THE STATUS OF PICKETING UNDER 8(b)(7) OF THE
LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959

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THE STATUS OF PICKETING UNDER 8(b)(7) OF THE
LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959

by

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Approved by Committee:

[Signatures]

Dean of the Graduate Division

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CHAPTER I

INTRODUCTION

Picketing as a form of economic sanction is a traditional weapon of the labor movement. American unions, however, have not had free and unlimited use of the right to picket. The right to picket is restricted by both state and federal laws. To date, the most comprehensive regulation of picketing is Section 8(b)(7) of the Labor-Management Reporting and Disclosure Act (LMRDA) of 1959.¹

The problem, as manifested in Section 8(b)(7), is that the Section has been subject to a variety of conflicting and occasionally ambiguous interpretations by the National Labor Relations Board (NLRB), and the federal courts.²

Under the provisions of Section 8(b)(7) picketing is unlawful where: (1) the employer already has a valid contract with a union; (2) where a valid election has already taken place within the preceding twelve months; and (3) where the union


²Under the power granted by the Wagner Act as amended, the National Labor Relations Board has original jurisdiction in labor dispute cases. The Board's order has no final validity on either the labor organization or employer unless an enforcing decree is issued by the federal courts.
has picketed for more than thirty days without filing for an expedited election. The publicity proviso, 8(b)(7)(C), allows picketing if its purpose is to advertise to the public in a truthful manner that the employees are not represented by a union, provided the picketing does not interfere with the picketed establishment. Interpretation of the publicity proviso has proved to be elusive.

Section 8(b)(7) restricts picketing directed at certain objects, e.g., organizational and recognitional picketing by an uncertified union. However, a determination of the union "object" in selected cases was found to be a difficult task. The criteria used to determine whether the object "is forcing or requiring an employer to recognize or bargain with a labor organization...or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative...",¹ have added to the difficulty of enforcement under 8(b)(7)(A) and 8(b)(7)(B), e.g., does an isolated instance of interference with deliveries constitute an infraction of 8(b)(7)? Or if the intent of the picketing was found to be informational, does interference with deliveries make the picketing unlawful? Or would

¹73 Stat. 544, United States Statutes at Large, Section 8(b)(7) (1959).
Section 8(b)(7)(C) protect the picketing as a right of informing the public?

Early cases tried under 8(b)(7) reveal the NLRB's endeavor to determine under which circumstances picketing should be allowed. The initial question presented to the Board was whether Section 8(b)(7) overruled prior case law established under the Labor Management Relations Act (LMRA).\(^1\)

One of the first decisions of the NLRB after the enactment of 8(b)(7) indicated that the status of picketing remained unaltered. With a change in membership the Board adopted a new approach to picketing under Section 8(b)(7).

The publicity proviso in Subsection (C) has been used by unions as a defense in picketing cases arising under Section 8(b)(7). In these cases the Board attempted to resolve such questions as whether Subsection (C), which allows informational picketing, also protected picketing in protest of substandard wage and working conditions. Or is picketing for the reinstatement of discharged economic strikers allowed? Or can an employer's unfair labor practice be used as a defense when the picketing is in violation of the terms specified in Section (A) and/or (B)?

While the aforementioned questions are of extreme importance to employers and unions alike, the Board opinions

\(^1\)Labor-Management Relations Act (Taft-Hartley), United States Statutes at Large, 61 Stat. 136 (1947).
concerning such questions were seldom unanimous. The lack of unanimity concerning which types of picketing are to be prohibited by Section 8(b)(7) suggests the need for a re-examination of the status of picketing. This is the purpose of this thesis.

The procedure of the thesis will include: (1) a review of the legal status of picketing prior to the enactment of the LMRDA of 1959, (2) an examination of the legislative history of the LMRDA, including a review of the tenor of public opinion toward organized labor and the scope of the congressional philosophy as manifested in Section 8(b)(7), and (3) a review of the decisions and orders of the NLRB and appeals to the federal courts. Analysis of the decisions of the NLRB and Court of Appeals will serve to clarify the status of picketing under Section 8(b)(7) and to examine the effect of the changing status of picketing on unions, management and the public. It is within this framework that the success or failure of policy measures must be examined. If the policy in question does not provide conditions which will enable the parties to equitably resolve their difficulties, further amendments may be necessitated. Such is the test of public policy, continuous development and adaptation to meet the ever-changing format of industrial relations.
CHAPTER II

THE STATUS OF PICKETING PRIOR TO 1959

Picketing Prior To 1940

The use of picketing is not a new concept in industrial relations. The first known instance of picketing in the United States occurred in 1827. This incident of picketing which was to protest the discharge of fellow journeymen tailors resulted in the picketers being indicted for conspiracy. Similarly, a conspiracy charge was issued in 1836 against picketers who supported a strike in protest of wage reduction. Although the legal status of picketing was not established until 1880, the effect of the picketing weapon was sufficient to cause an anti-picketing bill to be introduced in the New York Legislature in 1864. In 1873, the Illinois State Legislature passed an act making intimidation of strike breakers a criminal offense.


2 People v. Faulkner (N.Y., N.Y.C. O.T. 1836), 4 Commons, op. cit. supra note 1 at 315.


4 Id.
By the end of the 1880's the court injunction began to emerge as a means of controlling unions. The effectiveness of the injunction ended the prosecution of labor activities as a crime of conspiracy under the common law. Prior to the development of the injunction, common law courts construed picketing as a civil wrong subject to the law of torts. Courts ruled that property rights included the right of doing business. Interference with property rights or business operations was a tortious action and enjoinable. In order for the picketing to be excused the picketers were required to prove the legality of their actions by showing self-interest.

By the mid-1900's most state courts held that the legality of picketing depended on the means and ends sought while others, Illinois, Michigan, New Jersey, California, and Washington, held picketing illegal per se. In the states which held all picketing to be illegal the judges reasoned that "the picket line is intended to and does by nature intimidate."

1 There was no unanimity among the states as to what constituted peaceful or non-intimidating picketing. This lack of uniformity among states regarding allowable picketing led Joseph Tanehaus, a recognized

\[\text{Id. at 138.}\]
authority on picketing to state that:

It is not surprising... to find many courts, even in jurisdictions where peaceful picketing was sanctioned by statute, quite disposed in fact to restrain all but nominal picketing by so limiting the term "peaceful" as to exclude all conduct inappropriate at a dowager's tea.¹

The status of picketing as interpreted by the state courts remained in a state of flux until the passage of the Norris-LaGuardia Act in 1932.² The purpose of the Act was to limit the use of the labor injunction. The Norris-LaGuardia Act had the effect of sanctioning peaceful and truthful picketing. Section 4(e) of the Act prevented any court in the United States from restraining picketers from "giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence..."

Before the full effect of the Norris-LaGuardia Act could be realized, a United States Supreme Court ruling reversed the tort theory of picketing. In the famous case


of Thornhill v. Alabama, the Court held picketing to be a form of speech, constitutionally protected by the First Amendment. This Court decision set aside the regulation of picketing as a branch of the law of torts.

The Thornhill Doctrine

At issue in the Thornhill case was an Alabama statute which prohibited all picketing. In holding the statute unlawful the Court said:

...In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution.

To determine under what circumstances picketing could be limited, the Court added a test.

Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arise under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion.

The Court's language in the above statement suggested two possibilities of interpretation for later cases. A broad construction of the Thornhill opinion would indicate that the Court intended to remove all regulations on picketing that could not meet the test of this opinion.

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2Id. at 102. 3Id. at 104-5.
A narrow construction would restrict only those laws which make picketing unlawful per se.

The most important aspect of the Thornhill case was the equating of picketing with speech. As guaranteed by the Constitution, all persons have the right to voice their opinions publicly. By equating picketing with speech, a new concept was established. In the Thornhill case the Court stated that this right was not to be extended so far as to allow activities that would ordinarily be circumscribed by law, i.e., the Court would allow only truthful and peaceful dissemination of information.

The U.S. Supreme Court's first application of the Thornhill Doctrine indicated the complexity of the new principle. At issue in the case of Milk Wagon Drivers' Union of Chicago v. Meadowmoor Dairies, Inc., was a picketing situation with a background of violence. Meadowmoor Dairies was engaged in the business of selling milk to vendors. The vendors in turn sold the milk to retail outlets. A door-to-door service was provided by members of the union supplying essentially the same products. The union claimed that because of the lower prices offered by the vendor system, their jobs and incomes were jeopardized. To support

the union's protest, pickets were stationed at stores employing the vendor system. A preliminary injunction was granted by an Illinois state court to stop the picketing. Although the picketing had been peaceful, it was accompanied by violence. The trial court enjoined the violence but not the picketing, for to do so would have been in conflict with the Thornhill Doctrine. The Supreme Court of Illinois reversed the trial court, making the preliminary injunction permanent. The U.S. Supreme Court granted certiorari.

The Court's dictum added a new principle to the Thornhill Doctrine. Mr. Justice Frankfurter, speaking for the majority, which included Mr. Justice Murphy, writer of the Thornhill decision, said that picketing "enmeshed" in violence is not constitutionally protected. In a context of violence, picketing stops being an appeal for union support and becomes a coercive device.

Mr. Justice Reed and Mr. Justice Black dissented, holding that the majority opinion opened the door for revision of the Thornhill Doctrine. The dissenting justices felt that nothing in the Meadowmoor case justified an injunction and "that neither the findings nor the evidence . . . showed such imminent clear and present danger as to justify an abridgment of the rights of freedom of speech and the press."1 The Meadowmoor case shows that although picketing

1Id. at 313.
is equated with free speech and protected, picketing conducted in an atmosphere of violent conduct is not entitled to the First Amendment guarantee.

The status of stranger picketing under the Thornhill Doctrine was reviewed in the case of American Federation of Labor v. Swing.\(^1\) An injunction was sought against the picketing of Swing's beauty parlor because the picketers were not in Swing's employ. Mr. Justice Frankfurter, speaking for the Court, said that the right to picket cannot be denied by "drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him," adding that even stranger pickets engaged in the "same industry" have an "interdependence of economic interest."\(^2\) The decision in the Swing case represents an extension of the Thornhill Doctrine by allowing picketing in the absence of a direct employer-employee relationship. The reliance on the term "interdependence of economic interest" in the Swing case established another criteria for evaluating the status of picketing.

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\(^1\)American Federation of Labor v. Swing, 312 U.S. 321 (1941). Picketing of an employer by those who are not in the employ of the employer is termed stranger picketing.

\(^2\)Id. at 326.
How narrowly the states could define the term "interdependence of economic interest" was the subject discussed in *Carpenters & Joiners Union v. Ritter's Cafe*.\(^1\) Ritter, a restaurant owner, was engaged in the construction of a building some distance from his cafe. The construction was not related to his cafe business. To supervise the construction, Ritter hired Plester, a non-union contractor. In protest of the assignment to a non-union contractor the cafe was picketed by members of Local 213 (a carpenter's and painter's union).\(^2\)

The picketing was held to be in violation of a Texas anti-trust law. As interpreted by the Texas court, the picketing had the effect of forcing Ritter to require Plester to employ only union help at the building site. The decision was appealed to the U.S. Supreme Court which upheld the initial injunction. The Supreme Court said that:

> recognition of peaceful picketing as an exercise of free speech does not imply that the states must be without power to confine the sphere of communication to that directly related to the dispute.\(^3\)

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\(^2\) The employees at Ritter's Cafe were members of a hotel and restaurant union.

\(^3\) *Id.* at 727.
This interpretation enabled the states to restrict picketing to sites of the dispute.

