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THE DURATION OF TEMPORARY RESTRAINING ORDERS IN FEDERAL COURT

Rule 65(b) of the Federal Rules of Civil Procedure provides that a temporary restraining order may issue for ten days and extend for an additional ten days if good cause is shown. Most federal courts have held that if a TRO extends beyond twenty days without the consent of the restrained party, the TRO is transformed into a preliminary injunction. However, since the TRO transformed into an injunction fails to satisfy the requirements of a preliminary injunction, the courts strike it as being improperly issued. This comment examines this phenomenon, analyzes the conflicting positions among the circuit courts, and suggests that in certain circumstances TROs that extend beyond twenty days should remain TROs and not be transformed into invalid preliminary injunctions.

I. INTRODUCTION

An injunction is defined as a judicial order which requires a person to refrain from doing a certain act.¹ A temporary restraining order (TRO), a type of injunction,² is considered an extraordinary remedy³ issued only in exceptional or urgent situations.⁴ TROs are designed to maintain the status quo and prevent unnecessary and irreparable injury⁵ until a preliminary injunction hearing can be held.⁶ TROs are distinguishable from other injunctions in that they are of short duration,⁷ may be issued ex parte without notice to the adverse party,⁸ and are not appealable.⁹

The Federal Rules of Civil Procedure impose strict limitations upon the availability and duration of TROs in federal court.¹⁰ Rule 65 (b) provides, in part, that a TRO must expire within ten days of its issuance unless the order is extended for another ten days upon a showing of good cause or the restrained party consents to a further extension.¹¹ Generally, this twenty day maximum duration is strictly

1. *United Bonding Ins. Co. v. Stern*, 410 F.2d 483, 486 (3d Cir. 1969).

2. *Owens v. Coker*, 368 S.W.2d 777, 778 (Tex. Civ. App. 1963).

3. *Norwalk Core v. Norwalk Bd. of Ed.*, 298 F. Supp. 203, 206 (D. Conn. 1968), *aff'd*, 423 F.2d 121 (2d Cir. 1970).

4. *Luster Enter., Inc. v. Jacobs*, 278 F. Supp. 73, 75 (S.D.N.Y. 1967).

5. *Major v. Sowers*, 297 F. Supp. 664, 666 (E.D. La. 1969).

6. *Norwalk Core v. Norwalk Bd. of Ed.*, 298 F. Supp. 203, 206 (D. Conn. 1968), *aff'd*, 423 F.2d 121 (2d Cir. 1970).

7. *Pan Am. World Airways, Inc. v. Flight Eng'rs Int'l Ass'n*, 306 F.2d 840, 843 (2d Cir. 1962).

8. *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 180 (1968).

9. *Grant v. United States*, 282 F.2d 165, 167 (2d Cir. 1960).

10. *See* FED. R. CIV. P. 65(b).

11. *Id.* I refer to the durational limitation upon TROs as twenty days throughout this article. Of course, I am referring to the ten days authorized by rule 65(b) as well as the authorized ten day extension.

interpreted and rigidly applied by the federal circuit courts.¹² Most circuit courts find that extending a TRO beyond twenty days results in its transformation into a preliminary injunction.¹³ The consequences of this transformation are significant for two reasons. First, a preliminary injunction is an appealable order that may be reviewed by an appellate court, while a TRO is generally not appealable.¹⁴ Second, the requirements that must be satisfied for a TRO to issue fail to satisfy the minimum requirements of a preliminary injunction.¹⁵ Thus, when a TRO extending beyond twenty days is appealed as a preliminary injunction, the appellate court will often strike it as being improperly issued. However, other circuits hold differently and find that in certain circumstances a TRO extending beyond twenty days is not transformed into a preliminary injunction.

This comment discusses the time limitations placed upon TROs in federal court,¹⁶ including the relevant statutory history of rule 65. It also examines the conflicts among the circuits that have not been resolved by the Supreme Court. Finally, it is suggested that in certain narrowly defined circumstances a federal district court should have the authority to extend a TRO beyond twenty days without it becoming an invalid preliminary injunction.

II. BACKGROUND

A. *The Judiciary Act of 1872*

The Judiciary Act of 1872¹⁷ was the first statute in the United

12. *E.g.*, *Sims v. Greene*, 160 F.2d 512, 516 (3d Cir. 1947).

13. *E.g.*, *Pan Am. World Airways, Inc. v. Flight Eng'rs Int'l Ass'n*, 306 F.2d 840, 843 (2d Cir. 1962); *Sims v. Greene*, 160 F.2d 512, 516-17 (3d Cir. 1947).

14. *See Grant v. United States*, 282 F.2d 165 (2d Cir. 1960). There are, however, certain circumstances when refusal to grant a TRO effectively disposes of the action for injunctive relief. In such circumstances an order of refusal has been held to be appealable as a final order under 28 U.S.C. § 1291 (1976), because it comes within the collateral order doctrine enunciated in *United States v. Wood*, 295 F.2d 772, 778 (4th Cir. 1961), *cert denied*, 369 U.S. 850 (1962).

15. A court shall set forth separate findings of fact and conclusions of law which constitute the grounds of its actions when refusing or granting a preliminary injunction. FED. R. CIV. P. 52(a). In addition, a preliminary injunction may issue only after a hearing during which both parties to the dispute have had an opportunity to be heard. *Morning Telegraph v. Powers*, 450 F.2d 97, 99 (2d Cir. 1971), *cert denied*, 405 U.S. 954 (1972). A TRO, on the other hand, may be issued without notice when it appears that there is a possibility of immediate and irreparable loss, injury or damage occurring before notice can be served and a hearing held on a motion for a preliminary injunction. *Sampson v. Murray*, 415 U.S. 61, 88 n.59 (1974).

16. This comment does not deal with injunctions in any depth or detail. For a complete and detailed treatment of injunctions, see Note, *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994 (1965).

