What's At Stake In High Court NLRB Injunction Case

By **William Baker** · Listen to article

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On Jan. 12, in Starbucks Corp. v. McKinney, the U.S. Supreme Court**agreed to resolve** a long-standing circuit split regarding the standard under which a particular National Labor Relations Board discretionary injunction should be evaluated.[1]

William Baker

Starbucks has been the target of a large union organizing drive in the past few years. The company's opposition to unionization has been vociferous. Starbucks has come under fire by the NLRB for using legally questionable tactics to oppose this large-scale unionization effort.

In Memphis, Tennessee, a group of employees spearheading a union drive, who have been referred to as the Memphis 7, were fired after giving an interview in the store in which they worked. Starbucks argues that it fired these workers for-cause, as this interview violated company policy.

The workers, and the NLRB, argue instead that Starbucks fired these workers in an illegal attempt to interfere with their right to organize. The NLRB brought legal action against Starbucks to enjoin the termination of these employees under a legal mechanism called the 10(j) injunction, so called because it is set out in Section 10(j) of the National Labor Relations Act.[2]

Starbucks argues that 10(j) injunctions should be evaluated under the traditional equitable principles standard. This is the way most injunctions are evaluated, and it consists of a four-part balancing test as set out by Federal Practice and Procedure:

> (1) the significance of the threat of irreparable harm to plaintiff if the injunction is not granted;
>
> (2) the state of the balance between this harm and the injury that granting the injunction would inflict on defendant;
>
> (3) the probability that plaintiff will succeed on the merits; and
>
> (4) the public interest.[3]

The NLRB argues that the standard the U.S. Court of Appeals for the Sixth Circuit applied in McKinney, the "just and proper" standard, is appropriate.

First, this article will explain precisely what a 10(j) injunction is. Next, it will shed light on the circuit split. Finally, it will evaluate what this case means for the NLRB and the labor movement.

What is a 10(j) injunction?

Labor organizing and collective bargaining in the U.S. is governed by the NLRA.[4] The NLRA creates an independent federal agency, the NLRB, to vindicate "workers' right[s] to organize and to engage in concerted activity for mutual aid or protection," as set out in Section 7.

Section 8(a) of the NLRA defines employer behaviors that aim to interfere with workers' collective rights — such as retaliatory actions taken against employees exercising their rights — as unfair labor practices.

In the most typical example, a company will fire or transfer workers who are attempting to organize a union in their workplaces in order to "chill" the union drive or dissuade workers from organizing. This type of situation equates to the NLRB's allegations in the McKinney case.

If an employee believes that their employer has violated Section 7, they may file an unfair labor practice with the NLRB, which can bring charges against the employer. Those charges are litigated in the first instance in administrative hearings before an NLRB administrative law judge in a process that is typically lengthy.

The length of time these administrative adjudications take is a challenge for the NLRB. If a company fires a worker, allegedly for cause, but the NLRB believes that the company has committed an unfair labor practice, it can take years for that worker's organizing rights to be vindicated.

This delay means that the company scores a victory, because in the years that the employee has been out of work, the organizing campaign has generally had time to lose momentum.

Workers, fearing they might be out of work for years if they attempt to organize, may be intimidated out of exercising their rights by such a lengthy process even if the NLRB ultimately prevails.

This is where Section 10(j) comes in. Section 10(j) of the NLRA authorizes the NLRB to petition the district court to enjoin an unfair labor practice undertaken by a company.

In our example of the fired worker, the district court will enjoin the employer from firing the worker until the administrative hearing before the administrative law judge has concluded.

In essence, the district court is freezing the prelitigation situation until there is a final decision on the merits and allowing workers to exercise their organizing rights unfettered in the interim.

What is the circuit split?

The NLRA was drafted in 1935. Section 10(j) states that the board may file a petition for an injunction, which the district court may grant as "it deems just and proper."

In Weinberger v. Romero-Barcelo, the Supreme Court ruled in 1982 that all petitions for injunctions should be governed by equitable considerations unless, "in so many words, or by a necessary and inescapable inference," legislation bypasses that standard.[5]

This is the basic question before the Supreme Court in McKinney: Is the "just and proper" standard simply asking district courts to apply the four-part balancing test, which is the general way in which courts evaluate these equitable principles? Or is it setting forth an entirely different standard that district courts must apply when they consider injunctions pursuant to 10(j)?