The case of Bakers & Pastry Drivers & Helpers Local 802 of the International Brotherhood of Teamsters v. Wohl, presented the issue of whether peaceful picketing affecting a third party to the dispute would lose its constitutional immunity. Wohl, an independent proprietor, operated a delivery service between bakers and retail outlets. The economic advantage of this operation encouraged other bakeries to terminate the services of union drivers and distribute their goods through independent peddlers. Feeling the impact of this change, the union began soliciting the membership of the peddlers. Wohl refused to accede to the union campaign. In retaliation the union began picketing the bakeries supplying Wohl and soliciting the support of Wohl's customers. An injunction, requested by Wohl, was granted by a New York court against the picketing of both Wohl's suppliers and customers. The injunction was upheld by the New York Court of Appeals on the grounds that "no labor dispute" was involved as defined by the State statutes.\(^1\) The U.S. Supreme Court granted certiorari.

\(^1\)Bakers & Pastry Drivers & Helpers Local 802 of the International Brotherhood of Teamsters v. Wohl, 313 U.S. 769 (1942).

\(^2\)Id.
Mr. Justice Jackson spoke for the majority who reversed the decision of the New York court. The majority view held that an injunction could not be sustained where there were "no findings and no circumstances from which we can draw the inference that the publication was attended or likely to be attended by violence, force or coercion, or conduct otherwise unlawful or oppressive. . . ."¹ The majority found that it was not necessary for a "labor dispute" to exist in order to make picketing legal, as suggested by the New York Court of Appeals. To isolate picketing only to situations involving a labor dispute would seriously curtail the right to make grievances known to the public. While this opinion retains the Thornhill interpretation, it strongly suggests that picketing seriously affecting a third party may lose its constitutional immunity.

In a concurring opinion, Justice Douglas suggested the need to extend the logic of the Thornhill Doctrine by holding picketing to be:

... [More than speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated.]²

By admitting that picketing contains more elements than that of communication, Justice Douglas conceded at least

¹Id. at 775.
²Id. at 776.
a moral victory to the opponents of the free speech con-
cept. These now famous words of Justice Douglas eventually
resulted in a further extension of the Thornhill pronounce-
ment—and were to be used again to substantiate the Court's
opinion in later cases.

A case, similar in fact to Wohl, was Giboney v.
Empire Storage & Ice Co.\textsuperscript{1} Here the concern was over picketing
in violation of a state anti-trust law. A Kansas City ice
handlers union was petitioning for recognition. In support
of their cause the union asked the Kansas City wholesale
ice distributors not to sell to non-union ice peddlers.
All but Empire agreed. The union picketed Empire in an
attempt to force Empire to become a union employer. Empire
resisted on the grounds that to join it would subject them
to a violation of Missouri's anti-trust law. The union
contended that they were free to picket under the right
of free speech guaranteed by the Constitution. The state
court added that the "state law does not violate the
Federal Constitution."\textsuperscript{2}

In a unanimous decision the U.S. Supreme Court up-
held the state court injunction. The Court reasoned that
peaceful picketing could not be separated from the single

\textsuperscript{1}Giboney v. Empire Storage & Ice Co., 336 U.S. 490
(1949).

\textsuperscript{2}Id.
course of conduct which violated the law. To support his opinion, Mr. Justice Black adopted the language of Justice Douglas' concurring opinion in Wohl, that picketing was more than free speech. The decision in this case reflects the Court's recognition that picketing contained many more facets than had been considered in the Thornhill decision. The Thornhill Doctrine was adequate when viewed in the light of the time and conditions of the case. But for law to deal with the changing economic conditions of industry, it must be flexible. The Court found that social injustices may be created if the Thornhill Doctrine is strictly followed. The Court eventually adopted the interpretation that picketing was something "more than speech" and might go beyond its free speech protection and violate the law. This principle first enunciated by Justice Douglas in the Wohl case was extended in later cases.

In Hughes v. Superior Court, a unanimous Court upheld an injunction of a California state court against peaceful picketing of a retail store. The purpose of the picketing in question was to force the management of a supermarket to hire Negro help in proportion to its Negro trade. In formulating his opinion, Mr. Justice Frankfurter

1 supra, at 501, and in n. 6, at 503.

relied on Justice Douglas' concurring opinion in Wohl. Justice Frankfurter stated that "the Constitution does not demand that the element of communication in picketing prevail over the mischief furthered by its use. . . ." Justice Frankfurter felt that to allow the picketing in this instance would open the door to picketing for the proportional employment of other minority groups in the United States. This would not only encourage racial disharmony but would create unnecessary hostilities. The Hughes case began a gradual withdrawal from the Thornhill Doctrine by holding certain types of picketing not to be equated with free speech.

The retreat from Thornhill is further evidenced in Hughes' companion decision, International Brotherhood of Teamsters v. Hanke. In Hanke, the union established a picket line to force a used car dealer to adhere to a union established work schedule. The Washington State Supreme Court, affirming the injunction against the picketing granted by the trial court, set forth the principle of "community interest." The community interest doctrine introduces the possibility of considering the welfare of the business. If these considerations outweigh the union's interest in

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1 Id. at 464.

the dispute, the picketing could be enjoined. The "community interest" principle recognizes the public's stake in industrial conflicts. In adopting the opinion of the Washington court the U.S. Supreme Court established another basis for regulating peaceful picketing. The state courts could restrict picketing under the dictum of the "community interest" rule.

The picketing-free speech equation was further developed in a case involving union picketing for recognition in violation of a state law. In Building Service Employees Union v. Gazzam the union was seeking recognition from a hotel owner. The union was told that recognition would be forthcoming if the employees themselves would agree. The union was rejected by the employees. After the loss of the certification election the union established a picket line to force the owner to grant their demands. The picketing was enjoined by the Washington State Supreme Court and sustained by the U.S. Supreme Court. The Court held that Washington's public policy legitimately protected the employer from coercion to force him to interfere with his employees' choice of a labor union. The state's policy was to allow employers freedom in the running of their

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business. The Court explained very carefully that the effect of the union's action was to force Gazzam to act in violation of state law.

The 1950 decisions of Hughes, Hanke, and Gazzam marked the beginning of the Court's movement away from the free-speech principle established in the Thornhill Doctrine. The retreat was all but concluded three years after the Hughes, Hanke, Gazzam decisions in the case of Journeymen Plumbers v. Graham.¹

The Graham brothers had contracted the construction of a school building in Richmond, Virginia. Work was subcontracted to non-union employers. The job site was picketed by the union members when their request for removal of non-union employers was denied. The Graham brothers sought an injunction on the grounds that to comply with the union demands would subject them to a violation of Virginia's right-to-work law. An injunction was issued by the state court and was sustained by the U.S. Supreme Court. The Court accepted the Giboney-Hanke-Gazzam thesis which allowed states to forbid peaceful picketing which interferes with valid economic policy. The Court found the picketing was for the purpose of forcing non-union contractors from the job

¹Graham v. Retail Clerks International Ass'N., Local 57, 345 U.S. 522 (1950).
and replacing them with union men. This action, although peaceful, clearly contravened Virginia's state law. The Graham decision, which indicated still further decay of the Thornhill Doctrine, was consistent with the shifting attitude of the U.S. Supreme Court on picketing.

The U.S. Supreme Court wrote the final chapter of the Thornhill Doctrine in the case of International Brotherhood of Teamsters v. Vogt, Inc.\(^1\) In the Vogt case, a 1957 decision, the U.S. Supreme Court sustained Wisconsin's action restraining peaceful picketing of a union which had failed to organize the employees of the picketed establishment. The trial court refused to find that the union action was to induce the employer to force his employees to recognize the union. The Wisconsin State Supreme Court found the picketing in violation of a state statute making the union conduct illegal and consequently issued an injunction restraining the picketing.

In a dissenting opinion of the Vogt case, Mr. Justice Douglas said that the Court had come "full circle" from the decision in Thornhill.\(^2\) The Thornhill Doctrine granted to labor the right to picket and at least temporarily equated picketing with free speech. The Swing and Meadowbrook

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\(^2\)Id. at 295.
decisions added to the picketing-free speech doctrine, conceding to labor unions the right to express their demands in a manner that had judicial protection. Time and most likely the ever changing public opinion influenced the Wohl, Ritter, Giboney, Hughes, Hanke, and Graham decisions. In his Vogt dissent Justice Douglas writes that the Court signs its "formal surrender" to the Thornhill Doctrine, putting the status of picketing where it was prior to the Thornhill decision in 1940.¹

**Picketing Under the L.M.R.A.**

On June 30, 1947, the National Labor Relations Act² (NLRA) was amended by the Labor Management Relations Act (LMRA). Picketing was indirectly regulated by Sections 3(b)(4)(A) and (B) of the LMRA.³ Sections 8(a)(4)(A) and

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¹Id. at 297.

²National Labor Relations Act (Wagner Act), United States Statutes at Large, 49 Stat. 149 (1935).

³61 Stat. 141 (1947), United States Statutes at Large, Section 3(b)(4)(A) and (B). Section 8(b) It shall be an unfair labor practice for a labor organization, or its agents--

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services where an object thereof is: (A) forcing or requiring...
(B) dealt with secondary union activity, with primary emphasis directed toward secondary boycotts. Because secondary boycotts are often accompanied and supported by picketing, the right to picket was severely restricted.

The language of Section 8(b)(4)(A) and (B) is broad in scope. Had the literal meaning of the section been accepted its effect would have outlawed even primary picketing activity. Decisions of the NLRA and the courts, rendered under Section 8(b)(4)(A) and (B), show that the literal meaning was not adopted.

Section 8(b)(4)(A) and (B) does not distinguish between primary and secondary boycotts. The differentiation between the primary and secondary boycott was made by the Board and the courts in a series of cases following the enactment of the NLRA.

requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9. . . .

The primary versus secondary boycott issue was examined by the NLRB in the Matter of Schenley Distillers Corporation case. In this case the local was engaged in an economic strike. A sister local honored the strike by picketing Schenley's distributors.

In reviewing the case, the NLRB found the action to be secondary in nature since the pressure on the distributor had caused them to stop doing business with the manufacturer in violation of 8(b)(4)(A). The picketing of the distributor (secondary employer) by the sister local was sufficiently distinct from the dispute with the manufacturer (primary employer).

The legality of picketing a primary employer causing third persons not to enter the premises was the question presented the Board in the case of Oil Workers International Union and Pure Oil Company. In this case Local 346 who represented Standard Oil's employees called an economic strike in protest of terms and conditions of employment at Standard's dock site. The strike was supported by picketing

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1In the Matter of Schenley Distillers Corporation, 73 N.L.R.B. 504 (1948), enforced, 173 F.2d 534 (2d Cir. 1949).

2The NLRB has original jurisdiction in federal labor cases.

at the dock. The presence of union pickets at the dock induced Pure Oil employees not to handle Pure Oil products. The Board held the picketing to be primary not secondary action. In reviewing the case, the Board held that the "very nature" of a strike inconveniences are imposed on those doing business with a struck employer. Further, picketing of the primary employer's business is "necessarily designed to encourage third persons to cease doing business with the picketed employer."¹ The Board felt the union was making lawful demands of Standard Oil. Because the accompanying picketing was restricted to the primary employer's premises, it was primary and therefore legal.

The problem of picketing a primary employer was further discussed in the International Brotherhood of Teamsters (Int'l. Rice Milling Co.)² case. Here local 201 was picketing for organizational purposes. None of the primary employees took part in the picketing. Truck drivers of another employer, making deliveries to the mill, were stopped by the picketers. Under these circumstances the Board construed the picketing to be primary and protected under 3(b)(4)(A) and (B). The Board ruling was

¹Id. at 313-19.

