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THE TREATMENT OF REFUSALS TO CROSS PICKET LINES: "BY-PATHS AND INDIRECT CROOKT WAYS"*

James T. Carney† and Mark J. Florsheim††

It is axiomatic that the strike is the most important weapon in the labor union's arsenal. It is doubtful, however, that a strike would be a potent weapon in any conflict other than one conducted by an extremely cohesive group were it not for its enforcing arm—the picket line. Pickets discourage work by employees who would not on their own initiative remain away from the job. Pickets also discourage workers of secondary employers from performing tasks that necessitate contact with the strike area. Most of the controversy surrounding the picket line problem has involved the extent to which and the methods by which picket lines may be established. The converse of the problem—the question of the circumstances under which employees may honor a picket line and refuse to carry out their normal duties—has attracted relatively little attention.¹

Justification for this lack of attention is easily found. The normal American worker's reaction to a picket line is to head immediately in the opposite direction. The reasons for this reaction are varied. Many American workingmen feel an almost sacrosanct regard for picket lines.² Some see their economic interest directly or indirectly involved in observance of all picket lines;³ others are moved by fear

* W. SHAKESPEARE, *THE SECOND PART OF THE HISTORY OF HENRY IV*, Act IV, scene v (J. Wilson ed. 1946).

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¹ There seem to be only three articles dealing with this problem: O'Connor, *Respecting Picket Lines: A Union View*, N.Y.U. 7TH CONF. ON LAB. 235 (1954); Petro, *National Labor Policy and Respect for Picket Lines*, 3 LAB. L.J. 83 (1952); Thatcher & Finley, *Respect for Picket Lines*, 32 NEB. L. REV. 25 (1952). There have also been a number of student notes and comments on this problem. See, e.g., Note, *Respect for Picket Lines*, 42 IND. L.J. 536 (1967).

² Cf. L.A. Young Spring & Wire Corp., 70 N.L.R.B. 868, 874 (1946), *enforcement denied*, 163 F.2d 905 (D.C. Cir. 1947), *cert. denied*, 333 U.S. 837 (1948), where the Board observed that "[i]t is almost a rule of trade union ethics for one labor union to respect a picket line established by another."

³ Cf. Cyril de Cordova & Bros., 91 N.L.R.B. 1121 (1950).

of the social ostracism,⁴ economic reprisal,⁵ or physical violence⁶ that might result from crossing a picket line. Against such pressures, fear of an employer's wrath avails little. Employers, cognizant of their lack of practical weapons to overcome employee convictions regarding picket lines, and possibly believing that isolated refusals to cross picket lines are not particularly harmful, generally have chosen to fight for legal limitations on the power of employees to establish picket lines rather than on their power to refuse to cross them.

Nevertheless, some employers have attempted by discharge or other disciplinary measures to limit the power of their employees to refuse to cross a picket line. These attempts have raised the issue of the employer's right to discipline employees who refuse to cross picket lines in the normal course of their employment.⁷ Although there often is a similarity between the factual situations and policy considerations involved in these cases and those involved in partial strikes,⁸ sympathy strikes,⁹ and refusals to "scab,"¹⁰ the Board and the courts have, for the most part, treated the refusal-to-cross cases as *sui generis*.

Superficially, at least, the basic legal questions involved in this problem seem simple. Section 7 of the Labor-Management Relations Act (LMRA)¹¹ guarantees workers covered by the Act the right to "engage in . . . concerted activities for . . . mutual aid or protection."

⁴ Cf. *New York Tel. Co.*, 89 N.L.R.B. 383 (1950).

⁵ Cf. *Local 248, UAW (Allis-Chalmers Mfg. Co.)*, 149 N.L.R.B. 67 (1964), *enforcement denied sub nom.* *Allis-Chalmers Mfg. Co. v. NLRB*, 358 F.2d 656 (7th Cir. 1966), *rev'd*, 388 U.S. 175 (1967).

⁶ Cf. *Redwing Carriers, Inc.*, 130 N.L.R.B. 1208 (1961), *modified*, 137 N.L.R.B. 1545 (1962), *enforced sub nom.* *Teamsters Local 79 v. NLRB*, 325 F.2d 1011 (D.C. Cir. 1963), *cert. denied*, 377 U.S. 905 (1964).

⁷ The converse problem is presented where a union attempts to discipline a member for crossing a picket line. See *Local 248, UAW (Allis-Chalmers Mfg. Co.)*, 149 N.L.R.B. 67 (1964), *enforcement denied sub nom.* *Allis-Chalmers Mfg. Co. v. NLRB*, 358 F.2d 656 (7th Cir. 1966), *rev'd*, 388 U.S. 175 (1967).

⁸ *C.G. Conn, Ltd.*, 10 N.L.R.B. 498 (1938), *enforcement denied*, 108 F.2d 390 (7th Cir. 1939); *Harnischfeger Corp.*, 9 N.L.R.B. 676 (1938).

⁹ *Cummer-Graham Co.*, 90 N.L.R.B. 722 (1950); *Granite City Steel Co.*, 87 N.L.R.B. 894 (1949). It is particularly hard to distinguish between cases involving a sympathy strike and cases involving a refusal to cross a picket line since both actions occur for much the same reason and produce much the same result. Generally, however, the sympathy striker takes action before a picket line is erected and acts solely because of his sympathy with the initial grievants, while the employee who refuses to cross a picket line takes no action until the line is erected and then acts at least partly out of general regard for the picket line, rather than exclusively out of sympathy with the grievants.

¹⁰ *Cooper Thermometer Co.*, 154 N.L.R.B. 502 (1965); *Columbia Pictures Corp.*, 82 N.L.R.B. 568 (1949), *enforcement denied sub nom.* *NLRB v. Warner Bros. Pictures, Inc.*, 191 F.2d 217 (9th Cir. 1951); *Pinaud, Inc.*, 51 N.L.R.B. 235 (1943); *Hazel-Atlas Glass Co.*, 34 N.L.R.B. 346, *modified*, 127 F.2d 109 (4th Cir. 1942).

¹¹ 29 U.S.C. § 157 (1964).

Section 8(a)(1) of the Act¹² makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7]." To determine whether an employer has a right to discipline an employee for the latter's refusal to carry out assigned duties, it is only necessary to decide whether or not such a refusal is a protected activity within the terms of section 7.¹³ Assuming the refusal constitutes a protected activity, the employer may still be permitted to replace the refusing employee if the replacement falls within the *Mackay* rule.¹⁴

Unfortunately, the relatively simple legal questions of whether a refusal is protected and, if so, to what degree this protection is affected by the *Mackay* rule, are obscured by the more complex policy issue of the extent to which it is in the public interest to protect such refusals.¹⁵ This issue requires a balancing of the interests of the affected parties.

In any refusal to cross a picket line case, there may be as many as six potential parties—the refuser, his employer, his union, the pickets,

¹² *Id.* § 158(a)(1).

¹³ The Board often holds that a discharge for a refusal to cross a picket line violates § 8(a)(3) as well as § 8(a)(1) on the ground that a discharge for engaging in a protected activity is inherently discriminatory, despite the absence of proof of any specific anti-union animus on the part of the employer. See *Illinois Bell Tel. Co.*, 88 N.L.R.B. 1171 (1950), *enforcement denied*, 189 F.2d 124 (7th Cir.), *cert. denied*, 343 U.S. 885 (1951). But see *General Electric Co.*, 6-CA-4377 (May 27, 1969) (trial examiner's decision).

For a discussion of the demise of the necessity of proving specific anti-union animus for an 8(a)(3) violation, see Janofsky, *New Concepts in Interference and Discrimination Under the NLRA: The Legacy of American Ship Building and Great Dane Trailers*, 70 COLUM. L. REV. 81 (1970). The Board may hold that discharge for refusal to cross a picket line constitutes an 8(a)(3) violation when the employer assigns a union activist to a mission where he would encounter a picket line in the hopes of provoking a refusal that would justify the discharge. See *Cone Bros. Contracting Co.*, 135 N.L.R.B. 108 (1962), *enforced*, 317 F.2d 3 (5th Cir.), *cert. denied*, 375 U.S. 945 (1963).

¹⁴ *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938). In *Mackay*, the Supreme Court ruled that an employer confronted with an economic strike could permanently replace the strikers without committing an unfair labor practice. It established the principle that the employer could, under some circumstances, employ certain retaliatory measures against employees who engaged in concerted activity against him for the purpose of advancing their economic interest at his expense. Although the decision made little logical sense, since it is a contradiction to hold that concerted activity is "protected" but still subjects the actor to the risk of losing his position, it is quite defensible on economic grounds, since it established an arena in which the parties are free to engage in economic conflict on relatively equal terms. The *Mackay* rule did not completely destroy the protection that § 7 affords employees because the weapons the employer can use under the *Mackay* rule to deal with concerted activities are less effective, for the most part, than those which he can use to deal with activities unprotected by § 7.

¹⁵ Another legal problem that arises is whether the refusing employee is eligible for unemployment compensation if such refusal results in his temporary or permanent discharge from work. See 44 IOWA L. REV. 819 (1959); 37 NOTRE DAME LAW. 739 (1962).

their union, and the picketed employer. The diverse interests of these parties can best be understood by an examination of the following situations in which refusals to cross picket lines seem to occur:

- I. Refusals to cross picket lines at one's place of employment
 - A. Picket line erected by fellow workers in one's bargaining unit
 - B. Picket line erected by fellow workers not in one's bargaining unit
 - C. Picket line erected by outsiders
- II. Refusals to cross picket lines at another's place of employment
 - A. Picket line erected by workers of the picketed employer
 - B. Picket line erected by outsiders.

The refuser normally has a strong economic interest in honoring only a picket line of type I-A and a limited economic interest in honoring a picket line of type I-B, although in a given situation he may have some indirect interests in honoring other picket lines. The refuser's employer has a great economic interest in having the refuser cross the picket lines in situation I and a limited economic interest in having the refuser cross the picket line in situation II. The refuser's union (or potential union) has a great economic interest in having him honor the picket line of type I-A and may, depending on the circumstances, have a limited economic interest in having the refuser honor picket lines of the other types. Under some circumstances, however, the refuser's union may have a slight interest in having him *cross* picket lines of types I-B, I-C, and II because failure of the refuser to cross these picket lines may result in the picketed employer's business being shifted away from the refuser's unionized employer to a non-unionized employer. Generally, the picketers and their union have a limited economic interest in having the refuser honor the picket line, while the picketed employer has an equally limited interest in having the refuser cross the picket line.

