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## Labor Law's New Frontier: The End of the Per Se Rules

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# STUDENT COMMENTS

## LABOR LAW'S NEW FRONTIER: THE END OF THE PER SE RULES

This article will explore and attempt to explain recent changes in the national labor law wrought by the National Labor Relations Board and the United States courts. The article will emphasize new doctrines which have been expounded by the Board since the appointment to the Board of Chairman McCulloch and Member Brown.<sup>1</sup> The changes in doctrine reflect not only changes in Board personnel but also the growing reluctance of the reviewing courts to enforce many of the earlier Board orders. Naturally, many of the decisions of the reconstituted Board reflect the 1959 labor law amendments passed by Congress as well as a belief that tried doctrines have not always been true or useful doctrines.

In tracing these changes this article will divide the field into five major areas: Representation, Secondary Boycott, Organizational and Recognitional Picketing, Management Coercion and Hot Cargo agreements.<sup>2</sup> The modifications in all areas appear to stem from a unified philosophy and the division is only for the purpose of discussion.

### REPRESENTATION

In one of its last decisions the old Board held that when two unions are seeking to represent employees in a particular plant, with one union seeking to represent both production and maintenance employees, and the other union seeking to represent only the maintenance employees, the narrower unit (maintenance) is inappropriate.<sup>3</sup> The new Board permitted review of the case and reversed on the basis that there was no evidence that the employer's operation was so integrated that the maintenance employees had lost their separate identity.<sup>4</sup> The new Board emphasized that the maintenance employees are established in separate departmental sections

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<sup>1</sup> Chairman McCulloch was appointed March 7, 1961, and Member Brown April 13, 1961.

<sup>2</sup> The appendix lists all new Board modifications of old Board cases and classifies them by LMRA Section.

<sup>3</sup> American Cyanamid Co. (Pensacola Bldg. Trades Council) 130 N.L.R.B. 1, 47 L.R.R.M. 1231 (1961). There were three unions seeking to represent the employees, but only two of the unions were involved in this particular dispute. The Council wanted to represent a unit of maintenance and utility sections employees, while the Textile Workers Union desired to represent a unit of production, maintenance and utility employees. The maintenance men were part of the employer's engineering section while the utility men were part of the employer's Production Department. The unit sought by the Textile Workers Union apparently was composed of men in the employer's Plant, Production and Engineering Departments. There was no bargaining history at the plant. The maintenance men worked closely with the production men and had many of the same benefits.

<sup>4</sup> American Cyanamid Co. (Pensacola Bldg. Trades Council) 131 N.L.R.B. No. 125, 48 L.R.R.M. 1152 (1961).

and have their own supervisors. Most importantly, the new Board stated: "We are convinced that collective bargaining units must be based on the relevant evidence in each individual case."

In another aspect of appropriate unit determinations the new Board swept out a policy venerated by the old Board. When a union seeking to organize a larger unit in a partially organized plant was opposed by the current bargaining agent which desired to continue its representation of the current unit, the old Board determined the appropriateness of the units and ordered an election. But the old Board held that if the current unit rejected both unions, the formerly unrepresented unit must remain unrepresented.<sup>5</sup>

The new Board in *Felix Half and Brother, Inc.*<sup>6</sup> altered this approach to permit a pooling of votes. The Board held that if the previously represented employees rejected both unions but the combined vote of the current unit and the new unit selected a union that union would represent both groups in a single unit. Naturally, this decision was preceded by a determination that both units were appropriate and that the combined unit was appropriate.<sup>7</sup> This decision advances the design of the act more fully because it permits the selection of a bargaining agent in a unit the Board has de-

<sup>5</sup> *Cook Paint and Varnish Co. (District 50, United Mine Workers)*, 127 N.L.R.B. 1098, 46 L.R.R.M. 1162 (1960). Here the Board directed an election in two groups. Group one (the current unit) consisted of all production employees, warehouse employees, shipping and/or receiving clerks, but included employees in group two; group two (the new unit) consisted of all maintenance employees, control technicians, porters and/or janitors but excluded all employees in group one. The Board stated that the following combinations were possible: group one selects the intervenor, and group two rejects the petitioner; group one selects the intervenor, group two rejects petitioner; both groups select the petitioner and there is one combined unit. But, ruled the Board, if group one rejects both unions, group two must remain unrepresented regardless of the vote in its group.

As late as March 9, 1961, the old Board in *J. R. Simplot Co.*, 130 N.L.R.B. 1283, 47 L.R.R.M. 1481 (1961), affirmed the validity of *Waikiki Biltmore Inc.*, 127 N.L.R.B. 82, 45 L.R.R.M. 1511 (1960), which ruled that there shall be no pooling of votes when the Board directs separate elections in units of currently represented employees and currently unrepresented employees. Fairness, stated the Board, will be served by forcing the union to demonstrate that it enjoys representative status in both the current bargaining unit and the hitherto unrepresented unit before both may be combined into one unit. But *Simplot* distinguished *Waikiki Biltmore* and directed separate elections in two units when the unrepresented unit was more than forty times larger than the currently represented unit. The Board in *Waikiki Biltmore* was attempting to avoid the inclusion of the previously unrepresented employees in the current unit if it voted to remain unrepresented. Also cf. *Zia Co.*, note 6, *infra*.

<sup>6</sup> *Local 72, Office and Clerical Employees, Teamsters*, 132 N.L.R.B. No. 135, 48 L.R.R.M. 1528 (1961). This decision merely activates an older Board practice followed in the *Zia Co.* case, 109 N.L.R.B. 312, 34 L.R.R.M. 1359 (1954), modifying 108 N.L.R.B. No. 140, 34 L.R.R.M. 1133 (1954).

<sup>7</sup> The Teamsters sought to organize a unit of office workers (the old unit) plus a porter-clerk who performed duties as janitor and messenger for the office. The current bargaining agent merely wanted to continue representation of the old unit. The Board took notice of the fact that there was an inside salesman in the office who would be denied representation if not included in one of these units. The Board determined that the old unit was still appropriate, that a new unit consisting of the porter-clerk and the inside salesman was appropriate and that the combined unit was appropriate.

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terminated to be appropriate. Notice also that this decision is a reinforcement of the *American Cyanamid*<sup>7a</sup> decision because it also holds that, where a larger appropriate unit fails to select a bargaining agent, the smaller unit is entitled to its own bargaining agent.

In still another area the new Board held that a unit of insurance workers comprising only the employees in the employer's Alexandria, Virginia, district office was an appropriate unit.<sup>8</sup> In so holding, the Board overruled the policy of *Metropolitan Life Ins.*<sup>9</sup> which it had followed since 1944 and which had held inappropriate any unit of insurance workers not at least company or state wide. When the latter case was decided the insurance industry appeared to be undergoing a period of rapid organization promising the benefits of collective bargaining to insurance agents on a broad base. The Board then feared that to break the industry into many small units would imperil the organization of the industry. The new Board noted that, since the expected organization failed to materialize, the reason supporting the rule was gone.

*Litton Industries*<sup>10</sup> in 1959, reaffirmed a long standing Board policy to exclude technicians from a bargaining unit of other employees when the unit placement of the technicians was contested. The rationale which the Board found persuasive was that the technicians, because of their distinctive training, experience and function, have different interests than other employees. The Board declared that it would scrutinize closely the classification of an employee as a technician, but once the classification was made, the issue was determined.

The new Board in the *Sheffield*<sup>11</sup> case overruled *Litton* to the extent of the inconsistency. The Board ruled that:

. . . automatically excluding all technical employees from production and maintenance units whenever their unit placement is in issue is not a salutary way of achieving the purposes of the Act. To do so is to give primacy in unit placement to the parties' disagreement rather than to the overriding consideration of the community of interests of such employees with the production and maintenance employees. In order, therefore, to give effective weight to such community of interest, we shall no longer utilize an automatic placement formula, but shall, instead, make a pragmatic judgment in each case based upon an analysis of the following factors among others: desires of the parties, history of bargain-

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<sup>7a</sup> Supra note 3.

<sup>8</sup> *Quaker City Life Ins. Co. (Insurance Workers Int'l)* 134 N.L.R.B. No. 114, 49 L.R.R.M. 1281 (1961). The employer's operations encompass sixteen states. The closest Virginia district office is 100 miles away. Excluding the district manager who reports directly to the home office, the office force consists of five debit insurance agents and one office clerical employee. The district manager has exclusive control of all personnel in the district office.

<sup>9</sup> *Metropolitan Life Ins. Co.*, 56 N.L.R.B. 1635, 14 L.R.R.M. 187 (1944).

<sup>10</sup> 125 N.L.R.B. 722, 45 L.R.R.M. 1166 (1959).

<sup>11</sup> *Sheffield Corp.*, 134 N.L.R.B. No. 122, 49 L.R.R.M. 1265 (1961).

ing, similarity of skills and job functions, common supervision, contact and/or interchange with other employees, similarity of working conditions, type of industry, organization of plant, whether the technical employees work in separately situated and separately controlled areas, and whether any union seeks to represent technical employees separately. Of course, where the parties are in agreement as to the unit placement of the technical employees, we shall, in assessing all the above factors, give considerable weight to the desires of the parties.

Once again the new Board has shown a desire to consider each case on its own merits. It becomes increasingly apparent that the new Board is not impressed with rigid formalisms. Yesterday's rule will not be today's rule unless there are sound reasons, other than *stare decisis*, justifying the continuation of the rule.

In another representation case of general interest, the Board has reversed the long standing practice of including driver-salesmen in the production-maintenance employees union unless a union wants to represent them separately or unless the parties agree that the driver-salesmen should not be included in the unit of production and maintenance workers.<sup>12</sup> The old Board had treated the driver-salesmen as if they were truck drivers by reasoning that driver-salesmen, truck drivers and production and maintenance men are all doing manual labor directly involved in the flow of materials and, therefore, should be included in the same bargaining unit.<sup>13</sup>

But in *Plaza Provision*<sup>14</sup> the new Board abandoned the rule on the basis that:

Our experience has shown us that the duties of employees who drive trucks or automobiles and distribute products of their employers from their vehicle may vary greatly, depending on the given employer's sales and distribution policies and practices. In some instances, the employees have little or no function in making or promoting sales of the employer's products but are essentially deliverymen or truck drivers. In others, their function is clearly selling and sales promotion, and driving vehicles is merely an incident of such function.

The Board promised to examine closely the facts of any case wherein the driver-salesmen perform both functions in a more or less equal degree. In the instant case the Board ruled that the interests of the route and special salesmen were diverse from those of the warehousemen and drivers, apparently on the bases that the salesmen were paid a salary plus incentive bonuses while the drivers and warehousemen received only salary, and that there was no "interchange" between the special and route salesmen and the warehousemen and drivers. Member Rodgers, in dissent, thought that the

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<sup>12</sup> *Plaza Provision Co.*, 134 N.L.R.B. No. 101, 49 L.R.R.M. 1295 (1961).

<sup>13</sup> *Valley of Va. Milk Producers Ass'n*, 127 N.L.R.B. 785, 46 L.R.R.M. 1096 (1960).

<sup>14</sup> *Supra* note 12.

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majority was giving too much weight to company organization. The employer agreed with member Rodgers.

In *Burns Detective Agency*<sup>15</sup> the Board held that a contract between an employer and a union which represents both production-maintenance employees and guards, but separates the guards into an appropriately different unit, will bar an election. The Board read closely Section 9(b)(3) which prohibits both the determination of a unit composed of guards and other employees as appropriate and the certification of a labor organization which admits to membership, or is affiliated with an organization which admits to membership, guards and non-guards. After determining the appropriateness of the unit, the Board stated that the contract-bar rules apply regardless of the absence of a certified bargaining agent. The *Burns* case overrules *Columbia-Southern Chemical Corp.*<sup>16</sup> Despite the fact that Section 9(b)(3) defines a "guard" as one who:

. . . enforce[s] against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises . . . ,

it is unclear whether the typical night watchman with janitorial duties is included in the definition. Doubtlessly, the existence of this problem moved the Board to invoke the contract-bar rule in the *Burns* case because that rule tends to stabilize existing collective bargaining relationships. Here, as in other representation cases, the new Board attempts to give appropriate groups of employees maximum freedom to select their bargaining representatives.<sup>17</sup>

A paradoxical example of this policy is *D. V. Display Corp.*<sup>18</sup> in which the Board held that it will direct only one election in a group found appropriate when a representation question involves a "historical" unit which the incumbent seeks to enlarge by adding to it previously unrepresented "fringe group" employees. *D. V. Display* overrules *Zia Co.*<sup>19</sup> which held that a group of previously unrepresented employees which did not comprise an appropriate unit had the right to determine their inclusion in the existing unit. The *Zia* rule tended to perpetuate the existence of inappropriate units, a practice not in conformity with the statutory direction to determine appropriate units.

