that masculine possessive personal pronouns have been replaced with gender neutral terminology).

Solien also pre-dated *Trbovich*. *See Solien v. Miscellaneous Drivers & Helpers Union, Local No. 610*, 440 F.2d 124 (8th Cir. 1971).

217. *See Squillacote v. UAW Local 578*, 383 F. Supp. 491, 492 (E.D. Wis. 1974); *Trbovich*, 404 U.S. at 539.

3. *Potential Impairment of Interest*

Besides holding that Section 10(j) precluded further consideration of the Rule 24(a)(2) intervention analysis, the *Wilson* court held that, in any event, the charging party was not entitled to intervene under Rule 24(a)(2) because it could only benefit from the Section 10(j) action.²¹⁸ Specifically, the court stated, "In this case there is no possibility that the outcome will adversely affect the union's ability to protect its interests."²¹⁹ Under the *Wilson* court's analysis, Rule 24(a)(2) entitles an applicant to intervene only if the pending action potentially can make the applicant worse off.

4. *Adequacy of the Board's Representation*

Besides determining that the charging party's interest was insufficient under Rule 24(a)(2), because "the only real interest intended to be protected by Section 10(j) is the public's interest," the court in *Squillacote* further concluded that the Board's representation was adequate.²²⁰ The court therefore denied the charging party's Rule 24(a)(2) motion on that ground as well.²²¹ Similarly, in *Boire v. Pilot Freight Carriers*,²²² the court denied a Rule 24(a)(2) motion to intervene on the ground that "to the extent that [the charging parties] are attempting here to protect their Section 7 rights, their interest is adequately represented by the Board."²²³ In *Reynolds*, the court concluded that because the Board was "possessed of expertise developed over the years," it would adequately represent the applicant's interest.²²⁴ Finally, in *Penello*, the court concluded that the Board "had not been neglectful in pursuing and protecting the interests of labor," and therefore denied intervention on grounds that the Board's representation was adequate.²²⁵

B. *The Scottex Approach*

In *Youngblood v. Scottex*,²²⁶ the NLRB instituted Section 10(j) injunction proceedings against an employer pursuant to charges by

218. See *Wilson v. Liberty Homes*, 500 F. Supp. 1120, 1123 (W.D. Wis. 1980), *aff'd as modified*, 108 L.R.R.M. (BNA) 2699 (7th Cir. 1981), *vacated as moot*, 673 F.2d 1333 (7th Cir. 1982).

219. *Wilson*, 500 F. Supp. at 1123.

220. *Squillacote*, 383 F. Supp. at 492-93.

221. *Id.*

222. 86 L.R.R.M. (BNA) 2976, 2978 (M.D. Fla. 1974).

223. *Id.*

224. *Reynolds v. Marlene Indus.*, 250 F. Supp. 722, 724 (S.D.N.Y. 1966).

225. *Penello v. Burlington Indus.*, 54 L.R.R.M. (BNA) 2165 (W.D. Va. 1963).

226. 80 L.R.R.M. (BNA) 2619 (N.D. Tex. 1972).

the International Ladies Garment Workers Union that the employer had engaged in unfair labor practices. The charging union then moved to intervene in the Section 10(j) proceeding, relying upon Rule 24(a)(2) of the Federal Rules of Civil Procedure.²²⁷ The United States District Court for the Northern District of Texas determined that Rule 24(a)(2) does entitle charging parties to intervene in Section 10(j) cases. The court began its discussion of the governing law by noting the Supreme Court's ruling in *UAW Local 283 v. Scofield*,²²⁸ that charging parties are entitled to intervene in all Section 10(f) circuit court reviews of final Board orders, even though Section 10(f) does not expressly provide charging parties such broad rights of participation. The *Scofield* case stands for the proposition that charging parties should be accorded broad participation rights in federal court unfair labor practice proceedings even where no statutory authority expressly entitles them to such participation.²²⁹ Moreover, *Scofield* demonstrates that charging parties have an interest in federal court proceedings to enforce the Act.²³⁰

The *Scottex* court continued its discussion by noting the Supreme Court's *Trbovich* decision granting an individual charging party's Rule 24(a)(2) motion to intervene in an action brought by the Secretary of Labor to enforce the charging party's statutory labor law rights.²³¹ The *Scottex* court observed that although the *Solien v. Miscellaneous Drivers & Helpers Union, Local No. 610* and *Reynolds v. Marlene Industries* decisions militated against granting intervention, their holdings were at odds with the Supreme Court's holding in *Trbovich*.²³² The *Scottex* court determined that the holding in *Trbovich* was "controlling" and therefore granted the charging party's Rule 24(a)(2) motion to intervene.²³³ By analyzing the Supreme Court jurisprudence regarding participation issues arising from analogous labor law provisions, the *Scottex* court recognized the consistent treatment of private parties by the federal labor law scheme. Where government agencies are charged with enforcing labor law statutes, private parties may not bring formal proceed-

227. *Id.* at 2619-20.