The public interest, as well as the interests of the immediate parties, may be involved in these picket line cases. Generally, it is in the public interest to attempt to localize labor disputes. Therefore, consideration should be given to whether the refusal involves a primary or a secondary picket line.¹⁶ Further, it is usually in the public interest

¹⁶ Section 8(b)(4) of the Labor-Management Relations Act, 29 U.S.C. § 158(b)(4) (1964), protects the right of unions to erect picket lines at the establishment of an employer with whom the union is having a dispute, if the object of the dispute is to improve the terms and conditions of employment of workers employed by that employer. This section generally makes it an unfair labor practice for unions to erect picket lines at the establishment of an employer when the object of the dispute is to improve terms and conditions of em-

to have employees act only through their collective bargaining representative and not to engage in individual work stoppages. Some consideration must therefore be given to the effect that a refusal has on a collective bargaining relationship. This is particularly important where the parties may have tried to regulate the right to refuse crossing a picket line or the obligation to cross a picket line in the collective bargaining agreement.

Who is to make the policy determinations concerning this balancing of interests? In theory, the answer is threefold. First, Congress is given the responsibility for creating a national labor policy. Second, the NLRB is given the responsibility for executing congressional policy by filling in legislative interstices where necessary and by resolving conflicts between opposing policy considerations. Third, the courts are given the responsibility of overseeing the work of the NLRB to assure that it develops a coherent body of law properly implementing the congressional purpose.¹⁷ This tripartite system thus places the major responsibility for formulating policy with Congress, as the initial policymaker, and with the courts, as the ultimate interpreters of congressional intent. It assigns to the NLRB the task of implementing such policy on a day-to-day basis. In practice, none of these bodies has effectively performed the functions assigned it when dealing with refusals to cross picket lines. How inadequately this tripartite system has worked may be seen in the following history of such refusals.

I

TO PROTECT OR NOT TO PROTECT

The legislative history of the Wagner Act¹⁸ indicates that Congress intended that Act to protect the worker who refused to cross a primary picket line legitimately erected at his place of employment. This

ployment of workers not employed by that employer. The former kind of dispute is a primary dispute; the latter, a secondary one.

¹⁷ For a general discussion of the roles of the NLRB and the courts, see Winter, *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 SUP. CT. REV. 53. Arbitration may also provide a medium for the balancing of interests in a labor dispute. See *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). Since arbitration is limited to the role assigned to it by the parties in their collective bargaining agreement, and thus less likely to reflect considerations other than the interests of the parties directly involved, it is not dealt with in this article.

¹⁸ The Wagner Act has been incorporated into the Labor-Management Relations Act, 29 U.S.C. §§ 141-87 (1964).

intention was a logical corollary of Congress's general decision to safeguard the right to strike. In acting, however, Congress was thinking not in terms of the right to refuse to cross picket lines but of the right to engage in a primary strike for economic gain. To protect the latter, Congress had to assist those who refused to work out of sympathy with the strike. This was essential, not only because such protection implemented the congressional goal of strengthening workers engaged in a primary strike, but also because such protection avoided the necessity of dealing with the probably insoluble questions of determining what factors motivated an individual's refusal to cross a picket line at his place of employment. Congress, however, failed to go beyond its determination to protect refusals to cross picket lines in the legitimate primary strike situation and apparently never considered the possible existence of other situations giving rise to such refusals.

A. *In the beginning . . .*

The initial refusal cases were, for the most part, of the kind envisaged by Congress: refusals to cross picket lines at the refuser's work site where the picket line was erected by fellow employees whose economic interests were identical with those of the refuser. In the Wagner Act period, the NLRB did not seem to handle refusals that had occurred at a plant other than one operated by the refuser's employer. Nevertheless, the NLRB did confront some refusals that differed from the ordinary case. In *Club Troika, Inc.*,¹⁹ *Rock Hill Printing & Finishing Co.*,²⁰ *Montag Brothers*,²¹ *L.A. Young Spring & Wire Co.*,²² and *Carnegie-Illinois Steel Corp.*,²³ employees refused to cross primary picket lines erected at their places of employment by fellow employees. Their situations differed significantly from the normal

¹⁹ 2 N.L.R.B. 90, 94 (1936).

²⁰ 29 N.L.R.B. 673 (1941), *enforced*, 131 F.2d 171 (4th Cir. 1942).

²¹ 51 N.L.R.B. 366 (1943), *enforced*, 140 F.2d 730 (5th Cir. 1944).

²² 70 N.L.R.B. 868 (1946), *enforcement denied*, 163 F.2d 905 (D.C. Cir. 1947), *cert. denied*, 333 U.S. 837 (1948).

²³ 84 N.L.R.B. 851 (1949), *enforced sub nom.* *Albrecht v. NLRB*, 181 F.2d 652 (7th Cir. 1950). In this case, certain foremen represented by one union left their emergency positions inside the plant when the production and maintenance workers who were represented by another union set up picket lines around the works. The employer subsequently discharged the foremen. The trial examiner and the Board did not recognize that there was a distinction in status between the production and maintenance workers and the foremen. Although the trial examiner held the foremen's activities to be protected, the Board, two members dissenting, noted that the foremen's presence in the plant was necessary to safeguard the plant and maintain vital services for the city of Gary. It therefore concluded that the interests of the employer and the city in this case outweighed the interests of the foremen and ruled that the foremen's actions were unprotected.

refusal situation because the lines they honored, though erected by fellow employees, were not erected by employees with identical economic interests. The refusers in these cases were supervisors honoring lines erected by bargaining unit personnel, craftsmen honoring non-craft lines, or non-craftsmen honoring craft lines. The NLRB, however, appeared oblivious to this distinction. It made no attempt to consider whether the language or the legislative history of section 7 justified protection of these refusals nor to examine the policy implications involved in these cases; the Board mechanically ruled that these refusals to cross picket lines were protected by section 7.

B. *Towards Rockaway*

Since neither the NLRB nor the courts had by 1947 confronted what would become the classic refusal case—refusal to cross a picket line erected at another employer's place of business—it is not surprising to discover that Congress, when in 1947 it again directed its attention to labor problems, did not concern itself directly with refusals to cross picket lines. Nevertheless, the LMRA did contain, attached to the section 8(b)(4) proscription of certain secondary activities, a puzzling proviso:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter . . .²⁴

There is no evidence to indicate that the significance of this proviso was ever discussed in Congress.²⁵ The lack of discussion is unfortunate because the proviso, as it appears in the LMRA, makes no real sense. Since there is nothing in section 8(b) to indicate that

²⁴ 29 U.S.C. § 158(b)(4) (1964).

²⁵ The proviso seems to have originated in another bill (S. 55, 80th Cong., 1st Sess. (1947)) which made certain types of secondary activity criminal but contained a provision exempting individual refusals to cross picket lines under the circumstances set forth in the proviso to § 8(b)(4). O'Connor, *supra* note 1, at 265-66. The Senate report on the proviso contained the following comment:

Attached to section 8(b)(4) is a proviso clause, which makes it clear that it shall not be unlawful for any person to refuse to enter upon the premises of any employer (other than his own), if the employees of that employer are engaged in a strike authorized by a union entitled to exclusive recognition. In other words, refusing to cross a picket line or otherwise refusing to engage in strikebreaking activities would not be deemed an unfair labor practice unless the strike is a "wildcat" strike by a minority group.

S. REP. NO. 105, 80th Cong., 1st Sess. 23 (1947).

an individual refusal to cross a picket line under any circumstances would constitute an "unfair labor practice," let alone be "unlawful," there seems to be no need for a proviso specifically stating that under some circumstances such refusal would not be unlawful. The proviso stands more as a hallmark of careless draftsmanship than as an expression of congressional intent regarding refusals to cross picket lines.

The Board was next confronted by a refusal to cross a picket line in *Illinois Bell Telephone Co.*²⁶ The employer here had two divisions that were represented by different unions: Chicago by the Chicago Telephone Traffic Union (CTTU); the rest of the state by the Illinois Telephone Traffic Union (ITTU). The contracts covering both bargaining units expired at about the same time. The CTTU extended its contract while continuing to negotiate with the employer; the ITTU struck and erected picket lines at the employer's business locations, including those employing CTTU-represented personnel. The complaining employees, members of a CTTU unit, refused to cross the picket line and stayed out until the ITTU strike was settled and the pickets removed. In retaliation the employer demoted them. Although the trial examiner recognized the essential difference in status and interest between the strikers and those who honored their picket lines,²⁷ he did not examine the language of the Act and its legislative history to determine whether or not Congress had intended to protect activity of this nature, nor did he weigh the policy considerations involved. He simply ruled that refusals to cross picket lines were protected by the Act, except in circumstances where a refusal to cross a picket line might endanger the physical safety of the plant. The Board upheld the trial examiner's ruling without elaborating on the rationale behind it.

The Seventh Circuit overruled the Board's determination that these refusals *were* protected under the terms of the Act²⁸ and then

²⁶ 88 N.L.R.B. 1171 (1950), *enforcement denied*, 189 F.2d 124 (7th Cir.), *cert. denied*, 342 U.S. 885 (1951).

²⁷ 88 N.L.R.B. at 1188.

²⁸ The court questioned whether the refusal was a "concerted activity" within the meaning of § 7. It pointed out that the complaining employees had not acted in concert with each other and rejected the Board's contention that the complainants had acted in concert with the pickets since they had refused to cross the picket line out of sympathy with the picketers' cause. The court also questioned whether the refusal was for the refusers' "mutual aid and protection." It noted that the picketers and the complaining employees belonged to different bargaining units and, consequently, had different interests, so that the action of the refusing employees did nothing to advance their own interest. 189 F.2d at 127-28. But the court failed to recognize that the refusal to cross the picket line could have been intended to advance the interests of the refusers as well as the picketers.

questioned whether the refusals *should* be protected.²⁹ It approvingly quoted *NLRB v. Draper Corp.*,³⁰ which held that employees who participated in a wildcat strike were not engaging in a protected activity because their strike was "a strike in violation of the purposes of the act by a minority group of employees in an effort to interfere with the collective bargaining by the duly authorized bargaining agent selected by all the employees."³¹ The Seventh Circuit indicated that the Illinois Bell employees, by refusing to work during a period in which there was a valid collective bargaining agreement in effect, were engaging in the same kind of wildcat action as the employees in *Draper*, and that action in derogation of their bargaining agreement should not be protected under the Act.