A further example is *Crumley Hotel, Inc.*<sup>20</sup> in which the new Board reversed the old on reconsideration of the same case. The new Board determined that where a hotel belongs to a multi-employer restaurant-hotel bargaining unit which covers certain types of employees common to both

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<sup>15</sup> Wm. J. Burns Int'l Detective Agency, Inc., 134 N.L.R.B. No. 36, 49 L.R.R.M. 1145 (1961).

<sup>16</sup> 110 N.L.R.B. 1189, 35 L.R.R.M. 1212 (1954).

<sup>17</sup> Cf. *American Cyanamid* case, supra note 4, *Felix Half and Brother*, supra note 6, and *Quaker City Life*, supra note 8.

<sup>18</sup> 134 N.L.R.B. No. 55, 49 L.R.R.M. 1199 (1961).

<sup>19</sup> 108 N.L.R.B. 1134, 34 L.R.R.M. 1133 (1954).

<sup>20</sup> 134 N.L.R.B. No. 15, 49 L.R.R.M. 1095 (1961), reversing 131 N.L.R.B. No. 20, 47 L.R.R.M. 1613 (1961).

hotels and restaurants, unrepresented hotel employees need not be placed in a multi-employer unit. The Board concluded that there was no bargaining history to warrant a different result. The Board distinguished this case from *Los Angeles Statler Hilton*<sup>21</sup> which held that the appropriate unit for the unrepresented employees was a multi-employer unit because the employer bargained with his represented employees as part of a multi-employer unit.

*The Ballentine Packing Co.* decision<sup>22</sup> seems contrary to these decisions. There the Meat Cutters sought to represent all 135 production and maintenance employees as well as 12 truck drivers whom the Teamsters sought to represent. The Board directed separate elections in the production and maintenance unit, and in the truck drivers unit, after determining that the truck drivers spent most of their time on the road and very little of their time in the plant. The Board reasoned that, if the Meat Cutters appeared on the truck drivers' ballot, support might be diverted from the Teamsters, and the Meat Cutters' campaign among the truck drivers might cause it to lose support among the production-maintenance unit. Since the unit of truck drivers was appropriate and since their interests were not closely allied with the production-maintenance workers there was no objection to their remaining unrepresented.

*Ballentine* overruled *American Linen Supply Co.*<sup>23</sup> which had held that, because of the differences in duties among the company's production-maintenance crew, the driver-salesmen and the transport drivers, the latter group formed an appropriate unit at each plant; but if the majority of any group of driver-salesmen and transport drivers did not vote for the Teamsters, that group would be included in the production-maintenance group and their votes pooled. Only the Teamsters appeared on the drivers' ballot.

Even in *Ballentine*, which does not permit pooling of votes, the object is to give an appropriate group of employees a greater opportunity to select a bargaining agent of their choice. The Board limits on pooling are imposed only to prevent undue confusion.

In *Paragon Products Corp.*<sup>24</sup> the new Board altered the contract-bar rule to state:

. . . only those contracts containing a union security provision which is clearly unlawful on its face or which has been found to be unlawful in an unfair labor practice proceeding may not bar a representation petition.

<sup>21</sup> 129 N.L.R.B. 1349, 47 L.R.R.M. 1194 (1961).

<sup>22</sup> 132 N.L.R.B. No. 75, 48 L.R.R.M. 1451 (1961). This case is consistent with the new Board's opinion in *American Cyanamid*, supra note 4.

<sup>23</sup> 129 N.L.R.B. 993, 47 L.R.R.M. 1117 (1960).

<sup>24</sup> 134 N.L.R.B. No. 86, 49 L.R.R.M. 1160 (1961). The union security clause herein failed to mention that present employees were allowed thirty days in which to join the union, and it was alleged that there were present employees who were denied the thirty day grace period. To determine the question would require a hearing. Contracts containing ambiguous but not clearly unlawful union security provisions will bar representation petitions in the absence of some other determination of illegality, ruled the Board.

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The old Board held that any union security clause which differed from its sample union security clause would not bar a representation petition by another union.<sup>25</sup> The new Board believed that the old rule had been disapproved by the Supreme Court and that the rule had had an unsettling effect on established collective bargaining units.<sup>26</sup>

Because the period between petitions for elections and the elections themselves has been greatly shortened through the delegation of representation cases to the Regional Directors, the Board has modified the *Woolworth* rule<sup>27</sup> to state that the date on which the petition was filed will be the cut-off time for asserting allegedly objectionable conduct as an unfair labor practice.<sup>28</sup> Conduct after the cut-off date which tends to prevent a free election will be considered grounds for objection to the election. The Board decided, in the interest of fairness, to apply this rule only prospectively.

### SECONDARY BOYCOTT

Section 8(b)(4) proscriptions limit union picketing in a wide variety of situations often distinguishable in name only. Section 8(b)(4)(B) and (C) alone have given rise to the terms "Primary Picketing," "Common Situs Picketing," and "Ambulatory Situs Picketing." Each of these has tended to spawn a separate set of rules. Recently, however, the lines of separation have blurred. For example, the *Moore Dry Dock*<sup>29</sup> case with its standards for ambulatory situs picketing, tended to become the law until May, 1961, when the Supreme Court complained that the old Board was applying its standards too rigidly.<sup>30</sup> *Moore Dry Dock* is not the law, said the Court, rather the Board must look to the statute. This article will not attempt to untangle the maze of rules which have grown up around the different

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<sup>25</sup> *Keystone Coat, Apron & Towel Supply Co.*, 121 N.L.R.B. 880, 43 L.R.R.M. 1251 (1959), revising former opinion, appearing in 42 L.R.R.M. 1456 (1958).

<sup>26</sup> The Supreme Court in *NLRB v. News Syndicate Co.*, 365 U.S. 695 (1961), which upheld the legality of so-called "deferral clauses" not expressly disclaiming all prohibited objects, quoted with approval a court of appeals which stated "In the absence of provisions calling for explicitly illegal conduct, the contract cannot be held illegal because it failed affirmatively to disclaim all illegal objectives." The Board followed this reasoning in *Paragon Products*. Another result of *News Syndicate* and its companion case, *ITU v. NLRB*, 365 U.S. 705 (1961), was the American Broadcasting Co. case, 134 N.L.R.B. No. 148, 49 L.R.R.M. 1365 (1961), which overruled an earlier unreported decision. The old Board had ruled that "deferral clauses" are to be ignored in considering whether a union security clause violated § 8(a)(3) and therefore was not a bar to a representation petition. The new Board ruled that the *ITU* and *News Syndicate* cases held that "deferral clauses" must be considered in applying the "contract bar" rules. Both the old and new Boards agreed that a representation hearing is neither the time nor the place to determine the legality of a union security clause.

<sup>27</sup> *F. W. Woolworth Co.*, 109 N.L.R.B. 1446, 34 L.R.R.M. 1584 (1954). It was there held that a union which goes ahead with an election when there is employer misconduct either after execution of the consent election agreement or in a contested case after issuance of the decision and direction of election, does not waive its right to assert the employer's misconduct as grounds for setting aside the election.

<sup>28</sup> *Ideal Electric & Mfg. Co.*, 134 N.L.R.B. No. 133, 49 L.R.R.M. 1316 (1961).

<sup>29</sup> *Sailors' Union of the Pacific*, 92 N.L.R.B. 547, 27 L.R.R.M. 1108 (1950).

<sup>30</sup> *Local 761 Int'l Union of Elec. Workers v. NLRB*, 366 U.S. 667 (1961).



types of picketing. It appears that the distinctions which can be drawn between the cases are often insubstantial, but the distinctions are always present.

The old Board had held, prior to the effective date of the 1959 amendments to 8(b)(4), that a union's picketing of a neutral employer's place of business when there were no employees of the primary employer at the site or when there were primary employer sites open for picketing was an 8(b)(4)(i) violation.<sup>31</sup> The Board reasoned that such activity, even when unaccompanied by interference with deliveries or work stoppages or refusals to handle the products of the primary employers, invites the employees of the secondary employer to unite with the pickets regardless of the literal appeal of the signs and handbills. Although the statute was amended in 1959 to permit publicity other than picketing, the old Board did not alter its rulings in this important area.<sup>32</sup> These holdings were not being enforced by the courts which read the amended law differently than did the Board.<sup>33</sup>

In *Lohman Sales Co.*<sup>34</sup> the new Board gave meaning to the 8(b)(4) publicity proviso. Lohman, a wholesale distributor, was struck by the Teamsters after collective bargaining failed to produce agreement. The union informed several of Lohman's customers that they would be handbilled if they did not cease buying from Lohman. Those firms which refused to cooperate were visited by union members who distributed handbills which stated the nature of the dispute with Lohman and which requested public boycott of those items bought from Lohman. The new Board held that the legislative history compels the conclusion that "mere handbilling is not picketing but is embraced by the term publicity which is protected by the proviso."<sup>35</sup>

The *Lohman* case has now become part of Board law. In *Schepps Grocery Co.*<sup>36</sup> the union seeking to gain public support for its strike against

<sup>31</sup> *Brewery & Beverage Drivers Union (Washington Coca Cola Bottling Works, Inc.)*, 107 N.L.R.B. 299, 33 L.R.R.M. 1122 (1953), which found an 8(b)(4)(A) violation when a union striking for recognition picketed at the neutral employer's place of business only when the primary employer's trucks were making deliveries. *NLRB v. Denver Bldg. and Constr. Trades Council*, 341 U.S. 675 (1951), reversed the court of appeals and enforced a Board order directing the cessation of picketing at a common situs when the union picketed the construction site in protest against the employment of non-union electrical workers on the job. Picketing, according to *Minneapolis House Furnishing*, *infra* note 47, is patrolling with a sign.

<sup>32</sup> *Hod Carriers Union (Calumet Contractors Ass'n)*, 130 N.L.R.B. 78, 47 L.R.R.M. 1253 (1960) and *Local 261, United Wholesale and Warehouse Employees (Perfection Mattress and Spring Co.)* 129 N.L.R.B. 1014, 47 L.R.R.M. 1121 (1960), reversed by the new Board, 134 N.L.R.B. No. 99, 49 L.R.R.M. 1297 (1961).

<sup>33</sup> *Wholesale Employees, Local 261 v. NLRB*, 282 F.2d 824, 46 L.R.R.M. 2554 (D.C. Cir. 1960).

<sup>34</sup> *Local 537, Int'l Bhd. of Teamsters*, 132 N.L.R.B. No. 67, 48 L.R.R.M. 1429 (1961).

<sup>35</sup> *Supra* note 34. The handbills were distributed outside of two drug stores. They stated: "The cigars, cigarettes, tobacco and candies on sale in this store are distributed by Lohman" and urged "don't purchase any cigars, cigarettes, or candies in this store." The union did delete mention of any items which did not come from Lohman upon notice that their list was inaccurate.

<sup>36</sup> *Local 968, Teamsters Union*, 133 N.L.R.B. No. 139, 49 L.R.R.M. 1011 (1961).

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the grocery wholesaler distributed handbills in front of the stores of Schepps' customers which explained the nature of the dispute and requested public boycott of goods sold by Schepps. The Board agreed that doubtlessly an object of the handbilling was to force Schepps' customers, both direct and indirect, to stop dealing with Schepps, but the Board held that under the 8(b)(4) proviso the union had the right to inform the public of the nature of its dispute with Schepps.

In another case the Board relied on the *Lohman* rationale to hold that handbilling at the business location of the primary employer's customer was permissible.<sup>37</sup> The handbills had stated the nature of the dispute and requested that the public not purchase products distributed by the wholesaler.

In all of these cases the Board gave the 8(b)(4) publicity proviso meaningful interpretation. The Board held that, regardless of the "inducement and encouragement" effect of the handbills, if the literal appeal is to the public and other evidence of impermissible objects is absent, then the publicity proviso protects the activity.<sup>38</sup>

The Board has not been blind to the fact that while the literal appeal of the handbills may be permissible, threatening use of this weapon combined with a threat to picket may be an unfair labor practice.<sup>39</sup> Yet in three cases the Board has held that the union has the right to warn customers of the primary employer that handbilling will occur if the customers refuse to cooperate with the union.<sup>40</sup> Thus far the union is treated as merely informing the secondary employer that it intends to exercise its legal rights if it does not obtain favorable action.

