

HILL, Senior Circuit Judge, concurring, *dubitante*:

The court today affirms contempt sanctions against a lawyer for doing what he knew the judge had ordered him not to do. I am not attracted to this lawyer's conduct. The problem arose, however, because the party who petitioned for and obtained the TRO stood silent while the order inadvertently expired without counselling the court of the requirements for its extension. One would expect more from the agency appearing here. It has obtained temporary restraint before.<sup>1</sup> I am not pleased with the performance of any of our cast of characters.

An *ex parte* temporary restraining order is an extreme remedy to be used only with the utmost caution. Rule 65(b) of the Federal Rules of Civil Procedure imposes strict restrictions on its scope and specific time constraints for its duration:

Every temporary restraining order granted without notice . . . shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period.<sup>2</sup>

Fed. R. Civ. P. 65(b).

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<sup>1</sup> An electronic search using only the words "Securities and Exchange Commission" and "temporary restraining order" or "TRO" yielded 11,541 cases. We are not suggesting that *all* these cases are similar to the instant situation, nor are we implying we have read each case. We would suggest that counsel representing the SEC are likely to have explored the requirements for effective extension of TROs from time to time.

<sup>2</sup> The district court found that Grossman consented to the extension of the TRO. The majority opinion, however, accepts without comment Grossman's contention that he did not. I concur in this conclusion and note that, if Grossman had consented to the extension, the TRO would have remained an unappealable interlocutory order. *Fernandez-Roque v. Smith*, 671 F.2d 426, 430 (11th Cir. 1982).

The importance of these restrictions was emphasized by the Supreme Court in *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70*, 415 U.S. 423 (1974). In *Granny Goose*, a state court issued a temporary restraining order to enjoin the local union from striking. Two days later, the case was removed to federal court. The union moved to dissolve the restraining order. After a hearing, the court denied the union's motion. The union went on strike some months later. The district court held the union in contempt for violating the TRO. The Ninth Circuit reversed, and the Supreme Court affirmed the appellate court.

The Court held that the union violated no order when it resumed its strike because no order was in effect at that time. The Court rejected the employer's argument that the district court's hearing on the union's motion to dissolve the restraining order was a hearing on a preliminary injunction, or that its order denying the motion should be construed as a grant of a preliminary injunction. Regardless of the district court's intent in the hearing, the TRO did not survive the expiration of the Rule 65(b) time limits because the district court did not follow the appropriate procedure. The Supreme Court held:

Where a hearing on a preliminary injunction has been held after issuance of a temporary restraining order, and where the District Court decides to grant the preliminary injunction, the appropriate procedure is not simply to continue in effect the temporary restraining order, but rather to issue a preliminary injunction, *accompanied by the necessary findings of fact and conclusions of law.*

415 U.S. at 443 (emphasis added); see also *Hudson v. Barr*, 3 F.3d 970, 975 (6th Cir. 1993) (indefinite continuation of TRO held improper; government's consent to TRO, pending hearing on motion for preliminary injunction, ended on day hearing was supposed to occur); Fed. R. Civ. P. 52(a) (" . . . and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action.").

Our panel's opinion today purports to accept *Granny Goose* but characterizes its holding as ". . . where there has been no notice to the parties and no hearing on the various factors involved in considering a preliminary injunction, a TRO continued past the Rule 65 limit falls of its own weight." This interpretation reads out of Rule 65(b) any requirement for consent to validate any extension of a TRO beyond the twenty-day limit. See *Connell v. Dulien Steel Products, Inc.*, 240 F.2d 414, 417 (5th Cir. 1957). Under the Rules, it is not just notice and a hearing that allows a TRO to become a preliminary injunction, but findings of fact and conclusions of law which *adjudicate the property right involved* thereby satisfying due process.

*Granny Goose* also emphasizes the safeguards built into Rule 65 to prevent the serious penalties imposed when one is found to be in contempt for violating court injunctions:

[O]ne basic principle built into Rule 65 is that those against whom an injunction is issued should receive fair and precisely drawn notice of what the injunction actually prohibits.

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It would be inconsistent with this basic principle to countenance procedures whereby parties against whom an injunction is directed are left to guess about its intended duration. Rule 65(b) provides that temporary restraining orders expire by their own terms within 10 days of their issuance. Where a court intends to supplant such an order with a preliminary injunction of unlimited duration pending a final decision on the merits or further order of the court, it should issue an order clearly saying so. And where it has not done so, a party against whom a temporary restraining order has issued may reasonably assume that the order has expired within the time limits imposed by Rule 65(b).

