

May 1976

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*Protest Groups and Labor Disputes - Toward a Definition of "Labor Organization": Center for United Labor Action*, 17 Wm. & Mary L. Rev. 796 (1976), <https://scholarship.law.wm.edu/wmlr/vol17/iss4/8>

## PROTEST GROUPS AND LABOR DISPUTES—TOWARD A DEFINITION OF "LABOR ORGANIZATION": CENTER FOR UNITED LABOR ACTION

Expansion of the protest movement of the sixties into labor relations has spawned a new problem in the interpretation of the National Labor Relations Act (NLRA)<sup>1</sup>: Whether protest groups such as the Center for United Labor Action (CULA)<sup>2</sup> are labor organizations<sup>3</sup> within the meaning of the Act. Such a determination is fundamental in that under the NLRA only labor organizations<sup>4</sup> may be guilty of the unfair labor practice of secondary consumer boycotts,<sup>5</sup> or picketing to effect a total boycott of a neutral employer.

In *Center for United Labor Action (CULA)*,<sup>6</sup> CULA, supporting the Amalgamated Clothing Workers of America's (ACWA) drive to organize the employees of Farah Manufacturing Company (Farah), undertook a secondary boycott of Sibley's Department Store to persuade Sibley's to cease selling Farah products.<sup>7</sup> Holding that CULA was not a labor organization under the NLRA, the National Labor Relations Board (Board) dismissed Sibley's complaint against the organization.<sup>8</sup> In so concluding, the Board adopted the administrative law judge's

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1. The National Labor Relations Act (Wagner Act), 49 Stat. 449 (1935), as amended by the Labor Management Relations Act (Taft-Hartley Act), 61 Stat. 136 (1947), constitutes the National Labor Relations Act, 29 U.S.C. §§ 151-68 (1970).

2. CULA is a group "devoted to the advancement of all workers of all races and nationalities in the struggle against U.S. Corporations," Administrative Law Judge's Decision Case 3-CC-808, slip opinion at 5, and "resembles many of the anti-war and civil rights protest groups which emerged during the past decade." Brief for Respondent at 3, *Center for United Labor Action*, 219 N.L.R.B. No. 158, 90 L.R.R.M. 1004 (July 30, 1975).

3. This issue is not unique to the recent protest movement. See *Porto Mills, Inc.*, 149 N.L.R.B. 1454, 57 L.R.R.M. 1504 (1964); *Local Union 8505, District 30, UMW*, 146 N.L.R.B. 652, 55 L.R.R.M. 1368 (1964).

4. Although prior to the Taft-Hartley amendments only an employer was subject to the prohibitions of the NLRA, the amendments precluded unfair labor practices by labor organizations as well, 29 U.S.C. § 158(b) (1970), thus making the NLRA potentially more relevant to protest groups.

5. See notes 11-19 *infra* & accompanying text.

6. 219 N.L.R.B. No. 158, 90 L.R.R.M. 1004 (July 30, 1975).

7. For the details of the Farah dispute see *Center for United Labor Action*, 219 N.L.R.B. No. 158, 90 L.R.R.M. 1004 (July 30, 1975), Administrative Law Judge's Decision, Case 3-CC-808, slip opinion at 3, and Brief for the Respondent at 4-5, *Center for United Labor Action*, *supra*.

8. *Center for United Labor Action*, 219 N.L.R.B. No. 158, 90 L.R.R.M. 1004 (July 30, 1975).

decision and approved, in dicta, the judge's proposed standard: that to qualify as a labor organization the group must be *selected by* employees for the purpose of *resolving* their conflicts with employers.<sup>9</sup> The Board, however, rejected the judge's subsidiary finding that CULA, by dealing indirectly with the employer, met the literal definition of "labor organization,"<sup>10</sup> and limited application of the term to groups dealing directly with employers.<sup>11</sup>

To clarify the statutory meaning of the term "labor organization" and thus ascertain its applicability to protest labor groups, the tests formulated by the judge and Board in *CULA* will be examined in relation to pertinent legislative history, case law, and national labor policy.