17. Judiciary Act of 1872, ch. 255, § 7, 17 Stat. 196, 197 (recodified as ch. 12, § 78, Rev. Stat. 136 (1878)). Prior to its enactment in 1872, the Act of Congress of March 3, 1793, ch. 22, § 5, 1 Stat. 334, 335 (1793) was the statutory authority for issuing injunctions. Section 5 provided: "nor shall a writ of injunction be granted

States to specifically authorize federal courts to issue TROs.¹⁸ In *Houghton v. Meyer*,¹⁹ the Supreme Court expressly stated that a federal court has the power to grant a TRO when it appears that the delay caused by waiting for a preliminary injunction hearing presents a danger of irreparable injury.²⁰ Although the Judiciary Act of 1872 placed no definite time limitation upon the duration of a TRO, the Supreme Court was aware that it could not be allowed to extend indefinitely²¹ and held that a TRO, if granted, should remain in effect only until such time as a decision upon the motion for a preliminary injunction could be made.²²

By requiring the party seeking a TRO to simultaneously file a motion for a temporary injunction, and limiting the duration of a TRO to the time required for completion of the injunction hearing, the Court's interpretation of the statute seems to strike a balance between two conflicting interests. *Houghton* protects a restrained party from indefinitely being denied an opportunity to be heard,²³ yet at the same time recognizes that a person facing irreparable harm or injury, if forced to await a judicial decision on an injunction, should be able to obtain some type of judicial relief.

A survey of the case law from 1872 to 1914 reveals that very few cases dealing with TROs were litigated. Of the few decisions rendered, it was apparently believed that a TRO was limited to the time it took to render a decision on the motion for a temporary injunction.²⁴ In 1914, however, Congress departed from this position.

in any case without reasonable previous notice to the adverse party, or his attorney, of the time and place of moving the same." Section 5 was interpreted by the courts so as to preclude TROs. *See Houghton v. Meyer*, 208 U.S. 149, 155-56 (1908).

18. *Houghton v. Meyer*, 208 U.S. 149, 155 (1908).

19. 208 U.S. 149 (1908). In this case, which was the Supreme Court's first detailed analysis of the Judiciary Act of 1872, a TRO was issued by a district court restraining the Postmaster General from refusing to transmit certain of the appellant's publications at second class postal rates.

20. *Id.* at 156.

21. To allow a TRO to extend for an indefinite time would be a violation of the restrained party's right to due process. As a TRO is a species of injunction issued without a hearing or an opportunity for both sides to be heard, if no limit on its duration exists, then the TRO ceases to be temporary and is not distinguishable from other injunctions. However, an injunction may not properly issue until a hearing has been held during which both sides have an opportunity to be heard. Therefore, an injunction issued without a hearing or an opportunity to be heard violates the enjoined party's due process. *See id.* at 155-56.

22. *Id.* at 156. "[A] judge may grant a restraining order in case it appears to him there is a danger of irreparable injury, to be in force 'until the decision upon the motion' for temporary injunction." *Id.*

23. *See supra* note 22.

24. *See, e.g., North Am. Land and Timber Co. v. Watkins*, 109 F. 101, 106 (5th Cir. 1901); *Worth Mfg. Co. v. Bingham*, 116 F. 785, 789 (5th Cir. 1901); *Yuengling v. Johnson*, 30 F. Cas. 896 (E.D. Va. 1877) (No. 18,195).

B. The Clayton Act of 1914

In 1914 Congress passed the Clayton Act.²⁵ Section 17 of that Act, the progenitor of rule 65(b), dealt primarily with TROs.²⁶ The provisions of Section 17 differed markedly from those of the Judiciary Act of 1872. The most significant change effected was the imposition of a twenty day maximum duration for TROs.²⁷ Section 17 also required that when a TRO was issued without any notice to the party being restrained, a hearing on whether a preliminary injunction should be granted had to be scheduled at the earliest possible time.²⁸

It is difficult to discern why a more definite time limitation was placed upon the duration of TROs by the Clayton Act.²⁹ It would ap-

25. Clayton Act, ch. 323, § 17, 38 Stat. 737 (1914) (current version at FED. R. CIV. P. 65(b)).

26. Section 17 provided as follows:

That no preliminary injunction shall be issued without notice to the opposite party.

No temporary restraining order shall be granted without notice to the opposite party unless it shall clearly appear from specific facts shown by affidavit or by the verified bill that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every such temporary restraining order shall be endorsed with the date and hour of issuance, shall be forthwith filed in the clerk's office and entered of record, shall define the injury and state why it is irreparable and why the order was granted without notice, and shall by its terms expire within such time after entry, not to exceed ten days, as the court or judge may fix, unless within the time so fixed the order is extended for a like period for good cause shown, and the reasons for such extension shall be entered of record. In case a temporary restraining order shall be granted without notice in the contingency specified, the matter of the issuance of a preliminary injunction shall be set down for a hearing at the earliest possible time and shall take precedence of all matters except older matters of the same character; and when the same comes up for hearing the party obtaining the temporary restraining order shall proceed with the application for a preliminary injunction, and if he does not do so the court shall dissolve the temporary restraining order. Upon two days notice to the party obtaining such temporary restraining order the opposite party may appear and move the dissolution or modification of the order, and in that event the court or judge shall proceed to hear and determine the motion as expeditiously as the ends of justice may require.

Clayton Act, ch. 323, § 17, 38 Stat. 737 (1914) (current version at FED. R. CIV. P. 65 (b)). In 1934 Congress recodified section 17 of the Clayton Act. *See* 28 U.S.C. § 381 (1934) (repealed by the Judicial Code Revision Act of 1948). Section 381 used the same language as Section 17 of the Clayton Act and effected no changes in the duration of TROs. It appears, however, that by adopting the language of Section 17, Congress intended to broaden the statutory authority for authorizing and regulating TROs to include all cases in federal court, not simply those within the purview of the Clayton Act.

