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Labor Law -- Section 8 (b)(7) (c) of the NLRA -- Recognitional Picketing -- Temporary Injuction Pursuant to Section 10 (1) of the NLRA -- Samoff v. Building & Construction Trades Council (Samuel E. Long, Inc.)

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employer representatives for the "purpose of collective bargaining or the adjustment of employee grievances."[130]

Conclusion

It would appear that the result in *Electrical Workers* rests on inadequate reasoning regarding the scope of section 8(b)(1)(B) as determined by the Board and courts in earlier decisions. Although the majority hesistantly recognized the validity of union discipline in some cases involving supervisors, it insisted that the absolute duty of loyalty owed by supervisors in the exercise of managerial responsibilities, together with its finding that the performance of rank-and-file struck work constituted such an exercise, necessitated a finding of an 8(b)(1)(B) violation.

It is submitted, however, that the majority in *Electrical Workers* adopted an overly narrow view of the extent of permissible union discipline. As illustrated by the Supreme Court's decisions in *Allis-Chalmers* and *Scofield*, a union may legitimately enforce its internal rules and regulations unless such action would contravene an express element of the national labor laws. Although these cases involved an interpretation of section 8(b)(1)(A) rather than 8(b)(1)(B), the essential principles arguably remain the same for both since the decisions by the Supreme Court in *Scofield* and *Allis-Chalmers* rested upon the words "restraint or coercion" which are common to both subsections (A) and (B) of section 8(b)(1). Finally, it should be noted that the performance of rank-and-file work during a strike does not fall within the definition of supervisory responsibilities as contained in section 2(11) of the NLRA. Because the fines were levied by the union for activities not supervisory in nature, there can be no conflict with any provision of the national labor laws designed to protect supervisors from union discipline when acting in their managerial capacities. It is submitted that the majority in *Electrical Workers* erred when they allowed the supervisors to retain all the benefits of union membership without incurring any proportionate obligations.

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Labor Law—Section 8(b)(7)(C) of the NLRA—Recognitional Picketing—Temporary Injunction Pursuant to Section 10(*l*) of the NLRA—*Samoff v. Building & Construction Trades Council (Samuel E. Long, Inc.)*.[1]—Respondent labor organization[2] picketed a nonunion

[130] 29 U.S.C. § 158(b)(1)(B) (1970).

[1] 346 F. Supp. 1071, 80 L.R.R.M. 3358 (E.D. Pa. 1972).

[2] Respondent is an unincorporated association whose membership is comprised of delegates from craft unions and councils in the construction industry, and is a labor organization within the meaning of § 2(5) of the National Labor Relations Act, 29

general contractor in the construction industry to obtain a "subcontractors agreement." Such agreements are enforceable contracts in which a general contractor agrees that, whenever work is subcontracted on any project, the general contractor will employ only subcontractors who have entered into collective bargaining agreements with craft unions affiliated with the trades council.[3] The picketed general contractor filed with the Regional Office of the National Labor Relations Board (NLRB) a charge which alleged that the labor organization was engaged in an unfair labor practice within the meaning of section 8(b)(7)(C) of the National Labor Relations Act (NLRA).[4] Section 8(b)(7)(C) proscribes picketing by a labor organization, where an object thereof is recognition or organization,[5] for more than thirty days without the filing with the NLRB of a petition for a representation election. Subsequently, the Regional Director proceeded in federal district court for a temporary injunction pursuant to section 10(*l*) of the NLRA.[6]

U.S.C. § 152(5) (1970). 346 F. Supp. at 1078, 80 L.R.R.M. at 3363. See Local 60, Iron Workers (Nalews, Inc.), 177 N.L.R.B. 289, 291, 71 L.R.R.M. 1454 (1969); IBEW, Local 1, 164 N.L.R.B. 313, 314, 65 L.R.R.M. 1113 (1967); Building & Constr. Trades Council (General Plumbing & Heating Co.), 155 N.L.R.B. 1184, 1186-87, 60 L.R.R.M. 1468, 1469 (1965).

[3] 346 F. Supp. at 1073, 80 L.R.R.M. at 3359. In the construction industry, subcontracting has long been a subject of collective bargaining agreements and disputes between the craft unions and unionized general contractors. See Lunden, Subcontracting Clauses in Major Contracts, pts. 1, 2, 84 Monthly Lab. Rev. 579, 715 (1961).

[4] 29 U.S.C. § 158(b)(7)(C) (1970) provides in part:

> It shall be an unfair labor practice for a labor organization . . . (7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees: . . . (C) where such picketing has been conducted without a petition under section [9(c) of the NLRA] being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing . . . .

[5] Although "[i]n both state decisions and NLRB reasoning there has been a tendency to distinguish picketing for recognition from organizational picketing [t]he [NLRA] amendments wisely ignore the purely verbal distinction and treat them alike." Cox, The Landrum-Griffin Amendments to the National Labor Relations Act, 44 Minn. L. Rev. 257, 265 (1959). Consequently, for the purposes of this casenote, the terms are used interchangeably.

[6] 29 U.S.C. § 160(*l*) (1970) provides in part:

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of . . . section [8(b)(7) of the NLRA], the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character . . . . If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with

At an evidentiary hearing in district court, the respondent labor organization contended that the picketing was not for any organizational or recognitional purpose, but rather solely to obtain the subcontractors agreement.[7] The NLRB maintained that, even assuming the respondent's purpose was not specifically to organize the general contractor's employees, section 8(b)(7)(C) also prohibits picketing to obtain a subcontractors agreement.[8] The NLRB theory may be summarized thus: respondent was admittedly seeking a contract relating to subcontracting; the subject of subcontracting is a matter within the statutory phrase "terms and conditions of employment"[9] and is thus a mandatory subject of collective bargaining; a labor organization which seeks a contract with an employer relating to a mandatory subject of bargaining is seeking recognition; and, as the respondent did not file a petition for a representation election, its recognitional picketing was violative of section 8(b)(7)(C).

Based upon a factual finding that the picketing had no purpose other than to obtain a subcontractors agreement,[10] the court HELD: the sole focus of section 8(b)(7)(C) is upon picketing which has as its objective the organization of employees by a labor organization and recognition of that labor organization as the full collective bargaining agent for those employees.[11] Therefore, the court found no reasonable cause to believe that the elements of an unfair labor practice within the meaning of that section are present in picketing for a subcontractors agreement.[12] Consequently, the court denied the temporary injunction, concluding that section 10(*l*) does not require a district court "to grant relief based upon legal theories advanced by the Board which, while thoughtfully presented and not frivolous, are, in the view of the Court, erroneous."[13]

After a brief examination of the legislative history and case law concerning section 8(b)(7)(C), the purpose and coverage of that section will be discussed in light of the opposing views of the *Samuel E. Long* court and the NLRB. With the requirements for a section 10(*l*) temporary injunction as a focal point, the merits of the instant case will then be analyzed.

Section 8(b)(7) was enacted in 1959 as part of the Landrum-

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respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper . . . .

[7] 346 F. Supp. at 1073, 80 L.R.R.M. at 3359.

[8] Id.

[9] Section 8(d), 29 U.S.C. § 158(d) (1970), provides in part that "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . ."

[10] 346 F. Supp. at 1076, 80 L.R.R.M. at 3361.

[11] Id. at 1083, 80 L.R.R.M. at 3367.

[12] Id. at 1085, 80 L.R.R.M. at 3368.

[13] Id. at 1086, 80 L.R.R.M. at 3369.

Griffin amendments to the NLRA.[14] The provision was assertedly prompted by evidence of "blackmail picketing."[15] Indeed, the legislative history emphasizes the intent to proscribe situations in which a labor organization attempts "to secure recognition and bargaining rights by the pressure brought on the employees or employer by a picket line."[16] However, a large gap arguably exists between the professed purpose and the operative provisions of the entire paragraph.[17] For while the legislative history is replete with references to blackmail or extortionate picketing,[18] the actual language of section 8(b)(7) is not confined to that context.[19] The meaning of the language is unclear: because "[s]ection 8(b)(7) was the product of intense conflict between competing interests [t]he resulting language is not notable for its clarity; it has been aptly described . . . as 'confusing.' "[20] Thus, in view of the fact that the provision is "marked by calculated and inadvertent ambiguities,"[21] the court in *Samuel E. Long* understandably relied on legislative materials to determine the type of picketing with which Congress was concerned in 8(b)(7).[22] Since the legislative history emphasizes blackmail picketing, the court concluded that section 8(b)(7)(C) is concerned solely with situations in which a labor organization seeks to compel an employer to accept the union—without a

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14 Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Amendments), tit. VII, § 704(c), 73 Stat. 544, 29 U.S.C. § 158(b)(7) (1970).

15 Samoff, Recognition and Organizational Picketing—A Wider Angle of Vision, 14 Lab. L.J. 891, 896 (1963).

16 S. Rep. No. 187, 86th Cong., 1st Sess. 75 (1959); 1 Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 [hereinafter cited as Leg. Hist. LMRDA] 397, 471 (1959).

17 ITU No. 57 v. NLRB, 326 F. Supp. 634, 636, 54 L.R.R.M., 2535, 2537 (D.C. Cir. 1963); cf. Witney, NLRB Membership Cleavage: Recognition and Organizational Picketing, 14 Lab. L.J. 434, 457 (1963); Comment, Picketing by an Uncertified Union: The New Section 8(b)(7), 69 Yale L.J. 1393, 1396, 1399 (1960).