²International Brotherhood of Teamsters (Int'l. Rice Milling Co.) 84 N.L.R.B. 360 (1949).
upheld by the U.S. Supreme Court. The Court held that stopping the delivery trucks was not a concerted action of the picketers. Rather it was an isolated instance that did not move to the vicinity of the secondary employer.

In the Schenley and Rice Milling cases the primary situs was separate from the other employer's business. In this situation the legality of union sanctions against the primary employer or the secondary employer is determined by the location of the dispute. If the picketing is confined to the primary situs, the picketing is lawful.

That unions may picket at locations separate from the primary situs of the dispute was the context of the Board's opinion in the International Brotherhood of Teamsters (Schultz Refrigerator Service, Inc.) case. The Board reasoned that picketing in this situation was lawful if it met two conditions: (1) is the picketing limited to when the primary employer is doing business with the neutral at the neutral's business place, and (2) if the picketing is limited to the dispute.2

The issue of picketing at a common situs was raised

1 International Brotherhood of Teamsters (Schultz Refrigerator Service, Inc.) 37 N.L.R.B. 502 (1949).

2 If these conditions are not met, picketing is then unlawful. See, Local 1796 United Brotherhood of Carpenters, etc. (Montgomery Fair Co.), 82 N.L.R.B. 211 (1949).
in the Denver Building & Construction Trades Council\textsuperscript{1} case. The general contractor subcontracted electrical work to both non-union and union contractors. The building trades union established a picket line to protest the existence of the non-union workers at the project, and the union workers left the job. Consequently the general contractor asked the non-union contractor to leave the job. The Board held the picketing to be in violation of Section 8(b)(4)(A). The Board's order was reversed by the Circuit Court of Appeals, who held the picketing to be primary, not secondary.

The U.S. Supreme Court reversed the circuit court and reinstated the Board's order. The Court accepted the finding of the Board that the object of the strike was to force the general contractor to terminate the non-union subcontractor. The Court held that this constituted an unfair labor practice within the meaning of Section 8(b)(4)(A).

In the above cases the Board and the courts analyzed the facts of each case as they arose. No specific guidelines were formulated by which the primary-secondary question could be resolved. What was needed was a check list that could be used to determine the legality of union action.

\textsuperscript{1}Denver Building & Construction Trades Council 341 U.S. 675 (1951).
This was established by the Board in the Matter of Sailors' Union of the Pacific, AFL and Moore Dry Dock case.

In Moore Dry Dock, Local 96 was picketing to induce employees of Moore, a ship rebuilder, to strike or refuse to work for Moore in the conversion of a ship for Samsoc. The purpose of the picketing was to cause Moore to cease doing business with Samsoc. The Board, in the interest of clarifying the issue of primary versus secondary action spelled out qualifying conditions. Picketing the premises of a secondary employer is primary and lawful if:

(a) the picketing is strictly limited to times when the situs of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the situs; (c) the picketing is limited to places reasonably close to the location of the situs; and (d) the picketing discloses clearly that the dispute is with the primary employer.

In the Moore Dry Dock case the Board held that the picketing met these qualifications and was legal under 3(b)(4)(A).

The rule of the Moore Dry Dock case, distinguishing primary from secondary action, was first applied by the Board in the International Brotherhood of Boilermakers (Richfield Oil Corporation) case.

1In the Matter of Sailors' Union of the Pacific, AFL and Moore Dry Dock, 92 N.L.R.B. 347 (1950).

2Id. at 349.

3International Brotherhood of Boilermakers (Richfield Oil Corporation), 93 N.L.R.B. 1191 (1951).
In Moore Dry Dock the Board considered the question of whether the picketing clearly disclosed that the dispute was with the primary employer. The Board found that it had not. In the Richfield case, however, Local 807 was picketing Superior, the primary employer, at Superior's place of business. Richfield Oil Company was the secondary employer, also residing at Superior's business place. The Board found that the union had disrupted deliveries of materials to be used by Richfield, not Superior. Conduct of the picketing toward the delivery firms was held to go beyond Superior alone and disrupted Richfield's business. There was no attempt by the picketers to confine their action to the primary employer as in the Moore Dry Dock case. Under these circumstances the Board held the picketing to be in violation of §(b)(4)(A).

The review of cases in this chapter illustrates the status of picketing under the Thornhill Doctrine and the LMRA. The U.S. Supreme Court ruled that the states could allow picketing having no direct secondary effect. Under the LMRA the NLRB and the federal courts established the principle that conduct which disrupted neutrals (or secondary employers) only incidental to the primary picketing was not violative of §(b)(4)(A) or (B). Simply stated, only intentional concerted conduct designed to coerce the neutral employer to become involved in the labor dispute, was unlawful.
The Board determined that the distinction between primary and secondary picket activity was to be made on the facts as they arose in each case.¹ The Moore Dry Dock case established rules to determine primary and secondary action in future cases. Thereafter, the Moore Dry Dock Doctrine was used as a basis of determining the legality of union action. However, the problem of secondary pressures to supplement the labor strike was not completely solved. This is evidenced by the amendment in 1959 of Section 8(b)(4) which made secondary picketing unlawful per se.

CHAPTER III

BACKGROUND OF THE L.M.R.D.A.

Early Labor Legislation

In reviewing the development of U.S. labor legislation it is apparent that Congress has attempted to develop laws which will serve to balance rights between labor and management. Government intervention in labor-management relations can be traced to early Congressional attempts to deal with labor problems in the railroad industry. Early labor legislation is distinguished by its recognition of collective bargaining as the principal means of setting terms of employment.

Not until 1926, with the passage of the Railway Labor Act, was labor granted the freedom to engage in organizational activity devoid of employer reprisal. The structure of the Act was developed from experience under the Adamson Act (1916). The major importance of the Railway Labor Act was the collective bargaining provisions. The Act made bargaining enforceable, and provided instruments to effectuate the policy. The progress of labor under the Railway Labor Act served to promote the cause of labor in other industries where collective bargaining agreements were either weak or nonexistent.
With the onset of the depression in the thirties, attempts were made by Congress to lift the nation out of the economic holocaust. One such attempt was the enactment of the National Industrial Recovery Act (NIRA) in 1933. Section 7(a) of the NIRA guaranteed employees the right of collective bargaining and organization free of employer retaliation. To enforce Section 7(a), President Roosevelt established the National Labor Board. In 1934, when it became apparent that the NLB was ineffective, the President established the NLRB by executive order. The NLRB continued to function with as little success as had the earlier board until the NIRA was found unconstitutional by the U.S. Supreme Court in Schechter Poultry Corporation v. United States.¹

In 1935, Congress enacted the National Labor Relations Act. Section 7 of the NLRA was quite similar to that of the NIRA. Congress hoped that by modeling Section 7 of the NLRA after Section 7(a) of the NIRA, the Act would


The attempt through the NIRA to fix the wages and working conditions of Schechter employees in their intra-state business was found unconstitutional because it was not a valid exercise of federal power.
not be held unconstitutional by the U.S. Supreme Court. The purpose of the NLRA, as stated in Section I, was to restore the bargaining power of labor which had been thwarted by employers in the past. Section 7 granted employees:

...the right to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Section 8 of the NLRA outlined five employer unfair labor practices, was designed to protect employee rights granted to them in Section 7. It was held to be an unfair labor practice if the employer: (1) interfered with the efforts of employees to form, join, or assist labor organizations, or to engage in concerted activities for mutual aid or protection; (2) dominated the labor organization in the form of company formed or assisted labor organizations; (3) discriminated as to hire or tenure for reasons of union affiliation; (4) discriminated for filing charges or giving testimony under the Act; or (5) refused to bargain with the representative of the employees.

The protection given to employees by the NLRA provided impetus for the continued growth of organized labor. Between the enactment of the NLRA (1935) and the 1947 amendment, the position and influence of the union was continually improved. While organized labor was generally satisfied with the NLRA, employers were not. Employers
complained that the legislative protection afforded unions gave labor an undue advantage in collective bargaining.

As a consequence of the general feeling that the NLRB was biased, favoring labor, and the fact that the NLRA outlined only employer unfair labor practices, Congress enacted the Labor Management Relations Act in 1947.\(^1\) In this attempt to restore equality of bargaining power, Congress specified certain union unfair labor practices in Section 8(b). Section 8(b) made it unlawful for a union to: (1) coerce workers in their rights as outlined in Section (7); (2) cause an employer to discriminate against his employees; (3) refuse to bargain in good faith with the employer; (4) engage in unlawful strikes and boycotts; (5) demand excessive or discriminatory initiation fees; and (6) engage in featherbed practices.

Origin Of The L.M.R.D.A.

Section 8(b)(4)(C) of the Taft-Hartley Act\(^2\) had been used to regulate organizational picketing. However, experience under the Section proved it inadequate. Section 8(b)(4)(C) specified that organizational picketing was prohibited only where another union had been certified. Section 8(b)(4)(C) made no reference to unions being

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1Ross, op. cit. at 133.

2L.M.R.D.A. is referred to by its legislative sponsors, Taft and Hartley.
recognized by employers through a collective bargaining agreement. Unions had used this technical loophole to thwart the will of employees and to force the employer to recognize the picketing union.\(^1\) Such a consequence caused both employee and employer dissatisfaction with the Taft-Hartley Act. The inadequacies of the Taft-Hartley Act necessitated a different approach to organizational picketing.

Enactment of comprehensive legislation dealing with such basic economic importance as picketing, should take place in an atmosphere conducive to rational inquiry of all possible alternatives. This setting was not present in 1959. The rash of propaganda that resulted from investigations of internal union affairs by the Senate Committee on Labor and Public Welfare (McClellan Committee), served to cloud the issue of Taft-Hartley amendments in Congress.

The public hearings of the McClellan Committee brought corrupt union practices to the attention of the public. The evidence gathered by the Commission was extensively reported through the news media. In a 1957 national opinion poll, 49 per cent of the public said that they had heard or read of corruption in labor unions.

\(^{1}\) Cox, Archibald, "The Landrum-Griffin Amendments to the National Labor Relations Act," \(44\) Minn. L. Rev. 257 at 264 (1959).
Two years later 73 per cent of those polled said they were aware of corrupt union practices. The evidence as collected through public opinion surveys indicates that the public feared growing union power. The exposure of union corruption by the McClellan Committee and the exploitation of the issue by the news media molded a public sentiment adverse to unions. The proliferation of news reports moved Mr. Holland, Representative from Pennsylvania, to address the House, saying that America is experiencing "the greatest barrage of anti-union propaganda that any nation has ever witnessed." Mr. Holland was quite concerned by what he felt were attempts by the news media to "stampede" an anti-labor bill through Congress. Those who propagated union attacks were the very same people who would benefit the most from tough labor reform measures. Corrupt methods as disclosed existed in only selected instances however, and primarily in the Teamsters union.

1Legislative History of the Labor Management Reporting and Disclosure Act of 1959, p. 1391 (1). (Hereinafter referred to as II Leg. Hist.)
2Id. at 1510 (2).
3Id. at 1510 (3).
Management groups\(^1\) had no real interest in internal union reform, but spared no effort in an attempt to increase the public's adversity toward organized labor.\(^2\) These groups hoped that by generating enough resentment toward labor, they could push restrictive Taft-Hartley amendments through Congress, thereby gaining the greater power in labor-management relations.