Following the NLRB's *Illinois Bell* decision, but prior to the Seventh Circuit's refusal to enforce the Board's order therein, the NLRB, in *New York Telephone Co.*³² and *Cinch Manufacturing Corp.*,³³ continued to rule that refusals to cross picket lines were protected. The Board seemed to indicate, however, that individual refusals to cross a picket line, motivated by fear, would not constitute concerted activity protected under the Act.³⁴ In *Cyril de Cordova & Brothers*,³⁵ the NLRB for the first time confronted the troublesome proviso to section 8(b)(4). There, the trial examiner found in it an expression of general congressional intent to protect refusals. The Board, admittedly puzzled, determined that nothing in the proviso indicated refusals to cross lawful picket lines should not be protected and dropped the matter.

The question of whether refusals to cross picket lines were protected arose again in *Rockaway News Supply Co.*³⁶ The charging

²⁹ *Id.* at 128-29. For a detailed analysis of the factors to be weighed in deciding the categories of picketers who should be protected by LMRA § 7, see Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U. P. A. L. Rev. 1195 (1967).

³⁰ 145 F.2d 199 (4th Cir. 1944).

³¹ *Id.* at 202, quoted in 189 F.2d at 128.

³² 89 N.L.R.B. 383 (1950).

³³ 91 N.L.R.B. 371 (1950).

³⁴ In *New York Telephone*, the employers argued that the refusals were not protected because they were not the result of concerted activity but were due to fear of the picketers; the trial examiner and the Board found, however, that the employee had acted out of sympathy for the picketers. 89 N.L.R.B. at 384, 389-90. In *Cinch Manufacturing*, the trial examiner and the Board found that the employees had acted out of fear, but that their action was concerted in the sense that it was a collective action resulting from consultation among the refusers themselves. 91 N.L.R.B. at 372, 381.

³⁵ 91 N.L.R.B. 1121 (1950).

³⁶ 95 N.L.R.B. 336 (1951), *enforcement denied*, 197 F.2d 111 (2d Cir. 1952), *aff'd*, 345 U.S. 71 (1953). See text at notes 83-87 *infra*.

party, a driver for a newspaper delivery company, refused to enter the premises of one of his employer's customers when he saw that the customer's locale was surrounded by a picket line. Without discussing its history or significance, the trial examiner read the proviso to section 8(b)(4), together with the Board's decisions in *Illinois Bell*³⁷ and *Cyril de Cordova*, to establish a rule that refusals to cross picket lines of the type described in the proviso were protected. He then ruled that the challenged refusal came under that rule because the picket line had been a valid one. In upholding the trial examiner, the Board rejected an argument by the employer that the approach taken in this case would produce a result different from *Cyril de Cordova* because refuser and picketer lacked common union membership.³⁸ In effect, it held that common union membership and identity of economic interests were irrelevant.

The Second Circuit agreed with the Board's conclusion that a refusal to cross a picket line out of sympathy with the picketers was a concerted activity for mutual aid and protection and was therefore protected under a literal interpretation of the Act. Its agreement with the Board on this point proved illusory, however, because it went on to state that refusals to cross picket lines occurring in the course of the working day were not protected under the Act. The court held that the section 8(b)(4) proviso was intended solely to ensure that a refusal in this situation would not be considered an unfair labor practice, not to protect a refusing employee from discipline. It supported this conclusion with a reference to the Seventh Circuit's then-recent decision in *Illinois Bell*.³⁹ The effect of the Second Circuit's decision was to cause most refusals to cross picket lines to be unprotected by section 8(a)(1), because almost all refusals occur during working time.⁴⁰

The Supreme Court failed to adopt the Second Circuit's analysis of the case, declining to promulgate any "sweeping abstract principles as to the respective rights of employer and employee regarding

³⁷ The trial examiner's ruling in *Rockaway News* preceded that of the Seventh Circuit in *Illinois Bell*.

³⁸ 95 N.L.R.B. at 337. In *Cordova*, the trial examiner had supported his ruling that the refusal was protected by pointing to the identity of union membership and economic interest between the picketers and the employee who refused to cross the picket line. 91 N.L.R.B. at 1135.

³⁹ 197 F.2d at 115. Judge Clark dissented. He claimed that the proviso indicated a congressional intent to protect refusals to cross picket lines, although he cited nothing in the legislative history to support this position. He chided his brethren for preempting the Board's primary role as a policy maker. *Id.* at 116.

⁴⁰ A refusal to cross a picket line during non-working time is presumably protected by § 8(a)(3) as well as § 8(a)(1) since the only ground for employer action against such a refusal would be anti-union bias.

picket lines,"⁴¹ and decided the case on other grounds. The dissent attempted to justify the Board's rule that refusals were protected by referring without discussion to the 8(b)(4) proviso.⁴²

C. *Turn and Turn Again*

By the time the NLRB encountered its next case involving a refusal to cross a picket line, the Truman Board had been replaced in large measure by Eisenhower appointees. The effect was evident in *Auto Parts Co.*⁴³ There, an automobile parts dealer whose employees were represented by the Teamsters hired a member of the International Association of Machinists. This new employee refused to deliver parts to an automobile dealer serviced by his employer because the striking employees of that and other dealers were represented by the IAM and had erected picket lines around their lots. As a result the employer discharged the employee, who in turn filed unfair labor practice charges alleging that the refusal was protected under section 7. The trial examiner rejected the argument accepted by the examiner in *Cyril de Cordova* that the proviso to section 8(b)(4) indicated a congressional desire to protect such refusals. He pointed out that "[a]ll the proviso stands for . . . is the proposition that the refusal by a person to enter the premises of an employer other than his own, under the indicated conditions, does not constitute an unfair labor practice by a labor organization."⁴⁴ He then noted that the Second and Seventh Circuits had both effectively held that such refusals were unprotected by the Act, and that the Supreme Court had rejected a contention put forth by the dissenters in *Rockaway* that these refusals were protected. Consequently, he dismissed the unfair labor practice charges. The Board found it unnecessary to adopt the trial examiner's view of the proviso to section 8(b)(4). It declared that since the case involved nothing more than simple insubordination, discharge was justified.⁴⁵

⁴¹ 345 U.S. at 75.

⁴² *Id.* at 81. See text at notes 24-25 *supra*.

⁴³ 107 N.L.R.B. 242 (1953). The *Rockaway* case was decided by a unanimous Board composed of Members Herzog, Houston, Reynolds, and Murdock, with Member Styles not participating. The *Auto Parts* case was decided by a unanimous Board composed of Members Farmer, Rodgers, Beeson, and Peterson, with Member Murdock not participating. Thus, none of the Board members who decided *Auto Parts* had been on the Board when *Rockaway* was decided; three of the four were Eisenhower appointees.

⁴⁴ *Id.* at 246.

⁴⁵ The Board attempted to distinguish this case from the other refusal cases by saying: We do not consider it material here that part of [the employee's] assigned duties which he chose not to perform were in some manner related to the union activities of employees elsewhere or to [his] own union predilections. Therefore we do not adopt the Trial Examiner's comments as to the applicability here of Board or

In *Redwing Carriers, Inc.*,⁴⁶ decided eight years after *Auto Parts*,⁴⁷ a mineral products hauler discharged a number of his non-unionized drivers for their refusal to cross a picket line erected at the mine of one of his major customers. This refusal was motivated by the drivers' fear of the strikers: prior to their refusal to cross the lines two other drivers had been threatened and one had been assaulted. The Board's General Counsel argued that section 502⁴⁸ of the LMRA protected this refusal because it was a refusal by the employee to undertake an activity that was abnormally dangerous. The trial examiner simply ruled that these refusals were protected, and then turned to section 502 to find some further support for the result. He declared:

[Section 502 of] the Act gives employees, acting in concert and in the face of abnormally dangerous conditions, a right to quit their labor without penalty (either in the face of a no-strike clause or where there is no such clause) in order to protect their health and their lives.⁴⁹

The Board refused to apply section 502 to this situation, however, because no abnormally dangerous conditions existed—a conclusion that did some violence to the facts of the case. The Board then held, on the authority of *Auto Parts*, that the employer had justifiably discharged the men for a refusal to carry out orders.⁵⁰

The Teamsters local that had been involved in *Redwing* appealed

court cases on the issue of concerted activities by employees of diverse employers. Similarly, we find it unnecessary to adopt the Trial Examiner's comments as to the import of the proviso to Section 8(b)(4) of the Act.

Id. at 243.

⁴⁶ 130 N.L.R.B. 1208 (1961) (*Redwing I*), modified, 137 N.L.R.B. 1545 (1962), enforced sub. nom. *Teamsters Local 79 v. NLRB*, 325 F.2d 1011 (D.C. Cir. 1963), cert. denied, 377 U.S. 905 (1964).

⁴⁷ There was one intervening case, *Pacific Tel. & Tel. Co.*, 107 N.L.R.B. 1547 (1954). The Board there held that employees who refused to cross illegal "hit and run" picket lines were not protected by the Act. Member Murdock dissented, citing *Cyril de Cordova* for the principle that any discharge for the refusal to cross a picket line constituted an unfair labor practice. *Id.* at 1558.

⁴⁸ 29 U.S.C. § 143 (1964).

⁴⁹ 130 N.L.R.B. at 1216.