18 See, e.g., 105 Cong. Rec. 1272-73, 1729-30, 1731, 6106, 6647-66; 2 Leg. Hist. LMRDA, supra note 16, at 975-76, 993, 994-95, 1029, 1174-93 (1959). Thus, Senator Ervin noted, at 105 Cong. Rec. 6656, 2 Leg. Hist. LMRDA 1183 (1959): "Recognition picketing is picketing which is designed to compel the employer to accept the union as the bargaining agent for the employees, regardless of whether the union represents a majority of the employees."

19 For example, "under ordinary circumstances it is difficult to conceive of a pragmatic situation where a union's ultimate objective in picketing would not be for recognition or organizational purposes . . . ." Graham, How Effective Is the National Labor Relations Board?, 48 Minn. L. Rev. 1009, 1040 (1964). See also Note, Organizational and Recognition Picketing: Permissible Activity Under the Landrum-Griffin Amendments, 36 St. John's L. Rev. 293, 301 (1962).

20 NLRB v. District Council of Carpenters, 387 F.2d 170, 174, 67 L.R.R.M. 2012, 2015 (2d Cir. 1967), quoting McLeod v. Chefs, Local 89, 286 F.2d 727, 729, 47 L.R.R.M. 2541, 2542 (2d Cir. 1961).

21 Meltzer, Organizational Picketing and the NLRB: Five on a Seesaw, 30 U. Chi. L. Rev. 78 (1962).

22 This conforms to normal principles of statutory construction, see 2 J. Sutherland, Statutory Construction § 4503 (3d ed. 1943).

representation election—as the full collective bargaining agent for the employees, "and nothing less than that."[23]

The NLRB, on the other hand, has adopted the view that, "to an unusual degree, the words of the statute provide the only safe measure of the actual agreement between contending purposes and points of view [in Congress]."[24] Consequently, the NLRB has preferred to read section 8(b)(7) expansively. It has consistently maintained that picketing is recognitional where a purpose is "to establish a continuing contractual relationship with the employer with regard to matters which could substantially affect the working conditions of his employees, and which are the proper subject of bargaining by a lawfully recognized exclusive representative of those employees."[25] Under this theory, the picketing union's objective need not be an explicit grant of full recognition, nor a collective bargaining agreement covering every term and condition of employment;[26] it would suffice that the employer could avoid picketing only by acceding to union demands that contemplate agreement to and maintenance of any significant term and condition of employment.

In the *Samuel E. Long* case, therefore, the critical question, in the NLRB's view, was whether the proposed subcontractors agreement related to the terms and conditions of employment of the general contractor's employees. If so, the NLRB would deem the picketing to be recognitional. In asserting that the picketing did concern a term or condition of employment, the NLRB relied on *Fibreboard Paper Products Corp. v. NLRB*.[27] The Supreme Court there held that an employer's decision to contract out work otherwise performed by regular employees is a term and condition of employment within the meaning of section 8(d) and therefore a subject of mandatory collective bargaining.[28]

In contradistinction to the situation in *Fibreboard*, however, a

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[23] 346 F. Supp. at 1083, 80 L.R.R.M. at 3367.

[24] Lane-Coos-Curry-Douglas Counties Bldg. & Constr. Trades Council v. NLRB, 415 F.2d 656, 658, 72 L.R.R.M. 2149, 2151 (9th Cir. 1969). See Cox, supra note 5, at 266: "The very few men close to the drafting of the Conference Report who understood this problem had no common intention—perhaps 'had conflicting intentions' would be a better phrase."

[25] Lane-Coos-Curry-Douglas Counties Bldg. & Constr. Trades Council v. NLRB, 415 F.2d 656, 658-59, 72 L.R.R.M. 2149, 2151 (9th Cir. 1969); see also id. at 659 n.6, 72 L.R.R.M. at 2151 n.6.

Cases in which the Board dismissed 8(b)(7)(C) charges against construction trades councils which picketed to force a general contractor to cease doing business with nonunion subcontractors are distinguished on the basis that the aim of the picketing in those cases was merely to remove the nonunion subcontractors from the particular job site and was not to obtain a continuing agreement with the general contractor. See IBEW, Local 903 (Pass Dev., Inc.), 154 N.L.R.B. 169, 59 L.R.R.M. 1722 (1965); Building & Constr. Trades Council (Winwake, Inc.), 141 N.L.R.B. 38, 52 L.R.R.M. 1269 (1963).

[26] Samoff v. Building & Constr. Trades Council (Samuel E. Long, Inc.), 346 F. Supp. 1073, 1080, 80 L.R.R.M. 3358, 3364 (E.D. Pa. 1972).

[27] 379 U.S. 203, 57 L.R.R.M. 2609 (1964).