The effect of the anti-union campaign was felt in Congress. In the Senate, a bill introduced by Senator John F. Kennedy, dealing with extortionate picketing only, was amended to include other forms of picketing. The bill as amended reflected the Congressional feeling toward picketing by organized labor. In the House, representatives received letters from their home districts demanding a tough reform law. The appeal for a tough law was supported by a public address by President Eisenhower calling specifically for the more restrictive of bills pending in the House, the Landrum-Griffin bill. The Landrum-Griffin bill was strongly favored by management groups and equally opposed by labor. Labor supported the Shelley bill which made no provision for Taft-Hartley amendments. Because of the public pressure for the Landrum-Griffin bill, Congress had

\(^1\) United States Chamber of Commerce and the National Association of Manufacturers (NAM).

\(^2\) Cox, op. cit. at 263.
either to vote for strong legislation or face the possibility of losing their seat in the next election. Congress had to vote for the Landrum-Griffin bill, the people demanded it.

With the Senate and House bills before it, the Conference Committee had to reconcile the existing differences. The result of the Committee indicated that the pressure to pass restrictive legislation had prevailed. While not as restrictive as the House version, Section 8(b)(7) as finally accepted was the most restrictive of all choices offered to Congress.

Congress And The Picketing Amendments

Initial debate in the U.S. Senate indicated the existence of three separate factions favoring amendments to the Taft-Hartley Act. These factions each were championed by Senator John F. Kennedy, Senator Barry Goldwater, and Senator John L. McClellan. Each group eventually submitted separate bills to the Senate on labor reform.

The first bill submitted was offered by Senator Kennedy. His bill (S.505) dealt with picketing in a narrow fashion by establishing a "prohibition of picketing for extortion or to secure payoffs from employers."1 Senator

1 II Leg. Hist. at 969 (2).
Goldwater, however, was opposed to S.505, feeling that the bill failed to deal effectively with organizational picketing.¹ In support of his opposition to the Kennedy bill, Senator Goldwater offered in testimony a letter written by Godfrey P. Schmidt, one of the three court appointed monitors of the Teamster Union. Schmidt found S.505 to be "unacceptable and inefficient," stating that "no labor reform can be effectuated unless recognition and organizational picketing is banned."² The support of Schmidt's position by Senator Goldwater indicates his desire for a tough labor policy restricting organizational and recognition picketing. The Kennedy bill did not include the provisions which Senator Goldwater believed necessary for producing an effective labor reform.

The Administration's bill (S.748) sponsored by Senator Goldwater was introduced on January 28.³ The bill contained proposals for internal union reform and also extensive revisions of the Taft-Hartley Act. Senator Goldwater felt that any bill which was to eliminate the abuses in the labor-management field would have to deal with coercive secondary boycotts and picketing. The bill made it an unlawful labor practice for a union to picket in an

¹Id. at 970 (1). ²Id. at 1003 (1) (2) (3). ³Id. at 975 (3).
effort to coerce an employer into recognition, or to force employees to recognize that union as their representative where: (1) another union has been lawfully recognized; (2) within the last twelve months a valid election has been held; (3) the union cannot establish sufficient employee interest; (4) picketing has been conducted for a reasonable time without an election being held under 9(c) of the Act.¹

On February 19, the third major bill (S.1137) was introduced to the Senate by Senator McClellan.² McClellan's bill did not deal with organizational or recognition picketing but was concerned with internal union reform. Senator McClellan explained that it was important that major changes in the Taft-Hartley Act be deferred to separate proposals. If Taft-Hartley amendments were included with the labor reform proposal it was possible that neither would be enacted.³ This view, that changes dealing with the Taft-Hartley be considered in a separate package, was shared by Senator Kennedy.

¹Id. at 979 (3). ²Id. at 1000 (2).

³Management groups had made it clear that opposition would be forthcoming if the proposed changes to Taft-Hartley did not also include their own recommendations. By offering reform legislation in two packages (labor reform and Taft-Hartley changes), the labor reform demanded by the public could be passed, allowing changes in Taft-Hartley to be recommended by a "blue ribbon committee." This method was hoped to eliminate opposition to the entire program because of the controversial Taft-Hartley changes.
In accordance with his previous position Senator McClellan, on March 12, introduced four separate bills concerned with revision of Taft-Hartley. The third bill (S.1386) dealt specifically with organizational and recognition picketing. This bill made it an unfair labor practice for a union to picket an employer to induce the employees to join the union, or to force the employer to recognize the union unless a majority of the employees designated the union as their bargaining representative. McClellan believed S.1386 covered the inadequacies of both the Kennedy bill and the Administration bill.

The Senate Committee on Labor and Public Welfare held hearings to reconcile the conflicting proposals. The meeting commenced with Senator Goldwater's motion to substitute the Administration bill for the Kennedy bill, but Goldwater's motion was defeated. Senator Morse introduced a motion to report the Kennedy bill directly to the Senate. This was also defeated.

Senator Goldwater proceeded to offer to the Committee the Administration bill through a series of amendments. Lengthy discussion and arguments were made on each of the proposed amendments. Concessions were made to the substance of Senator Kennedy's bill but the concessions did not significantly alter the proposed Taft-Hartley amendments. The Committee voted 13 to 2 to present the amended form.

1 111 Cong. Hist. at 1087 (3).
of S.505 to the Senate. Senators Goldwater and Dirkson dissented.

Senator Kennedy introduced the compromise proposal to the full Senate on April 14. In rebuttal Senator Goldwater submitted that "people deserve far more than this so-called attempt. . . . S.1555 provides." Obviously Senator Goldwater did not favor the Kennedy bill and hoped to defeat its purpose by amendment. Senator Kennedy was anxious to have the Senate pass his bill without substantial change. Kennedy feared that the controversial section dealing with Taft-Hartley would be especially vulnerable for amendments. These fears were substantiated when Senator Goldwater submitted numerous amendments to S.1555.

Senator McClellan also offered amendments to S.1555. One picketing amendment proposed by Senator McClellan made violation of its provisions a criminal act. Speaking to the Senate, McClellan reviewed selected cases where unions used picketing as a means of coercing employers and employees into accepting the union. McClellan cited examples of "sweetheart" contracts negotiated with employers without the consent or knowledge of the employees. In a debate between Senators McClellan and Kennedy, Kennedy asked what would be the effect of the amendment in selected situations.

1Id. at 1015 (3).
One situation cited by Senator Kennedy was an example of a city with all but one of its meat dealers recognizing the union. The unorganized meat dealer was able to undersell the other firms and pay lower wages. The union established a picket line with signs reading "this employer pays lower wages than the other meat dealers in the city." What would the effect of McClellan's amendment be in this situation? McClellan's answer was that "it would be prohibited." In support of his position McClellan reasoned that if the employees are satisfied and the employer is paying the minimum wage, no one has the right to compel the employer to do otherwise. The picket line is an economic force which prevents the delivery of supplies to that employer and stops customers from crossing the line. Senator Kennedy explained the difference between himself and McClellan was that every time McClellan saw a union he also saw racketeering; whereas Kennedy saw men and women trying to further their economic interests. Senator Kennedy argued that McClellan's amendment went beyond the abuses practiced by the Teamsters union; Kennedy said he would support the amendment if it applied to the Teamsters only, but in its present form the amendment applied to all unions and would destroy the very right.

1Id. at 1176 (3). 2Id. 3Id. at 1176 (1).
to make agreements that had worked effectively in cleaning up the sweatshop conditions in the garment industry.\textsuperscript{1}

Kennedy felt that the amendment would be of little benefit in ridding labor of racketeering and would unnecessarily chastise labor. McClellan's amendment was defeated in the Senate 59 to 30 with Senator Goldwater voting in the minority.

Subsequent to the debate over the McClellan amendment, Senator Prouty of Vermont, proposed an amendment to S.1555 which would make organizational and recognition picketing under some circumstances an unfair labor practice. Senator Prouty's amendment did not contain the criminal penalties that had been present in the McClellan proposal. Senator Keating, of New York, offered an amendment to the Prouty amendment which limited the circumstances under which organizational and recognition picketing would be considered an unfair labor practice. Senator Keating's amendment was softer on labor than either the McClellan or Prouty proposals, thus much more to Kennedy's liking.\textsuperscript{2}

\textsuperscript{1}Id. at 1703 (1).

\textsuperscript{2}Senator Kennedy was opposed to legislation which could have the effect of unnecessarily chastising honest union's efforts at organization. Although agreeing that some regulation was necessary, Kennedy felt that unions should be afforded the opportunity to picket for legitimate
The Prouty amendment as amended was not opposed by Senator Kennedy. Senator Goldwater, probably realizing that it was this amendment or nothing said "I am perfectly willing to go along with the amendment, and I will vote for it." The yeas and nays were ordered. The amendment passed 36 to 4.

Such was the trend of amendments offered for the Taft-Hartley Act. Kennedy's bill, S.1555, was passed by the Senate 90 to 1 with Senator Goldwater dissenting. S.1555 was stronger in the area of organizational and recognition picketing than had been S.505. Senator McClellan did succeed in getting a bill of rights accepted while Senator Goldwater's numerous amendments to Section VII were generally defeated.

Passage of S.1555 in the Senate marked the end of phase I in the labor reform bill and it was sent to the House for further consideration.

Three labor reform proposals were introduced in the House: the Shelley bill, the Elliott bill, and the Lendrum-Griffin bill. All three bills resembled each other purposes. Kennedy recognized that freedom to picket had been basic to union efforts in ridding themselves of sweatshop conditions in the garment industry.

III Leg. Hist. at 1200 (3).
in the first six titles. It was in the Taft-Hartley changes (Title VII) that the bills differed. The Elliott and Landrum-Griffin bills were different on three major points in Title VII, i.e., secondary boycotts, organizational picketing, and federal-state jurisdiction with the Landrum-Griffin being the tough bill in these areas. The Shelley bill made no provisions for the first two areas and would have applied federal law to the third.

It was the Landrum-Griffin bill that finally passed the House. The Landrum-Griffin bill emerged from the House without substantial changes from the original proposals. The Taft-Hartley amendment remained intact because of strong administration pressure supported by a personal appeal of President Eisenhower to the nation. This address called for new labor reform measures regulating organizational picketing and specified the Landrum-Griffin as the bill to do the job. This speech and the resulting letters from concerned citizens demanding a tough labor bill produced enough votes in the House to pass the Landrum-Griffin bill by a vote of 303 to 125.

The Senate and House bills were sent to the conference committee to reconcile the existing differences. The

1Ross at 205-6.
2Op. cit. at 1702 (1).
committee, chaired by Senator Kennedy, quickly disposed of conflicts in the first three titles. Agreement was subsequently reached on the next three titles (IV, V, VI) and it was decided that debate on Titles I-VI be closed. The treatment of the first six titles had taken only three days. The most controversial title remaining was Title VII which dealt with the Taft-Hartley changes. Reconciliation of Title VII proved much more arduous than had the first six titles. The final result presented by the Committee most resembled the House bill. The committee bill was accepted in the Senate by a vote of 95 to 2 and in the House 352 to 52.

The bill as finally adopted was admittedly a compromise. Proposals dealing with picketing ranged from Senator Kennedy's S.505 which covered extortionate picketing only, to that of Senator McClellan's which provided criminal penalties for infractions of its provisions.

Union proponents viewed the bill as being anti-labor. In view of the heavy Democratic majorities in both Houses the Landrum-Griffin came as a surprise to labor. Because of the upcoming presidential election in 1960, it was necessary if not mandatory, for the Democrats to demonstrate their administrative ability to the public. Failure to do so could have resulted in the continuation of the Republican administration.
Although prompted by management propaganda, the public demand for tough reform legislation was impossible for Congress to ignore. The labor movement found themselves trapped between citizen's demands and the Democratic party's fight to win the public's favor.