*Middle South Broadcasting Co.*<sup>41</sup> (WOGA), in addition to presenting the new Board with its first ambulatory situs case, raised serious questions under the 8(b)(4) publicity proviso. In addition to picketing, the union, in the course of an economic dispute with the employer, caused to be published, circulated and mailed to union members, firms advertising on WOGA and the public, leaflets requesting the public to cease patronizing named firms still advertising on WOGA. The leaflet was accompanied by a two-page pamphlet which explained the nature of the dispute between the union and management. Two months later the union circulated another

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<sup>37</sup> Local 848, Wholesale Delivery Drivers' Union (*Servette, Inc.*), 133 N.L.R.B. No. 152, 49 L.R.R.M. 1028 (1961). A union picketed the primary employer, a wholesaler, and after an appropriate warning to retailers who purchased from the primary employer, handbilled those who refused to cease dealing with *Servette*. As a result of the handbilling some market managers refused to permit the stocking of products sold by *Servette*.

<sup>38</sup> E.g., *Schepps Grocery Co.*, supra note 36.

<sup>39</sup> Cf. Local 886, General Drivers Union (*Stephens Co.*) 133 N.L.R.B. No. 134, 49 L.R.R.M. 1013 (1961), which seems to indicate that the form of the threat to handbill may be important.

<sup>40</sup> In the *Lohman Sales*, supra note 34, *Schepps Grocery*, supra note 36, and *Servette cases*, supra note 37, the Board considered the form of the warning of handbilling and, in each case, concluded that the warning did not constitute threats or coercion within the meaning of 8(b)(4)(ii).

<sup>41</sup> Local 662, Int'l Bhd. of Elec. Workers, 133 N.L.R.B. No. 165, 49 L.R.R.M. 1043 (1961). Cf. page 500 infra.

leaflet very much the same as the first. It is noteworthy that the first leaflet was addressed "To our friends in THE CHATTANOOGA LABOR MOVEMENT," while the second was addressed to "Chattanooga Area Union Members, Their Families and Friends . . ."<sup>42</sup>

The Board found the circulation of the leaflets protected by the 8(b)(4) publicity proviso. The Board determined that the legislative history indicates the publicity proviso was intended to permit a boycott of the secondary employer's entire business and not merely a product boycott. Although the 8(b)(4) publicity proviso permits publicity concerning "product or products" only, the Board, in concluding that the radio station produces a product, quoted the *Lohman* case to the effect that:

. . . labor is the prime requisite of one who produces and therefore an employer who applies his labor to a product whether of an abstract or physical nature or in the initial or intermediate stages of the marketing of the product is one of the producers of the product.<sup>43</sup>

The Board was influenced in this determination by the fact that advertising, by enlarging the public demand, contributes materially to the value of the products advertised. Member Rodgers, in addition to dissenting on the Board's handling of the ambulatory situs questions, was positive that the radio station did not produce a "product" within the meaning of the act.

The old Board, in *Carolina Lumber Co.*,<sup>44</sup> held that the term "any individual" in the 8(b)(4)(i) proscription included any supervisor belonging to the rank and file employees' union or who once belonged to the rank and file employees' union and was still sympathetic to it. The Board reasoned that if the term "any individual" included laborers, supervisors and management the enactment of the 8(b)(4)(ii) proscriptions was pointless. Because Congress does not pass pointless legislation, the Board concluded

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<sup>42</sup> Since the leaflets were addressed primarily to organized labor and its friends it is inferable that the leaflets were attempts to induce or encourage union men to engage in refusals to work with an 8(b)(4)(B) objective.

<sup>43</sup> *Supra* note 34.

<sup>44</sup> Local 505, Teamsters Union, 130 N.L.R.B. 1438, 47 L.R.R.M. 1502 (1961). When the struck employer delivered lumber to a construction site the strikers asked the carpenters on the job, "Are you going to use the material? If you do, our jobs is [sic] sunk." When the carpenters used the lumber the strikers told the foreman in charge of moving and handling the lumber at the construction site, "You know it's wrong to handle that flooring. You will bust our union if you handle it." The foreman ordered the carpenters not to handle the lumber until he checked with the union. The union directed use of the lumber. On another construction site the strikers informed a project supervisor of the strike. The project supervisor, who directed all work at the site from his field office and who had charge of all men on the job, spoke to the job's union business agent who said that he preferred that the lumber not be used. The supervisor then refused to use the lumber stating that he "didn't want any part of somebody else's union problems." The Board held that there was an 8(b)(4)(i)(B) violation in inducing the foreman, but that there was no 8(b)(4)(i)(B) violation in inducing the project supervisor.

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that the term "any individual" included only rank and file employees<sup>45</sup> and some part of the supervisory force. The new Board has followed the reasoning of *Carolina Lumber* in several later cases and has given the case greater meaning. The earliest of the new Board decisions on this point held that a partner of one motor carrier, the president of another motor carrier, supervisors of a motor carrier's shipping and routing department, and an agent of another motor carrier acknowledged by all parties to be an independent contractor were not "any individuals" within the meaning of 8(b)(4)(i).<sup>46</sup> The Board ruled that those above the first rank of supervision or whose jobs spontaneously identify them with management in their relations with the outside world are not included in the class of persons whom it is improper to induce or encourage. The Board stated that placement of a person induced or encouraged within the scope of "any individual" would depend on a case to case assessment of the relevant factors.

In *Minneapolis House Furnishing Co.*<sup>47</sup> the new Board held that a store manager, a store sales manager and other unnamed supervisors were not "any individuals" within the meaning of the act. The Board reasoned that, since such supervisory personnel had actual or apparent authority to determine the purchasing or selling policies of their respective stores without referring the matter to supervisors, they were managerial employees whose interests were clearly not allied with those of the rank and file employees.

Yet in the *Lohman* case when the trial examiner found the purchasing agent of a drug store chain, the drug department manager of another chain, and the area merchandizing supervisor of the same chain to be "any individuals" within the meaning of the act, the new Board accepted that *unchallenged* finding.<sup>48</sup> But the Board noted that it did not necessarily agree with the finding. A later case ruled that retail market managers are not included within the scope of "any individual."<sup>49</sup>

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<sup>45</sup> See Local 299, Int'l Sheet Metal Workers (S. M. Kisner & Sons), 134 N.L.R.B. No. 110, 49 L.R.R.M. 1319 (1961).

<sup>46</sup> Local 294, Int'l Bhd. of Teamsters (Van Transp. Lines, Inc.), 131 N.L.R.B. No. 42, 48 L.R.R.M. 1026 (1961). The union called a strike against Van for refusing to honor an arbitration award. To bring more pressure on Van, the union sought to obtain the cooperation of Van's customers. Some of the persons not included in the term "any individual" complied with the union request. See 3 B.C. Ind. & Com. L. Rev. 546.

<sup>47</sup> Local 61, Upholsterers Union, 132 N.L.R.B. No. 2, 48 L.R.R.M. 1301 (1961). Here the Board held that picketing of retail stores does not induce or encourage the named supervisors to cease performing services or to engage in work stoppages. Yet the Board did find that the picketing was impermissible on other grounds which will be discussed later in this article.

<sup>48</sup> *Supra* note 34. Here the trial examiner determined that the appeals to the aforementioned managers constituted an inducement not to perform services they were hired to perform. Apparently the trial examiner took the view that these particular persons could not perform their jobs if they refused to handle Lohman's goods. The case does not include enough facts to determine whether there is any basis in fact for such a finding. But even if there were, it is unlikely that the Board will follow a similar line of reasoning in view of the *Servette* decision.

<sup>49</sup> *Supra* note 37. In that case, the managers were empowered to determine whether to continue doing business with *Servette*. The Board ruled flatly that even

One of the most difficult questions raised under 8(b)(4) is where may a striking union picket. At one time the answer could be found by applying rigid rules; in fact, the classification of the picketing determined its permissibility. Not so today. The new Board, under heavy prodding from the courts, has revised the rules so that mere classification does not determine the permissibility of the picketing. The same general classifications still seem to be helpful, at least for the purposes of discussion: primary picketing which presents the difficult separate gate problem; common situs picketing which presents the question of union objective; ambulatory situs picketing (today apparently including picketing of primary employer's delivery trucks at delivery sites); and secondary boycott picketing which involves all other types of 8(b)(4) picketing violations, but is characterized by the absence of the primary employer or any of his working employees from the picket site.

#### *Primary Picketing*

In 1949 the Board held that picketing a separate gate used by construction company employees erecting an addition to the primary employer's plant on land contiguous to the main plant was not an 8(b)(4)(A) violation.<sup>50</sup> The Board relied heavily on the fact that the strikers told the construction workers they could pass through the picket line if they so desired and that construction workers stated that as "good union men" they would not cross through a picket line. Further, the Board noted that the signs were directed at the primary employer and not at the construction company, and the primary employer's employees were able to enter the premises through the construction company gate.

This doctrine was seemingly overruled by *Phelps Dodge Corp.*<sup>51</sup> in which the old Board held that picketing of a newly opened gate marked "contractors only" at a site contiguous to a manufacturing plant was an 8(b)(4)(i)(A) violation. The Court of Appeals for the Second Circuit enforced the cease picketing order, stating:

[t]here must be a separate gate, marked and set apart from other gates; the work done by the men who use the gate must be unrelated to the normal operations of the employer, and the work must be of a kind that would not, if done when the plant were engaged in its regular operations, necessitate curtailing those operations.<sup>52</sup>

Shortly after this opinion by the Second Circuit, the Supreme Court was faced with a similar problem in the *Electrical Workers* case.<sup>53</sup> The

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though some of the managers refused to permit the stocking of products sold by Servette none of the managers by so doing "refused to perform services."

<sup>50</sup> United Elec. Workers (Ryan Constr. Corp.), 85 N.L.R.B. 417, 24 L.R.R.M. 1424 (1949).

<sup>51</sup> United Steelworkers (Phelps Dodge Refining Corp.), 126 N.L.R.B. 1367, 45 L.R.R.M. 1474 (1960).

<sup>52</sup> United Steelworkers v. NLRB, 289 F.2d 591, 48 L.R.R.M. 2106 (2d Cir. 1961).

<sup>53</sup> Local 761 Elec. Workers v. NLRB, 366 U.S. 667 (1961).

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union struck General Electric when unable to settle a grievance. The union picketed a gate marked "GATE 3-A FOR EMPLOYEES OF CONTRACTORS ONLY—G. E. EMPLOYEES USE OTHER GATES." The Court remanded the case to the Board for further consideration on the ground that the use of Gate 3-A was a mingled one because the independent contractors' employees did conventional maintenance work necessary for the normal operation of General Electric. The Court found the above quoted statement of the Second Circuit controlling.

It seems apparent that the old Board overruled the *Ryan* case in the *Phelps Dodge* case. The Supreme Court in the *Electrical Workers* case reproved the Board for its mechanical handling of the cases. The Court suggested that *Moore Dry Dock*, upon which the Board had relied heavily, was not the law, rather the statute contained the law to be applied. It would appear that these separate gate picketing problems are still open questions.

### *Ambulatory Situs Picketing*

In the *Moore Dry Dock*<sup>54</sup> case in 1950, the Board laid down a series of rules which have since been applied to nearly every type of picketing situation. The Board held that picketing of an ambulatory situs when it comes to rest is permissible if: (a) the picketing is limited to the time when the situs is present; (b) during the period of the picketing the situs was engaged in its normal business; (c) the pickets get as close to the situs as they reasonably can; and (d) the conduct of the pickets indicates that the dispute is solely with the primary employer.

In *Washington Coca Cola*<sup>55</sup> the Board ruled that when a union failed to picket the company warehouse but picketed the employer's delivery truck at delivery sites within the *Moore Dry Dock* rules, the delivery site picketing was a violation of 8(b)(4) because the union had available another site (the warehouse) which would enable it to properly air its dispute. The rationale was not approved by the reviewing court. In *Campbell Coal*,<sup>56</sup> which presented facts substantially identical with *Washington Coca Cola*, the Board followed the latter case. The court of appeals which reviewed the case remanded it for further consideration by the Board.<sup>57</sup> On remand the Board found the picketing prohibited but on the grounds that the pickets

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<sup>54</sup> Sailors' Union of the Pac., AFL, 92 N.L.R.B. 547, 27 L.R.R.M. 1108 (1950). The object picketed was a ship of foreign registry. The Phopho was training her new Greek crew (which replaced an American crew) at the Moore Dry Dock site in addition to undergoing repairs there.