27. *See* Clayton Act, ch. 323, § 17, 38 Stat. 737 (1914) (current version at FED. R. CIV. P. 65(b)). A TRO must expire within ten days of its issuance unless, for good cause, the court extends the TRO for an additional ten day period. Thus, the maximum duration of a TRO becomes twenty days.

28. *See id.*

29. While I was unable to find any reported cases which interpret and apply this

pear that the introduction of a twenty day maximum duration for TROs was established because of legislative concern for the rights of the party being restrained and a desire to establish certain concrete, minimal safeguards protecting those rights.³⁰

C. Rule 65(b)

In 1938 the Federal Rules of Civil Procedure were promulgated by the Supreme Court. Rule 65(b) concerns TROs and, like its immediate predecessor, limits their duration to a maximum of twenty days.³¹ Unlike prior legislation concerning TROs, however, the provisions of rule 65(b) with regard to their duration are frequently litigated in federal courts. Recently, new concern has arisen respecting the strict interpretation most federal courts have given this twenty day limitation.

III. CHARACTERISTICS OF TEMPORARY RESTRAINING ORDERS

A court takes several factors into consideration when deciding whether to grant a TRO. First, the court requires the party seeking a TRO to show that unless it is issued he will suffer some irreparable harm or injury and that he is likely to succeed on the merits of his claim.³² Second, a court must decide that the hardship facing the person seeking the TRO outweighs any hardship the restrained party would suffer if a TRO were issued.³³ Finally, there must be no adequate legal remedy available to the moving party, and no substantial harm to the public that can be caused by the issuance of the order.³⁴

A party may not appeal a court's decision to grant, deny or dissolve a TRO because it lacks the requisite finality required for appealable orders.³⁵ Additionally, there are two practical reasons for not considering TROs appealable. First, TROs are only effective for brief periods of time before they are supplanted by some type of appealable

change in the duration of TROs, there are cases which imply that section 17 of the Clayton Act was to be strictly interpreted. *See, e.g.,* Laurence v. St. Louis — San Francisco Ry. Co., 274 U.S. 588, 596 (1927).

30. This appears to be true because in later cases analyzing 28 U.S.C. § 381 (1934) (repealed by the Judicial Code Revision Act of 1948) and FED. R. CIV. P. 65(b) the courts have expressed concern as to restraining a person from acting or compelling him to act without notice and an opportunity to be heard. By limiting the circumstances in which a TRO may issue and its duration once issued, minimal safeguards protecting the restrained party's procedural due process rights are present. *See* Sims v. Greene, 160 F.2d 512 (3d Cir. 1947).

31. FED. R. CIV. P. 65(b).

32. Hughes v. Cristorfone, 486 F. Supp. 541, 544 (D. Md. 1980).

33. *Id.*

34. *Id.*

35. *See* Grant v. United States, 282 F.2d 165, 167 (2d Cir. 1960); 28 U.S.C. § 1291 (1976).

injunction.³⁶ Second, because TROs are generally issued *ex parte*, it would be unjust to allow an appeal when the trial judge did not command sufficient time for a full presentation of the facts and law.³⁷

While the standards a court uses to decide whether to grant a preliminary injunction are similar to the standards used for determining whether to issue a TRO,³⁸ there are additional procedural safeguards that must be satisfied both before and after a court grants or denies a motion for a preliminary injunction.³⁹ Preliminary injunctions are issued only after both parties have had an opportunity to be heard.⁴⁰ In addition, any judicial order that grants or denies a preliminary injunction must be accompanied by a published opinion setting forth the separate findings of fact and conclusions of law upon which the judge based his decision.⁴¹ Accordingly, if a TRO, issued *ex parte*, becomes an appealable preliminary injunction after twenty days, it will be stricken as defective due to the lack of a hearing and the absence of the required findings of fact and conclusions of law.⁴²

For example, in *National Mediation Board v. Air Line Pilots Association International*,⁴³ a district court issued a TRO enjoining the National Mediation Board from conducting a representation election during a labor dispute between American Airlines and competing unions.⁴⁴ The district court, however, extended the TRO beyond twenty days.⁴⁵ The National Mediation Board appealed.⁴⁶ The District of Columbia Circuit Court found that the TRO had become a preliminary injunction and held that because it was not accompanied by separate findings of fact and conclusions of law it was improperly issued.⁴⁷ Since 1938, however, federal court decisions concerning the twenty day

36. *Connell v. Dulien Steel Products, Inc.*, 240 F.2d 414, 418 (5th Cir. 1957), *cert. denied*, 356 U.S. 968 (1958).

37. *Connell*, 240 F.2d at 418.

38. *See, e.g., Jones v. Pacific Intermountain Express*, 536 F.2d 817, 818 (9th Cir.), *cert. denied*, 429 U.S. 979 (1976); *Pratt v. Stout*, 85 F.2d 172, 176-77 (8th Cir. 1936). The appropriateness of granting or denying preliminary injunctions lies within the sound discretion of the court and depends on the consideration and balancing of various factors, such as the likelihood of success on the merits, lack of adequate legal remedy, impact on the parties and the public interest, and the prospect of irreparable harm.

39. *See* FED. R. CIV. P. 52, 65(a).

40. *Morning Telegraph v. Powers*, 450 F.2d 97, 99 (2d Cir. 1971), *cert. denied*, 405 U.S. 954 (1972).

41. *See* FED. R. CIV. P. 52(a), 65(a).

42. It is interesting to note that the same is true when a TRO is not issued *ex parte*. Apparently, whatever opportunity the restrained party may have had to be heard is insufficient to satisfy the requirements of a preliminary injunction hearing.

43. 323 F.2d 305 (D.C. Cir. 1963).

44. *Id.* at 305.

45. *Id.* The TRO was issued on June 18, 1963. On June 27 the district court extended it until July 5. On July 5, the court again extended the TRO for an additional ten days. *Id.*

46. *Id.*

47. *Id.* at 306.

limitation on the duration of a TRO have been inconsistent. A detailed examination of the various positions taken by the federal judiciary follows.