The final bill was probably in general the best that could have been obtained under the existing circumstances in 1959. It was now up to the NLRB and the courts to establish guidelines and formulate the policy of the Act.
CHAPTER IV

THE STATUS OF PICKETING UNDER 8(b)(7)

Initial Development

Section 8(b)(7)\(^1\) of the NLRA as amended regulates organizational and recognitional picketing. This section does not bar all picketing for this purpose but rather it determines when and how and by whom it may be conducted. Section 8(b)(7) is not directed against certified unions.

\(^1\)73 Stat. 544, United States Statutes at Large Section 704(b)(7)(1959).

3(b) It shall be an unfair labor practice for a labor organization or its agents . . .

(7) to picket or cause to be picketed . . . any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative of such employees: (A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under Section 9(c) of this Act; (B) where within the preceding twelve months a valid election under Section 9(c) of this Act has been conducted, or (C) where such picketing has been conducted without a petition under Section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: . . . Provided further, That nothing in this subpart of any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing
The picketing restrictions apply only to uncertified unions.\(^1\) Under the provisions of Section 8(b)(7) an uncertified union may not picket or threaten to picket to either gain recognition by an employer or acceptance by the employees in three situations where: (A) the employer already has a valid contract with another union; (B) a valid election has been held within the preceding twelve months; or (C) the union has picketed for more than thirty days without filing for an expedited election. The only exception to 8(b)(7)(A), (B), and (C) is the qualifying proviso in Subsection (C). The proviso allows picketing after thirty days if the purpose of the picketing is to truthfully advertise to the public that the "employer does not employ members of, or have a contract with, a labor organization"

\(^1\) Section 8(b)(7) would also apply to a union whose members indicated via a decertification election that they no longer desired representation by the union.
unless, as a result of the picketing, deliveries are stopped.

Early cases tried under 8(b)(7) reflect opposing interpretations of the Section by the NLRB. Conflicting interpretations of Subsection (C) has proved to be the primary cause of disagreement. The Board's division centered on the question of which picketing objectives are or are not banned by the proviso in Subsection (C). Both factions of the Board found justification for their position in the legislative history of the Act.¹ Some of the Board members supported the Kennedy analysis of Subsection (C). Senator Kennedy held that picketing would be allowed without filing an election petition if the purpose of the picketing was to appeal only to the employees to join the union or to the public not to patronize the non-union employer; provided union activity did not disrupt deliveries or induce employees of other employers to refuse to cross the picket line.² Senator Kennedy was also of the opinion that picketing by an uncertified union designed to advertise that the employer is non-union and to appeal to the employees to join the union would not be held in violation of 8(b)(7).³

¹Neither the Senate or House bills contained the proviso in 8(b)(7)(C). The subsection was added by the conference of the two Houses.

²II Leg. Hist. at 1334 (1). ³Id. at 1377 (3).
Other members of the Board found support in the Goldwater interpretation. Senator Goldwater held that picketing for organizational and recognition purposes for more than thirty days without filing an election petition becomes an unfair labor practice. Goldwater felt that picketing could be carried on "indefinitely" and not violate the law if the purpose of the picketing was to advertise to the public that the employees were not represented by a union, and provided the picketing did not interfere with deliveries.¹

Essentially the Kennedy approach was, that organizational and recognition picketing, without a contract or election petition being filed, would be proscribed only if it interfered with deliveries or the employees of the employer.

The Goldwater interpretation was that organizational and recognition picketing after thirty days was prohibited unless a petition had been filed for an election.

With such conflicting congressional views as to the scope of Subsection (C) it is not surprising that the Board entertained opposing interpretations.

The initial decisions of the NLRB followed the logic established in organizational and recognition picketing.

¹ Id. et 1858 (3).
cases prior to the enactment of Section 8(b)(7). Section 8(b)(4)(C) of the LMRA proscribed picketing where another union had been certified as the representative of the employees by the NLRB. In the case of **Gate Drivers Local No. 626 (Lewis Food)**1 the Board held that picketing for an object that could have been negotiated at the bargaining table would be considered as organizational or recognition, therefore prohibited. The Eisenhower Board applied this line of reasoning to cases tried under 8(b)(7). When Kennedy appointees were placed on the Board, picketing for certain objects was found to fall outside the prohibitions of 8(b)(7).

Illustrating the Eisenhower Board's attempt to resolve the question of permissible union objects is the case of **International Hod Carriers Local 41 (Calumet I)**,2 decided in 1961.

Local #41 of the International Hod Carriers Union contended that the object of the picketing was to induce the employer to meet the prevailing rates of pay and conditions of other employers in the area. The union's president testified that the picketing would stop when the

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1. **Gate Drivers Local No. 626 (Lewis Food)** 115 N.L.R.B. 590 (1956).
union demands had been met. The union did not request recognition for purposes of bargaining. The pickets were stationed at the construction site, carried placards and distributed handbills to those interested. Workers were not stopped or asked not to cross the picket line. The placard carried by the picketers read as follows:

NOTICE TO PUBLIC

The work being performed by the following contractor is not being done by qualified BUILDING TRADES CRAFTSMEN

The prevailing rate of pay & conditions are not being met

This notice is addressed only to the general public & not to the employers or employees on the job

GEO DeJONG & EMPLOYEE MEMBERS OF THE CALIFORNIA CONTRACTORS ASSN LABORERS UNION #41 AFL-CIO

The Board disregarded "...as an inadequate defense" the union's claim of wanting the employer to meet prevailing rates of pay and working conditions. Following the rationale of Lewis Food the Board reasoned that the picketing was an attempt to gain conditions they would normally obtain

1 Id. at 30.  2 Id. at 32.
from collective bargaining and was an effort on the union's part to force itself on the employees.\(^1\)

Had the Board's reasoning in Calumet I continued to be employed as the criteria in determining acceptable picketing objectives and proviso could have been used to eliminate virtually all picketing by an uncertified union.

Soon after the Calumet I decision, the composition of the Board was altered by a Kennedy appointee. The Calumet I case was reheard by the new Board in *International Hod Carriers Local 41* (Calumet II).\(^2\) The union claim of not wanting to organize the employees or be recognized by the employer was accepted by the Board. The union was cleared of any recognition or organizational motives reversing Calumet I. The Board stated emphatically that the union "...clearly disclaimed such an objective (organizational or recognitional) and sought only to eliminate subnormal working conditions..."\(^3\) The Board held that area standards picketing could not be considered picketing for the purpose of recognition or bargaining. The majority

\(^1\)Id.

\(^2\)International Hod Carriers Local 41 (Calumet II), 133 N.L.R.B. 512 (1961). The Board is authorized by statute to either set aside or modify their orders before the case is filed in Court.

\(^3\)Id. at 513.
reasoned that the union's picketing objective could have been met without the employer either bargaining with, or recognizing the union.\textsuperscript{1}

The Calumet II decision adopted the minority opinion in Calumet I. The Calumet I philosophy was not completely forgotten though by certain of the Board members.

The dissenting members in Calumet II, Rogers and Leedom, who represented the majority opinion in Calumet I, felt that "despite the union disclaimer of interest in recognition...the union's picketing must necessarily have as its ultimate end the substitution of Respondent for the certified bargaining agent."\textsuperscript{2} Such union action the dissenters held to be violative of the Act.

Like Calumet the Houston Building and Construction Trades Council (Claude Everett Construction Co.)\textsuperscript{3} case presented the question of whether a non-certified union may successfully picket in protest of substandard working conditions.

The facts of the case, as presented by the Trial Examiner, were accepted by the Board. The union in question had inquired about the wage rates of the construction company.

\textsuperscript{1}Id.
\textsuperscript{2}Id.
\textsuperscript{3}Houston Building and Construction Trades Council (Claude Everett Construction Co.), 135 N.L.R.B. 371 (1962).
After determining that wage rates were lower than those paid by other companies in the area, the union sent a letter to the construction company. The letter protested the rates paid, and threatened to picket unless the prevailing rates of other companies were met. The letter was not answered, thereupon the union commenced picketing. The pickets carried signs which read as follows:

Houston Building and Construction Trades Council, AFL-CIO protests substandard wages and conditions being paid on this job by Claude Everett Company. Houston Building and Construction Trades Council does not intend by this picket line to induce or encourage the employees of any other employer to engage in a strike or a concerted refusal to work.¹

The Board relying on the decision found that the union had not violated Section 8(b)(7)(C). In their argument the Board contended that the union had not violated Subsection (C) relying on the analysis of Professor Cox.²

¹Id. at 322.

²Id. at 325. Professor Cox, who had been an aid to John F. Kennedy, suggested that a non-certified union might picket to protest substandard pay and working conditions and not violate the provisions against organizational and recognition picketing.

The prohibition seeks to protect the employees' decision concerning union representation, not their freedom to work at substandard wages without reprisal from those who are injured. The union's objective of eliminating the competition based upon differences in labor standards can be accomplished without interfering with the decision concerning union representation. Cox, pp. 266-67, supra note 1 at 48.
Professor Cox was of the opinion that the proviso in Subsection (C) allows informational picketing if it does not interfere with deliveries. The Board adopted this reasoning holding that Subsection (C) has significance only if the union's picketing could first be shown to have a prohibited objective. The Board in exempting the picketing held that the interference with deliveries did not constitute a violation of Subsection (C).

Again Members Rodgers and Leedom dissented. The dissenters attacked the majority opinion which allows picketing for substandard working conditions, as "... not withstanding scrutiny in the light of industrial realities." Members Rodgers and Leedom maintained that in order for the construction company to meet the union demands it would be necessary to initiate negotiations. These negotiations would be bargaining as specified in 8(b)(7) and would be the result of the union picket line. Such an outcome would be in violation of 8(b)(7). The dissenters held that even if the picketing were termed informational there would be a violation of 8(b)(7) because


2It shall be an unfair labor practice for an unorganized labor union "to picket or cause to be picketed... any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees..."
of the interruption of deliveries.

An important aspect of the majority opinion was the endorsement of picketing which interrupts deliveries. The proviso's language clearly and specifically states that picketing has the proscribed effect if it induces "any individual" not to pick up or deliver "any goods" or "to perform any services". A literal interpretation of the proviso's language would prohibit picketing if it stopped even one delivery man. The Board obviously did not want to accept such a restricted view. The decision in the Houston case seems to go beyond the Kennedy-Cox interpretation of the proscribed effect.

The line of reasoning established by the majority opinion in Calumet II and Houston Building Trades Council was continued in the Retail Clerks Local 294 (Alton Myers Brothers) case.\(^1\) Alton Myers filed an 3(b)(7)(B) charge alleging that the union had picketed the Company's premises within a year of a valid election.\(^2\) The charge further stated that the picketing had the object of forcing the Company to recognize the union as the bargaining representative. The Trial Examiner dismissed the complaint concluding

\(^1\) *Retail Clerks Local 294 (Alton Myers Brothers)*, 136 N.L.R.B. 1270 (1962).

\(^2\) Section 3(b)(7) states that it is deemed an unfair labor practice for an unorganized union to picket "where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted."
that the General Council had not proved a violation of 8(b)(7)(B). The Board agreed with the Trial Examiner.

In reviewing the case the Board held that organization and recognition had been the object of the picketing prior to the election. The union failed to win this election but continued the picketing. The union stated that the post-election picketing was not organizational or recognitional but to protest the Company's substandard working conditions. The shift of picketing objective was accepted by the Board. The Board held that a "presumption" that the picketing continued to be organizational and recognitional was not enough to find a violation of 8(b)(7)(B). The "presumption" had to be supported by "substantial independent evidence."¹ Such evidence would be found in facts of the case and the union's actions.