[28] Id. at 209, 57 L.R.R.M. at 2611.

subcontractors agreement does not relate directly to the decision to contract out work.[29] The agreement does not require a general contractor to subcontract, nor does it forbid the general contractor to do so. Under such an agreement, the general contractor is free to subcontract or not to subcontract. The only restriction imposed concerns the organizational status of any subcontractor. *Fibreboard* held that the decision to subcontract is a mandatory subject of bargaining; it did not hold that the employer must bargain about the union status of those to whom work is subcontracted. Thus *Fibreboard* is not truly apposite in determining whether or not picketing for a subcontractors agreement is picketing over a term and condition of employment of the general contractor's employees.[30]

Perhaps realizing that *Fibreboard* does not fully support the proposition asserted for it, the NLRB had maintained in a previous case that it is immaterial to its view of section 8(b)(7) whether the subject of the proposed subcontractors agreement is mandatory or permissive (*i.e.*, not forbidden), so long as it has a "substantial impact" upon the interests of the general contractor's employees.[31] Yet, if the bargaining status of a subcontractors agreement were in fact immaterial, a question remains as to why the NLRB would make the mandatory nature of the bargaining a major element in its *Samuel E. Long* argument. The obvious reason is, certainly, to tie the Board's argument more closely to the wording of 8(b)(7), which specifically uses the terms "bargain" and "collective bargaining" to indicate subjects of a mandatory nature. An additional reason may perhaps be that, despite the previous attempts of the NLRB to gain a favorable ruling, no court has yet adopted the proposition that 8(b)(7) applies to permissive subjects of bargaining and found a violation where the

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[29] "Bargaining about the decision means discussing with the union the question whether there will be subcontracting at all." 1966-1967 Annual Survey of Labor Relations Law, 8 B.C. Ind. & Com. L. Rev. 771, 853 n.5 (1967).

[30] It may nevertheless be argued that a subcontractors agreement does relate to a mandatory subject of collective bargaining in light of the construction industry proviso to § 8(e) of the NLRA. That proviso specifically exempts, from the general prohibition against "hot cargo" contracts, "an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work . . . ." 29 U.S.C. § 158(e) (1970). See Comment, Hot Cargo Agreements under the National Labor Relations Act: An Analysis of Section 8(e), 38 N.Y.U.L. Rev. 97 (1963). In construing the proviso, courts have held that a recognized union may picket to compel the unionized general contractor to subcontract only to union subcontractors. See District Council of Carpenters v. NLRB, 332 F.2d 636, 641, 56 L.R.R.M. 2091, 2094 (3d Cir. 1964); Orange Belt Dist. Council of Painters v. NLRB, 328 F.2d 534, 537, 55 L.R.R.M. 2293, 2295 (D.C. Cir. 1964); Laborers, Local 383 v. NLRB, 323 F.2d 422, 426, 54 L.R.R.M. 2246, 2249 (9th Cir. 1963). See also 105 Cong. Rec. 17900, 2 Leg. Hist. LMRDA 1433 (1959). Consequently, although there is no specific precedent in support, a subcontractors agreement could arguably relate to a term or condition of employment.

[31] Dallas Bldg. & Constr. Trades Council v. NLRB, 396 F.2d 677, 680 n.6, 68 L.R.R.M. 2019, 2021 n.6 (D.C. Cir. 1968).

subject at issue was clearly not mandatory. Consequently, to drop the argument as to the mandatory nature of a subcontractors agreement would appear as an overt move to expand 8(b)(7) coverage to include subjects of permissive bargaining.

The court in *Samuel E. Long* did not, however, question the NLRB's interpretation of the *Fibreboard* holding. Instead, the court challenged the "substantial impact" claim, concluding that the subcontractors agreement would have "relatively small effect . . . on the ability of [the general contractor's] employees to engage in the full panoply of normal bargaining functions."[32]

The case upon which the NLRB primarily relied to demonstrate substantial impact in the proposed agreement was *Dallas Building & Construction Trades Council v. NLRB*.[33] There, the various recognized unions had previously sought subcontracting clauses, but uniformly abandoned the demand in return for other concessions.[34] Subsequently, a trades council sought a subcontracting agreement on behalf of all the member unions, picketed for that objective, and was cited for unfair labor practices pursuant to section 8(b)(7)(A).[35] The full Board unanimously found that the "subcontracting proposal would significantly affect employees of the picketed general contractors to the extent that it regulated subcontracting of such work."[36] The District of Columbia Circuit enforced the Board's order and "expressed its agreement with the Board that the proscriptions of section 8(b)(7)(A) are not confined to the blackmail-picketing context."[37] Further, the court specifically approved the Board's rationale that any subcontracting clause would " 'take away an opportunity for the recognized unions to either bargain for or trade off subcontracting controls.' "[38] The probability that the employees would benefit from the agreement was thought "irrelevant" since the agreement nonetheless "would bind the employer with respect to a matter about which the recognized union may bargain as exclusive representative of the employees."[39]

The *Dallas* interpretation was adopted by a divided panel of the Ninth Circuit in *Lane-Coos-Curry-Douglas Counties Building & Con-*

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[32] 346 F. Supp. at 1081, 80 L.R.R.M. at 3365.