IV. CONFLICT IN THE FEDERAL COURTS

In analyzing the positions taken by the various federal circuits concerning the duration of TROs, two distinct approaches are discernible.⁴⁸ One approach strictly construes rule 65(b) to require that a TRO which extends beyond twenty days without the restrained party's consent automatically becomes a preliminary injunction.⁴⁹ The second approach does not construe rule 65(b)'s twenty day limitation so strictly. Rather, it allows a TRO to extend beyond twenty days, under the proper circumstances, without becoming a preliminary injunction.⁵⁰

A. *Strict Interpretation of Rule 65(b)*

In *Sims v. Greene*⁵¹ the Third Circuit strictly interpreted rule 65(b) and held that a TRO may not extend beyond twenty days unless the party against whom the order is directed consents to such an extension.⁵² In *Sims*, a bishop sought to enjoin another bishop of the same church from attempting to preside over the First Episcopal District.⁵³ An ex parte TRO was issued on December 2, 1946 and was scheduled to expire ten days later.⁵⁴ In accordance with rule 65(b), this restraint was extended by court order for an additional ten days. Two days before the extended TRO was to expire, the restrained party consented

48. Some courts apparently have opted to avoid this issue. See, e.g., *Consolidation Coal Co. v. Disabled Miners of So. W. Va.*, 442 F.2d 1261 (4th Cir.) (on appeal the court did not address the issue of whether a TRO may extend beyond twenty days), *cert. denied*, 404 U.S. 911 (1971). For a detailed discussion of this case, see *infra* notes 92-98 and accompanying text.

49. See, e.g., *Morning Telegraph v. Powers*, 450 F.2d 97 (2d Cir. 1971) (TRO's have a propensity to self-destruct in twenty days), *cert. denied*, 405 U.S. 954 (1972); *National Mediation Bd. v. Air Line Pilots Ass'n Int'l*, 323 F.2d 305 (D.C. Cir. 1963) (an order extending a TRO beyond twenty days is tantamount to the grant of a preliminary injunction); *Sims v. Greene*, 160 F.2d 512 (3d Cir. 1947) (no TRO's may be continued beyond twenty days unless the party against whom the order is directed consents).

50. See, e.g., *Maine v. Fri*, 483 F.2d 439, 441 (1st Cir. 1973) (court stated that the district court's failure to dissolve a TRO within ten days of its issuance must be viewed as an extension of the original order for an additional ten days beyond the initial date of expiration. The court assumed that the trial court realized that a TRO cannot be extended indefinitely and that the lower court intended to conduct a hearing on the issuance of the preliminary injunction within the twenty day period or very shortly thereafter); *Connell v. Dulien Steel Products, Inc.*, 240 F.2d 414 (5th Cir. 1957) (TRO which remained in effect for twenty-eight days was not an appealable preliminary injunction), *cert. denied*, 356 U.S. 968 (1958).

51. 160 F.2d 512 (3d Cir. 1947).

52. *Id.* at 516-17.

53. *Id.* at 513-14.

54. *Id.* at 514.

to an extension of the TRO until January 14, 1947.⁵⁵ On January 13 the court again extended the TRO for a ten day period without the restrained party's consent and began a preliminary injunction hearing.⁵⁶ This third extension caused the order to extend beyond twenty days without the consent of the restrained party. The Third Circuit held that the TRO had become a preliminary injunction.⁵⁷ Accordingly, since the district court had not set out findings of fact and conclusions of law as to the grounds for the issuance of the injunction, the Third Circuit dissolved it.⁵⁸

Sims is significant because it was one of the first cases to interpret rule 65(b)'s provision limiting a TRO's duration. Its rationale has been adopted by most of the federal circuits.⁵⁹ For example, *Pan American World Airways, Inc. v. Flight Engineers International Association*⁶⁰ and *Connell v. Dulien Steel Products, Inc.*⁶¹ illustrate how most circuit courts follow the rationale of *Sims* and strictly interpret rule 65(b). In *Pan American*, a district court issued a TRO enjoining threatened strike activity by a flight engineers' union against Pan American.⁶² The court, however, extended this TRO well beyond twenty days.⁶³ The flight engineers' union appealed.⁶⁴ In holding that the TRO was transformed into a preliminary injunction, the Second Circuit emphasized that merely because notice was given and a hearing held there was no justification for allowing the TRO to extend beyond the twenty day period prescribed by rule 65(b).⁶⁵ When notice has been given and a hearing held, the Second Circuit stated that a court may either grant or deny the request for a preliminary injunction, but it should not extend the TRO.⁶⁶

In *Connell v. Dulien Steel Products, Inc.*⁶⁷ a Louisiana district court interpreted rule 65(b)'s time limitations to apply only to TROs issued ex parte and, therefore, concluded that any notice to the party to be restrained should give a district court the power to extend a TRO beyond twenty days.⁶⁸ This interpretation was potentially significant be-

55. *Id.*

56. *Id.*

57. *Id.* at 516-17.

58. *Id.*

59. See, e.g., *Morning Telegraph v. Powers*, 450 F.2d 97 (2d Cir. 1971), *cert. denied*, 405 U.S. 954 (1972); *Dilworth v. Riner*, 343 F.2d 226 (5th Cir. 1965); *National Mediation Bd. v. Air Line Pilots Ass'n Int'l*, 323 F.2d 305 (D.C. Cir. 1963).

60. 306 F.2d 840 (2d Cir. 1962).

61. 240 F.2d 414 (5th Cir. 1957), *cert. denied*, 356 U.S. 968 (1958).

62. *Pan Am. World Airways, Inc. v. Flight Eng'rs Int'l Ass'n*, 306 F.2d 840, 841 (2d Cir. 1962).

63. *Id.* at 842. The TRO was issued on June 22, 1961. It was extended on June 26 until July 6 and again on July 5 until August 1.

64. *Id.* at 841.

65. *Id.* at 842.