The dissenters, Members Rodgers and Leadon, however, held that such evidence did exist. The evidence was a letter written by the local union and circulated to other unions in the area complaining about the "unfairness" of the Company's "nonunion standards". This letter, the minority held, revealed the union's object as illegal. The minority held that the circulation of the letter at the time picketing was being conducted was to gain concessions

¹ op. cit. 136 at 1273.
that normally would result from collective bargaining constituting a claim for recognition.¹

The Alton Myers case shows that the Board majority required the employer to prove by "substantial independent evidence" that a violation of §(b)(7) had occurred. This requirement is not disputed by the minority.

The issue of what constitutes "substantial independent evidence" as established in Alton Myers, continued to be the crux of the dispute in the Keith Riggs Plumbing and Heating Contractors² case.

Local Union #741 had sent a letter to Riggs, a plumbing contractor, asking that he meet the prevailing wage scale. The letter stated that the union did not want to organize the employees or represent them. After Riggs' refusal to respond to the union letter the union began to picket the premises where Riggs was engaged as a plumbing subcontractor. The picketers carried signs which read:

Keith Riggs Plb. unfair to Plumbers Local 741. Sub-standard wages & working conditions.³

The Board found that the union may picket beyond

¹Id. at 1275.
²Local No. 741, United Ass'n of Journeymen (Keith C. Riggs), 137 N.L.R.B. 1125 (1962).
³Id. at 1127.
the thirty day limit without filing a petition for an election.¹ Not all picketing after 30 days "runs afoot of this Section..."² Also it is the duty of the complaining party to prove that the picketing "had an objective proscribed by the statute..."³ The Board declared that a union has an interest apart from organizing employers. A union may picket to prevent the undermining of area standards and preserve rates of pay and working conditions.

Both Members Leedom and Rodgers dissented. The dissenters contended that picketing for changes in wages and working conditions is "necessarily" for the purpose of recognition. The majority held that there was no legislative or judicial support for such a contention. The majority went on to say that had Congress wanted to proscribe such action they would have done so in straightforward language. This Congress had not done.

The minority opinion essentially reiterates the contention they had made in Alton Myers. That is picketing for area standards cannot be separated from picketing for recognition.

¹The language of Section 3(b)(4)(C) reads in pertinent part as follows: It is considered an unfair labor practice for an unorganized union to picket "where such picketing has been conducted without a reasonable period of time not to exceed thirty days from the commencement of such picketing..."

²Op. cit. at 1125. ³Id.
In certain situations the Board has held picketing for the alleged object of informing the public of working conditions to fall outside the protection of the proviso in Subsection 8(b)(7)(C).

In Local 1796, Drug and Hospital Employees Union (Janel Sales Corporation), 1 the Board refused to accept the view that organizational and recognition picketing which violated 8(b)(7)(A) or (B) could not be defended by the provisions of the informational picketing proviso. The Janel case established that the proviso could be applied only to cases encompassed by 8(b)(7)(C).

In the Janel case Local 220 had organized a drug store (Janel) and was the valid representative of the employees. A second union (Local 1199) tried unsuccessfully to negotiate an agreement with Local 220 whereby Local 1199 would become the representative of Janel employees. Local 1199 argued that they should represent the employees because they were a "drug" union whereas Local 220 was a "Butchers" union. Because of the failure to convince Local 220 to relinquish their employees, Local 1199 picketed Janel. The picketers, none of whom were Janel employees, carried signs which read:

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1Local 1796, Drug and Hospital Employees Union (Janel Sales Corporation), 136 N.L.R.B. 1564 (1962).
This is not a Local 1199 drug store. Please do not patronize this store. Local 1199.

This store does not meet Local 1199 standards. Please do not patronize this store. Local 1199.

This store signed with the Butchers Union. It undercuts our standards. Please do not patronize this store. Local 1199.

The trial examiner found that Local 1199's picketing was to gain recognition of Janel employees in disregard to the fact that the employees were currently represented by Local 220. Accordingly the trial examiner concluded that the picketing of Janel was in violation of §(b)(7)(A) of the LMRDA.

The union contended that their picketing was not for recognition but was for, first, informational purposes and therefore exempt from an §(b)(7)(A) violation by reason of the informational proviso in §(b)(7)(C). Secondly, it was for the purpose of publicizing the fact that Janel paid substandard rates of pay and provided substandard working conditions, and thirdly, that Local 220 was not recognized as required by §(b)(7)(A). The Board, like the trial examiner, found no merit in these contentions.

The Board held that the union claim of informational picketing was not supported by the publicity proviso in

1Id. at 1566. 2Id. at 1567-68.
3(b)(7)(C). The publicity "proviso in Section 3(b)(7)(C)
appears only to situations defined in the principal
clause of Section 3(b)(7)(C)." Thus the Board established
that the publicity proviso did not apply to other para-
graphs in Section 3(b)(7).

Regarding the union's alleged purpose of area standards
picketing the Board found that "the evidence clearly reveals
... [the] object was recognition. ..." 2

Concerning the union's third contention that Local
220 was not recognized as required by 3(b)(7)(A) the Board
stated that the union "introduced no substantial evidence
in support of its contention. ...." 3

The decision of the three member panel 4 found that
Local 1199 could not support their argument by substantial
evidence. This decision followed the precedent established
in Alton Myers.

In the 1962 case of Local No. 429, IBEW (Sam Nelson) 5
the Board again rejected a union claim of picketing to

1Id. at 1567. 2Id. at 1568. 3Id.

4The provisions of Sec. 3(b) of the L.M.R.D.A. pro-
vides for the Board to delegate its authority to a three
member panel. In this case Members Rodgers, Fanning and
Brown.

5Local No. 429, IBEW (Sam Nelson), 133 N.L.R.B.
160 (1962).
protest area standards. Sam Melson, a general contractor, was engaged in the construction of a school building. Local 429 began picketing Melson Construction at the building site. The picketing commenced without prior communication and lasted for more than 30 days without a petition being filed for an election. The picketers carried signs which read:

Melson Construction Co. does not employ members of or have a contract with Local 429, I.B.E.W.1

The picket line caused employees of Melson's subcontractors to cease work at the site. The picketing also caused employees of employers other than Melson's to stop making deliveries to the site. At no time was Melson asked to recognize or bargain with the union. The union claimed their picketing was to protest the substandard wages and working conditions at Melson's. Neither the Trial Examiner nor the Board accepted the union claim. The union was found to have picketed for the purpose of organizing and seeking recognition of Melson's employees.

Both the Trial Examiner and the Board found the union to have violated 8(b)(7)(C) but the Board did so for different reasons. The Board found that the Trial Examiner had misconstrued the second proviso of 8(b)(7)(C) by holding

1Id. at 461.
that this section offers no protection for picketing having
an organizational or recognitional object. The Board reasoned
that although §(b)(7) prohibits picketing for organizational
and recognitional objects, the second proviso of (C) "carves
out an exception from the prohibition."¹ Picketing is
allowed which, although for the purpose of organization
and recognition, meets the two qualifications of the second
proviso of (C): (1) that the intent of the picketing is
to truthfully advertise to the public that the employer
does not employ union members or have a contract with a
union, and (2) that the picketing does not have the effect
proscribed by the proviso, e.g., stopping of deliveries.

Relying on the language of the picket sign, the
Board found that the picketing, although having an organiza-
tional and recognitional object, fell within the scope of
the second proviso. Since this picketing was held to
be allowable, the next question was whether the picketing
had the effect proscribed in the second proviso. The
Board held that the refusals to deliver and the employees
leaving the job site had the effect clearly proscribed by
the second proviso of §(b)(7)(C). The union was found to
be in violation of the law within the meaning of §(b)(7)(C).

¹Id. at 462.
Regarding the proviso effect the Board stated:
"...we find that the picketing did have a sufficient impact to constitute an effect within the meaning of Section 3(b)(7)(C)."¹ This language implies that, should the picketing not have a serious or sufficient impact, it would be allowable even though deliveries were stopped. In their concurring opinion, members Rodgers and Leedom found it unnecessary to determine the degree of impact the picketing had on deliveries or the disruptions of work to bring the picketing within the ambit of the second proviso.²

The foregoing case discussions demonstrate that the Board had found a situation where picketing by an uncertified union is permissible if the picketing was to protest area standards. However, the Board imposed qualifications on area standards picketing. If the picketing caused either deliveries to stop or employees to cease work, which could be found to have a "sufficient impact" on the employer, the picketing would then violate Section 3(b)(7)(C).

Other early decisions of the Board revealed that not only was area standards picketing permitted, but picketing for the reinstatement of discharged employees was also allowed.

¹13, at 463. ²13, at 465.
The case establishing the right to picket for reinstatement was Local 259, UAW (Fanelli Ford), decided in 1961. During the course of an organizational campaign an employee of Fanelli was dismissed. After their attempt to discuss the discharge with Fanelli failed, Local 259 began picketing the premises of Fanelli. The union claimed that they had ceased their attempt to gain recognition and were picketing solely to protest the discharge of the employee.

Both the Trial Examiner and the Board accepted the union claim. The Board reasoned that Fanelli could reinstate the employee without recognizing or bargaining with the union. The Board's decision overruled the Lewis Food rationale which held that picketing for the reinstatement of an employee "necessarily" is to compel the employer to recognize or bargain with the union. However, the Board stated that they realized that in "some circumstances" picketing for reinstatement may be used as a "pretext for attaining recognition." The Board was not willing to infer that this was the situation existing in the present case because of a lack of evidence to prove such a contention.

The Board felt that had Fanelli reinstated the employee, the picketing would have ceased. Therefore, the Board dismissed the case.

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1Local 259, UAW (Fanelli Ford), 133 N.L.R.B. 1463 (1961).

2Id.

3Id., at 1469.
Member Rodgers dissented, holding that Lewis Food was still "sound" and applicable in this case. Accordingly member Rodgers would have found the picketing in violation of 3(b)(7)(C).

The decision of the Board in the Fanelli Ford case confirmed the Janel Keith Riggs holding that the mere presumption that the picketing was for an illegal object was insufficient evidence. "...some more affirmative showing of such [illegal] object must be made than exists here." Thus, picketing for reinstatement of a discharged employee does not constitute an unfair labor practice. The burden of proving that the picketing was for a proscribed object rests with the complaining party.

In Teamsters General Local No. 200 (Bachman Furniture Co.) (1961) the Board established a third legal object for picketing. Local No. 200 demanded recognition from the employer and had obtained signatures of five of the seven members in the bargaining unit. After the loss of the certified election the union established a picket line. Bachman filed an 3(b)(7) charge against the union for picketing within one year after a valid election. The

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1Id. at 1163-69.

union claimed they had abandoned their pre-election objective and were now picketing in protest of an 8(a)(1) employer unfair labor practice.

The Board agreed with the Trial Examiner that the picketing was not for an illegal object. The Board offered no explanation for holding that the picketing was not in violation of 8(b)(7)(3).

In their dissenting opinion members Rodgers and Leedom expressed their dissatisfaction with the majority opinion. The dissenters felt that to accept the union claim was to completely disregard the union's obvious objective. Members Rodgers and Leedom reasoned that Congress in enacting 8(b)(7), wished to ban all post-election picketing. Reasoning further they said the majority opinion would "allow a union to pop up with a picket line five minutes after it had lost an election, and to extinguish the existence of a recognition objective through the device of a self-serving picket sign."\(^1\) Putting the dissenters argument into a simple statement—they felt the union's post-election picketing for an employer unfair labor practice was an obvious coverup for a continuing attempt at organization.