#### SECONDARY BOYCOTTS: THE PROHIBITED ACTIVITY UNDERTAKEN BY CULA

A consideration of the NLRA's prohibition of secondary boycotts is integral to understanding the dispute in *CULA*. Under section 8(b) (4) (ii) (B) of the Act<sup>12</sup> it is an unfair labor practice to threaten, coerce, or restrain any person with the object of forcing him to cease selling another's product. CULA's picketing of Sibley's, urging a total boycott of the store,<sup>13</sup> clearly constituted coercion of a secondary employer, for Sibley's, though not involved in the ACWA's dispute, was being forced either to cease dealing with Farah or suffer a loss of patronage.<sup>14</sup>

9. *Id.*

10. For the statutory definition of "labor organization" see note 25 *infra* & accompanying text.

11. Center for United Labor Action 219 N.L.R.B. No. 158, 90 L.R.R.M. 1004 (July 30, 1975).

12. Section 8(b) (4) (ii) (B) provides:

It shall be an unfair labor practice for a labor organization or its agents . . . to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . . forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . ."

29 U.S.C. § 158(b) (4) (ii) (B) (1970).

13. The boycott and picketing were not limited to Farah products but rather, as the placards indicated, applied to the entire store. Brief for Charging Party at 4.

14. In *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969), the Court stated: "The gravamen of a secondary boycott . . . is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employees' demands." *Id.* at 388, *quoting* *International Bhd. of Electrical Workers*

A proviso to section 8(b) (4),<sup>15</sup> however, does allow limited secondary activity by permitting publicity, other than picketing, for the purpose of informing the public "that a product . . . [is] produced by an employer with whom the labor organization has a primary dispute and [is] distributed by another employer . . . ." <sup>16</sup> In *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits)*<sup>17</sup> the Supreme Court construed this proviso expansively by holding that a labor organization could conduct picketing on the premises of a secondary employer so long as a boycott of the primary employer's product and not a boycott of the store itself was advocated.<sup>18</sup> As evinced by *Tree Fruits*, therefore, a boycott of Farah products by CULA clearly would have been allowable regardless of CULA's status as a labor organization.<sup>19</sup> CULA, however, by boycotting the entire store with the object of forcing Sibley's to either cease trading with Farah or lose business and

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Local 501 v. NLRB, 181 F.2d 34, 37 (2d Cir. 1950). Further evidence that CULA's activity fell within the prohibition of the Act is found in *Local 140, United Furniture Workers v. NLRB*, 390 F.2d 495, 502-03 (2d Cir.), cert. denied, 392 U.S. 905 (1968), and in *Hoffman v. International Typographical Local 37*, 243 F. Supp. 790, 791-92 (D. Hawaii 1965).

15. 29 U.S.C. § 158(b) (4) (1970). This proviso was added by the Landrum-Griffin Act § 704, 73 Stat. 541 (1959). For an interesting discussion of some of the negative features of these amendments see Petro, *Labor Relations Law*, 35 N.Y.U.L. Rev. 733, 757-61 (1960) in which the author asserts: "[a] measure of the inadequacy of Landrum-Griffin is that it approves by implication all such perversions of the basic policy of the Taft-Hartley Act, which was to confine work stoppages and labor disputes to the parties immediately involved." *Id.* at 759.

In Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257 (1959), the author discusses thoroughly the major modifications achieved by the amendments.

16. 29 U.S.C. § 158(b) (4) (1970).

17. 377 U.S. 58 (1964).

18. *Id.* at 71. The slogans on the picket signs specified that the boycott was against a particular product (apples packed by nonunion firms employing strike breakers) and *not* against the store.