228. 382 U.S. 205, 222 (1965).

229. *See id.*

230. *See Scottex*, 80 L.R.R.M. (BNA) at 2619 (citing *Scofield*, 382 U.S. 205).

231. *See Scottex*, 80 L.R.R.M. (BNA) at 2619-20 (citing *Trbovich v. United Mine Workers*, 404 U.S. 528 (1972)).

232. *Scottex*, 80 L.R.R.M. (BNA) at 2620.

233. *Id.*

ings, but the law nevertheless accords them full rights of participation and appeal once a government agency initiates proceedings.²³⁴

C. Why the *Scottex* Rule is Correct

The text of Rule 24(a)(2) and the Supreme Court's *Trbovich* decision interpreting that Rule are the controlling authorities. The statute and enforcement scheme at issue in the *Trbovich* case are closely analogous to the Section 10(j) framework. The Secretary enforces LMRDA rights in the election context, while the Board enforces NLRA Section 7 rights.²³⁵ The union member in *Trbovich* lacked the right to enforce his LMRDA rights by suit, just as employees lack the right to institute injunction proceedings to enforce their Section 7 rights.²³⁶ In both the LMRDA and Section 10(j) contexts, the government agency bringing suit does so not only in the public interest but also in vindication of employees' private rights.²³⁷ In this sense, the Board acts as the "lawyer" for charging parties in Section 10(j) cases just as the Secretary acts as a lawyer for aggrieved union members in LMRDA Title IV cases like *Trbovich*.²³⁸ Thus, all the factors upon which the Supreme Court relied to determine that Rule 24(a)(2) intervention was appropriate in *Trbovich* are at work here.

Additionally, Rule 24(a)(2) intervention in Section 10(j) cases is consistent with the scheme Congress envisioned when it enacted the NLRA. In the pre-complaint stage, charging parties do not have extensive rights of participation; they cannot cause formal unfair labor practice proceedings to commence.²³⁹ Rather, the General Counsel has discretion whether or not to take the decisive step of issuing a complaint.²⁴⁰ Once the General Counsel issues a complaint, however, the charging party becomes virtually a full partner

234. Accordingly, while only the Board's General Counsel, and not charging parties, may institute formal unfair labor practice proceedings, charging parties have full rights of participation and appeal in all subsequent unfair labor practice proceedings for permanent relief. See *supra* part I. Additionally, while only the Secretary of Labor and not charging parties may institute LMRDA Title IV actions to set aside union elections, charging parties are entitled to become full parties pursuant to Rule 24(a)(2) once the Secretary initiates such an action. See *Trbovich*, 404 U.S. at 539.

235. See 29 U.S.C. § 160 (1988); *Trbovich*, 404 U.S. at 531 (discussing LMRDA enforcement framework).

236. See *Calhoon v. Harvey*, 379 U.S. 134, 140 (1964); *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511, 517 (1955).

237. Compare *Trbovich*, 404 U.S. at 539 with Section 10's enforcement scheme for employees' Section 7 rights, 29 U.S.C. §§ 157, 160 (1988).

238. See *Trbovich v. United Mine Workers*, 404 U.S. 528, 539 (1972).

239. See *supra* notes 43-49 and accompanying text.

240. See *supra* note 49 and accompanying text.

in terms of its right to participate and appeal throughout the administrative processes and any appellate court review.²⁴¹

In both the LMRDA Title IV context and the NLRA administrative proceedings context, like the Section 10(j) context, some initial decisive government agency action is a prerequisite for the private party to obtain relief.²⁴² Such schemes serve the purpose of insulating purported wrongdoers from frivolous litigation.²⁴³ Where the government agency brings an action, further insulation of the purported wrongdoer is unnecessary.²⁴⁴ Accordingly, charging parties can intervene under Rule 24(a)(2) in LMRDA Title IV actions instituted by the Secretary²⁴⁵ and charging parties are accorded full rights of participation and appeal in post-complaint unfair labor practice proceedings that seek permanent relief.²⁴⁶ Thus, the pervading participation framework in the federal labor law scheme is consistent with charging parties being allowed to intervene in Section 10(j) proceedings brought by the Board.

The Rule 24(a)(2) analysis that follows demonstrates that, besides the fact that allowing charging parties to intervene is sensible, all of the factors required for Rule 24(a)(2) intervention generally are present in the Section 10(j) context.