\(^{1}\)Id. at 673.
More than one year after the Bachman Furniture case, both Bachman Furniture and Fanelli Ford were reaffirmed in the case of Waiters & Bartenders Local 500 (Mission Valley Inn).\(^1\) The facts of the case show that Local 500 was the certified representative of certain of Mission's employees according to a collective-bargaining agreement. In a letter sent to Mission, the union requested the termination of the current agreement and that negotiations be held for a new one. Mission then sent a letter to the union agreeing to the request.

In a meeting of union members subsequent to the letters, a decision was made to strike Mission's motel and picket in protest to certain unfair labor practices committed by Mission. The union filed an unfair labor practice charge against Mission. The union claimed that Mission had violated Sections \(8(a)(1), (2),\) and \((3)\) of the NLRA.\(^2\) Upon investigation of the alleged violation

\(^1\)Waiters & Bartenders Local 500 (Mission Valley Inn), 140 N.L.R.B. 133 (1963).

\(^2\)Section \(8(a)\) of the NLRA provides that it shall be an unfair labor practice for an employer to: (1) interfere with efforts of employees to form, join, or assist labor organizations, or to engage in concerted activities for mutual aid or protection; (2) dominate the labor organization, or (3) discriminate in the hire or tenure because of union affiliation.
the regional director concluded that Mission had committed the unfair labor practices. A unilateral settlement agreement was reached whereby Mission was to rehire certain dismissed employees and place the remaining on a preferential hiring list.

The union protested the agreement to the General Council, arguing that the settlement would affect their election rights in the pending election. The General Council denied the Union's appeal holding that the agreement adequately settled the dispute.

The union continued their picketing which had commenced after the decision to strike Mission carrying signs which read as follows:

WE PROTEST MISSION VALLEY INN'S REFUSAL TO REHIRE ALL UNFAIR LABOR PRACTICE STRIKERS

The other side of the sign read:

22 EMPLOYEES STRUCK BECAUSE MISSION VALLEY INN ENGAGED IN UNFAIR LABOR PRACTICES MISSION NOW WILL TAKE BACK ONLY PART OF EMPLOYEES MISSION IS REAPING BENEFIT OF UNFAIR LABOR PRACTICE WITHOUT RECTIFYING SITUATION

Subsequent to the representation election, which the union lost, the picketing continued with signs essentially the same as before the election.

The question before the Board was whether the union had violated §(b)(7)(A). The Board majority found the

union had not violated the Section. The basis for the finding was the Board's acceptance of the union's claim of picketing to protest the employer's failure to rehire the discharged employees. The fact that the union had continued to picket in protest of the unfair labor practice after it had been settled did not alter the situation.

The Board reasoned that even though the picketing might not be considered to be in protest of the unfair labor practice, it does not follow that the picketing was for a prescribed object. It must be proved that a violation had in fact occurred, and this proof must be more than just the non-existence of a legal objective.¹ The Board found that the union's failure to inform Mission that the picketing objective had changed from one of organization to one of protesting the unfair labor practice did not have significance.

Members Rodgers and Leedom disagreed with the majority opinion. The dissenters held that the picketing, which continued non-interrupted after the unfair labor practice settlement with no material alteration of picket signs, was enough to find that a violation occurred.

The dissenters also held picketing for purposes of protesting an unfair labor practice is not a valid defense

¹ Id. at 438.
to an 8(b)(7) charge. The only exception being a "meritorious 8(a)(5) charge. . . ."¹

The trend of decisions which allowed certain picketing objectives to fall outside the prohibitions of 8(b)(7) continued in the Alton-Wood River Building and Construction Trades Council² case. A group of AFL-CIO unions were accused of violating Section 8(b)(7)(A) for picketing several stores in town whose employees were represented by an independent union. In the interest of informing the public of "poor working conditions" the AFL-CIO unions picketed along a five block area. The picketers did not picket in front of any one store, nor did they mention any particular store on the picket signs. With the exception of one isolated case, there was no attempt to gain recognition or organize the employees. The picketing was claimed to have the purpose of instigating a consumer boycott of the stores.

In dismissing the 8(b)(7)(A) charge, the Board could find no evidence that the union's picketing was for organi-

¹Id., at 444. Section 8(a)(5) states that an employer will be guilty of an unfair labor practice by refusing to bargain collectively with a duly designated representative of the employees.

zational or recognition purposes. The Board held that
the consumer boycott of the independent union stores would
assist the AFL-CIO members to continue to enjoy their wage
standard. The independent union stores' starting wage scale
was far below that advocated by the AFL-CIO unions.

Member Leedom, dissenting, would have agreed with
the trial examiner. Member Leedom reasoned that the con-
sumer boycott appeal did not necessarily "preclude the
presence of a proscribed object." The dissenter could
see no way for the stores to rid themselves of the picketing
short of recognition. References to the independent union
as being "phony" indicated to Member Leedom, an attempt
by the AFL-CIO to displace it. Accordingly, Member Leedom
would have held the picketing to have violated 8(b)(7)(A).

The Board's attitude on acceptable union picketing
objectives after the Alton-Hood decision placed employers
in a precarious position. The Board had held certain types
of picketing objectives to be outside the prohibitions of
1(b)(7). Unions could picket in protest of employer unfair
labor practices, for the reinstatement of discharged econo-
ic strikers, and in protest of non-union wage scales and
working conditions. That certain picketing objectives
were allowable did not impair the employer's position so

1 Id. at 529.
much as did the fact that the employer had to prove by "substantial independent evidence" that the picketing was for the purpose of organization or recognition.

By executing their picketing cautiously and wording their placards carefully the union would actually reveal no incriminating information at all. The employer faced the problem of producing needed evidence when none existed. Professor Cox recognized that this problem could develop.

The danger in distinguishing picketing to protest substandard wages or working conditions from picketing for union recognition or organization is that it may encourage verbal evasions through disingenuous phrasing of the pickets' placard and the union's demands.¹

Cox states that "normally recognition or union organization are objectives of any picketing of an unorganized shop..." and "the best solution would be to treat the union's objective as a question of fact."²

Even by treating picketing objectives as a question of fact there is much difficulty in differentiating between allowable picketing and that which is not.³

¹ Cox, supra note 1 at 48. ² Id. ³ Referring to Cox's suggestion to treat union picketing objectives as a question of fact, Burtner states that:

His proposal would give rise to a new set of difficulties and administrative burdens, which may be suggested by testing some questions and hypothetical situations: How substantial a difference between union standards and plant standards is necessary for rebuttal purposes? Suppose the union standards include "featherbedding" practices that are not established in the
Two possible solutions have been suggested for making this distinction: (1) ask the union what action the employer must take to free himself from the picketers, and (2) require proof from the union that the picketing will stop once the demands are met.¹

Current Status

In order to undertake such an approach as suggested here it would be necessary for the Board to establish some criteria for judging the validity of union demands. The Board’s² 1965 decision in Local 952, IBEW (Erickson Electric Co.)³ indicates a move toward this approach.

²More recent cases were heard by a three-member panel, who usually confirmed the trial examiner without consent.
Local 953 had unsuccessfully sought a collective bargaining agreement with Erickson Electric Company. The Company employed as many as three electricians at the rate of $2.00 per hour for apprentices and $4.00 per hour for journeymen. Erickson's wage scale was lower than that paid to union members in the area. The union began picketing the Company at the job site with signs which read:

EMPLOYEES OF ERICKSON ELECTRIC RECEIVE SUBSTANDARD BENEFITS
LOCAL 953 IBEW

OUR ONLY DISPUTE IS WITH THE SUBSTANDARD BENEFITS PAID BY ERICKSON
LOCAL 953 IBEW

In support of Local 953's picketing, employees of employers other than Erickson stopped work. Erickson's attorney phoned an agent of Local 953 asking what should be done to have the pickets removed. The agent replied: "Mr. Erickson knows what he had to do. . . ."2 Subsequently Erickson filed a petition for a representation election. When informed of the pending election the union disclaimed any intention of organizing Erickson and stated that their conduct did not warrant an election being held.

1Id. at 1303.
2Id. at 1304.
Despite the union's disclaimer the election was held under the supervision of the Regional Director. Although all three of Erickson's employees chose not to be represented by the union, the picketing continued. Erickson then filed an 8(b)(7)(3) charge against the union.

Reviewing the evidence of the case the Board held the picketing to be in violation of Section 8(b)(7)(B). Reasoning that rarely will an unlawful picketing objective be proved by admission, proof of an illegal picketing objective must be found in the facts of the case, i.e., the union's conduct and past relations of the parties.

The Board found that the union's continued attempts to organize Erickson prior to the election and their failure to give notice of a change in picketing objective subsequent to the election were relevant facts in concluding an 8(b)(7)(B) violation. Concerning the picket signs which purported area standards picketing, the Board stated: "We do not regard self-serving legends on picket signs as conclusive evidence of the real objective of the picketing."1 The Board consequently held the alleged area standards picketing as an obvious coverup for recognition picketing.

\[1\text{Id. at 1305.}\]
In Centralia Building and Construction Trades Council,¹ the issue was whether the union's purported area standards picketing violated 3(b)(7)(C). While being picketed by the union (Centralia) the employer (Pacific) received notice that the picketing would stop when the area standards were met. To meet the union demand it would have been necessary to sign a "settlement agreement" requiring the employer to pay wages and other benefits equal to those paid by others already under the agreement. The agreement would have allowed the union to make monthly inspections of employer's records to determine whether the agreement was being kept.

The settlement agreement was accompanied by a cover letter in which the union denied any recognition objective. The letter stated that unless the employer met the area standards the union would be forced to publicize the fact that Pacific's employees were working at substandard pay and working conditions.

The Trial Examiner found the substance of the settlement agreement as the most significant evidence of an 3(b)(7)(C) violation. The Trial Examiner held that the agreement would leave little room for the employees to remain with a representative if one were ever chosen.

leaving the will of the employees "thwarted" and "nullified." Disregarding the cover letter as any evidence that the picketing was for area standards the Trial Examiner stated: "the label on a bottle and its contents are not always congruous."\(^1\)

In view of the evidence, both the Trial Examiner and the Board held that the union had in fact violated 8(b)(7)(C).

Further evidence that the Board's attitude had changed concerning shifts in picketing objectives is found in the case of Knitgoods Workers' Union, Local 155, (Boulevard Knitwear Corporation),\(^2\) decided in 1967. For five years prior to the dispute a union, Local 155, had unsuccessfully attempted to organize Boulevard Knitwear employees. A union agent's threat of closing down the shop unless a contract was signed caused the employer to file a petition with the Board for a representation election. As in Centralia, the union denied any intention of organizing or gaining the recognition of the employees. The election results indicated that the union had lost. However, the picketing of Boulevard continued.

The Trial Examiner rejected the union's shift in picketing objectives as a pretense of covering up their

\(^1\) Id. at 606.

real purpose of organizing Boulevard Knitwear employees. The Trial Examiner stated: "The union at no time before or after the election abandoned its original object of recognition and a contract, and its disclaimer to the regional director of the existence of such an object was a sham." The Trial Examiner found the union had violated 8(b)(7)(B). This decision was again accepted by the Board without comment.

In Retail Clerks Local 389 (1967) an 8(b)(7)(C) charge was sustained when it was found that Local 389 had gone beyond acceptable area standards demands. State-Mart, a retail market, was being picketed for what the union claimed as area standards. A meeting between Local 389 and the employer was held to inform State-Mart of what was meant by standards in the particular area. The union offered a standard union contract form with only the recognition clauses omitted. The union stated that they were interested in "the same benefits" for the State-Mart employees as received by other area employees and that they were not concerned about the cost of such a package.

1Id. at 23,395.

2Retail Clerks Local NO. 389, 166 L.R.B. No. 92, 1967 CONF IND Sec. (Per.) 21,563, at 23,311 (1967).