The *Tree Fruits* decision is significant in that the Court, acknowledging that picketing to persuade customers not to buy products of the primary employer was impermissible under the literal language of the statute, nonetheless allowed it, reasoning that Congress' intent was not to prohibit such conduct. *Id.* at 70-71. For an analysis of the *Tree Fruits* doctrine see 3 JENKINS, *LABOR LAW* §§ 16.9-16.12 (1974) and Lewis, *Consumer Picketing and the Court—The Questionable Yield of Tree Fruits*, 49 MINN. L. REV. 479 (1965), in which the author suggests that the Court, in reaching the result in *Tree Fruits*, "strained the arguably 'plain meaning' of the section coupled with its proviso, and overcame a legislative history which seemingly compelled a contrary conclusion [that all consumer picketing was forbidden]." *Id.* at 481.

19. This is the type of boycotting engaged in by the ACWA. Brief for the Charging Party at 3.

customers,<sup>20</sup> aided the ACWA by doing what the ACWA, a labor organization, could not do.

### THE REQUISITE ELEMENTS OF A LABOR ORGANIZATION

Although not a conventional labor union,<sup>21</sup> CULA possesses many of the characteristics of a union<sup>22</sup> in that it participates extensively in picketing and leafleting.<sup>23</sup> In *CULA*, however, the organization was neither formally selected by the employees of Farah to represent them nor did it collectively bargain for them.<sup>24</sup> In this respect it differed from the traditional union.

As defined in section 2(5) of the NLRA,<sup>25</sup> the term "labor organization" means "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."<sup>26</sup> The breadth of this description implies that even an unstructured protest group, although not a conventional labor union, may fall within the purview of the Act. Examination of the critical elements of the terms "organization," "employee participation," and "dealing" establishes the applicability of the Act to groups such as CULA.<sup>27</sup>

CULA, as is characteristic of activist protest groups, is loosely structured.<sup>28</sup> There are no officers; rather, it is run by a self-appointed chair-

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20. CULA's news release stated its purpose was to stop Farah's strike breaking policy. *Id.*

21. One of CULA's leaflets stated: "We should explain that [CULA] is not a union, and [that we] could not ourselves conduct an organizing drive." Center for United Labor Action, 219 N.L.R.B. No. 158, 90 L.R.R.M. 1004 (July 30, 1975), Administrative Law Judge's Decision, Case 3-CC-808, slip opinion at 6. CULA's basic purpose was to aid the unorganized in forming a union, *id.* at 5, in order to improve workers' wages and working conditions. Their motto is: "If you haven't got a union—Fight to get one! If you have one—Fight to make it fight!" *Id.*

22. *Id.* at 9.

23. CULA's activities are described in detail by the Administrative Law Judge. *Id.* at 3-7.

24. *Id.* at 4, 6.

25. 29 U.S.C. § 152(5) (1970).

26. *Id.*

27. A fourth element in the definition of "dealing" is "subject matter," which involves ascertaining whether the dealing concerns, as the statute requires, grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. As this element was not at issue in *CULA* or in any of the cases discussed herein, it is without the scope of this Comment.

28. For a description of CULA's structure see Center for United Labor Action,

person or steering committee. Even though the group maintains a list of those making donations, it has no members in the ordinary sense. No dues are collected; no evidence of membership is issued. Under a narrow interpretation of section 2(5), a group as unstructured as CULA might fail to meet the "organization" element.<sup>29</sup> Case law<sup>30</sup> and the legislative history<sup>31</sup> of the section, however, rather than substantiating such a narrow interpretation, have mandated that no formal structure is required.<sup>32</sup> A "loosely-formed committee" will suffice.<sup>33</sup> The group need

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219 N.L.R.B. No. 158, 90 L.R.R.M. 1004 (July 30, 1975), Administrative Law Judge's Decision, Case 3-CC-808, slip opinion at 3-4.

29. Notably, under 29 U.S.C. § 185(b) (1970) and 29 U.S.C. § 187 (1970), a labor organization can be sued as an entity for damages collectible only from the organization and not from its members. This may indicate that the organization must have at least enough structure and sufficient continuous membership to determine who can speak for the group as an entity, who should be served with process, and who is responsible for the group's funds.