[33] 396 F.2d 677, 68 L.R.R.M. 2019 (D.C. Cir. 1968), enforcing 164 N.L.R.B. 938, 65 L.R.R.M. 1170 (1967).

[34] 164 N.L.R.B. at 940.

[35] 29 U.S.C. § 158(b)(7)(A) (1970), proscribes picketing where "the employer has lawfully recognized in accordance with [the NLRA] any other labor organization and a question concerning representation may not appropriately be raised under section [9(c) of the NLRA] . . . ."

[36] 164 N.L.R.B. at 942, 65 L.R.R.M. at 1171. The Board noted, for example, that "[w]ithout such an agreement, the general contractors might choose to employ fewer laborers and millwrights, obtaining the remainder of the requisite manpower through subcontractors not bound to unions affiliated with the Council." Id.

[37] 1968-1969 Annual Survey of Labor Relations Law, 10 B.C. Ind. & Com. L. Rev. 785, 885 (1969).

[38] 396 F.2d at 681, 68 L.R.R.M. at 2022, quoting 164 N.L.R.B. at 941.

[39] 396 F.2d at 680-81, 68 L.R.R.M. at 2022.

struction Trades Council v. NLRB,[40] which also arose under 8(b)(7)(A).[41] There again, it was held that "picketing to secure a continuing agreement with respect to [the] subject matter [of subcontracting] intruded upon the area reserved to collective bargaining . . . ."[42]

The *Samuel E. Long* court apparently conceded that picketing for a subcontractors agreement would be recognitional within the rationale of *Dallas* and *Lane-Coos*, but concluded that those cases were distinguishable since they involved violations of section 8(b)(7)(A), i.e., picketing when the employer is already party to a collective bargaining agreement with another union, which agreement bars an NLRB conducted election. This basis for distinction appears faulty. The structure of section 8(b)(7) reveals that the essential element of a violation common to all the subparagraphs is that an object of the picketing is recognition. Once the recognitional objective has been established, the type of violation will depend merely on whether subparagraph (A), (B), or (C) is applicable. As the Board has noted, "structurally, as well as grammatically, subparagaphs (A), (B) and (C) are subordinate to and controlled by the opening phrases of Section 8(b)(7)."[43]

On this basis, it is submitted that the actual ground for the court's attack on *Dallas* and *Lane-Coos* was not the distinguishable characteristics of those decisions, but the court's belief that the cases were decided erroneously. The court correctly noted that *Lane-Coos* directly follows the *Dallas* interpretation;[44] thus, *Lane-Coos* can be considered as valid only if its predecessor is first found to be so.[45] The *Samuel E. Long* court reached the conclusion that *Dallas* incorrectly read the case upon which it relied as authority for its holding and accordingly was itself unreliable.

The case upon which *Dallas* rested is *Centralia Building & Construction Trades Council v. NLRB*.[46] That decision enforced a Board

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[40] 415 F.2d 656, 72 L.R.R.M. 2149 (9th Cir. 1969).

[41] The dissent in *Lane-Coos* found both *Dallas* and the *Lane-Coos* majority to have ignored the fact that subcontractors agreements are legal under the construction industry proviso of § 8(e), see note 30 supra. 415 F.2d at 663, 72 L.R.R.M. at 2154-55. The mere legality of a subcontractors agreement is, however, of no consequence to an 8(b)(7) unfair labor practice charge. That the picketing may have legitimate, as well as proscribed, objectives is immaterial, since the existence of "an object" forbidden by the NLRA is sufficient for a finding that the picketing violates 8(b)(7). NLRB v. Local 182, Teamsters, 314 F.2d 53, 58-59, 52 L.R.R.M. 2354, 2356-57 (2d Cir. 1963); Local 346, Leather Goods Union v. Compton, 292 F.2d 313, 317, 48 L.R.R.M. 2678, 2681 (1st Cir. 1961).

[42] 415 F.2d at 659, 72 L.R.R.M. at 2151.

[43] Hod Carriers, Local 840 (C.A. Blinne Constr. Co.), 135 N.L.R.B. 1153, 1159, 49 L.R.R.M. 1638, 1641 (1962).

[44] 346 F. Supp. at 1081, 80 L.R.R.M. at 3365.

[45] This argument follows from the *Lane-Coos* dissent which found that the majority had mistakenly "assume[d] *Dallas* to have been correctly decided." 415 F.2d at 663, 72 L.R.R.M. at 2154.