The Sixth Circuit, where the McKinney case originated, holds the latter view. This standard is supposedly deferential to the NLRB. The U.S. Courts of Appeals for the Third, Fifth, Sixth, Tenth and Eleventh Circuits conform to the view that the 10(j) injunction is considered according to a different standard than a run-of-the-mill injunction.

The U.S. Courts of Appeals for the First, Second, Fourth, Seventh, Eighth and Ninth Circuits hold that the conventional injunction standard applies to the 10(j) injunction.

What will the parties argue?

Starbucks' petition for certiorari indicates that the corporation plans to argue that the two standards are starkly different, and Starbucks is framing the NLRB's reading of the 10(j) injunction standard as atextual.

Quoting a concurrence in the Sixth Circuit, Starbucks argued in its petition for certiorari that the "straightforward meaning" of the phrase "just and proper" is that the NLRA invokes the traditional four-part standard.[6]

The NLRB argues that the two-part and the four-part test are analyzed in approximately the same way. As the NLRB noted in its brief opposing certification, the board understands that the difference between the two standards is "essentially terminological rather than substantive."[7]

The NLRB will also argue that it is entitled to significant deference, as NLRA provides the NLRB with "the authority to develop and apply fundamental national labor policy," as noted by the Supreme Court's 1978 ruling in Beth Israel Hospital v. NLRB, and argued in the NLRB's reply brief.[8]

Why is this case important?

Starbucks argues that this circuit split has had a tangible impact on the outcome of McKinney and on labor injunctions across the board. Starbucks may be right in this particular case. Nationally, however, it will likely have little bearing on the labor movement, the NLRB or even the NLRB's use of the 10(j) injunction.

For one, my research shows that the NLRB petitioned for over twice as many 10(j) injunctions in circuits applying the traditional injunction test to 10(j) injunctions.[9]

The injunction standard that Starbucks is arguing for is already applied in about 60% of cases, including cases before the influential Second and Ninth Circuits. If Starbucks prevails, most 10(j) injunctions will be evaluated in the same fashion as they are today.

Additionally, the NLRB actually fares worse in the circuits where supposedly a more deferential standard is applied.

Charles Morris, a professor emeritus of law at Southern Methodist University, has hypothesized that the more deferential standard "haunt[s] the relationship between the Board and the courts," damaging the credibility of the NLRB when it requests 10(j) injunctions under this lowered standard.[10]

I have argued that standardizing the 10(j) injunction may even aid the NLRB in its 10(j) petitions by "streamlining the process of deciding whether to bring 10(j) petitions while increasing the buy-in of courts within the more hostile circuits."[11]

Either way, the outcome of McKinney is not likely to be a significant blow to labor.

William Baker is an associate at Wigdor LLP.

[1] McKinney for and on behalf of Natl. Lab. Rel. Bd. v. Starbucks Corp. , 77 F.4th 391, 406 (6th Cir. 2023), cert. granted sub nom. Starbucks Corp. v. McKinney , No. 23-367, 2024 WL 133821 (U.S. Jan. 12, 2024).

[2] 29 USCA § 160(j).

[3] 11A Fed. Prac. & Proc. Civ. § 2948 (3d ed.) (Wright & Miller).

[4] 29 USCA § 151 et seq.

[5] Weinberger v. Romero-Barcelo , 456 U.S. 305, 313 (1982).

[6] McKinney for and on behalf of Natl. Lab. Rel. Bd. v. Starbucks Corp. , 77 F.4th 391, 406 (6th Cir. 2023) (Readler, J., concurring).

[7] Brief for the Respondent at 8.

[8] Beth Israel Hosp. v. NLRB , 437 U.S. 483, 500-501 (1978).

[9] William Baker, Division And Delay: Evaluating The Efficacy And Underuse Of The 10(J) Injunction, NYU Rev. of Law and Soc. Change, The Harbinger, Vol. 48, https://socialchangenyu.com/harbinger/division-and-delay-evaluating-the-efficacy-and-underuse-of-the-10j-injunction/.

[10] Charles J. Morris, A Tale Of Two Statutes: Discrimination For Union Activity Under The NLRA And RLA, 2 Empl. Rts. & Employ. Pol'y J. 317, 351.

[11] Baker, Division And Delay, supra.

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