30. See notes 32-38, 77-82 *infra* & accompanying text.

31. S. REP. No. 573, 74th Cong., 1st Sess. 7 (1935). See also *Indiana Metal Prods. Corp. v. NLRB*, 202 F.2d 613 (7th Cir. 1953). There the court stated: "The legislative history shows that the definition of the term 'labor organization' was purposefully phrased very broadly." *Id.* at 621 (footnote omitted).

32. As stated in *NLRB v. Ampex Corp.*, 442 F.2d 82 (7th Cir. 1971), "[t]he statute has been broadly construed, both with respect to absence of formal organization and the type of interchange between the parties which may be deemed 'dealing.'" *Id.* at 84 (footnotes omitted). In *Ampex*, the committee held to be a labor group consisted of employees chosen at random on a rotating basis and thus lacked continuous membership. The corporation compared the group to a personal suggestion box. *Id.*

33. See e.g., *Western Addition Commun. Org. v. NLRB*, 485 F.2d 917 (D.C. Cir. 1973), *rev'd on other grounds sub nom.*, *Emporium Capwell Co. v. Western Addition Commun. Org.*, 95 S. Ct. 977 (1975) (dissident labor group deemed a labor organization despite its loose structure because it sought direct bargaining with the employer); *NLRB v. Clapper's Mfg. Inc.*, 458 F.2d 414 (3d Cir. 1972) (group deemed a labor organization despite its amorphous structure because its purpose and function was to deal with management); *Indiana Metal Prods. Corp. v. NLRB*, 202 F.2d 613, 621 (7th Cir. 1953) (absence of formal organization does not invalidate labor organization status); *NLRB v. American Furnace Co.*, 158 F.2d 376, 378 (7th Cir. 1946) (labor organization existed despite lack of formal organization, continuity from one committee to another, constitution, or by-laws).

For articles dealing with the labor organization status of such loosely structured groups as civil rights organizations and faculty senates see: Gould, *Black Power in the Unions: The Impact Upon Collective Bargaining Relationships*, 79 YALE L.J. 46, 73-77 (1969) (committees of black worker and civil rights groups which intervene on behalf of minority group employees); Herman, *Private Arrangements and Agreements for Employment of Minority Groups*, N.Y.U. 24TH CONF. ON LABOR 279, 304-05 (1971) (civil rights organizations involved in employment disputes qualify as labor organizations); Kahn, *The NLRB and Higher Education: The Failure of Policymaking Through Adjudication*, 21 U.C.L.A.L. REV. 63, 147-51 (1973) (faculty senate is a labor organization under the inclusive statutory definition); Meltzer, *The NLRA and*

not have officers, a charter, by-laws, or a constitution.<sup>34</sup> Nor are membership requirements, dues, or funds necessary.<sup>35</sup>

In light of the consistently liberal interpretations<sup>36</sup> of "organization," it appears that a group even less structured than CULA would come within the ambit of this term under section 2(5). In *NLRB v. Kenametal, Inc.*,<sup>37</sup> for instance, a group of workers who suddenly decided to visit the president's office and demand higher wages was held to be a labor organization.<sup>38</sup> The implication of this decision is that any protest group, no matter how loosely formed, will be deemed an organization under the Act. Illustrative of such groups are two individuals who, upon seeing one another in front of a store, agree to take shifts and picket, or interested citizens who decide spontaneously to join and picket a store because of their support for workers whose employer

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*Racial Discrimination*, 42 U. CHI. L. REV. 1, 35 (1974) (loosely structured dissident racial minority group a labor organization).

34. See, e.g., *NLRB v. Sterling Elec. Motors, Inc.*, 109 F.2d 194, (9th Cir. 1940); *Clapper's Mfg., Inc.*, 186 N.L.R.B. 324, 333, 75 L.R.R.M. 1349 (1970); *Yale Univ.*, 184 N.L.R.B. 746, 75 L.R.R.M. 1190 (1970); *Coppus Eng'r. Corp.*, 115 N.L.R.B. 1381, 1391, 38 L.R.R.M. 1079 (1956).