415 U.S. at 444-45 (emphasis added)(footnote omitted).

No case is cited to us in which the imposition of contempt for violation of an indefinitely-extended TRO has been upheld. Nevertheless, we hold today that "[f]or Grossman just to disregard the district court's order based on his personal belief that it was invalid, is conduct that warrants a determination of contempt." I do not concur in this, but I do not view it as a basis for the judgment. The opinion seems to say that, notwithstanding *Granny Goose*, it was not "reasonable" for Grossman to assume that the TRO had expired as Rule 65(b) prescribes.<sup>3</sup>

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<sup>3</sup> I believe that this conclusion denies Grossman the benefit of that to which he is entitled under *Granny Goose*. Rule 65(b) is clear that no TRO may be extended beyond the twenty days without the consent of the party restrained. On May 27, 1994, after the expiration of twenty calendar days, Grossman requested the return of some of his client's funds from the Receiver who had custody of them. The Receiver disagreed about the calculation of time, stating that the time would expire on June 1. On June 3, Grossman inquired of the district court whether a preliminary injunction had issued. The staff advised that no order had been issued. On June 6, Grossman again inquired of the Clerk of Court and of the district court's chambers whether any injunction had issued. Informed that no order had issued nor was any order forthcoming, Grossman transferred his client's retainer from a trust fund to Grossman's law firm operating account in partial payment of his fees. As far as the record reveals, Grossman did what Rule 65(b) permitted him to do, and as his client instructed him to do with

This holding is based upon *Sampson v. Murray* , 415 U.S. 61 (1974). In *Sampson*, a government employee sought a temporary injunction against her dismissal from employment as a probationary employee. The district court granted a temporary restraining order. Later, after an adversary hearing at which the government declined to produce the discharging official as a witness to testify as to the reasons for the dismissal, the district court ordered the temporary restraint continued until the witness appeared. In considering the issue of appellate jurisdiction over the order the Supreme Court wrote:

A district court, if it were able to shield its orders from appellate review merely by designating them as temporary restraining orders, rather than as preliminary injunctions would have virtually unlimited authority over the parties in an injunctive proceeding. In this case, where an adversary hearing has been held, and the court's basis for issuing the order strongly challenged, classification of the potentially unlimited order as a temporary restraining order seems particularly unjustified. Therefore, we view the order at issue here as a preliminary injunction.

*Id.* at 87-88.

An order extending a TRO beyond the statutory twenty-day limit, therefore, is treated as a preliminary injunction. One might well conclude that the conversion of an indefinitely-extended TRO into a preliminary injunction would be for purposes of appeal only, conferring jurisdiction on the court of appeals for the sole purpose of voiding the invalidly extended TRO.<sup>4</sup>

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the client's funds.

<sup>4</sup> As noted earlier, until today there has never been a case affirming sanctions for contempt for violation of an indefinitely-extended TRO.

This was exactly the approach of the Court of Appeals for the District of Columbia Circuit in *National Mediation Bd. v. Air Line Pilots Association, Int.*, 323 F.2d 305 (D.C. Cir. 1963). In that pre-*Sampson* case, the Court of Appeals held that an order extending a TRO beyond the twenty days allowed by Rule 65(b) is tantamount to the grant of a preliminary injunction, thus conferring jurisdiction on the court of appeals. The court further held, however, that since the restraining order was not supported by findings of fact and conclusions of law as required by Rule 55(a), it was not a valid preliminary injunction and remanded the case to the district court with directions to dissolve the void order. *Id.* at 305-06.<sup>5</sup>

This result was later endorsed by Justice Marshall in his dissent in *Sampson*. In *Sampson*, the Supreme Court went beyond the mere exercise of appellate jurisdiction and considered the *merits* of the application for a preliminary injunction. This appeared to be a significant extension to Justice Marshall who wrote:

It is suggested that if an indefinitely extended temporary restraining order remained unappealable, the District Court would have virtually unlimited authority

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<sup>5</sup> An earlier approach adopted by two circuits upon finding that temporary restraining orders had expired by virtue of the Rule 65(b) limitations, was to hold that there was no existing order to review and dismiss the appeals as moot. *Benitez v. Anciani*, 127 F.2d 121 (1st Cir. 1942), *cert. denied*, 317 U.S. 699 (1943) and *Southard & Co. v. Salinger*, 117 F.2d 194 (7th Cir. 1941). Subsequent courts have distinguished these cases where, as here, a district court has ordered an indefinite extension of the TRO. See *Pan American World Airways, Inc. v. Flight Engineers' Int'l Ass'n*, 306 F.2d 840, 842 (2d Cir. 1962) ("In the present case, because the district judge extended the order beyond the twenty day period, we consider that the temporary restraining order became an appealable preliminary injunction.").

over the parties in an injunctive action. At the outset, this cannot justify this Court's reaching the merits of Mrs. Murray's claim for a preliminary injunction. Even if the order entered by the District Court is appealable, it should be appealable only for the purposes of holding it invalid for failure to comply with Rule 52(a). This was the precise course taken by the Court of Appeals for the District of Columbia Circuit in *National Mediation Board, supra*, on which the majority relies.