66. *Id.*

67. 240 F.2d 414 (5th Cir. 1957), *cert. denied*, 356 U.S. 968 (1958).

68. 240 F.2d at 417.

cause of its liberal construction of rule 65(b)'s time provisions. Instead of strictly interpreting rule 65(b) to mean that a TRO may only extend beyond twenty days when the restrained party consents to it, the district court's approach attempted to establish that whenever a restrained party has received notification that a TRO is being sought, prior to its actual issuance, the court may extend the order beyond twenty days.⁶⁹ The Fifth Circuit, however, concluded that this reasoning was completely erroneous, and emphasized that such an interpretation would eliminate the requirement of consent by the restrained party before an extension beyond a second ten day period would be allowed by the court.⁷⁰ The Fifth Circuit felt that such an interpretation would require only mere notice to the party for an extension of the TRO.⁷¹

B. A Less Stringent Interpretation of Rule 65(b)

Limiting the duration of a TRO plays an important role in guaranteeing that no party shall be restrained from acting or be compelled to act for an indefinite period of time without an opportunity to be heard. There are, however, some federal courts which have recognized that blindly adhering to rule 65(b)'s twenty day limitation may, in certain circumstances, cause irreparable harm to a party seeking injunctive relief.⁷² Thus, these federal courts have been less inclined to rigidly apply rule 65(b)'s twenty day limitation. Legal commentators have also been critical of such a strict interpretation of the twenty day limitation.⁷³

A case illustrative⁷⁴ of this more flexible approach is *Maine v.*

69. *Id.*

70. *Id.*

71. *Id.* At the same time, however, the court concluded that a TRO should be transformed into a preliminary injunction only when the order is continued for a substantial length of time past the period prescribed by rule 65. The court found that 8 days was not substantial in this case. *Id.* What constitutes a substantial length of time beyond twenty days remains unclear.

72. *See, e.g.,* *Maine v. Fri*, 483 F.2d 439 (1st Cir. 1973); *Connell v. Dulien Steel Products, Inc.*, 240 F.2d 414 (5th Cir. 1957), *cert. denied*, 356 U.S. 968 (1958).

73. *See, e.g.,* 11 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 2953, at 521 (1973) (courts should have discretion to extend a TRO beyond twenty days if the moving party has exercised good faith in seeking the preliminary injunction hearing but has been unsuccessful, and if the danger of irreparable injury continues); 7 J. MOORE, *MOORE'S FEDERAL PRACTICE* ¶ 65.07, at 65-81 (Supp. 1980-81) (although the author agrees with the general principle of *National Mediation Bd.*, that indiscriminate extensions, without consent, cannot be tolerated, there may be circumstances which warrant an additional extension for good cause which would make the overall period exceed twenty days).

74. For additional cases see *Pennsylvania Motor Truck Ass'n v. Philadelphia Marine Terminal Ass'n*, 276 F.2d 931 (3d Cir. 1960) (court refused to hear an appeal from a TRO which provided that it would remain in force until the application for a preliminary injunction had been heard. The court emphasized that the district court's failure to designate a ten day limitation did not alter its essential character so as to convert it into a preliminary injunction); *Connell v. Dulien Steel Products, Inc.*, 240 F.2d 414 (5th Cir. 1957) (TRO which remained in effect for twenty-

*Fri.*⁷⁵ In *Fri* the state of Maine was attempting to force compliance with Title II of the Federal Water Pollution Control Act Amendment of 1972.⁷⁶ The district court issued a TRO and ordered the federal government to allot money to the state until further order of the court.⁷⁷ After the district court denied a motion to vacate the order, the federal government filed an appeal claiming that because the district court's order was not limited to ten days and there had been a full presentation by both sides at the dissolution hearing⁷⁸ the TRO had effectively become a preliminary injunction.⁷⁹

However, the First Circuit rejected the appellant's argument, and held that it had no jurisdiction to hear the appeal.⁸⁰ The court gave several reasons why the TRO had not been transformed into a preliminary injunction. First, there had not been a full presentation by both parties at the dissolution hearing.⁸¹ Second, the district court had clearly indicated that it was issuing a TRO and that a full hearing on the issuance of a preliminary injunction would soon follow.⁸² Furthermore, the court stated that rule 65(b) explicitly limited the duration of all TROs to ten days,⁸³ and the district court's failure to so limit the TRO was not significant.⁸⁴ Additionally, the court declared that the district court's refusal to dissolve the TRO should be considered an extension of the original order for an additional ten day period.⁸⁵ While recognizing that a TRO may not extend indefinitely, the First Circuit expressly stated that when a district court intends to conduct a hearing on the issuance of a preliminary injunction within the twenty day period, or very shortly thereafter, the TRO could remain as such without being transformed.⁸⁶ The court enumerated two specific situations where a TRO may be permitted to extend beyond the twenty day limit without becoming a preliminary injunction.⁸⁷ The first situation

eight days was not converted into a preliminary injunction because it did not continue for a substantial length of time beyond twenty days), *cert. denied*, 356 U.S. 968 (1958).

75. 483 F.2d 439 (1st Cir. 1973).

76. *Id.* at 441. See 33 U.S.C. § 1281 (1976 & Supp. VI 1982).

77. *Fri*, 483 F.2d at 440.

78. *Id.*

79. *Id.* Seven days after the TRO was issued a hearing was held on the appellants' motion to vacate the restraining order. The motion was denied. *Id.*

80. *Id.*

81. *Id.* at 440-41.