[46] 363 F.2d 699, 62 L.R.R.M. 2511 (D.C. Cir. 1966).

order based upon a Board determination[47] that picketing a nonunion employer to obtain an agreement obligating the employer to pay union scale wages and fringe benefits was recognitional and therefore violative of 8(b)(7)(C). *Centralia* thus involved not a one-subject issue such as subcontracting, but instead dealt with numerous terms of employment which are clearly the typical subjects of mandatory collective bargaining. Yet, in language which was relied upon by the NLRB in *Samuel E. Long*,[48] the *Dallas* court stated:

> *Centralia*, however, does not mean that Section 8(b)(7) is violated only when the picketing union seeks to preempt the entire scope of interest of a recognized representative of the employees. The thrust of *Centralia* is that, so long as the union seeks a contract dealing with a subject relating to the conditions of employment of the general contractors' own employees, the picketing is recognitional within Section 8(b)(7).[49]

The *Samuel E. Long* court, on the other hand, read the *Centralia* holding more restrictively: the extent to which the picketing organization is seeking to assume normal collective bargaining functions with regard to the general contractor's employees is determinative of whether the picketing has a lawful or unlawful objective.[50] The court saw *Dallas* as "extending the *Centralia* rule,"[51] a "rule" which the court, in any event, considered incorrect insofar as it implied that picketing for something less than "full collective bargaining agent" status can have a "recognitional purpose."[52]

"Full collective bargaining agent" status represents the core of the *Samuel E. Long* decision. It is the court's position that

> there is no provision in the scheme of things established by the [NLRA] and implemented by the Board for employees to select a representative to bargain for them on one subject, such as subcontracting. . . . [F]or, had Congress meant to proscribe picketing by § 8(b)(7)(C) other than for purposes of organization and recognition in the conventional sense, *i.e.*, to organize employees and compel the employer to recognize the union as their bargaining agent, it would not have geared § 8(b)(7)(C) violations to failure to file a § 9(c) representation petition which leads to a Board supervised election.[53]

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[47] Centralia Bldg. & Constr. Trades Council (Pac. Sign & Steel Bldg. Co.), 155 N.L.R.B. 803, 60 L.R.R.M. 1430 (1965).

[48] 346 F. Supp. at 1081, 80 L.R.R.M. at 3365.

[49] 396 F.2d at 683, 68 L.R.R.M. at 2023.

[50] 346 F. Supp. at 1081, 80 L.R.R.M. at 3365. "We view the *Centralia* case as setting forth this proposition and nothing more." Id.

[51] Id.

[52] Id. at 1083, 80 L.R.R.M. at 3367.

[53] Id., 80 L.R.R.M. at 3366-67.

This argument—that picketing for any goal that is not the equivalent of status as full collective bargaining agent is not violative of 8(b)(7)(C)—is not unpersuasive. The Board's contrasting view admittedly also presents a reasonable reading of section 8(b)(7). It is well recognized, however, that the entire 8(b)(7) provision is ambiguous[54] and poorly drafted,[55] and under such circumstances the *Samuel E. Long* court was fully warranted in rejecting the Board's position and drawing its interpretation from the supportive legislative history. Clearly that interpretation is contrary to the holding of *Dallas* and *Lane-Coos*. Yet, in light of the NLRB's continued expansion of 8(b)(7) coverage—in *Centralia*, *Dallas*, *Lane-Coos*, and culminating in the instant case—the court's view in *Samuel E. Long*, supported as it is by the legislative history, would appear the better of the two. It may be that picketing for a subcontractors agreement by a trades council is an evil in terms of national labor policy. Yet it is for Congress, and not the NLRB, to proscribe such picketing by making appropriate changes in the NLRA.[56]

Nevertheless, the crucial issue before the court in *Samuel E. Long* should not have been whether *Dallas*, or for that matter *Centralia*, was decided erroneously. The district court's function under section 10(*l*) is very limited.[57] The *Samuel E. Long* court recognized that limited role,[58] but its decision belies the court's understanding.

Section 10(*l*) embodies the determination of Congress that certain unfair labor practices give or tend to give rise to such serious interruptions of commerce as to require their discontinuance, pending adjudication by the Board, to avoid irreparable injury to the policies of the NLRA and the frustration of the statutory purpose which would otherwise result.[59] As part of section 10(*l*), Congress imposed a mandatory duty upon the NLRB to seek injunctive relief in the appropriate

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[54] Meltzer, supra note 21, at 78.

[55] A. Cox, Law and the National Labor Policy 31 (1969).

[56] It is now [fourteen] years since the Landrum-Griffin Amendments . . . . Perhaps Congress should look again at the matter of picketing in the building trades industry—at the new patterns of picketing which have developed in the interim—and in the furtherance of its policy-making role, enact a more comprehensive and consistent regulatory scheme than it has heretofore.