<sup>55</sup> Brewery & Beverage Drivers Union, 107 N.L.R.B. 299, 33 L.R.R.M. 1122 (1953).

<sup>56</sup> Sales Drivers (Associated Gen. Contractors), 110 N.L.R.B. 2192, 35 L.R.R.M. 1369 (1954). Campbell operated ready-mix concrete plants. Its drivers picked up the concrete at a Campbell plant and delivered it to construction sites. The drivers spent approximately 25% of their working day enroute, 25% at the Campbell plants, and 50% at the construction sites.

<sup>57</sup> Sales Drivers, Local 859 v. NLRB, 229 F.2d 514 (D.C. Cir. 1955), cert. denied, 351 U.S. 972 (1956). The court of appeals set aside the Board order because the Board failed to consider what the objective of the picketing was as required by as yet unamended 8(b)(4)(A).

at the delivery site did nothing to confine the dispute to the primary employer.<sup>58</sup> The court of appeals enforced the Board order by the narrowest of margins.<sup>59</sup>

The new Board faced its first ambulatory situs picketing case in *Middle South Broadcasting Co. (WOGA)*.<sup>60</sup> When negotiations for a new contract broke down, the union picketed the building in which the station was located. On January 30, 1960, WOGA had a remote broadcast from the premises of a local auto dealer. The broadcast lasted two hours, but the employees left the remote site for two five-minute news broadcasts which originated at the station. During the entire two hour period the union had no pickets at the station, but it did have two pickets patrolling the auto dealer's store carrying the following sign: "WOGA UNFAIR LOCAL 662 DO NOT PATRONIZE LOCAL UNION 662, I.B.E.W." On May 14, 1960, the station took its newly acquired musicmobile (mobile radio station) back to the same auto dealer. The musicmobile was located on the street parallel to the curb and directly in front of the entrance to the auto dealer's showroom. While the broadcast was in progress the union had two pickets patrolling and one of them carried the same sign used earlier. During the first half hour the pickets patrolled on the sidewalk between the musicmobile and the showroom, but then for the remaining one and one-half hours they patrolled the street side of the musicmobile. The union had no pickets at the station's permanent location during the remote broadcast. On both these occasions WOGA publicized the remote broadcasts and requested that the public attend. There were no work stoppages by the auto dealer's employees, and there was no interference with deliveries. It was stipulated that WOGA regularly conducts about ten mobile broadcasts per week. The Board found that the picketing was permissible under the *Moore Dry Dock* rules after making a point-by-point comparison. The Board's opinion does not indicate whether the Board even considered the continuation of picketing during the ten minute absence of WOGA employees who left the ambulatory site to make the news broadcasts. After further reviewing the facts the Board distinguished *Washington Coca Cola* on the basis that:

. . . with advance publicity to the public to that effect, the primary employer moves its "regular" place of business to secondary sites for substantial and frequent periods of time, and that during such periods the Union was and is entitled . . . to picket the primary employer at such sites in order to publicize its primary dispute to the public, because during such periods it can "adequately" publicize its dispute to the public only at these "roving" [sic] places of business.<sup>61</sup>

<sup>58</sup> *Sales Drivers, Local 859*, 116 N.L.R.B. 1020, 38 L.R.R.M. 1392 (1956).

<sup>59</sup> *Truck Drivers, Local 728 v. NLRB*, 249 F.2d 512 (D.C. Cir. 1957), cert. denied, 355 U.S. 958 (1958). With one judge dissenting the court of appeals was still doubtful about the Board's application of the act on these facts, but resolved the doubt in favor of the Board.

<sup>60</sup> *Supra* note 41.

<sup>61</sup> *Ibid.*

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Members Rodgers and Leedom joined in dissent on the basis that *Moore Dry Dock* was not applicable to "common situs picketing" and that the correct rule to be applied was that of *Washington Coca Cola* even though it had not been approved by all of the courts which had passed upon it.<sup>62</sup>

### *Common Situs Picketing*

In 1951 the Supreme Court upheld a Board determination that picketing a construction site in protest of the use of non-union men was an 8(b)(4)(A) violation.<sup>63</sup> The Court viewed the notice of picketing given Denver Building Trades Council by the Council's Board of Business Agents as a "signal in the nature of an order to the members of the affiliated unions to leave the job and remain away until otherwise ordered."<sup>64</sup> The Court was convinced that there was an object of forcing and requiring the general contractor to cease doing business with the non-union subcontractor since those two parties had a contract.

The old Board had so amplified this ruling that almost any picketing at a common situs became impermissible under the combined application of the *Moore Dry Dock*,<sup>65</sup> *Washington Coca Cola*<sup>66</sup> and *Denver Building Trades Council*<sup>67</sup> rules. The Board had ruled that failure to follow *Moore Dry Dock* to the letter was an 8(b)(4) violation, but even if *Moore* were followed there was still an 8(b)(4) violation in a *Washington Coca Cola* situation. If the union picketing was still permissible then the Board would rule that there was picketing for a proscribed object because picketing at the common site necessarily induces and encourages the employees of other employers to strike.

For example, when the Hod Carriers Union patrolled the work site of any employer whose employees had a certified bargaining representative carrying signs and distributing handbills which advised the public that unqualified personnel were performing the work and that union pay and work standards were not being met, the old Board found an 8(b)(4)(C)

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<sup>62</sup> The *Washington Coca Cola* rule has been a subject of controversy among the courts of appeal. When the First Circuit in the *NLRB v. United Steelworkers* case, 250 F.2d 184 (1st Cir. 1957), enforced a Board order based on the *Washington Coca Cola* rule, it noted that such action was in agreement with that taken by the District of Columbia Circuit and the Fifth Circuit. But the District of Columbia Circuit which enforced the Board order in the *Washington Coca Cola* case, *Brewery and Beverage Drivers Union v. NLRB*, 220 F.2d 380 (D.C. Cir. 1955), later in the *Campbell Coal* case, *supra* note 57, denied enforcement to a Board order based on the *Washington Coca Cola* rule. There the court remanded the case for a finding as to the objective of the picketing.

<sup>63</sup> *NLRB v. Denver Bldg. & Const. Trades Council*, 341 U.S. 675 (1951). The general contractor, Doose & Litner, had a subcontract with Gould & Preisner, a non-union firm, to perform electrical work on a construction site in Denver. The Council paid a picket to patrol the construction site after informing Doose and Litner that union men could not work on the job with non-union men.

<sup>64</sup> *Id.* at 678.

<sup>65</sup> *Supra* note 54.

<sup>66</sup> *Supra* note 55.

<sup>67</sup> *Supra* note 63.



violation.<sup>68</sup> The old Board found inducement and encouragement of the employees at the work site regardless of the literal appeal of the signs; it further concluded, union statements to the contrary notwithstanding, that the purpose of the picketing was to obtain recognition. The Board's rationale was that the objects sought by the union were those normally obtained only through the collective bargaining process. The new Board on reconsideration of the case dismissed the charge stating:

Section 8(b)(4)(C), as we read it, does not contain a broad prescription against all types of picketing. It forbids only picketing with the objective of obtaining "recognition and bargaining." On the record before us, Respondent clearly disclaimed such an objective and sought only to eliminate subnormal working conditions from area considerations. As this objective could be achieved without the Employer either bargaining with or recognizing Respondent, we cannot reasonably conclude that Respondent's objective in picketing . . . was to obtain recognition or bargaining.<sup>69</sup>

The *Hod Carriers* case overruled sub silentio *Lewis Food*<sup>70</sup> which had held that striking or picketing for an objective normally obtained through recognition and collective bargaining requires a finding that the striking or picketing is for recognition and bargaining. *Lewis Food* was expressly overruled by *Fanelli Ford*<sup>71</sup> which presented an 8(b)(7)(C) problem.

Shortly after the *Hod Carriers* case, the new Board decided *Plauche*<sup>72</sup> which had facts strikingly similar to those in *Denver Building Trades Council*. U. S. Tire Engineers, Inc. desired to have Lake City Electric, a non-union firm, do some electrical work on its premises. Fearing union trouble, the job was awarded to Plauche Electric, which had a settlement agreement with the union, on the basis of the Lake City estimates. The contract was on a cost (including the labor of the Lake City partners who were hired by Plauche as temporary employees) plus profit basis. After work began according to the agreement, the union picketed U. S. Tire carrying signs which stated that Plauche was the sole disputant. There was no picketing at Plauche's nearby office to which Plauche employees normally

<sup>68</sup> *Hod Carriers Union (Calumet Contractors Ass'n)*, 130 N.L.R.B. 78, 47 L.R.R.M. 1253 (1961), reversed, 133 N.L.R.B. No. 57, 48 L.R.R.M. 1667 (1961). While the signs and leaflets were clearly drafted with the 8(b)(4) proviso in mind, the picket would remain in his car until people approached the work site and then he would get out to patrol.

<sup>69</sup> *Hod Carriers Union*, 133 N.L.R.B. No. 57, 48 L.R.R.M. 1667 (1961).

<sup>70</sup> 115 N.L.R.B. 890, 37 L.R.R.M. 1421 (1956). The closest reading of the ruling in this case is that striking or picketing to obtain reinstatement of a discharged employee is for the purpose of compelling recognition and bargaining on that issue. The rationale of the ruling was that since reinstatement is normally achieved only after recognition and bargaining that recognition and bargaining must be the objectives of the striking or picketing. It seems obvious that the old Board would have regarded the *Lewis Food* decision as controlling in the *Hod Carriers* case.

<sup>71</sup> *Local 259, UAW*, 133 N.L.R.B. No. 163, 49 L.R.R.M. 1021 (1961).

<sup>72</sup> *Local 861, Elec. Workers (Plauche Electric, Inc.)*, 135 N.L.R.B. No. 41, 49 L.R.R.M. 1446 (1962).

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reported before going to the job site. The Lake City partners posing as employees of Plauche reported to Plauche's office only on one day.

The Board ruled that the place of the picketing was only one circumstance to be considered in determining the object of the picketing. Plauche's office was not the sole permissible situs for publicity of the dispute. The Board expressly overruled *Washington Coca Cola* to the extent of its inconsistency and applied the *Moore Dry Dock* formula. The application of the *Moore Dry Dock* formula was not rigid because the Board found the picketing permissible although the union had picketed when the Lake City partners went to lunch and took coffee breaks.<sup>73</sup>

### *Secondary Boycott Picketing*

One of the few areas of agreement between the new and the old Boards is the rule that peaceful picketing for an objective proscribed by 8(b)(4) constitutes restraint or coercion within the meaning of 8(b)(4)(ii).<sup>74</sup> *Minneapolis House Furnishing*<sup>75</sup> applied this rule to the picketing of a retail store by union members employed by a local manufacturer whose products were not sold by the retailer. There were two union men at the retailer's premises one of which patrolled with two signs, while the other distributed handbills. The handbill contained a more complete explanation of the nature of the dispute and the type of action which the union was requesting.<sup>76</sup> The Board separated the handbilling from the picketing and ruled that the latter was activity proscribed by 8(b)(4)(ii) although there were neither work stoppages nor delivery interruptions. The Board's findings were unusual in that it found: (1) that the primary dispute was with the non-local manufacturers who sold to the retailers; and (2) that the store owners were coerced and restrained; but (3) that the store employees who had a certified bargaining representative but no contract were not induced or encouraged. Under the 8(b)(4)(ii)(B) proscriptions if this picketing were primary it would have been permissible. But the Board, regarding the picketing as economic blackmail, apparently found that the primary dispute was with the non-local manufacturers in order to find the picketing impermissible. To find that activity coercive to management is not even encouraging to employees is anomalous, but is perhaps an expedient way to

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<sup>73</sup> The Board found that the maintenance of picketing while Lake City men were having lunch and coffee constituted a de minimus variation from *Moore Dry Dock*. *Moore Dry Dock* must be applied with common sense. It is noteworthy that the *Moore Dry Dock* rule has been applied to a situation far removed from its origin. The rule is presently applied in nearly every type of picketing problem.

<sup>74</sup> Cf. Local 1140, Hod Carriers Union (Gilmore Const. Co.), 127 N.L.R.B. 541, 46 L.R.R.M. 1043 (1960) and Local 261, Retail, Wholesale & Dept. Store Union (Perfection Mattress & Spring Co.), 129 N.L.R.B. 1014, 47 L.R.R.M. 1121 (1960).

<sup>75</sup> *Supra* note 47.