⁵⁰ *Id.* at 1211-12. The trial examiner also noted that a common carrier called upon to transport goods across a picket line is placed in a particularly difficult situation since it may be legally obligated to transport such goods, though unable to persuade any of its employees to cross the picket lines. *Id.* See generally Elbert & Rebman, *Common Carriers and Picket Lines*, 1955 WASH. U.L.Q. 232; Flood, *Common Carrier's Duty to Serve Strike-Bound Plants*, 24 ICC PRAC. J. 30 (1956); Katcher, *The Duty of a Common Carrier to Handle Strike-Bound Goods*, 24 ICC PRAC. J. 22 (1956); Marshall, *Carrier Service and the Picket Line: A Dilemma*, 13 LAB. L.J. 301 (1962); Scurlock, *Carriers and the Duty to Cross Picket Lines*, 39 TEXAS L. REV. 298 (1961); Woods, *The Plight of a Strike Bound Carrier*, 33 MINN. L. REV. 255 (1949).

the Board's order to the District of Columbia Circuit. Before that appeal was heard, however, the Board filed a motion with the court to have the case remanded to it for further consideration, probably because the Eisenhower Board had been replaced in part by Kennedy appointees.⁵¹ In *Redwing II* the Board recognized that *Auto Parts* constituted a reversal of its previous position. It thus decided to ignore *Auto Parts*, and, relying instead on the authority of earlier cases such as *Cyril de Cordova*, ruled that refusals to cross picket lines were protected under the Act. However, it held that these discharges were justified under the *Mackay* rule.⁵²

The Teamsters appealed the Board's final order to the District of Columbia Circuit. That court refused to discuss the substantive question of whether refusals to cross picket lines were protected, and, without entering into the merits of the issue, it enforced the Board's ruling.⁵³

The Board chose, however, to construe the court's disposition of the case as a wholehearted endorsement of its position that refusals to cross picket lines were protected. Thus armed with precedent, the Board confronted *L.G. Everist, Inc.*,⁵⁴ in which four drivers of the Everist trucking firm were discharged for refusing to make deliveries to a construction site that was being picketed. Both the trial examiner and the Board (Members Leedom and Rodgers dissenting) ruled that these refusals were protected; the Eighth Circuit disagreed.⁵⁵ The Board appeared to be little disturbed by its defeat in yet another circuit. In

⁵¹ *Redwing Carriers, Inc.*, 137 N.L.R.B. 1545 (1962) (*Redwing II*), modifying 130 N.L.R.B. 1208 (1961), enforced *sub nom.* *Teamsters Local 79 v. NLRB*, 325 F.2d 1011 (D.C. Cir. 1963), cert. denied, 377 U.S. 905 (1964). *Redwing I* was decided by a Board composed of Rodgers, Leedom, and Fanning, with Jenkins and Kimball not participating. *Redwing II* was decided by a Board composed of McCulloch, Brown, and Fanning, with Leedom concurring only in the result and Rodgers not participating. Of the *Redwing II* majority only Fanning had participated in *Redwing I*; McCulloch and Brown were Kennedy appointees. Actually, the Board had started reversing its position in *Cone Bros. Contracting Co.*, 135 N.L.R.B. 108 (1962), enforced, 317 F.2d 3 (5th Cir.), cert. denied, 375 U.S. 945 (1963). There, the employer had conspired to place certain union activist employees in a situation where they would be forced to cross a picket line and refuse to do so; thus, he hoped to be justified in discharging them. The Board ruled that this action constituted an independent 8(a)(3) violation but declared in dicta that "even in the absence of such scheme the discharge of these employees for engaging in the protected activity of concertedly refusing to cross the picket line violated Sections 8(a)(3) and (1) of the Act." 135 N.L.R.B. at 109 (footnote omitted).

⁵² 137 N.L.R.B. at 1547-48. See note 14 *supra* and text at notes 58-59 *infra*.

⁵³ 325 F.2d at 1012.

⁵⁴ 142 N.L.R.B. 193 (1963), enforced in part, 334 F.2d 312 (8th Cir. 1964).

⁵⁵ 334 F.2d at 317-18.

Overnite Transportation Co.,⁵⁶ the Board found that a discharge for a refusal to cross a picket line was both a general violation of sections 8(a)(1) and 8(a)(3) and a specific violation of section 8(a)(3) because it was the result of anti-union animus. The District of Columbia Circuit enforced the Board's order solely on the ground that the discharge was motivated by specific anti-union animus, once again carefully refraining from endorsing the Board's rule that these refusals were protected. Undaunted, the Board has continued to hold that refusals to cross picket lines are protected.⁵⁷

II

Mackay AND ITS PROGENY

A. *Replacement Before Discharge*

The determination that an employee's refusal to cross a picket line is protected does not resolve every question pertaining to the refusal. Indeed, the further question of whether the employer has the right to take action against the refusing employee is immediately presented. This question stems from the decision of the Supreme Court, in *NLRB v. Mackay Radio & Telegraph Co.*,⁵⁸ that an employer may permanently replace employees who engage in an economic strike, even though he may not discharge such employees for engaging in the protected activity. The Court invoked the principle, which seems never to have been considered by Congress when it passed the Wagner Act, that an employer may avail himself of reasonable recourse against employees who are engaged in an economic action against him even though the activities engaged in are protected.

Some employers accused of committing an unfair labor practice

⁵⁶ 154 N.L.R.B. 1271 (1965) (*Overnite I*), enforced in part, 364 F.2d 682 (D.C. Cir. 1966).

⁵⁷ See *Smith Transit, Inc.*, 176 N.L.R.B. No. 141 (July 1, 1969) (involving a refusal by a driver to unload a truck even though the pickets had permitted him to cross the picket line); *Southern Greyhound Lines*, 169 N.L.R.B. No. 148, 67 L.R.R.M. 1368 (Feb. 23, 1968), enforced, — F.2d — (5th Cir. 1970); *Swain & Morris Constr. Co.*, 168 N.L.R.B. No. 147, 67 L.R.R.M. 1039 (Dec. 29, 1967); *Vargas, Inc.*, 168 N.L.R.B. No. 127, 67 L.R.R.M. 1108 (Dec. 19, 1967); *G & H Towing Co.*, 168 N.L.R.B. No. 82, 66 L.R.R.M. 1343 (Nov. 30, 1967); *Thurston Motor Lines, Inc.*, 166 N.L.R.B. 862 (1967); *Overnite Transp. Co.*, 164 N.L.R.B. 72 (1967); *K.B. & J. Young's Super Markets, Inc.*, 157 N.L.R.B. 271 (1966), enforced, 377 F.2d 463 (9th Cir.), cert. denied, 389 U.S. 841 (1967) (court of appeals enforcing Board's order on theory that employer acted with specific anti-union animus); *Canada Dry Corp.*, 154 N.L.R.B. 1763 (1965).

⁵⁸ 304 U.S. 333 (1938). See note 14 *supra*.

by discharging an employee who refused to cross a picket line have invoked the *Mackay* principle in justification of their action. This argument was first made in *Illinois Bell*, but the trial examiner rejected it. He observed that the *Mackay* rule permitted an employer to replace, though not to discharge, an employee who was engaged in an economic strike and to refuse to re-employ him if he had been permanently replaced prior to termination of the strike and his application for reinstatement. The trial examiner then pointed out that in *Illinois Bell* the employees were demoted before being replaced, and consequently the requirements of the *Mackay* rule had not been met.⁵⁹

One possible explanation for the trial examiner's wooden application of *Mackay* was his failure to realize an essential difference between the economic strike and the refusal situation. In an economic strike, the employer does not have to deal immediately with the striker because the latter has absented himself completely from work; the employer can hire a replacement, and at a later date notify the striker that he has been replaced. In the refusal situation, however, the employer has to deal promptly with the employee if he decides to replace him; it is logical to discharge the refusing employee and thus make way for a permanent replacement. Although the intent of the employer and the end result of his action are the same in either case, the unbending application of *Mackay* produces different legal consequences. However, another explanation may be given for the trial examiner's action. He may have realized that in the strike situation the *Mackay* rule is of little advantage to most employers because of the difficulty of replacing a work force of any size when the force goes on strike. But, if the *Mackay* rule applied to refusals, it might present a great practical advantage to employers because it would enable them to replace, without fear of legal consequence, those who refused to cross a picket line. The trial examiner might have believed such a result would give the employer too great an advantage over his work force; however, he did not discuss the rationale behind his holding. The Board and the Seventh Circuit were equally laconic.

Indeed, both the trial examiners and the Board in the next two refusal cases—*New York Telephone* and *Cinch Manufacturing*—avoided any mention of *Mackay*. The trial examiner in *Cyril de Cordova*, however, was compelled by the employer's argument to confront the issue. He indicated that the employer was not entirely defenseless in the face of a refusal to cross a picket line since he could have forced the employee to choose between performing all or none of his job and,

⁵⁹ 88 N.L.R.B. at 1192-97.

in the event of the latter choice, find a permanent replacement for the refusing employee. He held that by failing to afford his employee such an election, the employer had waived his *Mackay* rights.⁶⁰ The Board adopted the trial examiner's ruling that the activity was protected without discussing his *Mackay* theories.

In *Rockaway News*, the Board found that it could avoid the issue no longer. Although the trial examiner had not discussed the *Mackay* problem, the Board felt it necessary, in view of the employer's contention on appeal, to adopt the position taken by the trial examiner in *Cyril de Cordova*. It therefore ruled that since the employer had discharged and permanently replaced the employee before offering him the option of performing either all or none of his tasks, the employer had lost the protection of the *Mackay* rule. The Second Circuit found the Board's distinction between replacement prior to discharge and replacement after discharge "unrealistic."⁶¹ The Supreme Court, in its opinion, was equally unkind to the Board. It declared:

The distinction between discharge and replacement in this context seems to us as unrealistic and unfounded in law as the Court of Appeals found it. This application of the distinction is not sanctioned by *Labor Board v. Mackay Co.* . . . It is not based on any difference in effect upon the employee. . . . Substantive rights and duties in the field of labor-management do not depend on verbal ritual reminiscent of medieval real property law.⁶²

In one sense, however, the Second Circuit's and the Supreme Court's criticism of the Board's application of the *Mackay* rule may have missed the point. The Board may have been deliberately applying the rule in such a fashion as to prevent the employer from taking what seemed to the Board unfair advantage of his economic strength. However, the NLRB said nothing to indicate it was following such a rationale.

B. *Discharge Before Replacement*

In 1961, when the Board again began to protect refusals to cross picket lines, it apparently accepted the restrictions placed by the Second Circuit and the Supreme Court on its application of *Mackay* to the refusal situation. In *Redwing II*, the NLRB declared it would look to the substance rather than the form of replacement of the refusing employees. The Board stated that "where it is clear from the record that the employer acted only to preserve efficient operation of his business, and terminated the services of the employees only so it could immedi-

⁶⁰ 91 N.L.R.B. at 1137-38.

⁶¹ 197 F.2d at 115.

⁶² 345 U.S. at 75.

ately or within a short period thereafter replace them with others willing to perform the scheduled work,"⁶³ it may discharge the refusing employees without committing an unfair labor practice even though the refusal to cross a picket line is a protected activity.

In *L.G. Everist*,⁶⁴ employees who were discharged for refusing to cross a picket line had made unconditional applications for reinstatement before their employer permanently replaced them. The trial examiner ruled the employees' job security was not protected by the part of the *Mackay* rule that accords the right to be rehired to employees who have made such an application prior to replacement.⁶⁵ The Board, two members dissenting, rejected this finding, pointing out that if the refusals were protected, the employer had a right, in accordance with the *Mackay* doctrine, to replace the refusing employees if such replacement was necessary to continue the operation of the business. But where the refusing employees applied for reinstatement before they were permanently replaced, the same considerations that required the employer to reinstate economic strikers were applicable. The Board therefore held that the employer had committed an 8(a)(1) unfair labor practice by refusing reinstatement.⁶⁶ On appeal, the Eighth Circuit did not rule on the question of protection, but instead held that the Board's economic striker analogy had no support in precedent and ruled that the employees were not entitled to reinstatement.⁶⁷

In *Overnite I*, the Board again restricted the application of the *Mackay* rule. The employee, a driver for a pickup and delivery service, was ordered to make a pickup at a plant being picketed by members of the same local that was attempting to organize his shop. When he refused to cross the picket line, his employer discharged him. The trial examiner upheld the discharge under the *Mackay* rule. The Board concluded, however, that there was no justification for applying the

⁶³ 137 N.L.R.B. at 1547 (footnote omitted).