82. *Id.* at 441.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* The court's reference to the examples where a TRO may extend beyond twenty days without becoming a preliminary injunction is dicta. Nevertheless, it illustrates a more flexible approach in interpreting rule 65(b)'s provisions limiting the duration of TROs than the approach taken by the Second and Fifth Circuits. *Id.* at 441 n.1. The court cites 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2953, at 521 (1973) as its authority.

occurs when there is a continuing danger of irreparable injury and the moving party has exercised good faith in seeking the preliminary injunction hearing but has nonetheless been unsuccessful.⁸⁸ The second situation occurs if the hearing on a preliminary injunction has been held within the twenty day period, but an extension is needed until the court reaches its decision.⁸⁹

An interesting point raised in *Fri* concerns the situation when a preliminary injunction hearing is not held within twenty days of the TRO's issuance. The First Circuit stated that in this situation a strong argument could be advanced that the TRO had become a preliminary injunction for the purposes of appeal.⁹⁰ The court appeared to believe that a TRO's extension beyond twenty days, without the restrained party's consent, should be subject to judicial scrutiny on appeal. Nevertheless, the court did not indicate that appeal of a TRO which extends beyond twenty days should be stricken solely because it mechanically fails to satisfy all the requirements of a preliminary injunction.⁹¹

An excellent example of a situation where a preliminary injunction hearing began but, due to no fault of the parties, could not be completed within the twenty day period after a TRO had issued is *Consolidation Coal Company v. Disabled Miners of South West Virginia*.⁹² In this case the Consolidated Coal Company sought and obtained a TRO to enjoin picketing and work stoppages by disabled miners and their dependents at certain coal mining facilities in West Virginia.⁹³ When the district court realized that the preliminary injunction hearing would not be completed before the TRO was scheduled to expire, it extended the restraining order for an additional ten day period.⁹⁴ Ten days later, the district court judge was faced with a dilemma when he again realized that the injunction hearing would still not be completed before the TRO was scheduled to expire.⁹⁵ The judge could not properly issue a preliminary injunction because the injunction hearing had

88. *Fri*, 483 F.2d at 441.

89. *Id.* The court cites 7 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 65.07 n.11, at 65-81 to -82 (1972) as its authority.

90. *Fri*, 483 F.2d at 441; see 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2953, at 519-20 (1973).

91. For example, in *Fri*, separate findings of fact and conclusions of law were not issued by the judge.

92. 442 F.2d 1261 (4th Cir.), cert. denied, 404 U.S. 911 (1971).

93. 442 F.2d at 1263.

94. *Id.* at 1268. The TRO was issued on August 14 and was to expire at 5:00 p.m. on August 24. At the August 24 injunction hearing no witnesses testified because the bench and bar conferred concerning similar labor problems in the Southern District of West Virginia and their bearing on the instant case. As a result, the district judge extended the TRO for another ten days, or until September 3, and scheduled another injunction hearing for 1:30 p.m. on September 3. *Id.*

95. *Id.* at 1269. The September 3rd injunction hearing would not have been completed by 5:00 p.m., the time the TRO would expire, due to the length of witness testimony. *Id.*

not been completed. At the same time, he was aware that the propriety of extending a TRO beyond twenty days without the restrained party's consent was questionable. In an attempt to resolve this dilemma, the judge extended the TRO for another ten day period to allow the injunction hearing to be completed, and at the same time issued a preliminary injunction similar in scope to an injunction that another district court had granted in related litigation.⁹⁶ The decision granting this injunction was appealed. The Fourth Circuit ruled that the injunction was invalid because the necessary findings of fact and conclusions of law were absent.⁹⁷ Significantly, however, the court disposed of the case without dealing with the district court's extension of the TRO beyond twenty days.⁹⁸ This was because the court felt that the preliminary injunction had superseded the restraining order, thereby making the validity of its extension moot. While the Fourth Circuit was correct in stating that it was not necessary to address the propriety of extending the TRO beyond twenty days in order to decide the case, it also recognized the dilemma faced by the district court judge. Unfortunately, however, the Fourth Circuit chose not to offer any guidance as to whether a TRO may, when an injunction hearing has begun but cannot be completed within the twenty day period, extend beyond twenty days without becoming a preliminary injunction.

C. *The Supreme Court's Decisions*

In 1974 the Supreme Court decided two cases dealing with the twenty day limitation upon a TRO's duration prescribed by rule 65(b).⁹⁹ Neither of these decisions, however, holds that a TRO may never extend beyond twenty days without being considered a preliminary injunction. As a result, the conflicting decisions among the federal circuits on this issue remain unresolved.

In *Sampson v. Murray*,¹⁰⁰ Murray was scheduled to be discharged from her position as a probationary government employee on May 29, 1971.¹⁰¹ Prior to that date Murray filed an action claiming that certain civil service regulations were not followed with regard to her termination.¹⁰² Accordingly, she sought a TRO enjoining her employer from dismissing her pending an administrative appeal. The district court granted Murray's request and issued the TRO, scheduling a hearing on her application for a temporary injunction for the following week.¹⁰³ However, the government refused to produce a supervisor to testify at

96. *Id.*

97. *Id.*

98. *Id.*

99. *Sampson v. Murray*, 415 U.S. 61 (1974); *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423 (1974).

100. 415 U.S. 61 (1974).

101. *Id.* at 62-63.

102. *Id.*

103. *Id.* at 66.

the injunction hearing causing the court to extend the TRO beyond twenty days.¹⁰⁴ The government, claiming the TRO had become a preliminary injunction, appealed the district court's ruling. The Supreme Court agreed with the District of Columbia circuit court's interpretation that the extension of the TRO beyond twenty days required it to be treated as a preliminary injunction.¹⁰⁵ Justice Rehnquist, writing for the Court, emphasized that a district court should not be able to shield its orders from appellate review simply by designating them as TROs.¹⁰⁶ The Court reasoned that to hold otherwise would allow a district court virtually unlimited authority over the parties in an injunctive proceeding.¹⁰⁷

In *Sampson*, the Supreme Court neither discussed nor indicated what type of situation might warrant an extension of a TRO beyond twenty days. Nevertheless, by limiting its holding to the facts of the case,¹⁰⁸ the Court seemed to imply that there were circumstances when extension of a TRO would be proper, necessary, and not result in its transformation into a preliminary injunction.