<sup>76</sup> One sign read: "Help us keep our jobs—Buy mattresses made locally by Upholsterers Local 61 AFL-CIO." The handbill contained a short essay on the importance of buying locally made products, and then listed local manufacturing firms. The handbill concluded by asking the reader to ask for locally made products when shopping. 48 L.R.R.M. at 1303.

avoid casting doubt on such cases as *Calumet*<sup>77</sup> and *Plauche*<sup>78</sup> which hold that picketing of a common situs is not a per se inducement or encouragement of a secondary employer's employees.

In *Stephens Co.*,<sup>79</sup> after the union and the company had failed to agree on contract terms, the union sent letters to seventeen of Stephens' customers. The letters advised the customers of the nature of the dispute and stated that if their aid were not forthcoming

. . . it would be necessary for us to inform all union members and the public in general of the facts in this matter. This we intend to do by the use of pickets at the place of business of the customers of Stephens Co.

About two and one-half weeks later the union sent to the same firms a second letter, substantially the same as the first, but which added that if there were any picketing it would be conducted within the rules set out in a line of cases beginning with *Moore Dry Dock*. The new Board ruled that the first letter constituted a clear threat of picketing with an object of forcing or requiring other employers to cease doing business with Stephens. The first letter did state that the union intended to do everything in its power which was lawful to further its cause, but the Board paid no attention to this statement. The second letter was not an unfair labor practice because it indicated an intent to stay clearly within the law.

Mere threats to picket or picketing when the primary employer is not in the vicinity is a violation of 8(b)(4)(ii)(B) because the object is coercion of the secondary employer.<sup>80</sup> The only time when picketing of Stephens' customers could conceivably be permissible in view of the *Minneapolis House Furnishing Co.*<sup>81</sup> decision is when Stephens' trucks are making deliveries. In addition the only difference between the letters was that the second referred to the *Moore Dry Dock* rule which at best only permits picketing of the secondary site when the primary employer's equipment is present. Because of the permissibility of the second letter in *Stephens* and because of the holding in *Plauche* the implication is that picketing of the primary employer's delivery trucks at delivery sites is permissible since it can be properly restricted to have its major effect on the primary employer.

In view of these cases, the *Ryan*<sup>82</sup> case, impliedly overruled by the old Board is now the Board rule. If the Board will permit picketing of a secondary employer's place of business when a primary employer's delivery truck is present, it will permit picketing of a separate gate on a primary employer's premises if the picketing is limited in its appeal to employees of

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<sup>77</sup> Supra note 69.

<sup>78</sup> Supra note 72.

<sup>79</sup> Local 886, Gen. Drivers Union, 133 N.L.R.B. No. 134, 49 L.R.R.M. 1013 (1961).

<sup>80</sup> Ibid.

<sup>81</sup> Supra note 47.

<sup>82</sup> Supra note 50.

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the primary employer. Of course, if the gate has a mingled use, the Supreme Court has ruled that picketing is permissible.<sup>83</sup>

### RECOGNITIONAL AND ORGANIZATIONAL PICKETING

There is a paucity of 8(b)(7) cases because the section was first enacted in 1959. Yet there are 8(b)(4)(C) cases which have an impact on 8(b)(7). One of these, *Lewis Food Co.*,<sup>84</sup> was expressly overruled by the new Board in *Fanelli Ford*.<sup>85</sup> Two of Fanelli's mechanics solicited members for the union. When the union had an ostensible majority, it sought recognition from the employer who responded by firing one of the solicitors. When the employer refused to discuss the discharge with the union, the union paid one man to picket the service shop. The union later shifted the picket to the area near Fanelli's showroom. The picket carried signs which charged that Fanelli had committed an unfair labor practice and requested that the public buy cars elsewhere. The union informed its members that the picketing was only to secure the reinstatement of the discharged employee. Furthermore, the union, which has a policy of not striking for recognition, neither demanded recognition nor filed an unfair labor practice charge.

On these facts the Board found that the object of the picketing was not forcing or requiring the employer to bargain with the union but was to secure reinstatement of the discharged employee. Member Rodgers dissented on the basis that he would not overrule the more realistic *Lewis Food* case. The majority position is defensible because general counsel has the burden of proof in unfair labor practice cases.

In furtherance of its new thinking in recognitional picketing cases, the Board held that the fact that the picketing prior to the expiration of the 30 day period was for recognition did not compel a finding that subsequent picketing was for the same object.<sup>86</sup> In that case the Teamsters, after losing an election, settled unfair labor practice charges with the employer. At a post election meeting the union decided to picket Bachman as remedial action but not to picket another employer whose employees also rejected the union, although the circumstances surrounding both cases were substantially the same. The union agent testified that he did not think that Bachman would grant recognition to the union and that the purpose of the picketing was to inform the public that the Teamsters lost the Bachman election because of Bachman's unfair labor practices. The signs carried by the pickets stated merely that Bachman had violated federal law by committing an unfair labor practice.<sup>87</sup> On these facts the Board found that the

<sup>83</sup> Supra note 53.

<sup>84</sup> Supra note 70. Lewis presented an 8(b)(4)(C) case in which the Board ruled that striking or picketing to secure the reinstatement of a discharged employee had as its objectives recognition and bargaining.

<sup>85</sup> Supra note 71.

<sup>86</sup> "General" Local 200, Teamsters Union (Bachman Furniture Co.), 134 N.L.R.B. No. 54, 49 L.R.R.M. 1192 (1961).

<sup>87</sup> The Board stated that the question is not whether the employer actually engaged in the unfair labor practice charged by the signs and handbills but "whether the union honestly and reasonably believed that the employer had engaged" in the misconduct

picketing did not have as its object recognition or bargaining. Once again the Board seemed persuaded that the General Counsel had failed to satisfy his burden of proof. The Board has in both the 8(b)(4) and 8(b)(7) picketing cases required some affirmative showing that the union's objective is impermissible. A mere reading of the signs or the handbills will not meet the burden of proof in these cases. If the publicity provisos are to have any meaning, the act must be interpreted as the Board is now interpreting it.

The Board found picketing for a proscribed object when it found an 8(b)(7)(B) violation on the following facts: it was certified on August 25 that the union lost the election held on August 18; on August 19 the union changed its picket signs to read "This is a Non-Union Store—Irwins Opposes Unions for its Employees—Please do not patronize."<sup>88</sup> The union representative testified that the picketing before August 19 was for recognition, but that the subsequent picketing was only to convey information to the public. The union representative claimed that the picketing would be discontinued if the employer would: (1) assemble the employees; (2) give them assurances that they have free choice in selecting a bargaining representative; and (3) invite the union representative to address the employees. The picketing ceased on October 3 in response to an injunction issued by a federal district court. The facts seemed so extreme that the Board did not bother to discuss the improper objective factor in detail. The *Irvin* case also ruled that there can be no finding of an 8(b)(7)(B) violation until all challenges and objections have been disposed of, or until it has been determined that a runoff election is not required. Stated another way, there can be no finding of an 8(b)(7)(B) violation before the regional director certifies that the election results are such that a new election is not required.<sup>89</sup> If it is determined that there is an 8(b)(7)(B) violation, the remedial order will require the cessation of all recognition and/or organizational picketing for a period of twelve months after the date on which the labor organization terminates its picketing activities either voluntarily or involuntarily. Therefore the Board ordered the union not to picket Irvin for 12 months after October 3 for an object proscribed by 8(b)(7)(B). The Board treated this section of the act much like section 9(c) and in so doing determined that the Congressional intent was to grant immunity from the proscribed activity for a period of 12 months.

On February 20, 1961, the Board ruled on four 8(b)(7) complaints finding violations in all of them.<sup>90</sup> Exactly one year later the Board ruled

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charged. Therefore if the union has an honest and reasonable belief that the employer committed an unfair labor practice it has the right to conduct organizational picketing at the employer's premises.

<sup>88</sup> Local 692, Retail Store Employees Union (Irwins, Inc.), 134 N.L.R.B. No. 53, 49 L.R.R.M. 1188 (1961).

<sup>89</sup> *Ibid.*

<sup>90</sup> Local 840, Hod Carriers' Union (C. A. Blinne Constr. Co.), 130 N.L.R.B. 587, 47 L.R.R.M. 1318 (1961); Local 681, Hotel & Restaurant Employees Union (Crown Cafeteria), 130 N.L.R.B. 570, 47 L.R.R.M. 1321 (1961); Local 285, I.T.U. (Charlton Press, Inc.), 130 N.L.R.B. 558, 47 L.R.R.M. 1334 (1961); and Local 89, Hotel &

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on the same four cases on rehearing. Three of the cases reached different results and all gave evidence of the new Board philosophy.<sup>91</sup>

In *Blinne*<sup>92</sup> three laborers and an engineer were employed on a project. The union after signing the laborers as members demanded recognition. Blinne destroyed the union majority by transferring one of the employees. The union picketed in response to the transfer with several objectives, one of which was recognition. The union then filed 8(a)(1),(2),(3) and (5) charges. The regional director dismissed the 8(a)(2) and (5) charges after the union had picketed for thirty days without filing a petition for recognition. The regional director found the other charges meritorious and subsequently approved the settlement agreement which the parties executed. The old Board found a clear 8(b)(7) violation because the act requires the filing of a petition within 30 days after the commencement of recognitional picketing. The Board also noted that the only 10(l) exception is when an 8(a)(2) charge is filed.

In *Crown Cafeteria*<sup>93</sup> management refused to hire through a union hiring hall. The union commenced picketing to advise the public that Crown was non-union and to request that the public not patronize Crown. On some occasions the pickets carried signs stating that Crown "is attempting to break down our standard of wages, vacations, health and welfare, workday, workweek, contracts as paid by over 600 union establishments. Please do not patronize." For about four months the cafeteria had difficulty obtaining supplies, but this situation was remedied by arranging all deliveries before 11 A.M. when picketing commenced. The old Board found an 8(b)(7)(C) violation because the sole object of the union's picketing must be informational. It was not enough if one of the objects was to convey information. The union agent testified that the sole object was to get a union hiring hall, which he admitted would eventually mean majority status and recognition.

In the *Stork Club*<sup>94</sup> case, the company promptly fired any employees who joined the union. When the union demand for their reinstatement was refused, the union picketed with the usual "unfair" and "do not patronize" signs. On January 1, 1960, the company filed 8(b)(7)(C) charges, and, on January 15, the union dropped its demand for recognition. The post-January 14th signs and leaflets stated that the union did not have a contract with Stork, that Stork did not maintain union wage or working standards and that Stork had discharged employees for joining the union. The leaflet disclaimed recognition as an objective, terming it illegal. But

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Restaurant Employees Union (Stork Club), 130 N.L.R.B. 543, 47 L.R.R.M. 1327 (1961).

<sup>91</sup> The Board affirmed *Blinne*, 135 N.L.R.B. No. 121, 49 L.R.R.M. 1638 (1962); and reversed *Crown*, 135 N.L.R.B. No. 124, 49 L.R.R.M. 1648 (1962), *Charlton*, 135 N.L.R.B. No. 123, 49 L.R.R.M. 1650 (1962) and *Stork*, 135 N.L.R.B. No. 122, 49 L.R.R.M. 1653 (1962).

<sup>92</sup> *Supra* note 90.

<sup>93</sup> *Supra* note 90.

<sup>94</sup> *Supra* note 90.

on five occasions in seven days Teamsters refused to cross the picket line to make deliveries. The picketing through January 14 was admittedly an 8(b)(7) violation, but the Board found that the picketing after that date was also a violation, even if informational, because it had the effect of inducing individuals not to deliver.

In the *Charlton Press*<sup>95</sup> case, all nine composing room employees who had joined the union in early February were fired by early March after being interrogated and threatened. The company refused to bargain with the union which was greatly restricted in its scope of remedial activity by its failure to comply with Sections 9(f), (g) and (h). A trial examiner's finding of merit in the union's unfair labor practice charges was unchallenged by management. The union, without filing a representation petition, continued striking and picketing until the thirty-second day after the effective date of the act. The old Board found an 8(b)(7)(C) violation because the union failed to file a timely petition.

On rehearing of the *Blinne*<sup>96</sup> case, the new Board found that the objective of the striking and picketing was recognition and bargaining and since the union failed to file a timely petition it had violated 8(b)(7)(C). The Board found no mandate in the statute to direct an election until the unfair labor practices charges are resolved. Thus it concluded that Congress did not intend to change the Board procedure of not directing an election until the resolution of the unfair labor practices. The Board further determined that an unfair labor practice charge is not a defense to an 8(b)(7)(C) charge, but if the picketing were in protest of an employer unfair labor practice the 8(b)(7) proscriptions would not apply. In footnote 24 to that Board opinion Chairman McCulloch and Member Brown indicated that if a complaint under 8(a)(5) were filed a representation petition need not be filed.