⁶⁴ See text at notes 54-55 *supra*.

⁶⁵ 142 N.L.R.B. at 204.

⁶⁶ *Id.* at 195.

⁶⁷ The effect of this ruling was similar to that of the Second Circuit's opinion in *Rockaway News*; it made these refusals unprotected.

Judge Matthes, in his dissent, properly criticized the majority on the ground that "[t]he pivotal issue presented by this proceeding, and so recognized by the parties, is whether the refusal of the four employees to cross the picket line constituted protected activity. The majority fails to come to grips with this question . . ." 334 F.2d at 318. He pointed out that the Supreme Court in *Rockaway News* had not rejected the discharge-replacement dichotomy that the Board advanced in this case, but only its wooden application. He then claimed that since the refusal was protected on the authority of *Redwing II*, the *Mackay* doctrine was applicable and the Board had rightly held that the employees were entitled to reinstatement in view of their unconditional application prior to replacement.

Mackay rule in this case because the employer did not need to replace the employee in question; another driver had been sent in his place.⁶⁸ The Board thus rendered the *Mackay* rule virtually meaningless to trucking firms. In almost every case the Board could find that the employer might have used another driver and, consequently, had no legitimate reason to discharge the refusing driver.⁶⁹

The Board similarly applied its restrictive version of the *Mackay* rule in *Overnite Transportation Co. (II)*⁷⁰ and *Vangas, Inc.*⁷¹ In *Overnite II*, the trial examiner and the Board found that the discharge of a driver who refused to cross a picket line was invalid, and that since the employer could easily have found another driver to make the delivery in question, he was not entitled to the benefit of *Mackay*. In *Vangas*, an employee was discharged soon after announcing that he would not make a delivery to a customer who was about to be struck. Although the strike never occurred, the trial examiner held the refusal would have been protected. He ruled that *Mackay* was not applicable because the discharge occurred prior to actual refusal and because the employer could have used another driver had the need arisen. His recommendation that the driver be reinstated with back pay was adopted by the Board.

In *Thurston Motor Lines, Inc.*,⁷² where the refusal of both the initial driver and his replacement to cross a picket line forced a supervisor to make the delivery, the trial examiner upheld the subsequent discharge and replacement of the initial driver, but not of his replacement, on the ground that the employer's interest in maintaining its normal business operations justified the discharge. He stated that "a common carrier need not undergo the risk of repeated interruptions of his regular operation and need not be prepared to institute emergency procedures whenever such interruptions occur."⁷³ Having thus made a telling rejection of the Board's general refusal rule, he then turned around and ruled that the second discharge was not justified by the employer's business interest, although the employer presumably

⁶⁸ 154 N.L.R.B. at 1275.

⁶⁹ In *K.B. & J. Young's Super Markets, Inc.*, 157 N.L.R.B. 271 (1966), *enforced*, 377 F.2d 463 (9th Cir.), *cert. denied*, 389 U.S. 841 (1967), an employer discharged an employee who refused to transfer from one store to another because such transfer would have obliged her to cross a picket line at the second store. Neither the trial examiner nor the Board even considered the application of the *Mackay* rule. The Ninth Circuit did not consider this problem since it upheld the NLRB findings on the ground that this and other discharges were motivated by specific anti-union animus.

⁷⁰ 164 N.L.R.B. 72 (1967).

⁷¹ 168 N.L.R.B. No. 127, 67 L.R.R.M. 1108 (Dec. 19, 1967).

⁷² 166 N.L.R.B. 862 (1967).

⁷³ *Id.* at 866.

would be subject to the same risk of future refusals from the second employee as he would be from the first. The Board upheld this contradictory decision, attempting to justify its ruling with the following logic:

In the present case, Respondent required the services of only a single driver to make the delivery of [this] merchandise. It did not discharge [the second driver] until after the . . . delivery had been made by a supervisor substituting for [the first driver]. At the time of the discharge of [the second driver], therefore, there was no need to hire a replacement for him to make a delivery which had already been made by [the supervisor]. Moreover, Respondent knew that [the second driver] was a strong union adherent and thus would be a poor replacement choice for crossing the picket line of a sister labor organization. Under these circumstances, we find that [his] discharge . . . was not justified⁷⁴

The NLRB commenced an attack on the replacement rule in the non-trucking area in *Canada Dry Corp.*⁷⁵ Here, drivers at a plant represented by the Teamsters struck, and the charging party, a mechanic not represented by any union, was discharged for refusing to cross the picket line. The trial examiner held his action was protected, not on the rationale of the ordinary refusal case, but on the rationale of the primary strike case. He then held that since the refusal was protected and the employee had been discharged before being replaced, the *Mackay* rule was inapplicable.⁷⁶ The Board adopted his rulings without discussion. This result was followed in *Southern Greyhound Lines*,⁷⁷ where an office worker failed to cross a picket line established by janitorial employees. The trial examiner found the activity protected under the primary strike rationale and held that *Mackay* was inapplicable because the employer had failed to replace the employee prior to discharge. The trial examiner attempted to distinguish this case from *Rockaway*, *Redwing*, and *Everist* on the ground that it involved a picket line at the worker's own place of employment rather than at another employer's locale.⁷⁸

⁷⁴ *Id.* at 862 (footnote omitted).

⁷⁵ 154 N.L.R.B. 1763 (1965).

⁷⁶ *Id.* at 1769-70.

⁷⁷ 169 N.L.R.B. No. 148, 67 L.R.R.M. 1368 (Feb. 23, 1968), *enforced*, — F.2d — (5th Cir. 1970).

⁷⁸ The trial examiner admitted the weakness of this distinction when he said: Insofar as anything said by the Board or the courts in the *Redwing* and the *Everist* cases may be interpreted as inconsistent with my finding herein that Respondent violated Section 8(a)(1) of the Act by discharging and refusing to reinstate [the employee for refusal] to come to work through the picket line, I must respectfully decline to follow such a holding.

Id. at 4 (trial examiner's decision). In *G & H Towing Co.*, 168 N.L.R.B. No. 82, 66 L.R.R.M. 1343 (Nov. 30, 1967), a case not involving a trucking firm, the Board found

The NLRB seems to have completed its demolition job on the *Mackay* principle in non-trucking situations by its decision in *Swain & Morris Construction Co.*⁷⁹ The employer, engaged in the construction of power and light facilities, shifted a construction crew from one locale to another to do some more urgent work. After the shift, the former locale was picketed. Upon completion of work at the second locale, the employer prepared to send the crew back to finish the first job, but the crew members refused to return and were discharged. The employer then brought in another crew that finished the job without having to cross the picket line because it had since been removed. The employer re-employed several crewmen who made application for reinstatement before being permanently replaced; the rest filed a complaint with the NLRB. The trial examiner ruled that the refusals were protected, but he upheld the discharges on the ground that the employer was justified in replacing these men because they had caused him great inconvenience.⁸⁰ The Board refused to go along with the trial examiner, holding that he had misapplied the *Redwing* doctrine. Noting that the employer failed to replace the members of the crew immediately after discharge (chiefly because of the shortage of linemen), the Board revoked the dismissals and resurrected its replacement-discharge dichotomy.⁸¹

III

CONTRACT REGULATION OF REFUSALS TO CROSS PICKET LINES

A. *No-Strike* Clauses

In *Rockaway News*,⁸² the employer justified his discharge of an employee who refused to cross a picket line on the ground that the

that an employer did rightfully replace two employees who refused to cross a picket line to man their vessel.

⁷⁹ 168 N.L.R.B. No. 147, 67 L.R.R.M. 1039 (Dec. 29, 1967).

⁸⁰ *Id.* at 11 (trial examiner's decision).

⁸¹ *Id.* at 5-6, 67 L.R.R.M. at 1040-41. One criticism of the Board's use of the *Mackay* rule in the refusal cases is that it offers inadequate guidance for the parties. The refusing employee cannot tell in advance whether he might be lawfully replaced; his employer cannot tell in advance whether he might lawfully replace the refusing employee. Neither has any real hope of obtaining effective legal counsel because of the limited time in which to make a decision. Thus, the effect of the Board's rule is to encourage litigation in these cases. Of course, the Board could defend its conclusion by pointing out that a literal application of *Mackay* would give the employer "unnecessary" power. However, one might be somewhat skeptical of the Board's ability to determine in a given situation whether the power to replace was or was not "necessary" for the efficient operation of the employer's business.

⁸² See text at notes 36-42 *supra*.

refusal violated the "no-strike" clause contained in the collective bargaining agreement.⁸³ The trial examiner and the Board had rejected the employer's contention because the contract contained an illegal union security clause and was thus void.⁸⁴ The Second Circuit had ignored this aspect of the employer's argument altogether in its opinion. The Supreme Court, however, seized upon the no-strike clause issue. It ruled that this refusal constituted a prima facie violation of the no-strike clause, and that the labor contract was not totally invalid despite the illegal union security clause. The Court pointed out that the proviso to section 8(b)(4) permitted the parties to agree on no-strike clauses and that such clauses prohibited refusals to cross picket lines. The Court then held that a refusal to cross a picket line in violation of a no-strike clause was not a protected activity under section 7.⁸⁵ The dissent by Justice Black, joined by Justices Douglas and Minton, accepted in cursory fashion the Board's conclusion that the proviso to section 8(b)(4) indicated a congressional intent to protect all refusals to cross picket lines. It criticized the majority's rejection of the Board's ruling on the validity of the contract on the illogical ground that the Court should not "substitute its judgment about this contract for that of the Board."⁸⁶ The dissent implied that the contract's no-strike clause was not applicable to a refusal to cross a picket line, stating that it could "find no language in that contract which would justify the discharge of the employee here because he insisted upon respecting a union picket line."⁸⁷

The NLRB did not consider another refusal involving a contract containing a no-strike clause until eleven years later in *Southwest Banana Distributors, Inc.*⁸⁸ In that case, the employer had discharged certain workers who, in violation of the no-strike clause in their contract, had refused to cross a picket line established by their union at another employer's place of work and thereafter had refused to work at all. The NLRB's General Counsel, in arguing this case, claimed that since the defendant employer and the secondary employer were owned

⁸³ The clause read as follows: "No strikes, lockouts or other cessation of work or interference therewith shall be ordered or sanctioned by any party hereto during the term hereof except as against a party failing to comply with a decision, award, or order of the Adjustment Board." 95 N.L.R.B. at 346.