In *Granny Goose Foods, Inc. v. Brotherhood of Teamsters, Local No. 70*,¹⁰⁹ a local teamsters union, its officers and agents struck in violation of collective bargaining agreements.¹¹⁰ Granny Goose filed a complaint in state court seeking injunctive relief. A TRO enjoining all strike activity was issued,¹¹¹ but the union removed the case to federal district court¹¹² before the preliminary injunction hearing was held.¹¹³

104. *Id.* at 66-67.

105. *Sampson*, 415 U.S. at 86-88. The District of Columbia circuit court held that a TRO continuing beyond twenty days must be treated as a preliminary injunction, and must conform to the standards applicable to preliminary injunctions. This means that there must have been a hearing and separate findings of fact and conclusions of law issued; *see also* Murray v. Kunzig, 462 F.2d 871 (D.C. Cir. 1972).

106. *Sampson*, 415 U.S. at 86. The label given an order by a court is not determinative as to whether the order is a TRO or preliminary injunction. A reviewing court will look at the circumstances surrounding the issuance of the order to determine whether a TRO or preliminary injunction actually issued. Two factors to be considered are whether there was a hearing and whether a TRO lasted more than twenty days. *Id.*

107. *Id.* at 87.

108. Though the Court adhered to general principles imposing strict limitations on the scope of TROs, it limited its holding to the specific circumstances of the case. Referring to the court of appeals' decision that a TRO continuing beyond twenty days becomes a preliminary injunction, the Court stated: "We believe that this analysis is correct, *at least in the type of situation presented here*, and comports with general principles imposing strict limitations on the scope of temporary restraining orders." *Id.* at 86 (emphasis added).

109. 415 U.S. 423 (1974).

110. *Id.* at 427.

111. *Id.* at 428. The TRO was issued by the Superior Court of California on May 15, 1970. *Id.*

112. *Id.* The union and the individual defendants removed the proceeding to the federal district court for the District of Northern California on the ground that the action arose under section 301 of the Labor Management Relations Act. *Id.* Since the action arose under a law of the United States, removal from state to federal court was proper; *see* 28 U.S.C. § 1441(b) (1976).

113. *Granny Goose*, 415 U.S. at 428.

The district court denied a motion by the union to dissolve the TRO and after five months of relative tranquility, the labor dispute resumed.¹¹⁴ Thereafter, acting upon a motion by Granny Goose, the district court found the union to be in criminal contempt for violating the TRO's ban on all strike activity.¹¹⁵ Under the United States Code, any injunction or other order issued in a state court prior to removal remains in full force and effect until dissolved or modified by a federal district court.¹¹⁶ The district court reasoned that the TRO was still in effect because a federal court never dissolved or modified the order.¹¹⁷ The union argued that under rule 65(b) a TRO could not extend beyond twenty days without the consent of the party being restrained.¹¹⁸ Therefore, rule 65(b)'s twenty day limitation upon the duration of a TRO was in direct conflict with section 1450 of the code.

The Ninth Circuit's reversal of the contempt finding against the union¹¹⁹ was affirmed by the Supreme Court, which emphasized that section 1450 was not designed to give injunctions greater effect after removal to federal court than they would have had if the case had remained in state court.¹²⁰ Moreover, the Court held that the union had a right to be protected by rule 65(b)'s time limitation once the case was removed.¹²¹ Reflecting on the purpose and nature of TROs, Justice Marshall stated:

The stringent restrictions imposed by § 17,¹²² and now by Rule 65, on the availability of *ex parte* temporary restraining orders reflect the fact that our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard have been granted both sides of a dispute. *Ex parte* temporary restraining orders are no doubt necessary in certain circumstances, but under federal law they should be restricted to serving their underlying purpose of preserving the status quo and preventing irrepara-

114. *Id.*

115. *Id.* at 425-26.

116. *See* 28 U.S.C. § 1450 (1976). That section provides in part: "Whenever any action is removed from a state court to a district court of the United States . . . [a]ll injunctions, orders and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court." *Id.*

117. *Granny Goose*, 415 U.S. at 430.

118. *Id.*

119. The Ninth Circuit reversed the district court's contempt finding on the ground that the TRO had expired before November 30, 1970, the day of the alleged contempt. *Granny Goose Foods, Inc. v. Teamsters*, 472 F.2d 764 (9th Cir. 1973), *aff'd*, 415 U.S. 423 (1974).

120. 415 U.S. at 436.

121. *Id.* at 438. The Federal Rules of Civil Procedure govern the mode of proceedings in federal court after removal from state court. *See* FED. R. CIV. P. 81(c).

122. This refers to Section 17 of the Clayton Act. *See supra* note 26.

ble harm just so long as is necessary to hold a hearing, and no longer.¹²³

In an attempt to establish a rule of law to accommodate the conflicting policies of section 1450 and rule 65(b),¹²⁴ the Court concluded that a TRO issued by a state court, prior to removal, may remain in effect no longer than it would have stayed in effect under state law.¹²⁵ The Court stipulated, however, that under these circumstances a TRO may not remain in effect for longer than the twenty day limit imposed by rule 65(b), as measured from the date of removal.¹²⁶

Another issue raised on appeal was whether the district court's ruling on the union's motion to dissolve the TRO could be considered a hearing on a preliminary injunction, thereby causing the district court's denial of the motion to become a grant of a preliminary injunction.¹²⁷ The Supreme Court found this not to be so.¹²⁸ The rationale of the Court was primarily based on the fact that neither the parties nor the district court treated the dissolution hearing as one for a preliminary injunction.¹²⁹ The Court rejected the argument that the controlling factor should be whether the restrained party had an opportunity to be heard on the merits of the preliminary injunction when it moved to dissolve the TRO.¹³⁰ In an attempt to clarify the procedure to be followed when a hearing on a preliminary injunction is held after a TRO has been issued, Justice Marshall stated that a preliminary injunction, if appropriate, should be issued at the hearing accompanied by the necessary findings of fact and conclusions of law.¹³¹ Mere continuation of the TRO, however, would not be sufficient.¹³² The Court reempha-

123. *Granny Gose*, 415 U.S. at 438-39 (citations omitted).