Members Rodgers and Leedom objected to the 8(a)(5) exception noted in footnote 24. Member Fanning dissented in part and concurred in part because in his opinion the union was faced with a Hobson's choice under the *Aiello*<sup>97</sup> doctrine. Fanning would have ruled that in the future only *meritorious* 8(a)(5) charges would abrogate the need for filing a representation petition under 8(b)(7). The battle lines drawn in the *Blinne* case appear in the other three cases.

In *Crown Cafeteria*<sup>98</sup> the majority of the new Board directed dismissal

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<sup>95</sup> Supra note 90.

<sup>96</sup> Supra note 91.

<sup>97</sup> *Aiello Dairy Farms*, 110 N.L.R.B. 1365, 35 L.R.R.M. 1235 (1954), stated that a union whose claim of majority status is rejected by an employer may either file an 8(a)(5) charge or a representation petition. The case held that a labor organization which elected to proceed with a representation election with knowledge of employer 8(a)(5) violations may not, after losing the election, revert to the 8(a)(5) charges as a means of establishing its majority status. The Board will not consider facts which occurred before the election as grounds for finding an 8(a)(5) violation. The *Aiello* rule has been extended to require a union to withdraw an 8(a)(5) or suffer its dismissal, if it elects to process a representation petition. Cf. supra note 27.

<sup>98</sup> Supra note 91.

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of the 8(b)(7) charge on the basis of the Jenkins and Fanning dissent in the original *Crown* case. The dissent took the position that purely informational picketing is not proscribed by 8(b)(7). Mere delivery or work stoppage is not enough to convert informational picketing into recognitional picketing. The majority position apparently is that picketing which has as its major objective the dissemination of information is permissible.

Members Rodgers and Leedom dissented on the basis that informational picketing may be conducted only when there is no independent evidence of an unlawful objective and when there is no work stoppage. The dissenters asserted that the majority is only reading the signs and not looking at all of the union's conduct.

In *Charlton Press*<sup>99</sup> the majority used *Blinne* footnote 24 as the governing principle. The majority ruled that when an 8(a)(5) charge is filed there is no question of representation, and therefore a representation petition is inappropriate. Since the Typographical Workers clearly had a valid 8(a)(5) charge, the 8(b)(7) charge was dismissed. The Board was impressed with Supreme Court dicta<sup>100</sup> to the effect that the abolished 9(f),(g) and (h) penalties were to be the only penalties for failure to comply with the three sections. The Board reasoned that if it found an 8(b)(7) violation it would be penalizing the union for failure to comply with the abolished sections.

Members Rodgers and Leedom dissented on the basis that the separate opinion in *Blinne* should be the law. The union picketed more than 30 days without filing a representation petition and therefore violated the section. The dissent noted that section 10(l) prohibits the regional attorney from seeking a temporary restraining order when an 8(b)(7) charge had been filed if, but only if, it has been coupled with the filing of an 8(b)(2) charge; there is no such exception for an 8(a)(5) charge.<sup>101</sup>

In the *Stork Club*<sup>102</sup> case the Board agreed that the picketing prior to January 15 was illegal. In the period between Board rulings the General Counsel has sought a temporary injunction against the union picketing. A New York federal district court's ruling which granted the temporary restraining order<sup>103</sup> was reversed by the Court of Appeals for the Second Circuit.<sup>104</sup> The court of appeals stated that the signs which were permitted by the proviso cannot be the basis for the finding of the

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<sup>99</sup> Supra note 91.

<sup>100</sup> *UMW v. Arkansas Flooring Co.*, 351 U.S. 62 (1956); and *NLRB v. District 50, UMW*, 355 U.S. 453 (1958).

<sup>101</sup> Section 10(l) states:

. . . or regional attorney shall not apply for any restraining order under section 8(b)(7) if a charge against the employer under section 8(a)(2) has been filed and after preliminary investigation, he has reasonable cause to believe that such charge is true . . . .

<sup>102</sup> Supra note 91.

<sup>103</sup> *McLeod v. Local 89, Hotel and Restaurant Employees Union*, 181 F. Supp. 742 (S.D.N.Y. 1960).

<sup>104</sup> *McLeod v. Local 89, Hotel & Restaurant Employees Union*, 280 F.2d 760 (2d Cir. 1960).



unfair labor practice. Mere desire to eliminate poor working conditions by informational picketing is not an unfair labor practice even though such objectives are normally obtained through the collective bargaining process. Since both the Board and the court were faced with the same facts, the Board concluded that it would be frivolous for it to find an unfair labor practice. But the Board added that 8(b)(7)(C) does not prohibit picketing whose object is neither recognition nor bargaining even when the effect of the picketing is to induce persons not to perform services or not to pick up or make deliveries, since that proviso did not establish a separate unfair labor practice. The Board stated, however, that this ruling has no application to 8(b)(4) cases.

Members Rodgers and Leedom dissented on the basis that picketing is illegal when its effect is to interrupt deliveries or to cause work stoppages.

The *Stork Club* case is of little value as precedent. It does, however, indicate why the Board was having so much trouble in getting some of its earlier rulings accepted by the courts. The courts have generally rejected findings of illegal conduct based merely on admittedly legal conduct. Of course the Board could have treated the *Stork Club* facts differently than did the federal district court and in so doing force the court of appeals to reconsider the case. It would seem, however, that the Board probably agreed with the reasoning of the court of appeals.<sup>105</sup>

<sup>105</sup> There are a series of 9(c)(1)(B) cases which are of minor importance for their alterations in that area and which have a slight bearing on 8(b)(7). In *Normandin Bros. Co.*, 131 N.L.R.B. No. 150, 48 L.R.R.M. 1224 (1961), the employer requested an election in a unit of production-maintenance employees. The union, which earlier had been the certified bargaining representative of the employees and had lost its majority status, moved for dismissal of the petition. The union notified the company prior to the filing of the petition that it was no longer interested in recognition and bargaining but that it did intend to continue what it termed "informational picketing." The union then picketed the employee service gate in the rear of the employer's premises with a sign, addressed to the public, stating that Normandin's employees did not work under union conditions and that Normandin did not have a contract with the union. The Board directed an election after finding that the union's picketing of the employees' gate indicated that it was interested in representing the employees. The Board discounted the union's disclaimer. In *Miratti's, Inc.*, 132 N.L.R.B. No. 48, 48 L.R.R.M. 1407 (1961), the Board dismissed the employer's petition for a representation election. There the union, which had represented the employees for three years, lost its majority status. Three years later, after negotiations with the employer failed to resolve the representation issues, the union informed Miratti's that it intended to inform the public of the nature of the dispute. The union picketed Miratti's retail stores with signs stating that the union did not seek recognition from Miratti's, but that the union wanted the public to take its business to employers who did have contracts with the union. The Board distinguished *Normandin* on the basis that there the picketing was confined to the employee's entrance while here the picketing was confined to the employer's retail stores. The Board was willing to assume that the day before the commencement of the picketing the union's object was recognition, but found the union had made an effective disclaimer. Where there is such a disclaimer the Board announced that it would closely scrutinize the union's conduct at the time of the disclaimer and shortly thereafter. In another similar case, *Andes Candies, Inc.*, 133 N.L.R.B. No. 65, 48 L.R.R.M. 1711 (1961), the employer had a candy plant and several retail stores in the vicinity of the plant. From November, 1960, until May, 1961, union organizers (not

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### AGENCY SHOP

On October 20, 1959,<sup>106</sup> the UAW asked General Motors to begin bargaining on an agency shop provision for its Indiana employees.<sup>107</sup> General Motors refused on the grounds that such an agreement would violate sections 8(a)(1) and 8(a)(3) of the act. The union filed 8(a)(5) charges, and the case was heard under the following stipulations: (1) that the case should be decided solely on the basis of federal law without resort to the law of any state; (2) that no party was proceeding on the ground that the proposed agency shop would violate Indiana's "Right-to-Work" law; and (3) that no party was claiming that the existing collective bargaining agreement barred the requested bargaining. The old Board dismissed the complaint on the basis that such a provision would violate section 8(a)(3).<sup>108</sup> On rehearing the new Board decided that the proposed

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from the union which represented the employer's retail store employees) conducted an organizational campaign at the factory entrance by handing out union literature and seeking authorization cards. In December, 1960, the union informed the employer that it did not claim to represent the factory employees, nor did it seek recognition, but rather it was picketing the employer's retail stores to persuade the public to take its business to those employers with which the union had a contract. The union picketed the retail stores shortly before and after Christmas, Valentine's Day, Easter and Mother's Day advising the public that the employer did not have a contract with the union as did another named candy company. The signs asked the public to patronize those candy companies which did have contracts with the union. The Board dismissed the employer's representation petition on the basis of *Miratti's, Inc.*

*Andes, Miratti* and *Normandin* arise under section 9(c)(1)(B) of the act. That section raises the question of whether an employer has been presented with a claim to be recognized by a labor organization. If the employer has been so presented, the Board must make a determination whether there is reasonable cause to believe that a question of representation affecting commerce exists; if it does a hearing is ordered. Two of these cases represent the Board's administrative determination that a question of representation does not exist. They do raise the question of the objective of the union's picketing. But they do not raise the question in an 8(b)(7) context where the General Counsel has the burden of proof, and where the consequence of a violation is the termination of picketing for the proscribed object for a maximum of one year. *Crown* and *Stork* reach the result they do because the General Counsel has the burden of proof which he failed to satisfy.

<sup>106</sup> This occurred after *Meade Electric Co. v. Hagberg*, 159 N.E.2d 408 (Ind. App. 1959), in which it was held that the agency shop was a permissible form of union security under Indiana's "Right-to-Work" law.

<sup>107</sup> The proposed clause required each employee in Indiana to pay to the union, as a condition of employment, a sum equal to the initiation fees and dues normally imposed upon members of the union.

The national agreement had provided for a union shop and maintenance of membership except in those states where membership in a labor organization could not be a condition of employment under state law.

<sup>108</sup> *General Motors Corp.*, 130 N.L.R.B. No. 54, 47 L.R.R.M. 1306 (1961).

There was no single majority opinion. Chairman Leedom and Members Jenkins and Kimball each wrote separate concurring opinions. Chairman Leedom took the position that an agency shop provision would be illegal under federal law in any state in which employment could not legally be conditioned on "literal" membership in a labor organization, even though an agency shop would be legal under state law. Member Jenkins was of the opinion that an agency shop was permissible under federal law only when it supplemented a valid provision conditioning employment on actual

agency shop provision did not violate section 8(a)(3); that union security was a mandatory bargaining subject; and, consequently, that the refusal to bargain had been a violation of section 8(a)(5).<sup>109</sup> The Board reasoned that the provisos to section 8(a)(3) are not exclusive but permissive, so that any union security provision which requires no more than membership in a labor organization within thirty days of employment is legal.<sup>110</sup> Since the agency shop provision here only required payment of dues and fees and did not require membership, it was legal.<sup>111</sup>

#### HIRING HALL AGREEMENTS

In *Mountain Pacific* the Board said that hiring hall agreements would be considered unlawful per se unless they complied with certain conditions laid down by the Board.<sup>112</sup> The Supreme Court rejected such per se determination in *Local 357, Teamsters Union v. NLRB*.<sup>113</sup> The Court

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membership in a labor organization. Member Kimball concurred in the opinion of Member Jenkins and, in addition, said that an agency shop would effect a denial of equal participation in the labor organization to which the employees would have to pay dues.

<sup>109</sup> General Motors Corp., 133 N.L.R.B. No. 21, 48 L.R.R.M. 1659 (1961).

<sup>110</sup> In support of its conclusion the Board relied on two prior cases, Public Service Co., 89 N.L.R.B. 418, 26 L.R.R.M. 1014 (1950), and American Seating Co., 98 N.L.R.B. 800, 29 L.R.R.M. 1424 (1952), and on the legislative history of section 8(a)(3) as set out and interpreted in Radio Officers Union v. NLRB, 347 U.S. 17 (1954), and in Union Starch and Refining Co., 87 N.L.R.B. 779, 25 L.R.R.M. 1176 (1949).

In both Public Service Co. and American Seating Co., the Board had held that a support money clause supplementing a valid union shop clause was permissible under section 8(a)(3).

The *Radio Officers* case is wholly distinguishable, but in commenting on the provisos to section 8(a)(3) the Court said, "This legislative history (to the 1947 amendments) clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees." 347 U.S. at 41.

<sup>111</sup> The Board pointed out that there was nothing in the record to suggest that anyone wishing to join the union would be denied membership.