⁸⁴ *Id.* at 337. In an earlier case involving the same employer, the Board had ruled that the same contract was invalid because it contained an illegal union security clause. *Rockaway News Supply Co.*, 94 N.L.R.B. 1056 (1951).

⁸⁵ 345 U.S. at 78-81.

⁸⁶ *Id.* at 82.

⁸⁷ *Id.*

⁸⁸ 145 N.L.R.B. 815 (1964).

and operated by the same individuals, the refusers were actually engaging in a primary protected activity. The trial examiner, without deciding whether the employers constituted a single employer under the LMRA, ruled that the employer had a right to discharge an employee who violated a no-strike clause unless the strike was an unfair labor practice strike or the refusal to work was protected by section 502 of the Act.⁸⁹ He then ruled that since the refusals to work did not fall within either exception, they were unprotected and thus the discharge was lawful. The Board adopted his rulings without discussion.

The NLRB's decision to abandon its observance of the *Rockaway* rule became evident in *G & H Towing Co.*⁹⁰ G & H Towing had a contract with the union that contained a no-strike clause. Although the contract had expired prior to the refusal of two employees to cross a picket line and approach a ship, it had been extended and was still in effect at the time the incident occurred. The trial examiner found that the extension was invalid, but ruled that the discharge of the employees was justified because refusals to cross picket lines were not protected by the Act.⁹¹ The Board did not accept the trial examiner's reasoning on either point; ignoring the *Rockaway* rule that refusals by employees covered by no-strike clauses were unprotected, the Board concluded that the employees had been properly replaced under *Mackay*.⁹²

In *Swain & Morris Construction Co.*,⁹³ the Board completed its abandonment of *Rockaway*. Here an employer who employed IBEW members pursuant to a contract that contained a no-strike clause discharged a crew of employees for refusing to cross a picket line to work on a project. The trial examiner held that *Rockaway* did not justify these discharges because the language of the no-strike clause in this case was distinguishable from the language of the no-strike clause in *Rockaway*.⁹⁴ The Board ruled that the discharges were invalid and carefully avoided any mention of the no-strike clause problem.⁹⁵

⁸⁹ *Id.* at 819.

⁹⁰ 168 N.L.R.B. No. 82, 66 L.R.R.M. 1343 (Nov. 30, 1967).

⁹¹ *Id.* at 12 (trial examiner's decision).

⁹² *Id.* at 6, 66 L.R.R.M. at 1345. In *General Electric Co.*, 6-CA-4377 (May 27, 1969) (trial examiner's decision), the trial examiner upheld the disciplinary suspension of employees covered by a no-strike clause who refused to cross a picket line.

⁹³ See notes 79-81 and accompanying text *supra*.

⁹⁴ 168 N.L.R.B. No. 147, at 10-11 (trial examiner's decision). The no-strike clause in *Swain & Morris* provided: "There shall be no stoppage of work by strike or lockout or any subterfuge thereof because of any dispute relating to the application of this agreement . . ." *Id.* at 10 (trial examiner's decision). Compare the *Rockaway* clause in note 83 *supra*.

⁹⁵ 168 N.L.R.B. No. 147, at 1-6, 67 L.R.R.M. 1039, 1040-41 (Dec. 29, 1967).

B. *No-Picket-Line Clauses*

The so-called no-picket-line contract clause guarantees to individual employees the right to refuse to cross a picket line. Although the clause has long been utilized in some industries,⁹⁶ Congress did not deal with this type of contractual provision in the LMRA. Nevertheless, the NLRB has had to adjudicate the legality of such clauses.

In *Teamsters Local 878 (Arkansas Express, Inc.)*,⁹⁷ the employing carrier was struck by the Teamsters, who encouraged Teamster-represented employees of other carriers to take advantage of the no-picket-line clause in their contract and refuse to cross the picket line at Arkansas Express. The Board's General Counsel charged that the action of the Teamsters violated section 8(b)(4)(A), and that the no-picket-line clause in itself violated the section. The trial examiner dismissed the charge, and the Board upheld the trial examiner, stating that the clause did not violate the Act per se, although union activity to encourage employees to invoke the clause might constitute an unfair labor practice.⁹⁸

Further use of no-picket-line clauses was encouraged by the Supreme Court. In the *Rockaway* case, the Court had specifically declared that the refusals to cross picket lines could be contractually regulated by no-strike or no-picket-line clauses since, in the Court's view, the proviso to section 8(b)(4) "clearly enables contracting parties to embody in their contract a provision against requiring an employee to cross a picket line if they so agree."⁹⁹

The NLRB, in accord with its ultimate attitude toward hot cargo clauses,¹⁰⁰ did not regard the no-picket-line clause as constituting authorization for a union to exert pressure on employees of a secondary employer to take advantage of the clause. In *Albert Evans*,¹⁰¹ a Teamsters local represented a number of carriers that made deliveries to each other. The Teamsters struck one carrier and began to picket others whose employees were organized by the same local, whenever employees of the first carrier made or picked up deliveries. The result, of course, was to induce the employees of the other carriers to cease handling any goods of the first carrier. The trial examiner found that this action was

⁹⁶ See U.S. BUREAU OF LAB. STAT. BULL. NO. 686, at 165 (1942).

⁹⁷ 92 N.L.R.B. 255 (1950).

⁹⁸ *Id.* at 267-68. The NLRB took a similar view of hot cargo clauses, which gave employees the right to refuse to handle certain goods. See *Carpenters Local 1976 v. NLRB*, 357 U.S. 93 (1958).

⁹⁹ 345 U.S. at 80.

¹⁰⁰ See *Carpenters Local 1976 v. NLRB*, 357 U.S. 93 (1958).

¹⁰¹ 110 N.L.R.B. 748 (1954).

an unfair labor practice in violation of section 8(b)(4)(A), and he refused to accept the union's contention that no-picket-line clauses constituted a defense to the unfair practice. The Board accepted his ruling.

The distinction that had been made by the NLRB and the courts between the encouragement of secondary activity by hot cargo clauses and the secondary activity itself, was not one that recommended itself to a large segment of Congress. Consequently, when Congress passed the Landrum-Griffin Act, it created section 8(e),¹⁰² which specifically outlawed hot cargo clauses and made their existence per se an unfair labor practice. In outlawing hot cargo clauses, however, Congress did not intend to outlaw no-picket-line clauses. The original House bill contained a provision exempting from its hot cargo ban no-picket-line clauses; and although the Landrum-Griffin proposal, which was substituted for the original House bill, contained no such exemption, the legislative history indicates that the Landrum-Griffin hot cargo ban did not proscribe no-picket-line clauses.¹⁰³

The NLRB was forced to decide whether section 8(e) outlawed no-picket-line clauses in *Truck Drivers Local 413 (Patton Warehouse, Inc.)*.¹⁰⁴ A Teamsters local had negotiated a contract containing the following clause:

It shall not be a violation of this Agreement and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon any property involved in a labor dispute or refuse [*sic*] to go through or work behind any picket line, including the picket line of Unions party to this Agreement

¹⁰² 29 U.S.C. § 158(e) (1964).

¹⁰³ On the day prior to House passage of the Landrum-Griffin bill, Representative Cramer discussed the relationship between the hot cargo ban and the no-picket-line clause:

The *Rockaway News* case . . . , which is based on the proviso would therefore continue to be law under the Landrum-Griffin bill. It stands for the proposition that "contracting parties may embody in their contract a provision against requiring an employee to cross a picket line if they so agree. . . ."

. . . .
First. The Landrum-Griffin hot-cargo provision puts in statutory form the existing rule of the NLRB and the courts, including the Supreme Court, that hot-cargo contracts are unenforceable. It in no sense disturbs the further rule under which employees may agree with the contracting union that an employee may—or may not—be disciplined for refusal to cross a picket line at another employer's establishment. No reasonable interpretation of the language gives it such a meaning that would interfere with this rule and no such interpretation is intended.

¹⁰⁵ CONG. REC. 15677 (1959). See also Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 272-73 (1959).

¹⁰⁴ 140 N.L.R.B. 1474 (1963), *enforced in part*, 334 F.2d 539 (D.C. Cir.), *cert. denied*, 379 U.S. 916 (1964). At the same time as *Patton Warehouse*, the Board also dealt with a companion case involving the same issue. *Truck Drivers Local 728 (Brown Transp. Corp.)*, 140 N.L.R.B. 1436 (1963), *enforced in part*, 334 F.2d 539 (D.C. Cir. 1964).

and including picket lines at the Employer's place or places of business.¹⁰⁵

The employer argued that this clause was outlawed by section 8(e) and that the union had violated section 8(b)(4)(A) by forcing its inclusion in the contract. The trial examiner reviewed the legislative history of section 8(e) and found a congressional intent to outlaw no-picket-line clauses unless they protected the refusal of an employee to cross a picket line at his place of employment. The Board read the legislative history differently; interpreting section 8(e) in conjunction with the proviso to section 8(b)(4), it concluded that no-picket-line clauses were legal if they

were limited (a) to protected activities engaged in by employees against their own employer and (b) to activities against another employer who has been struck by his own employees, where the strike has been ratified or approved by their representative whom the employer is required to recognize under the Act.¹⁰⁶

The Board ruled that the clause in question was not so limited and was therefore invalid.

The Teamsters local appealed this decision to the District of Columbia Circuit, and in its opinion the court of appeals discussed the application of no-picket-line clauses in four hypothetical cases. It agreed with the Board that a no-picket-line clause may operate to protect refusals to cross picket lines "where the line is in connection with a *primary* dispute at the *contracting* employer's own premises."¹⁰⁷ The court said that the Board's rule in regard to this situation was obviously correct because refusals to cross this kind of picket line were clearly protected under the Act. The court agreed with the Board that a no-picket-line clause may not operate to protect refusals to cross picket lines when "the picket line at the contracting employer's own premises is itself in promotion of a *secondary* strike or boycott."¹⁰⁸ To hold otherwise would permit the unions to avoid the clear intent of section 8(e) and encourage secondary action of the type that sections 8(e) and 8(b) were intended to prevent. The court also agreed with the Board "that the clause may validly protect refusals to cross a picket line at the premises of *another* employer if that picket line meets the conditions expressed in the *proviso* to § 8(b)(4) of the Act."¹⁰⁹ Finally, the court disagreed with the

¹⁰⁵ 140 N.L.R.B. at 1476.