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Here, instead, we find the Supreme Court determining that although the District Court had jurisdiction to grant injunctive relief, the equities of Mrs. Murray's case did not support a preliminary injunction, when neither the District Court nor the Court of Appeals has yet confronted the latter issue. I do not believe this makes for sound law.

*Sampson*, 415 U.S. at 957 (footnote omitted).

I recognize that this reasoning was rejected by the Court in *Sampson*. Justice Rehnquist, for the Court, wrote:

Our Brother Marshall, in his dissenting opinion, nevertheless suggests that a district court can totally or partially impede review of an indefinite injunctive order by failing to make any findings of fact or conclusions of law. It would seem to be a consequence of this reasoning that an order which neglects to comply with one rule may be saved from the normal appellate review by its failure to comply with still another rule. We do not find this logic convincing. Admittedly, the District Court did not comply with Fed. Rule Civ. Proc. 52(a), but we do not think that we are thereby foreclosed from examining the record to determine if sufficient allegations or sufficient evidence supports the issuance of injunctive relief.

*Id.* at 951 n. 58.

By reviewing the merits, the Supreme Court appears to have held that the TRO *cum* preliminary injunction is a valid restraining order. Otherwise, the review on the merits would be a mere

intellectual exercise which the Court is not wont to do.<sup>6</sup> So, I am instructed by the Court that the indefinite extension of a TRO not only transforms the TRO into a preliminary injunction for purposes of appeal, but also into a valid injunction.<sup>7</sup>

Clearly, some problems emerge. We uphold the contempt imposed for violation of an expired TRO in this case at the expense of making unclear the duration of emergency orders that deprive a party of the free use of his or her property. This is not appealing in a free society. Furthermore, we eviscerate the protection afforded by Rule 65(b). If a TRO can metamorphose into a preliminary injunction by the expiration of the very time limits imposed as safeguards against the indefinite restraint over one's

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<sup>6</sup> Upon review of the merits, the Court analyzed whether petitioner had adequately demonstrated the irreparable harm necessary to secure injunctive relief, concluded that she had not done so. Therefore, although *valid*, the Court found the TRO *unlawful* in that it was incorrectly granted. The Court reversed the decision of the court of appeals which had upheld the district court's grant of the TRO.

<sup>7</sup> This determination is part of what is required in order for this court to uphold the contempt imposed upon Grossman in this case. Unlike criminal contempt, civil contempt may be upheld only if the disobeyed order was *valid and lawful*. *Smith v. Sullivan*, 611 F.2d 1050, 1052-54 (5th Cir. 1980).

Having been persuaded that the indefinitely extended TRO becomes a valid preliminary injunction, the second step would be to consider the injunction on the merits to determine whether it was granted according to law, *i.e.*, whether the applicant demonstrated the requisite irreparable harm and inadequate legal remedies.

In this case, however, Grossman does not appear to challenge the injunction on its merits, choosing to argue only that the TRO was void after the expiration of the statutory time limits. Therefore, my inquiry is limited to the validity of the order disobeyed.



property, then Rule 65(b) provides no protection at all.<sup>8</sup> As the Second Circuit has observed:

It is because the remedy is so drastic and may have such adverse consequences that the authority to issue temporary restraining orders is carefully hedged in Rule 65(b) by protective provisions. And the most important of these protective provisions is the limitation on the time during which such an order can continue to be effective.

*Pan American World Airways, Inc. v. Flight Engineers' Int'l Ass'n*, 306 F.2d 840, 843 (2d Cir. 1962) (holding, however, that a TRO indefinitely extended by a district court becomes a preliminary injunction so that it may be reviewed).

I confess to a temptation to conclude that *Sampson* is overruled by *Granny Goose*, or that, at least, because the restraint imposed in *Sampson* was found to be unlawful, the implications from the merits review are dicta. I do not undertake, however, to limit Supreme Court precedent. If our reading of *Sampson* is correct, it requires that, for the first time, we affirm a contempt imposed for violating a TRO extended beyond the statute's limit.

Not without doubt as to this conclusion, I **CONCUR**.

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<sup>8</sup> This approach does, however, have the virtue of easing the burden on over-worked district judges. It appears that now they may avoid the time-consuming chore of finding facts and making conclusions of law, and simply allow the passage of time to accomplish what many cases say they may not do--turn a TRO into a preliminary injunction without going to this trouble.