1. *No Statutory Preclusion*

Nothing in Section 10(j) specifically prohibits intervention.²⁴⁷ Unless intervention would frustrate the purposes of Section 10(j), therefore, the statute should not be read to prohibit intervention.²⁴⁸ Intervention would not frustrate Section 10(j)'s purpose that the Board have the exclusive right in unfair labor practice cases to initiate proceedings for injunctive relief, nor would intervention subject charged parties to burdensome multiple litigation

241. See *supra* notes 50-58, 74-75 and accompanying text.

242. See *supra* notes 78-79 and accompanying text (the Board's General Counsel has exclusive discretion to initiate formal unfair labor practice proceedings); *supra* notes 164-68 and accompanying text (Secretary of Labor has exclusive discretion to bring suit to enforce Title IV LMRDA rights in post-election setting); *supra* notes 105-09 and accompanying text (the Board has exclusive discretion to institute Section 10(j) proceedings).

243. See *Trbovich v. United Mine Workers*, 404 U.S. 528, 536 (1972).

244. *Id.* (noting that a defendant already subjected to suit is burdened only slightly more to defend against two plaintiffs instead of one).

245. *Id.* at 539.

246. See *supra* notes 54-67, 78-79 and accompanying text.

247. See 29 U.S.C. § 160(j).

248. See *Trbovich*, 404 U.S. at 536.

or to new and potentially groundless lawsuits.²⁴⁹ Although Section 10(l) guarantees charging parties the right to appear by counsel and present evidence, and Section 10(j) provides no such guarantees, this merely indicates that Section 10(j) does not *itself* provide a right to intervene. The statutory analysis does not lend an inference that Section 10(j) actually *prohibits* Rule 24(a) intervention.²⁵⁰

Moreover, the *Penello* court's conclusion that granting intervention would interfere with the Board's exclusive jurisdiction to prosecute unfair labor practices²⁵¹ ignores that the Board would still have exclusive authority of whether to institute Section 10(j) proceedings in the first instance.²⁵² It also ignores that the federal labor law scheme generally allows aggrieved parties extensive rights of participation once a government agent has taken some definitive initial action.²⁵³ For example charging parties have *de minimis* rights of participation and appeal in the pre-complaint stage of unfair labor practice proceedings, yet they enjoy extensive rights at all subsequent administrative and court proceedings for permanent relief.²⁵⁴ Likewise, Title IV of the LMRDA allows the Secretary substantial discretion as to whether to bring suit to set aside a union election, but, according to the Supreme Court's holding in *Trbovich*, Rule 24(a)(2) allows the aggrieved party to intervene as of right once the Secretary proceeds with such an action.²⁵⁵ A similar result is required in this context, where the Board has discretion to commence Section 10(j) proceedings; the charging party should be allowed to intervene in the proceedings once they are brought.

249. *Id.*

250. The distinction between Section 10(j) and 10(l) is still meaningful. If the federal rules were altered, for example, charging parties might be without any right of participation in Section 10(j) proceedings, while their counterparts in Section 10(l) proceedings would still be guaranteed the right to appear by counsel and offer testimony.

251. See *Penello v. Burlington Indus.*, 54 L.R.R.M. 2165 (W.D. Va. 1963).

252. See *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511, 517 (1955).

253. See *supra* part I.B. (discussing charging parties rights in post-complaint proceedings for permanent relief); *Trbovich*, 404 U.S. at 539 (charging party entitled to intervene as of right once the Secretary of Labor has initiated Title IV LMRDA suit to set aside a union election).

254. See *supra* part I.A.; part I.B.

255. See *Trbovich*, 404 U.S. at 539; *Calhoon v. Harvey*, 379 U.S. 134, 140 (1964).

2. Sufficient Interest

Courts that have concluded that an applicant must have had a right initially to maintain an action for relief²⁵⁶ are in direct conflict with the Supreme Court's holding in *Trbovich*. For example, the *Squillacote* court's conclusion that "intervention as of right presupposes that an applicant has a right to maintain a claim for the relief sought"²⁵⁷ is contrary to the Supreme Court's holding in *Trbovich*, namely that an applicant was entitled to intervene as of right even though he did not have an independent right to maintain a claim for relief in the court.²⁵⁸ In the Section 10(j) context, it is the charging party's rights that the Board seeks to enforce, and the charging party has the most to gain should relief be granted.²⁵⁹ The charging party's interest, therefore, is clearly sufficient under the governing law.

3. Potential Impairment of Interest

Charging parties have an obvious interest in the outcome of Section 10(j) proceedings: they stand to be the primary beneficiary of whatever relief the court issues.²⁶⁰ Although a charging party may not be likely to be affected adversely by the proceedings, the applicant's ability to protect its interest in benefitting from a Section 10(j) injunction is impaired if the Board's petition for relief is denied. In any event, under the *Trbovich* test, formulated by the Supreme Court to address an issue closely analogous to the one involved here,²⁶¹ the "potential impairment" prong of the analysis

256. See, e.g., *Squillacote v. UAW Local 578*, 383 F. Supp. 491, 492 (E.D. Wis. 1974); *Reynolds v. Marlene Indus.*, 250 F. Supp. 722 (S.D.N.Y. 1966).