¹⁰⁶ *Id.* at 1481. *Accord*, Teamsters Local 386 (Valley Employers Ass'n), 152 N.L.R.B. 780 (1965); Teamsters Local 559 (Anopolsky & Son), 145 N.L.R.B. 722 (1963), *modified*, 147 N.L.R.B. 1128 (1964).

¹⁰⁷ 334 F.2d at 542-43 (emphasis in original).

¹⁰⁸ *Id.* at 543 (emphasis in original).

¹⁰⁹ *Id.* (emphasis in original) (footnote omitted).

Board's rule that a no-picket-line clause could not protect "refusals to cross a picket line at *another* employer's premises where that line does *not* meet the conditions of the § 8(b)(4) proviso."¹¹⁰ It interpreted the Supreme Court's decision in *Rockaway* and the legislative history of section 8(e) as permitting a union to contract for a no-picket-line clause that protected refusals to cross any lawful primary picket line, whether or not the line met the requirements of the proviso to section 8(b)(4). The court pointed out that freeing such clauses from the limitation of the proviso to section 8(b)(4) was consistent with the Board's rule that refusals to cross picket lines were protected despite the restrictions of that proviso. The court finally held that the contested no-picket-line clause was valid insofar as it guaranteed immunity to employees who refused to cross primary picket lines.¹¹¹

The main weakness of the court's opinion was the possible contradiction between its ruling that no-picket-line clauses meeting the requirements of the proviso to section 8(b)(4) were lawful and its ruling that no-picket-line clauses permitting refusals to cross secondary picket lines were unlawful, because a picket line could meet the requirements of the proviso to section 8(b)(4) and still be secondary in nature.

This weakness became apparent in *Drivers Local 695 (John B. Threlfall d.b.a. Threlfall Construction Co.)*,¹¹² where the Board declared that a clause permitting refusals to cross picket lines described in the proviso to section 8(b)(4) was illegal because it had served as the basis of a refusal to cross a secondary picket line. The District of Columbia Circuit recognized that this conclusion was contrary to its own dictum in *Patton Warehouse* regarding picket lines described in the proviso, but the court repudiated that dictum by agreeing with the Board's rationale and conclusion.¹¹³ In response to the union claim that requiring an ordinary employee to ascertain whether a given picket line was primary or secondary before he could be sure that a no-picket-line clause afforded him protection was impractical, the court could

¹¹⁰ *Id.* (emphasis in original).

¹¹¹ *Id.* at 545. *Accord*, Bay Counties Dist. Council of Carpenters, 154 N.L.R.B. 1598 (1965), *enforced*, 382 F.2d 593 (9th Cir. 1967), *cert. denied*, 389 U.S. 1037 (1968); Teamsters Local 386 (Valley Employers Ass'n), 152 N.L.R.B. 780 (1965); Los Angeles Bldg. & Constr. Trades Council (Couch Electric Co.), 151 N.L.R.B. 413 (1965); Los Angeles Bldg. & Constr. Trades Council (Portofino Marina), 150 N.L.R.B. 1590 (1965); Cement Masons Local 97 (Interstate Employers, Inc.), 149 N.L.R.B. 1127 (1964).

¹¹² 152 N.L.R.B. 577 (1965), *enforced*, 361 F.2d 547 (D.C. Cir. 1966).

¹¹³ 361 F.2d at 550-51. *See* Lane-Coos-Curry-Douglas Counties Bldg. & Constr. Trades Council, 155 N.L.R.B. 1115 (1965), *enforced*, No. 20783 (9th Cir. Aug. 9, 1966). *Cf.* Carpenters Local 1273 v. Hill, 398 F.2d 360 (9th Cir. 1968), involving a § 303(b) civil suit brought by a contractor over the union's attempt to secure an illegal no-picket-line clause.

only reply that "employees and employers will generally be advised by counsel and will not have to rely upon their own judgment."¹¹⁴

CONCLUSION

Congress appears never to have considered whether refusals to cross picket lines are protected activities. The failure of Congress to deal with this issue is a product of its reluctance to formulate national labor policy unless virtually compelled to do so—decisions regarding that policy are so controversial and so fraught with political significance that Congress is rarely willing to legislate. What legislation Congress does pass is directed at problems of greater significance than refusals to cross picket lines. Consequently, in this particular area Congress has not performed its task of setting policy for the NLRB to follow. The NLRB is thus left to formulate policy on its own, subject only to the scrutiny of the courts.

The courts, however, have played only a circumscribed role in dealing with the refusal problem. There are several reasons for this. First, the courts can review NLRB actions only in cases that are brought to them for enforcement. Such actions are expensive and are rarely taken in refusal cases because of the small sums involved. Second, even in the cases that are appealed, the courts must affirm the NLRB's findings of fact if there is substantial evidence in the record to support them, even though they are not bound by the NLRB's conclusions of law. Third, the courts have traditionally tried to decide cases on the basis

¹¹⁴ 361 F.2d at 551. This suggestion is unrealistic since it hardly seems probable that a Teamster who encounters a picket line in the course of his deliveries will contact the Teamsters' counsel and obtain an immediate legal opinion about the consequences of a refusal to cross that line. The effect of the court's conclusion was to encourage additional litigation in the area and, ironically, to discourage refusals to cross picket lines since the refuser could generally not determine with certainty whether or not a given picket line was primary or secondary. Of course, the court's opinion can be defended on the ground that an opposite conclusion would have encouraged the erection of illegal picket lines.

The Teamsters apparently have accommodated themselves to the court's ruling. Their 1967 National Master Freight Agreement art. 9, § 1, contains the following modified no-picket-line clause:

It shall not be a violation of this Agreement, and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon any property involved in a primary labor dispute, or refuses to go through or work behind any primary picket line, including the primary picket line of Unions party to this Agreement, and including primary picket lines at the Employer's places of business.

The major trucking associations have not been satisfied with this language and have proposed to insert the word "lawful" to the description of picket lines in this provision. BNA DAILY LAB. REP. No. 4, AA-3 (Jan. 7, 1970).

of the facts presented, and they have refused to promulgate rules broad enough to cover circumstances not before them. Thus, normal judicial practice has meant that the courts have failed to exercise effective supervision over the NLRB's decisions regarding refusals. However, the courts could play an important role in overseeing the creation of a new refusal policy, and more adequately fulfill their role as "watch-dogs of the Board,"¹¹⁵ by ruling directly on the basic issues presented by Board decisions.¹¹⁶

To compensate for the failure of Congress to construct a refusal policy and the reluctance or inability of the courts to play a creative role, the NLRB might have utilized whatever vague guidelines provided by Congress and the courts, in conjunction with its own expertise, to formulate a broad national policy. However, neither the trial examiner nor the Board investigated the legislative history of the NLRA and its amendments in any of the refusal cases.¹¹⁷ Furthermore, the NLRB decisions seem to indicate a practice on the part of the Board and its trial examiners to use precedent that supports the desired result and to ignore unfavorable court decisions.¹¹⁸ When adverse opinions are cited, their holdings are treated cavalierly or misstated;¹¹⁹ if they

¹¹⁵ NLRB v. J.H. Rutter-Rex Mfg. Co., 396 U.S. 253, 268 (1969) (Douglas, J., dissenting).

¹¹⁶ The institutional nature of the parties usually before the courts in NLRB enforcement procedures, as well as the general interest aroused by such cases, which could result in amicus briefs, perhaps warrants a departure from the belief that only through strictly adversary proceedings can a court be advised of all the aspects of the issue at hand. *But see* NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764-65 (1969).

¹¹⁷ It is not altogether clear, however, that such an investigation would have been fruitful. *See* note 25 and accompanying text *supra*. If the inquiry had been futile, the Board should have stated so and proceeded to formulate policy, consciously recognizing its lack of a congressional mandate.

¹¹⁸ Thus, in the 15 refusal cases decided subsequent to the Seventh Circuit's holding in *Illinois Bell* that refusals to cross a picket line are not protected by § 7, that decision has been cited by only two trial examiners and in only one Board opinion. Similar results apply to the citation of the Second Circuit's *Rockaway News* and Eighth Circuit's *Everist* rulings. Court decisions only slightly favorable to the NLRB's viewpoint, such as *Redwing*, or the NLRB's own decisions, such as *Cyril de Cordova*, are cited more often.

¹¹⁹ *See* the trial examiner's treatment of *Illinois Bell* in *Thurston Motor Lines, Inc.*, 166 N.L.R.B. 862, 865 & n.12 (1967); the Board's discussion of *Rockaway News* in *Redwing Carriers, Inc.*, 137 N.L.R.B. 1545, 1546 & n.5 (1962), and in *Cooper Thermometer Co.*, 154 N.L.R.B. 502, 504 (1965) (which cited the Second Circuit in *Rockaway News* as support for the proposition that refusals are protected); the distinguishing of *Everist* by the trial examiner in *Vangas, Inc.*, 168 N.L.R.B. No. 127, at 5 n.2 (Dec. 19, 1967) (trial examiner's decision); and the use by the trial examiner in *Vangas* of the District of Columbia Circuit's *Overnight I* opinion as authority for the rule that refusals are protected, although that court had explicitly refused to so hold. Typical of this attitude is the NLRB's constant citation of the District of Columbia Circuit's opinion in *Redwing II*

are not ignored or misconstrued, the Board often adopts a policy of simply refusing to follow them.¹²⁰

Although the NLRB has shown no interest in ascertaining the intent of Congress with regard to refusals to cross picket lines, and although it has shown even less interest in following the strictures of the courts regarding this matter, it might have given heed to policy considerations. Conspicuous by its absence in all the NLRB cases dealing with refusals, however, has been any thoughtful analysis of the policy considerations and alternatives involved or any attempt to weigh the opposing interests.

If such an analysis were employed, it would seem that the refusing employee has the strongest and most valid economic interest in situation I-A,¹²¹ with some interest in situation I-B.¹²² Consequently, his refusal in I-A and possibly in I-B would seem to justify a policy of protection. The refuser would appear to have a less significant economic interest in situations I-C¹²³ and II.¹²⁴ The refuser's employer has a strong inter-

in support of the proposition that refusals are protected, even though all the court did in that case was enforce the NLRB order denying the refuser's request for reinstatement.