Samuel E. Long, Inc., 346 F. Supp. at 1086, 80 L.R.R.M. at 3369.

[57] "The injunctive function under the act has been analogized to 'the historic function of the grand jury, where it must determine probable cause for a man to be tried.' Such a determination compels a 'stopgap' injunction pending Board determination of the merits." Comment, Extent of Discretion Exercised by District Courts in Issuing Temporary Injunctions Against Alleged Unfair Labor Practices, 56 Mich. L. Rev. 102, 107 (1957).

[58] 346 F. Supp. at 1074 n.1, 80 L.R.R.M. at 3359 n.1. Note, Temporary Injunctive Relief Under Section 10(*l*) of the Taft-Hartley Act, 111 U. Pa. L. Rev. 460, 466, 474 (1963).

[59] S. Rep. No. 105, 80th Cong., 1st Sess. 8, 27 (1947); 1 Legislative History of the Labor Management Relations Act, 1947, 414, 433 (1948).

district court upon a reasonable belief that a violation of section 8(b)(7) has occurred.[60]

It is well settled that in a proceeding under section 10(*l*) the district court is not called upon to decide the merits of an unfair labor practice case.[61] The district court's inquiry is limited to determination of whether (1) the evidence adduced at any evidentiary hearing, and (2) the propositions of law relied upon by the NLRB, demonstrate at least "reasonable cause to believe" that the respondent labor organization is violating the NLRA as charged.[62] The court in *Samuel E. Long*, however, went beyond this role. In rejecting the legal theory presented by the NLRB as "erroneous" even though it recognized that theory as "thoughtfully presented and not frivolous,"[63] the court added an apparently unwarranted third requirement for a section 10(*l*) injunction. It is submitted that this "erroneous" test is merely a semantic manipulation which permits the district court to evade the otherwise clear standards set by the statute and the

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[60] See note 6 supra.

[61] NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 681-83, 28 L.R.R.M. 2108, 2111 (1951) (adverse district court decision in section 10(*l*) temporary injunction proceeding not res judicata in the unfair labor practice case subsequently heard by the Board).

> This lack of adjudication on the merits raises some of the traditional objections to use of the labor injunction. The force of these objections is perhaps minimized, however, by the fact that an injunction under section 10(*l*) is sought on only a small percentage of the charges filed under section 8(b)(4), and that because of care taken by the Board in investigation of the facts and verification of the law—often with legal advice from the General Counsel in Washington—the injunction frequently is not issued until a month or so after filing of the charge.

Goetz, Secondary Boycotts and the LMRA: A Path Through the Swamp, 19 Kan. L. Rev. 651, 705 (1971) (footnotes omitted). This statement applies with equal force to 10(*l*) petitions based on 8(b)(7)(C) charges. During the fiscal year ended June 30, 1972, 295 charges were filed under 8(b)(7)(C), but during this same period only fifteen petitions for injunctions under section 10(*l*) were filed on 8(b)(7)(C) charges, of which only one was denied. The balance were granted (9), settled (3), or dismissed voluntarily (2). 37 NLRB Ann. Rep. App., Tables 2, 20 (1972).

[62] In a decision which is binding upon the court in *Samuel E. Long*, the Third Circuit held:

> The Board need not show that an unfair labor practice has been committed, but need only demonstrate that there is reasonable cause to believe that the elements of an unfair labor practice are present. Nor need the Board conclusively show the validity of the propositions of law underlying its charge; it is required to demonstrate merely that the propositions of law which it has applied to the charge are substantial and not frivolous.

Schauffler v. Local 1291, ILA, 292 F.2d 182, 187, 48 L.R.R.M. 2434, 2437 (3d Cir. 1961). Cited as controlling, Cuneo v. Local 825, Operating Eng'rs, 300 F.2d 832, 834 n.4, 49 L.R.R.M. 2879, 2880 n.4 (3d Cir. 1962). Quoted with approval, McLeod v. Local 282, Teamsters, 345 F.2d 142, 145, 59 L.R.R.M. 2234, 2236-37 (2d Cir. 1965); Local Joint Bd., Hotel & Restaurant Employees v. Sperry, 323 F.2d 75, 77, 54 L.R.R.M. 2298, 2299 (8th Cir. 1963). Cited with approval in more recent decisions, e.g.: Sachs v. Local 48, Plumbers, 454 F.2d 879, 883, 79 L.R.R.M. 2321, 2323 (4th Cir. 1972); Terminal Freight Cooperative Ass'n v. NLRB, 447 F.2d 1099, 1102, 78 L.R.R.M. 2097, 2099 (3d Cir. 1971); Kennedy v. ITU Local 174, 418 F.2d 6, 8, 72 L.R.R.M. 2506, 2507 (9th Cir. 1969).