3Id. 4Id.
Reviewing the facts of the case, the Trial Examiner stated that: "the unions, by couching their demands in terms of providing equivalent benefits as those of contract employees, are in reality undertaking to bargain for State-Mart employees and to control certain of their working conditions. Picketing for such a recognitional or bargaining object is unlawful under Section 3(b)(7)(C)."

The Trial Examiner held that it was reasonable and lawful that a union insist that its area standards are jeopardized by the unorganized employer unless he conforms with other area wage scales and working conditions, "but by attempting to dictate how the cost package is to be distributed the unions are attempting to bargain." The unions insistence on welfare benefits and seniority rights, the Trial Examiner held, as going beyond an area standards demand. "What form the economic package is distributed to the employees should be of no concern to the union so long as it receives assurance that the cost package is the same."

The Trial Examiner found particularly significant the fact that the union's demands went beyond that which was "economically feasible" for State-Mart. Because it was not possible for State-Mart to meet the demands the

1Id. at 23, 312.  2Id.  3Id.
Trial Examiner drew the inference that the union's real object was something more than their purported one.¹

One of the Board's latest decisions concerning picketing under B(b)(7)(B) is the case of Local Joint Board, Bartenders and Cullinary Workers (Holiday Inn of Las Vegas),² decided in 1968. In this case the union again picketed for what they claimed to be area standards.

The employer of a newly opened motel received a letter from the union stating they had information that the motel was not maintaining area standards. The letter further stated that should the employer refuse to modify the working conditions, the union would commence picketing the motel. Included in the letter were copies of collective bargaining agreements that the union had with other motels in the area. In a meeting between the employer and the union, the union refused to explain the meaning of the letter to the employer. The union said that the letter was self-explanatory. Subsequent to the meeting picketing of the motel began. The employer then filed an B(b)(7)(C) charge against the union and also a petition for an election. The union notified the Regional Director that they had no

¹The Board agreed with the Trial Examiner.

²Local Joint Board, Bartenders and Cullinary Workers (Holiday Inn of Las Vegas), 1968-1-364 313 Misc. 2d. (Par.) 22,119 at 29,124 (1964).
interest in representing the motel employees. The election, which the union lost, was objected to by the union. The union then continued their picketing of the motel.

Reviewing the facts of the case the Trial Examiner held that the evidence failed to indicate the union's "post-election picketing was to obtain recognition..." and hence failed to establish a violation of Section 8(b)(7)(B)."1 The Trial Examiner reasoned that the "picketing was solely to enforce the employer's adherence to prevailing area standards."2

The Board disagreed with the Trial Examiner, finding that the union's real objective was recognition. Because of the broad demands made in the contract form and the subsequent refusal to explain its meaning, the Board found the union had violated 8(b)(7)(B). The Board also found significant the fact that the union lacked interest in the employer's actual employment conditions.

While the Board is only one of the steps in the adjudicative process, their treatment of union picketing objectives as a question of fact has received the support of the federal courts. Cases that have reached the federal level have not only confirmed the Board's line of reasoning but have added to the interpretative development of Section 8(b)(7).

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1Id.  
2Id.
In NLRB v. Suffolk County District Council of Carpenters, the Second Circuit Court affirmed a Board decision holding the Carpenters union in violation of Section 8(b)(7).

The facts of the case, as before the Board, show that both the Carpenters and Teamsters union had picketed Island Coal and Lumber Company for more than thirty days without filing a petition for an election. Testimony given by Island's general manager indicated that a substantial number of deliveries made to Island had been interrupted. The Board found that only the Teamsters' representative had engaged in organizational activity by soliciting the support of Island's employees. Signs carried by the Teamsters read:

EMPLOYEES OF THIS ESTABLISHMENT ARE NOT UNION
LOCAL 1205 IAT-AFL
ASK THESE EMPLOYEES TO JOIN WITH THE FOR:
Better Wages
Better Working Conditions
Job Security

1. NLRB v. Suffolk County District Council of Carpenters, 397 F.2d 170 (2d Cir. 1967).
3. 397 F.2d 179, at 179 (2d Cir. 1967). The general manager said that "about 50 per cent" of their deliveries had to be obtained by means other than their regular delivery procedures.
Those carried by the Carpenters read:

NOTICE TO PUBLIC

CARPENTERS ON THIS JOB ARE NOT PROTECTED BY A COLLECTIVE BARGAINING AGREEMENT

SUFFOLK COUNTY DISTRICT COUNCIL OF CARPENTERS

The Teamsters sign was changed after a few days to read the same as the carpenters. Island filed charges against both unions contending that they had violated 8(b)(7)(C). The unions claimed that their picketing was entirely informational and had no organizational or recognition objective. The Trial Examiner did not agree. The Trial Examiner held that even though the Teamster's sign was changed to appeal to the public, it did not necessarily indicate a change in the real object. The Trial Examiner also found evidence of an 8(b)(7)(C) violation in the interrupted deliveries. The Trial Examiner's decision that both unions had violated 8(b)(7)(C) was accepted by the Board without comment.

The Carpenters union appealed the Board's decision. The Carpenters union had not confronted any of Island's employees nor had they carried signs which could indicate any organizational or recognition object. The Carpenters

1 Id. at 172, and 159 N.L.R.B. at 393 (1966).
had done nothing that would indicate that their objective was anything but informational. The stopping of deliveries, while questionable, does not presuppose recognitional picketing. However, the Court confirmed the Board's decision, basing their opinion mainly on the stopped deliveries. The Court's decision seems to imply that if the union's conduct displays no discernable objective as to their purpose, then the fact that deliveries were stopped will serve as evidence that the picketing was for a prohibited object.

In *Carpenters Local No. 2133* the Circuit Court upheld the Board's decision in an area standards case. Here the union was picketing the owner-builder of a motel. The picketers carried signs which said that the work was being done by non-union workers. The signs said nothing about wages or fringe benefits, which could be construed to have an organization or recognition object. The Board relied chiefly on the testimony of two witnesses who testified that a union representative had stated that they wanted the motel owner to sign a contract. The Court excepted this testimony as being sufficient to find the union in violation of 8(b)(7)(C).

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1*Carpenters Local No. 2133*, 356 F.2d 464 (9th Cir. 1966).
Conclusion

The Board's initial interpretation of Section 8(b)(7), which was simply an extension of the Lewis Food decision, is indefensible. To prohibit picketing for objects that could have been settled at the bargaining table, places labor organizations in a stultified position. Had this line of reasoning continued, the union's economic interests could have been undermined completely.

Union strength is a result of their ability to maintain economic standards above that which could be obtained by individual bargaining. Unions, therefore, have a legitimate economic interest in the working conditions of unorganized employers. This is not to say, of course, that the union's economic interests should extend so far as to allow their activities to interfere with the employer's business operations.

The approach to picketing launched by the Kennedy Board was no better than that of its predecessor. The Board's ruling that it was the employer's duty to prove an illegal picketing objective had serious economic consequences. In order to circumvent an unfavorable Board ruling, the union needed only to disclaim an organizational or recognition object and remain silent as to their true purpose. The effect of the new Board's decisions was a
complete reversal of the Lewis Food ruling. The employer
had the choice of either accepting the union, which neither
he nor his employees wanted, or facing the possibility of
economic destruction. The new Board's position was equally
as unequitable as the one it had replaced.

The upshot of the Board and court decision since
1964 was the launching of a more rational approach in the
determination of actual union picketing objectives. The
treatment of picketing demands made under the guise of area
standards as a question of fact has rendered obvious union
deceptions useless.

Henceforth, for unions to picket successfully for
area standards, they will have to conduct their actions
carefully. Picketing in protest of substandard wages and
working conditions have been held by the Board to be legal
and justifiable. But as held in Centralise and Holiday
Inn of Las Vegas, the union has to make substantial effort
to determine the actual conditions of the employer. Other-
wise, the area standards picketing objective has been held
to be a sham.

In Retail Clerks Local 339 the Board found that by
picketing beyond what could be considered "economically feasible"
area standards demands, the union was in actuality attempting
to harass. Similarly, picketing for the reinstatement
of discharged economic strikers or in protest of an employer's
unfair labor practices are legitimate union objectives. However, to remain lawful the picketing must cease when the strikers are reinstated or when the unfair labor practice has been settled. The Board's logic is this: If the picketing continues after the dispute has been settled, the employer is offered no possible choice but to recognize the union in order to rid himself of the picketers. Such a consequence goes further than the proviso in Subsection (c) allows, therefore, the picketing is unlawful.

For future uncertified unions to picket outside the prohibitions of the current interpretation of 8(b)(7) they must, (1) retain a limited objective, (2) confine their conduct to that which will allow the employer to meet the demands short of recognition, and (3) cease picketing once their demands are met.

Once the union meets the above conditions, then both it and the employer are on more equal terms. By the Board treating the picketing objectives as a question of fact in the determination of whether the conditions are being met by the union, the intended policy goals of Section 8(b)(7) can be met.
CHAPTER V

SUMMARY

The unsatisfactory results of Board and Court decisions handed down prior to enactment of 8(b)(7) suggested the need for the passage of a new law regulating organizational and recognitional picketing.

With the rejection of the tort theory of picketing in the Thornhill case, picketing was temporarily equated with free speech, guaranteed by the Constitution. The inability of the Thornhill Doctrine to provide a satisfactory standard in picketing cases eventually led to its abandonment in the Vogt case.

Similar disappointments resulted from the regulation of picketing under Section 8(b)(4)(A) and (B) of the LMRA. The major difficulty of regulating picketing under 8(b)(4), is that it provided protection only where employees were already represented by a union which had been certified by the "LR3 as the exclusive bargaining agent of these employees. Sections 8(b)(4)(A) and (B) were intended to deal with secondary union activity, specifically secondary boycotts. The regulation of organizational picketing under Section 8(b)(4) was incidental to its primary purpose.

Success in the control of picketing under the Taft-Hartley
amendment could hardly be expected. While the Thornhill Doctrine and Sections 8(b)(4)(A) and (B) provided some basis of adjudication, they were essentially piecemeal attempts to deal with a problem outside their scope.

The uncertain status of picketing under the Wagner and Taft-Hartley Acts made it necessary, if not mandatory, for Congress to develop a new approach to the picketing issue. The Congressional concern of the picketing problem manifested in an amendment to the Taft-Hartley Act, Section 8(b)(7)(A), (B) and (C). Section 8(b)(7) was designed and intended to deal specifically with picketing by a non-certified union in certain situations.

The latest picketing amendments, while imperfect in some respects, have provided the NLRA and the federal courts with a rationale for the determination of acceptable union picketing. Most recent decisions by the Board and federal courts show that an approach has been undertaken that will provide for equitable adjudication of picketing cases for both the employer and labor union.

The Board's current interpretation of Section 8(b)(7) allows non-certified unions to picket for certain specified goals only if the union provides some means for the employer to meet the demands, short of recognition. It is suggested that this approach still maintains the basic union right to picket, while at the same time providing the employer
and employees with the free exercise of their right to remain non-union. This interpretation of the law retains for both union and employers the economic freedoms necessary for successful labor-management relations.

For law to be effective in its purpose, it must maintain a consistent interpretation in order for those who operate under that law to predict consequences of their action. However, if the premise upon which the law was established, or a re-evaluation of the Congressional intent shows the current approach to be wrong, that law may be successfully reinterpreted. Section 8(b)(7) is now in what could be considered its third stage of interpretation. If time also proves this stage inadequate, Section 8(b)(7) will have outlived its usefulness and it will be necessary for Congress to define or re-define this Section by amendment.
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