<sup>112</sup> Associated Gen. Contractors, 119 N.L.R.B. 883, 41 L.R.R.M. 1460 (1958). The conditions were that the agreement must provide that:

(1) Selection of applicants for referral to jobs shall be on a nondiscriminatory basis and shall not be based on, or in any way affected by, union membership, bylaws, rules, regulations, constitutional provisions, or any other aspect or obligation of union membership, policies or requirements.

(2) The employer retains the right to reject any job applicant referred by the union.

(3) The parties to the agreement post in places where notices to employees and applicants for employment are customarily posted, all provisions relating to the functioning of the hiring arrangement, including the safeguards that we deem essential to the legality of an exclusive hiring agreement.

<sup>113</sup> 365 U.S. 667 (1961). The hiring hall agreement provided in part that:

Casual employees shall, wherever the Union maintains a dispatching service, be employed only on a seniority basis in the Industry whenever such senior employees are available. An available list with seniority status will be kept by the Unions . . . Seniority rating of such employees shall begin with a minimum of three months service in the Industry, *irrespective of whether such employee is or is not a member of the Union.* (Emphasis by the Court.)

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reasoned that, even though hiring hall agreements tend to encourage union membership, they do not violate section 8(a)(3) unless the encouragement is accomplished by discriminatory means. Thus in each case the Board will be required to find actual discrimination in order to find that the agreement is unlawful. Subsequent Board opinions have conformed to the Court's mandate.<sup>114</sup>

### SUPERSENIORITY FOR STRIKE REPLACEMENTS

Ever since the Supreme Court handed down its decision in *NLRB v. Mackay Radio & Tel. Co.*,<sup>115</sup> it has been accepted doctrine that an employer, not otherwise guilty of unfair labor practices, may hire permanent replacements for economic strikers. A more difficult question has been what sort of benefits an employer may confer on such replacements.

In *General Electric Co.* the Board held that the grant of additional seniority (superseniority) to those willing to work during the strike was a violation of section 8(a)(3).<sup>116</sup> This has been the Board's position ever since.

But in *NLRB v. Potlatch Forest, Inc.*,<sup>117</sup> the Court of Appeals for

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On the same day the Court handed down its decision in *Local 60, United Bhd. of Carpenters*, 365 U.S. 651 (1961), in which it held that, in the absence of any evidence that the union had coerced any employee to become or remain a member, the Board could not require the union to refund the dues and fees paid to it by its members who were covered by an illegal union security agreement.

<sup>114</sup> See *Peterson Constr. Corp.*, 134 N.L.R.B. No. 152, 49 L.R.R.M. 1403 (1961); *Operating Eng'r Union (Procon Co.)*, 133 N.L.R.B. No. 132, 49 L.R.R.M. 1010 (1961); *Local 1172, Carpenters Union (Refinery Eng'r Co.)*, 133 N.L.R.B. No. 44, 48 L.R.R.M. 1666 (1961).

<sup>115</sup> 304 U.S. 333 (1938). Although holding that there was sufficient evidence in the case before them to support the Board's finding that the employer had discharged certain employees on account of their union activities, the Court said that:

an employer, guilty of no act denounced by the statute, has [not] lost the right to protect and continue his business by supplying places left vacant by strikers . . . . [Nor] is he bound to discharge those hired to fill the places of strikers . . . in order to create places for them. The assurance by respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice, nor was it such to reinstate only so many of the strikers as there were vacant places to be filled.

<sup>116</sup> 80 N.L.R.B. 510, 23 L.R.R.M. 1094 (1948). Here employees willing to continue working during an economic strike were given "continuous service credit" for the period of the strike, while the strikers were not. "Service credit" was a basis for the determination of certain real benefits such as seniority, vacations and pensions. The Board found that, insofar as the nonstrikers received extra vacation and pension benefits (which are in reality compensation), there was no violation, but that, insofar as they received extra seniority, there was a violation of section 8(a)(3). The grant of seniority to the nonstrikers made them less vulnerable to lay-off and discharge, relative to the strikers, than they were before the strike. This was adjudged discrimination in regard to tenure of employment. Except in the case of an economic striker replaced during the strike, said the Board, a striker's employment relationship cannot be severed or impaired on account of his strike activity.

<sup>117</sup> 189 F.2d 82 (9th Cir. 1951).

the Ninth Circuit refused to enforce a similar Board order.<sup>118</sup> The court reasoned that, although superseniority does tend to discourage union activities, it is not an unfair labor practice because the benefit conferred upon replacements is a benefit reasonably appropriate for the employer to confer in attempting to "protect and continue his business." The court also held that superseniority could be offered to the replacements at any time. Thus the employer need not prove that superseniority was offered to the replacements as an inducement to get them to work.<sup>119</sup>

There was no Board decision directly contrary to *Potlatch* until *Erie Resistor Corp.*<sup>120</sup> There the Board, in a well reasoned opinion, held that superseniority is discrimination against a striker in violation of section 8(a)(3). It is discriminatory, when offered to members of the bargaining unit, because it constitutes an offer of individual benefit to strikers to abandon the strike and return to work. In other contexts such an offer has been held to be an independent 8(a)(1) violation.<sup>121</sup> It does not fall within the dicta of the *Mackay Radio* case<sup>122</sup> because the discrimination is of indefinite duration. The Board expressed confidence that the Supreme Court did not intend to permit preferred treatment of nonstrikers long after the strike had ended. Nor, "in view of the immediate consequences to employees' tenure which follow from a grant of superseniority," was specific evidence of the employer's discriminatory intent necessary.<sup>123</sup>

<sup>118</sup> *Potlatch Forest, Inc.*, 87 N.L.R.B. 1193, 25 L.R.R.M. 1192 (1949). In this case it was not until after the union gave up the strike that the employer drafted the "Return-to-Work" policy under which the strikers were to be laid off before any of those who worked or were hired during the strike. The Board's reasoning was essentially the same as in *General Electric Co.*, supra note 116.

<sup>119</sup> This latter holding was rejected by the Supreme Court in *Olin Mathieson Chem. Corp. v. NLRB*, 352 U.S. 1020 (1957). The Court was so clear on this that it cut off the petitioner's argument and affirmed from the bench.

<sup>120</sup> 132 N.L.R.B. No. 51, 48 L.R.R.M. 1379 (1961). During an economic strike, the employer asked the strikers to return to work, telling them that if they refused they would be replaced by new employees to whom the employer had offered permanent employment. A few days later the employer announced that all strikers who returned to work and all permanent replacements would be given an additional twenty years seniority to ensure the permanence of their positions. The union voted to consider this an unfair labor practice and to continue striking until the employer recanted—a threat which the union was unable to carry out. Sometime after the strike certain of the strikers were laid off earlier than they would have been but for the superseniority granted to the nonstrikers. After bargaining the union and the company agreed to submit the question to the NLRB without filing charges. This form of submission raises doubts as to the enforceability of the order, but should not affect the value of the case as an indication of the Board's position on superseniority.

<sup>121</sup> See, e.g., *Trinity Valley Iron and Steel Co.*, 127 N.L.R.B. 417, 46 L.R.R.M. 1030 (1960); *Marlboro Electronic Parts Corp.*, 127 N.L.R.B. 122, 45 L.R.R.M. 1516 (1960).

<sup>122</sup> *Supra* note 115.

<sup>123</sup> The Board also held that the insistence of the employer, during the strike, on the superseniority plan converted the strike into an unfair labor practice strike. This gave all strikers, not permanently replaced before the union declared that it was striking against the unfair labor practice, the right to reinstatement as of the day on which the strike ended.

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In view of the Board's firm position in this matter and the abrupt, per curiam treatment which the Supreme Court gave to the *Olin Mathieson* decision,<sup>124</sup> it is improbable that the Board will meet any further resistance from the courts.

### THE EFFECT OF NO-STRIKE CLAUSES ON UNFAIR LABOR PRACTICE STRIKERS

It has long been held that the right to strike without incurring discharge does not extend to employees whose strike is a breach of contract and is not caused by the employer's unfair labor practices.<sup>125</sup> But this does not necessarily foreclose the right of employees to strike against unfair labor practices of the employer, even though the existing collective bargaining agreement contains a broad no-strike clause.

Initially the Board held that there was no unfair labor practice in the suspension of employees who, in violation of a no-strike clause, struck to protest the discriminatory discharge of another employee.<sup>126</sup> The Board reasoned that the no-strike clause should be enforced, in spite of the employer's unfair labor practice, because such clauses advance the purposes of the act by encouraging the practice and procedure of collective bargaining. The Board was of the opinion that, since its unfair labor practice procedures were sufficient to protect the employees, the no-strike provision could safely be given effect.<sup>127</sup>

Five years later, however, the Board cast some doubt on the worth of the *National Electric* case<sup>128</sup> by its decision in *Mastro Plastics Corp.*<sup>129</sup> Here the no-strike provision was equally as broad as that in *National Electric*,<sup>130</sup> but the Board said that it applied only to strikes instigated by

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<sup>124</sup> Supra note 119.

<sup>125</sup> NLRB v. Sands Mfg. Co., 306 U.S. 332 (1939).

<sup>126</sup> National Elec. Products Corp., 80 N.L.R.B. 995, 23 L.R.R.M. 1148 (1948). The Board found that the discharge of the first employee was a discriminatory discharge within the meaning of § 8(3) of the Wagner Act, but that the suspension of the protest strikers was justified by their breach of the following clause in the collective bargaining agreement: "[S]hould any dispute arise between the Company and the Union or any employee and the Company . . . there shall be no interruption or impeding of the work, work stoppages, strikes or lockouts on account of such differences, but an earnest effort shall be made to settle such differences in accordance with (the established grievance) procedure. . . ."

<sup>127</sup> Chairman Herzog concurred in the disposition of the instant case but objected to the broad language used by the majority. He felt that, in a serious unfair labor practice situation, human nature and Board delay would almost certainly combine to bring on a strike or other self help, regardless of the terms of the collective bargaining agreement. This knowledge, he said, would enable the employers, under the broad rule implied by the Board's decision, to commit serious unfair labor practices with relative impunity.

<sup>128</sup> Supra note 126.

<sup>129</sup> 103 N.L.R.B. 511, 31 L.R.R.M. 1494 (1953).

<sup>130</sup> The Union agrees that during the term of this agreement, there shall be no interference of any kind with the operations of the Employers, or any interruptions or slackening of production or work by any of its members.

disputes over matters covered in the contract. It went on to distinguish *National Electric* by pointing out that there the strike was in protest of the discharge of an employee under the union shop provision of the contract—a matter covered by the contract—whereas the strike in *Mastro Plastics* protested the discharge of an employee for his activities on behalf of the incumbent union—a matter not covered by the contract. The real distinction between the two cases lies in the almost unqualified approval given to broad no-strike provisions by the majority in *National Electric*, as contrasted with the refusal of the majority in *Mastro Plastics* to find that such breadth exists in the absence of explicit language. When the case reached the Supreme Court, the Board was unanimously upheld in its interpretation of the scope of the no-strike provision, although three Justices dissented on another issue.<sup>131</sup>

But this concurrence of Court and Board has by no means settled the matter. In 1958, two years after the Court's decision in *Mastro Plastics*, the Board again reversed its field by holding that a protest strike against the discriminatory discharge of an employee violated a no-strike provision which prohibited strikes only until an expeditious grievance procedure had been exhausted. The no-strike clause did not specifically ban unfair labor practice strikes.<sup>132</sup>

Then in the recent case of *Arlands Dept. Store*,<sup>133</sup> the new Board grafted still another important exception onto the *Mastro Plastics* doctrine. Again they were faced with a broad no-strike clause which did not expressly

The Union further agrees to refrain from engaging in any strike or work stoppages during the term of this agreement.

<sup>131</sup> *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956). In its acceptance of the Board's interpretation of the contract, the Court clearly was influenced by the seriousness of the unfair labor practices which caused the strike. The employer had culminated a series of unfair labor practices aimed at the incumbent union by discharging one of its leaders. So although the Court narrowly interpreted the no-strike clause as being aimed solely "at avoiding interruptions of production prompted by efforts to change existing economic relationships," there is little doubt that they were prompted by a fear that a broader interpretation would open the way for a ruthless ouster of the bargaining representative.

The other issue in the case was whether employees who struck in protest against unfair labor practices within the sixty day period proscribed by § 8(d) lost their status as employees under the act. A six to three majority held that they did not.