¹²⁰ Illustrative of this attitude is the trial examiner's opinion in *Canada Dry Corp.*, 154 N.L.R.B. 1763 (1965):

The Respondent's argument that the decision of the Seventh Circuit Court of Appeals in *N.L.R.B. v. Illinois Bell Telephone Co.* . . . is controlling and requires a result different from that reached herein, is not appropriately addressed to me. As the Board has continued to adhere to the principle set forth in *Illinois Bell Telephone Company* . . . , which was reversed by the U.S. Court of Appeals in the above-cited case (see, e.g., *Redwing Carriers, Inc. and Rockana Carriers, Inc.* . . .), I have no alternative but to follow Board precedent until the Board or the Supreme Court holds to the contrary.

Id. at 1770 n.10.

¹²¹ See p. 943 *supra* for a designation of the situations in which refusals to cross picket lines occur. I-A constitutes the primary economic strike situation.

¹²² This situation was presented by: *Southern Greyhound Lines*, 169 N.L.R.B. No. 148, 67 L.R.R.M. 1368 (Feb. 23, 1968), *enforced*, — F.2d — (5th Cir. 1970); *Canada Dry Corp.*, 154 N.L.R.B. 1763 (1965); *Cinch Mfg. Co.*, 91 N.L.R.B. 371 (1950); *New York Tel. Co.*, 89 N.L.R.B. 383 (1950); *Carnegie-Illinois Steel Corp.*, 84 N.L.R.B. 851 (1949), *enforced sub nom. Albrecht v. NLRB*, 181 F.2d 652 (7th Cir. 1950).

¹²³ Situation I-C is exemplified by: *G & H Towing Co.*, 168 N.L.R.B. No. 82, 66 L.R.R.M. 1343 (Nov. 30, 1967); *Albert Evans*, 110 N.L.R.B. 748 (1954); *Illinois Bell Tel. Co.*, 88 N.L.R.B. 1171 (1950), *enforcement denied*, 189 F.2d 124 (7th Cir.), *cert. denied*, 342 U.S. 885 (1951).

¹²⁴ Situation II-A, where the picket line is erected by the employees of the picketed employer at their, rather than the refuser's, place of employment, is the most typical case dealt with in this article. Such a situation was involved in: *Swain & Morris Constr. Co.*, 168 N.L.R.B. No. 147, 67 L.R.R.M. 1039 (Dec. 29, 1967); *Thurston Motor Lines, Inc.*, 166 N.L.R.B. 862 (1967); *Overnite Transp. Co. (II)*, 164 N.L.R.B. 72 (1967); *Overnite Transp. Co. (I)*, 154 N.L.R.B. 1271 (1965), *enforced in part*, 364 F.2d 682 (D.C. Cir. 1966); *L.G. Everist, Inc.*, 142 N.L.R.B. 193 (1963), *enforced in part*, 334 F.2d 312 (8th Cir. 1964); *Redwing Carriers, Inc.*, 130 N.L.R.B. 1208 (1961), *modified*, 137 N.L.R.B. 1545 (1962), *enforced sub nom. Teamsters Local 79 v. NLRB*, 325 F.2d 1011 (D.C. Cir. 1963), *cert. denied*, 377

est at stake in all type I situations and a more limited economic interest in type II situations.¹²⁵ However, his economic interests in I-A and possibly in I-B would seem to be subordinate to the interest of the refusing employee, although an opposite conclusion seems to be justified in the other situations. The refusing employee's union has an economic interest in I-A that justifies protection of the refusal in this case but not in the other situations. The interests of the pickets, their union, and the picketed employer are not particularly significant in these cases and can be disregarded. The public has a general interest in limiting the scope of labor disputes and in preventing illegal secondary picket lines—an interest that justifies protecting the refusal in I-A and possibly in I-B but not otherwise. Of course, the results reached by weighing the interests of outside parties should yield to the results reached by the weighing of these interests by the parties themselves in the form of a collective bargaining agreement, unless its provisions are contrary to law.

It should be recognized, however, that the above approach has its weaknesses. The interests of the parties involved in this kind of a dispute may not be as significant in reality as they appear to be in theory. An alternative to a balancing approach to adjudicate priorities in this area would be for the NLRB to extend the legal rules applicable to analogous situations. This method would tend to further the maintenance of the logical structure of the law developed under other portions of the LMRA.¹²⁶ Viewed in this way, the refusal to cross a picket line resembles either a general economic strike or a partial economic strike, depending on whether the refusal takes place at the locale of the refuser's employer or at some other location. Indeed, in situations I-A and I-B, the refuser is essentially an economic striker, while in situation II he is a partial striker—a man refusing to do one part of his job but insisting on his right to do the remainder. Viewed from this perspective, it would seem that the refuser in I-A and I-B should receive no more protection than is given an economic striker, and the refuser in II should receive no more protection than is given a partial striker. It thus becomes evident that the NLRB's attempt to relax the *Mackay*

U.S. 905 (1964); *Rockaway News Supply Co.*, 95 N.L.R.B. 336 (1951), *enforcement denied*, 197 F.2d 111 (2d Cir. 1952), *aff'd*, 345 U.S. 71 (1953); *Teamsters Local 878 (Arkansas Express, Inc.)*, 92 N.L.R.B. 255 (1950); *Cyril de Cordova & Bros.*, 91 N.L.R.B. 1121 (1950).

Albert Evans, 110 N.L.R.B. 748 (1954), presented a type II-B situation.

¹²⁵ The interest of the refuser's employer in situation II would seem to merit particular protection, however, because of his lack of responsibility for, and his inability to do anything about, the dispute giving rise to the establishment of the picket line in question.

¹²⁶ See Winter, *supra* note 17, at 58.

rule as it applies to refusers in I-A, or other refusers, by interjecting the issue of the order in which dismissal and replacement took place, is inconsistent with what is done in an analogous area of the law. A similar criticism can be leveled at the NLRB's attempts to help the refuser in situation II. The refuser in I-C presents a special case. He certainly resembles the general economic striker more than the partial striker since he is refusing to perform all the functions of his job. On the other hand, in honoring a picket line that has not been erected by his fellow employees, he is not seeking to advance any direct or indirect economic interests, as are the refusers in I-A and I-B. Indeed, he is probably honoring an illegal secondary picket line or an organizational picket line of some type. Consequently, it seems not to be in the public interest to protect his action. This situation, however, is the only one in which the two suggested methods of analysis are likely to yield different results. Of course, the parties in question should be given the power to regulate their rights *inter se* by virtue of collective bargaining agreements except insofar as such agreements protect refusals to cross illegal picket lines.¹²⁷

From all that appears in the record of these cases, the NLRB has failed to utilize either approach and might well have been making national labor policy by flipping coins rather than by using its expertise, although an examination of the general trend of these cases suggests that the NLRB is pursuing as a consistent goal the aggrandizement of union power at the expense of the individual employee and the employer.¹²⁸

¹²⁷ Regardless of which method of analysis the Board employs in determining a policy with regard to refusals, it could articulate this policy either on a case-by-case basis or through the exercise of its rule-making authority. See *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 763-66 (1969); Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571 (1970).

¹²⁸ See the recently-released Ervin Subcommittee Report on the NLRB (SUBCOMM. ON SEPARATION OF POWERS, SENATE COMM. ON THE JUDICIARY, 91ST CONG., 1ST SESS., CONGRESSIONAL OVERSIGHT OF ADMINISTRATIVE AGENCIES (NATIONAL LABOR RELATIONS BOARD) (Comm. Print 1970)), which states:

On the basis of its study, the subcommittee has found that in choosing between conflicting values—in difficult cases and in some that are not so difficult—the National Labor Relations Board has of late unreasonably emphasized the establishment and maintenance of collective bargaining and strong unions to the exclusion of other important statutory purposes which often involve the rights of individual employees. Unions unable to persuade a majority of employees to opt for collective bargaining have been able to get the Board to impose it for them. And the Board has been able to do this by a freewheeling interpretation of the statute's more general provisions, by applying double standards, and by ignoring plain legislative mandates. The Board has also, we find, in matters going beyond recognition and the establishment of bargaining, given interpretations to the statute which reflect an over-emphasis on helping unions impose their will on

What emerges, then, from a study of the cases involving a refusal to cross picket lines, is a conviction that our system for making labor policy is not working well. What is needed, in general, is a greater effort on the part of all institutions involved in formulating national labor policy to perform the functions assigned to them. Thus, Congress must find some way to pass labor legislation on a regular basis. Similarly, the courts must endeavor to broaden the scope of their review of the NLRB's actions. Above all, however, the NLRB must be willing to heed the wishes of Congress and the strictures of the courts regarding its attempts to formulate national labor policy.

employers and individual employees. The Board clearly believes that it knows what is best for employees and all too frequently subordinates individual rights to the interests of organized labor.

Id. at 3-4. The Ervin Subcommittee Report was particularly critical of the Board's treatment of cases arising under § 8(b)(1)(A) of the Taft-Hartley Act, 29 U.S.C. § 158(b)(1)(A) (1964), which makes it an unfair labor practice for a union to restrain or coerce an employee in the exercise of his rights under § 7 (*id.* § 157), and which also modified § 7 to guarantee employees the right to engage or refrain from engaging in § 7 activities. SUBCOMM. ON SEPARATION OF POWERS, *supra* at 12-14. The intent of these amendments was to make it improper for a union, or its agents, to interfere with, coerce, or restrain employees in the exercise of their rights to take action or to refrain therefrom. 93 CONG. REC. 4021, 4435 (1947). There is no indication that Congress intended by either of these amendments to protect workers who refused to refrain from crossing picket lines at secondary locales, although Congress may specifically have intended to protect workers who crossed mass picket lines at their own plant. *See id.* at 4436. Certainly it intended that the NLRB protect the right to cross a picket line if it also protected the right to refuse to cross a picket line. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 208-13 (1967) (Black, J., dissenting).

One might expect that the NLRB would treat refusals to honor picket lines much as it has treated refusals to cross picket lines—that is, by considering whether a refusal to honor a picket line is protected activity. No case involving a decision to cross picket lines has been discussed on the basis of this analysis. Instead, the Board and the courts have stressed the right of labor unions to punish those who seek to refrain from exercising rights that the Board so assiduously protects in other contexts. The road to *Allis-Chalmers* (Local 248, UAW (*Allis-Chalmers Mfg. Co.*), 149 N.L.R.B. 67 (1964), *enforcement denied sub nom. Allis-Chalmers Mfg. Co. v. NLRB*, 358 F.2d 656 (7th Cir. 1966), *rev'd*, 388 U.S. 175 (1967)), which upheld the authority of a union to discipline its members for crossing a picket line, contrasts strangely with the path adhered to by the Board in refusal cases.