124. The policy underlying section 1450 is that no lapse in a state court's temporary restraining order will occur simply by removing a case to federal court. *Id.* at 439. The policy underlying rule 65(b) is to strictly limit and control the circumstances deemed appropriate for TRO's. *Id.*

125. *Id.* at 439-40.

126. *Id.* In the instant case the amended TRO was issued on May 18, 1970, and would have remained in effect no longer than fifteen days under California law, or until June 2, 1970. The case was removed to federal court on May 20, 1970. The TRO therefore expired on May 30, 1970 by applying the ten day limitation of rule 65(b) from the date of removal. Thus, no order was in effect on November 30, 1970, when the union was alleged to be in contempt. *Id.* at 440.

127. *Id.*

128. *Id.* at 441-42. The Court noted that there were situations when the parties would not intend to present their cases for or against a preliminary injunction at a hearing on a motion to dissolve a TRO. In such circumstances the appropriate procedure would be for the district court to address the issues raised in the motion to dissolve or modify the restraining order but to postpone for a later hearing, to be held within rule 65(b)'s time limitations, the application for a preliminary injunction.

129. *Id.* at 442.

130. *Id.*

131. *Id.* at 443.

132. *Id.*

sized that when a court decides to supplant a TRO with a preliminary injunction, it should issue an order specifically stating its intention.¹³³ If the court fails to do so, the party against whom the TRO is issued should be able to reasonably assume that the TRO expired within the time limits imposed by rule 65(b).¹³⁴ Although technically dicta, these statements are quite significant. They may be interpreted to mean that a TRO expires after a maximum of twenty days, unless a court provides otherwise. Thus, if a court specifically states that a TRO is to remain in effect until an injunction hearing is completed or until further order of the court, there exists a possibility that the TRO may extend beyond twenty days.

In short, the Supreme Court made it clear in *Sampson* and *Granny Goose* that TROs may not be of an indefinite nature. Nevertheless, the Court did not squarely address the question of whether a TRO may last beyond twenty days in the proper set of circumstances. Therefore, the Supreme Court has not resolved the conflict among the circuit courts.

V. ANALYSIS

Federal circuit courts disagree as to whether a TRO extending beyond twenty days, without the restrained party's consent, remains a TRO or is transformed into a preliminary injunction.¹³⁵ Moreover, no definitive stand has been taken by the Supreme Court on this issue.

While all of the circuits agree that a TRO may not be extended indefinitely, strong arguments have been made advocating that in the proper circumstances a TRO should be allowed to extend beyond twenty days without becoming an invalid preliminary injunction. Such arguments are deserving of careful attention and study as the conflicting interests and rights of the party being restrained and the party seeking the TRO must be balanced. In attempting to strike this balance, a difficult task indeed, it is important to remember that TROs were designed as a remedial means of preserving the status quo of the litigants and preventing irreparable harm just so long as necessary.¹³⁶ Before the introduction of a definite time limitation in 1917, the Supreme Court concluded that "just so long as was necessary" was until such time as a court decided to grant or deny the motion for a preliminary injunction.¹³⁷ Rule 65(b) attempts to strike this balance, and has done so quite effectively.

However, if a court issues a TRO and begins a preliminary injunction hearing within twenty days but cannot complete the hearing within this period, it should be able to extend the order until the hearing has been completed and the injunction has been granted or denied. This

133. *Id.* at 444-45.

134. *Id.* at 445.

135. See *supra* notes 49-50 and accompanying text.

136. *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 438-39 (1974).

137. *Houghton v. Meyer*, 208 U.S. 149, 156 (1908).

protects the party seeking the TRO from being placed in a position of suffering an irreparable injury because of an unreasonable interpretation of rule 65(b)'s time provisions. It also assures the restrained party that an injunction hearing will be completed as soon as possible, and that this hearing will begin within twenty days of the issuance of the TRO. This approach, in these circumstances, appears to be more rational than striking the order as an improperly issued preliminary injunction. It balances the rights and interests of both parties and arrives at a just solution.

A more difficult situation exists when the party seeking a TRO has made every possible attempt to have a preliminary injunction hearing begun within twenty days, but for reasons beyond his control has been unsuccessful. Keeping in mind a TRO's basic purpose — to preserve the status quo until an injunction hearing can be held — the most rational approach appears to be to allow the court to extend the TRO until the preliminary injunction hearing has been completed, so long as the court acts reasonably. This, of course, may be accomplished by making any TRO extending beyond twenty days appealable and subject to judicial review. That review, however, should judge the TRO by TRO standards rather than preliminary injunction standards.

VI. CONCLUSION

Most federal courts have strictly interpreted the provisions of rule 65(b). According to this view, a TRO that extends beyond twenty days without the consent of the restrained party is transformed into a preliminary injunction. However, since the TRO does not meet the minimum standards required of preliminary injunctions, the order is improperly issued and must therefore be stricken. Some circuit courts, on the other hand, have recognized that to blindly adhere to such an interpretation in certain cases may result in inequitable and harsh consequences. Accordingly, these courts take the position that in certain circumstances a district court should be allowed to extend a TRO beyond twenty days without the TRO being transformed into a preliminary injunction. The Supreme Court, while clearly stating that a TRO may not extend indefinitely, has failed to settle the conflict among the circuits on this issue.

It is the opinion of this writer that when an injunction hearing has begun within the twenty day period prescribed by rule 65(b), a district court judge should be allowed to extend the TRO until the hearing has been completed and the judge has granted or denied the request. Likewise, if the party seeking a TRO has done everything possible to have an injunction hearing begun within twenty days, but due to no fault of his own has been unsuccessful, a district court judge should be able to extend the TRO until the injunction hearing can be completed. Extending a TRO in such circumstances appears to be the best means of preserving the underlying purpose behind TROs: to maintain the sta-

tus quo and prevent irreparable harm just so long as is necessary to hold a hearing.

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