<sup>132</sup> *Mid-West Metallic Products, Inc.*, 121 N.L.R.B. 1317, 42 L.R.R.M. 1552 (1958). The pertinent parts of the no-strike clause were:

should differences arise between the Company and the Union, or the Company and an employee concerning any discharge . . . there shall be no . . . strikes . . . nor any other action taken by the Union . . . on account of such grievance until all the steps in the grievance procedure set forth have been observed and these steps have failed to produce a settlement.

The Board said that it was clear that the grievance procedure, at the option of the union or aggrieved employee, could be completed in about five days. Since the employees gave up their right to strike only for a brief period, the Board felt that it did not have to be as strict in construing the contract as they were in *Mastro Plastics Corp.*

<sup>133</sup> 133 N.L.R.B. No. 56, 48 L.R.R.M. 1731 (1961).

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prohibit unfair labor practice strikes,<sup>134</sup> and a strike by certain employees in protest of the discharge of another employee for his union activity. The trial examiner found that the discharge of the employee was illegal discrimination and coercion under sections 8(a)(1) and 8(a)(3); he also found that the discrimination did not extend to the other employees. The Board used this latter finding as the basis for holding that the discharge of the strikers was permissible under the no-strike clause and was not an unfair labor practice. The Board took the position that only "serious" unfair labor practices should exempt a strike from a broad no-strike provision. This discriminatory discharge was not so serious as to be "destructive of the foundations on which collective bargaining must rest" as were the unfair labor practices in *Mastro Plastics*. The test of what is that serious is to be one of experience, good sense and good judgment.<sup>135</sup>

The apparent result of all these cases is that, in this area, too, the Board has rejected all rigid rules and will henceforth determine the effectiveness of no-strike provisions on the basis of a number of factors, including the expediency and effectiveness of the available grievance procedures,<sup>136</sup> and the kind of impact which the unfair labor practice has upon the members of the bargaining unit. If the *Mastro Plastics* rule was ever a rigid one, the Court's preference for arbitration instead of strikes in an unrelated case indicates a retreat from that rigidity.<sup>137</sup>

### DISCHARGE AFTER BELATED TENDER OF UNION DUES

One of the most poorly received of all the old Board's per se rules was that which made a delinquent employee's full and unqualified tender of all dues and fees, at any time prior to actual discharge, an absolute bar to discharge under a union security agreement.<sup>138</sup> The rule was never accepted

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<sup>134</sup> "The Union agrees that during the term of this agreement there shall be no strikes, stoppages, or slowdowns of work by the Union or any of its members."

<sup>135</sup> Just three months earlier the Board had rejected the application of the "seriousness" doctrine in *Ford Motor Co.*, 131 N.L.R.B. No. 174, 48 L.R.R.M. 1280 (1961). There are two important distinctions between the two cases. In *Ford Motor Co.* there was a finding that the protested firing was designed to discourage membership in an independent union which sought to replace the UAW as bargaining representative. In *Arlans* the Board found that the discriminatory discharge was not intended as a broad warning to all the employees to refrain from seeking a change in their bargaining representative. And in *Ford Motor Co.* the Board noted that the UAW was less than vigorous in its advocacy of the aggrieved employees cause. Nothing of the sort appears in *Arlans*.

<sup>136</sup> Compare *General Motors Corp.*, 134 N.L.R.B. No. 116, 49 L.R.R.M. 1283 (1961), and *Mid-West Metallic Products, Inc.*, supra note 132, with *Ford Motor Co.*, supra note 135.

<sup>137</sup> *Local 174, Teamsters Union v. Lucas Flour Co.*, 49 L.R.R.M. 2717 (1962). This was a breach of contract action brought under § 301 of the NLRA. One of the issues before the Court was whether a no-strike provision was implicit in a clause providing for compulsory, terminal arbitration in any dispute arising under the contract. In an opinion from which only Mr. Justice Black dissented, the Court held that it was.

<sup>138</sup> *Aluminum Workers, AFL (Metal Ware Corp.)*, 112 N.L.R.B. 619, 36 L.R.R.M. 1077 (1955). The Board found a violation of section 8(b)(2) where the union requested and obtained the discharge of an employee under a valid union security



by any court,<sup>139</sup> and has now been overruled by the new Board.<sup>140</sup>

The new Board assigned two reasons for discarding the old rule. First, there can be little, if any, union security when dissident members can frustrate the orderly administration of lawful collective bargaining agreements by delaying payment of required dues and fees until the last moment before actual discharge. Secondly, the only possible basis for holding such a discharge to be an unfair labor practice under sections 8(a)(3) or 8(b)(2) would be the existence of some motive for discharge other than the failure to pay the required dues and fees. There is no merit in a rule which assumes the existence of such a motive in the absence of evidence to support the assumption.

Now that the *Aluminum Workers*<sup>141</sup> rule has been laid to rest, each case will be decided on its particular facts.

#### HOT CARGO AGREEMENTS

Section 8(e) makes any contract or agreement, violative of its terms, void and unenforceable without regard to when the agreement was made. There is, however, no unfair labor practice unless the parties "enter into" the illegal agreement after the effective date of the 1959 Amendments. The Board has resolved this paradox by holding, in two recent cases, that any act of affirmation or effectuation of clauses illegal under section 8(e) constitutes "entering into" an illegal agreement and is, therefore, an unfair labor practice.<sup>142</sup>

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agreement for his failure to pay back dues and reinstatement fees. The employee had made a full and unqualified tender of the back dues before the request for discharge was made, and made a full and unqualified tender of the reinstatement fee after the request but before actual discharge.

This decision overruled *Chisholm-Ryder Co.*, 94 N.L.R.B. 508, 26 L.R.R.M. 1062 (1951), which held that, to be effective, a tender of union dues and fees must be made within the time required by the union rules.

<sup>139</sup> The broad rule of the *Aluminum Workers* case was expressly disapproved by the Second Circuit in *International Ass'n of Machinists, AFL-CIO v. NLRB*, 247 F.2d 414 (2d Cir. 1957), and by the Ninth Circuit in *NLRB v. Technicolor Motion Picture Corp.*, 248 F.2d 348 (9th Cir. 1957). Even the Seventh Circuit, which enforced the Board's order in *NLRB v. Aluminum Workers, Local 135*, 230 F.2d 515 (7th Cir. 1956), did so on the basis of the evidence and without regard to the broad rule laid down by the Board.

<sup>140</sup> *General Motors Corp.*, 134 N.L.R.B. No. 116, 49 L.R.R.M. 1283 (1961). The union requested the company to discharge an employee, under a union security agreement, because of the employee's delinquency in the payment of his dues. There was no evidence of any other union motive. Before he was actually discharged, the employee offered to pay the amount of his delinquency. The union refused the offer and pressed for his discharge. When the company discharged him, the employee filed 8(a)(3) and 8(b)(2) charges. The Board dismissed the complaint. *Accord Acme Fast Freight, Inc.*, 134 N.L.R.B. No. 98, 49 L.R.R.M. 1286 (1961).

<sup>141</sup> *Supra* note 138.

<sup>142</sup> *Local 618, Teamsters Union (Greater St. Louis Auto. Trimmers and Upholsterers Ass'n)*, 134 N.L.R.B. No. 139, 49 L.R.R.M. 1326 (1961); *District 9, IAM (Greater St. Louis Auto. Trimmers and Upholsterers Ass'n)*, 134 N.L.R.B. No. 138, 49 L.R.R.M. 1321 (1961).

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The clause in question, essentially the same in each case, provided that "whenever the employer finds it feasible to send work out that comes under the jurisdiction of the union and this contract, preference must be given to shops or subcontractors having contracts with . . . [the union]."<sup>143</sup> In *District No. 9, IAM*,<sup>144</sup> an "entering into" was found when the union refused to approve a subcontractor selected by one of the employers and then sought mediation of the alleged contract violation. The mediation board found that the clause was binding on all parties. In *Local 618, Teamsters*,<sup>145</sup> there was an "entering into" when an employer, in response to union pressure, agreed not to send work to an unapproved subcontractor. In both cases the Board justified its holding on the theory that Congress could not have intended to allow affirmation, maintenance, or effectuation of illegal hot cargo agreements.<sup>146</sup>

### COURT REVERSALS INDICATING POSSIBLE NEW TRENDS

Two recent Court of Appeals opinions indicate additional areas in which the new Board might be expected to overturn old Board policies.<sup>147</sup>

In *Swift & Co.* the old Board had held that the filing of 8(a)(1) and 8(a)(2) charges by an intervening union, coupled with a 30% showing of interest, made negotiation of a collective bargaining agreement with the incumbent union a violation of sections 8(a)(1) and 8(a)(2).<sup>148</sup> The Court of Appeals for the Third Circuit refused to enforce the order on the ground that negotiation of a contract with one of several rival unions can constitute an 8(a)(2) violation only where there is a "real question of representation."<sup>149</sup> The facts found by the Board do no more than establish a claim on the part of the intervenor which falls short of presenting a "real question of representation."<sup>150</sup>

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In each case the collective bargaining agreement containing the illegal clause had gone into effect prior to the effective date of the 1959 Amendments, and in each case the acts of affirmance occurred after the effective date of the amendments.

<sup>143</sup> The Board distinguished this from a clause which bans the subcontracting of work normally performed by the employees. This clause allows subcontracting but restricts the people with whom the employer can do business. Without ruling on the validity of any clause which merely restricts subcontracting in order to preserve the jobs and job rights of the members of the bargaining unit, the Board held this clause to be a violation of § 8(e). The Board was unable to find any difference between a contract which prohibits an employer from using products produced by a nonunion firm and a contract which causes an employer to cease subcontracting to a nonunion firm.

<sup>144</sup> *Supra* note 142.

<sup>145</sup> *Supra* note 142.

<sup>146</sup> Members Fanning and Brown dissented in both cases on the ground that there is a difference between "entering into" an agreement and "enforcing" it.

<sup>147</sup> *NLRB v. Swift & Co.*, 294 F.2d 285 (3d Cir. 1961); *NLRB v. Cascade Employers Ass'n*, 296 F.2d 42 (9th Cir. 1961).

<sup>148</sup> 128 N.L.R.B. 732, 46 L.R.R.M. 1381 (1960).

<sup>149</sup> *NLRB v. Swift & Co.*, *supra* note 147.

<sup>150</sup> The court noted that the membership cards used for the 30% showing of interest have only slight evidentiary value when, as here, rival unions are competing for membership. Furthermore, the Board had given no weight to the fact that, although

In *Cascade Employers Ass'n* the company put into effect its own proposals on group health insurance, payments to the pension program, wages and the assignment of premium work after negotiations with the union on these subjects had stalemated. On these facts the old Board found violations of sections 8(a)(1) and 8(a)(5).<sup>151</sup> The Court of Appeals for the Ninth Circuit refused to enforce the Board's order and remanded the case for further fact findings.<sup>152</sup> The court agreed that an inference of bad faith arises from such employer activity, but refused to accept that inference as conclusive without fact findings as to all the circumstances surrounding the bargaining.<sup>153</sup>

#### CONCLUSION

The reviewed cases leave no doubt as to the new Board's rejection of the theory of per se violations. In place of the certainty of prediction sought by the old Board, there has been substituted a more thorough appraisal of each case. The ultimate, and perhaps the only, criteria for judging the value of this approach will be the accumulated experiences of the practitioners working under it.

Because the Board now requires more facts to support an unfair labor practice charge, the General Counsel's burden of proof has become more weighty. It would appear that the effect of this will be to decrease the amount of Board intervention and to increase the freedom of the parties to settle their own affairs.

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95% of the employees had given check-off authorization for the incumbent union, there was not a single revocation during the escape period.

As an example of a case in which there was a real question of representation, the court cited *Union Carbide & Carbon Corp.*, 105 N.L.R.B. 441, 32 L.R.R.M. 1276 (1953). In that case the incumbent union's certification was five years old and it had just terminated an unsuccessful strike during which many of its adherents had been replaced. The intervenor had made a claim and filed an election petition.

<sup>151</sup> 126 N.L.R.B. 1014, 45 L.R.R.M. 1426 (1960).

<sup>152</sup> *NLRB v. Cascade Employers Ass'n*, supra note 147. As authority for the proposition that the Board must consider the totality of conduct of both parties the court cited *NLRB v. Insurance Agents Union*, 361 U.S. 477 (1960), and *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131 (1st Cir. 1953).

<sup>153</sup> See *NLRB v. Katz*, 289 F.2d 700 (2d Cir. 1961),

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\* Lohman, 494-97, Servette, 495, and Schepps, 494, while not reversing or modifying any specific cases, do effect major alterations in the scope of the 8(b)(4) publicity proviso.

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