[63] 346 F. Supp. at 1086, 80 L.R.R.M. at 3369.

courts.[64] In the scheme of national labor relations policy, interpretation of unfair labor practice provisions and determinaton of cases arising thereunder, with respect to both issues of fact and of law, is not a function of the district court, but is reserved exclusively to the Board,[65] subject to review by the courts of appeals.[66]

It is not suggested that a district court must grant a temporary injunction under section 10(*l*) merely upon a Regional Director's allegation that there is reasonable cause to believe that a violation of section 8(b)(7)(C) has occurred. Certainly the Regional Director must demonstrate that "the elements of an unfair labor practice are present" and the petition must be supported by propositions of law which are "substantial and not frivolous."[67] Nonetheless, "in light of the congressional policy favoring the grant of such injunctions,"[68] even if convinced that its own interpretation of section 8(b)(7)(C) was the better view, the *Samuel E. Long* court should have granted the temporary injunction[69] where it admittedly found the NLRB's legal theory was "thoughtfully presented and not frivolous."[70]

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[64] "The primary task of the trial court in a 10(*l*) case is to determine 'reasonable cause' by examining the facts of the case with reference to the law as it had been developed by the Board and its reviewing courts." McLeod v. National Maritime Union, 457 F.2d 490, 494, 79 L.R.R.M. 2950, 2953 (2d Cir. 1972).

[65] McLeod v. Local 25, IBEW, 344 F.2d 634, 638, 59 L.R.R.M. 2170, 2173 (2d Cir. 1965); Terminal Freight Cooperative Ass'n v. NLRB, 447 F.2d 1099, 1103, 78 L.R.R.M. 2097, 2099 (3d Cir. 1971); Sachs v. Local 48, Plumbers 454 F.2d 879, 882, 79 L.R.R.M. 2321, (4th Cir. 1972); Retail Store Union v. Rains, 266 F.2d 503, 505, 44 L.R.R.M. 2040, 2041 (5th Cir. 1959); Radio & Television Artists v. Getreu, 258 F.2d 698, 699, 42 L.R.R.M. 2693, 2694-95 (6th Cir. 1958); Madden v. Hod Carriers, Local 41, 277 F.2d 688, 690, 46 L.R.R.M. 2181, 2182 (7th Cir.), cert. denied, 364 U.S. 863, 46 L.R.R.M. 3091 (1960); Solien v. Miscellaneous Drivers, Local 610, 440 F.2d 124, 129, 76 L.R.R.M. 2780, 2783 (8th Cir.), cert. denied, 403 U.S. 905, 77 L.R.R.M. 2403 (1971); Kennedy v. Teamsters, Local 542, 443 F.2d 627, 630, 77 L.R.R.M. 2607, 2609 (9th Cir. 1971).

[66] Pursuant to §§ 10(e), (f) of the NLRA, 29 U.S.C. §§ 160(e), (f) (1970). See authorities cited in note 65 supra.

[67] Schauffler v. Local 1291, ILA, 292 F.2d 182, 187, 48 L.R.R.M. 2434, 2437 (3d Cir. 1961).

[68] National Maritime Union v. Commerce Tankers Corp., 457 F.2d 1127, 1133, 79 L.R.R.M. 2954, 2959 (2d Cir. 1972).

[69] Although appellate review of an order granting a § 10(*l*) injunction is limited to a determination of whether a district court was "clearly erroneous" in finding reasonable cause to believe that the NLRA was violated and whether the district court abused its discretion in granting the requested injunctive relief, it has been held that the scope of review is not so limited when an injunction is denied. Id. at 1133-34, 79 L.R.R.M. at 2959. See also Local 83, Drivers Union v. Jenkins, 308 F.2d 516, 517 n.1, 51 L.R.R.M. 2177, 2179 n.1 (9th Cir. 1962).

[70] 346 F. Supp. at 1086, 80 L.R.R.M. at 3369. It is worthy of note that, subsequent to the district court's denial of the temporary injunction, an administrative law judge heard the unfair labor practice charge. The subcontractors agreement picketing was found to be in violation of 8(b)(7)(C) on the authority of *Dallas*. Building & Constr. Trades Council (Samuel E. Long, Inc.), 1973 CCH NLRB ¶ 24,984 (1972). That finding

was approved, almost without comment, by a three-member panel of the Board. See Building & Constr. Trades Council (Samuel E. Long, Inc.), 201 N.L.R.B. No. 42, 82 L.R.R.M. 1218 (1973).

Subsequent to submission of this note for publication, the Third Circuit reversed the instant decision. Samoff v. Building & Constr. Trades Council (Samuel E. Long, Inc.), — F.2d —, 82 L.R.R.M. 2790 (3rd Cir. 1973). The court ruled that the district court had misinterpreted *Schauffler* and applied an incorrect standard under 10(*l*). The court necessarily did not reach the underlying 8(b)(7)(C) issue.