257. *Squillacote*, 383 F. Supp. at 492. As is noted *supra* note 216 and accompanying text, *Squillacote* relied on *Solien v. Miscellaneous Drivers & Helpers Union, Local No. 610*, 440 F.2d 124, 132 (8th Cir. 1971), for this proposition. See *Squillacote*, 383 F. Supp. at 492 (citing *Solien*, 440 F.2d at 132). *Solien*, in turn, had relied on *Reynolds v. Marlene Indus.*, 250 F. Supp. 722, 724 (S.D.N.Y. 1966). See *Solien*, 440 F.2d at 132 (citing *Reynolds*, 250 F. Supp. at 724). *Reynolds* was decided under the former Rule 24(a)(2) and prior to *Trbovich*. Neither *Solien* nor *Squillacote* reconciled their determinations that an applicant must have a right maintain a claim for the relief in court in order to intervene under Rule 24(a)(2) with the *Trbovich* Court's holding granting the Rule 24(a)(2) motion to intervene of an applicant who had no right to maintain a claim for the relief sought in court. Compare *Solien*, 440 F.2d at 132 and *Squillacote*, 383 F. Supp. at 492 with *Trbovich*, 404 U.S. at 539. Under close scrutiny, therefore, neither *Squillacote*, *Solien*, nor *Reynolds* reasonably is persuasive for the proposition that Rule 24(a)(2) intervention is appropriate only where the applicant initially had the right to bring suit.

258. See *Trbovich*, 404 U.S. at 538-39.

259. See 29 U.S.C. §§ 157, 160 (1988); *supra* part I.C.

260. See *supra* note 106.

261. See *supra* note 178 and accompanying text.

is merely a part of the "sufficiency of interest" test.²⁶² This accords with the Advisory Committee's emphasis that Rule 24(a)(2) analysis should make practical considerations rather than formalistic distinctions.²⁶³

4. *The Board's Representation "May Be" Inadequate*

The Board commences Section 10(j) proceedings in order to protect its power ultimately to remedy harm caused by infringement of Section 7 rights, such as where an employer discriminates against employees because of their union activities. Thus, Section 10(j) proceedings serve the public interest but also serve to vindicate these private rights.²⁶⁴ The Board, therefore, acts in a capacity analogous to that of the charging party's "lawyer" for purposes of enforcing Section 7 rights.²⁶⁵ Accordingly, the Board's representation "may be" inadequate for Rule 24(a)(2) purposes.²⁶⁶ Moreover, the very structure of the administrative scheme is based on the premise that the Board's representation "may be" inadequate under the minimal Rule 24(a)(2) standard; otherwise, there would be no reason to afford charging parties extensive rights of participation in proceedings for permanent relief. Charging parties enjoy full rights of participation and appeal in all proceedings for permanent relief subsequent to the issuance of a complaint.²⁶⁷ In addition, there surely have been instances where charging parties' counsel have lent vital assistance to the Board in prosecuting unfair labor practice complaints; charging parties no doubt could be of similar assistance to the Board in Section 10(j) proceedings.²⁶⁸ Granting charging parties the right to intervene at the preliminary injunctive relief stage following a Board petition for Section 10(j) relief, therefore, would comport with the enforcement scheme envisioned by Congress.

262. See *supra* notes 143, 178 and accompanying text.

263. The Advisory Committee explained that "If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene." FED. R. CIV. P. 24 advisory committee's note to 1966 amendment.

264. See *supra* notes 235-37 and accompanying text.

265. See *Trbovich*, 404 U.S. at 538-39.

266. *Id.*

267. See *supra* part I.B.

268. In *Donovan v. Local Union 70, Int'l Brotherhood of Teamsters*, 661 F.2d 1199, 1203 (9th Cir. 1981), the Ninth Circuit upheld an award of attorney fees for a charging party who had intervened in a Title IV LMRDA because the intervenor's counsel had provided "vital and ongoing" assistance in the preparation and litigation of the case.

IV. Conclusion

Federal Rule of Civil Procedure 24(a)(2) entitles charging parties to intervene as of right in Section 10(j) proceedings for preliminary injunctive relief. The *Scottex* court's analysis and its determination that the charging party's Rule 24(a)(2) motion to intervene was due to be granted, were correct. The *Scottex* analysis comports with the federal labor law scheme and is the only analysis that takes proper account of the Supreme Court's decision in *Trbovich*. Moreover, it is the only analysis that is consistent with the text and purposes of both Rule 24(a)(2) and Section 10(j).

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