35. See, e.g., *NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 209 (1959); *Utrad Corp.*, 185 N.L.R.B. 434, 440, 75 L.R.R.M. 1069 (1970).

36. This statement must be qualified in that none of the cases construing the term "organization" were concerned with a suit against the organization for an unfair labor practice; rather, they all concerned unfair labor practices by the employer. Notably, though, *Indiana Metal Prods. Corp. v. NLRB*, 202 F.2d 613, 621 (7th Cir. 1953), involved a charge that an employee had been wrongfully discharged due to participation in a labor organization. The other cases involved charges that the company had dominated the labor organization. See notes 32-35 *supra*. Thus, none concerned the problems of suing a labor organization. See note 29 *supra*. Consequently, it is conceivable that a court might find a group to be an organization under the NLRA if an unfair labor practice by the company is involved, but not such an organization if an unfair labor practice by the group is involved.

37. 182 F.2d 817 (3d Cir. 1950).

38. The facts in *Kenametal* illustrate how informal the organization of a labor group might be. Several employees were discussing wages at work when one suggested they present their grievances to the company president. As they walked to his office their members increased to approximately one hundred. The court stated: "It seems perfectly clear to us that the employees who informally joined together to present their grievances . . . fall well within the statutory definition [of labor organization]." *Id.* at 818.

Similarly, in *National Packing Co. v. NLRB*, 377 F.2d 800 (10th Cir. 1967), the court held that a group of employees who spontaneously picketed their employer to protest unsafe working conditions constituted a labor union, for although the employees "did not have the organic structure of a typical labor union, they were a group which acted in unison to obtain mutual objectives by combined efforts." *Id.* at 803. See also *Gullett Gin Co. v. NLRB*, 179 F.2d 499 (5th Cir. 1950); *Smith Victory Corp.*, 90 N.L.R.B. 2089, 26 L.R.R.M. 1420 (1950).

sells products through the store, or finally, several dissenting CULA members who agree to picket, contrary to their group's decision. Such ad hoc protest groups are less structured than CULA in that they are not "highly purposed with a *continuous* existence."<sup>39</sup> Yet under the standards of *Kennametal* they surely would be deemed organizations. Indeed, under the *Kennametal* interpretation of section 2(5), perhaps only a single picket would be outside the ambit of the "organization" element.

As illustrated, "the degree of organization necessary to qualify as a labor [union] is absolutely minimal."<sup>40</sup> Similarly, the requirement that employees participate in the labor group is construed expansively. Although in *CULA* both parties stipulated that this element was met,<sup>41</sup> the broader question of the applicability of the Act to protest groups in general merits discussion of the "employee participation" factor. Section 2(3) of the NLRA states that the term "employee" includes any employee and is not restricted to those of a particular employer.<sup>42</sup> Congress, in drafting such an inclusive definition, acknowledged that "disputes may arise regardless of whether the disputants stand in the proximate relation of employer and employee . . . ." <sup>43</sup> The Supreme Court further expanded the meaning of "employee" by holding that it included workers who, after being discharged, had obtained employment elsewhere.<sup>44</sup> As asserted in *Marine Engineers Beneficial Association v. Interlake Steamship Co.*,<sup>45</sup> interpreting the "employee participation" element, whenever a reasonably arguable case is made, the courts should invest a union with labor organization status.<sup>46</sup> In view of the liberal

39. Center for United Labor Action, 219 N.L.R.B. No. 158, 90 L.R.R.M. 1004 (July 30, 1975), Administrative Law Judge's Decision, Case 3-CC-808, slip opinion at 9.

40. Herman, *Private Arrangements and Agreements for Employment of Minority Groups*, N.Y.U. 24TH CONF. ON LABOR 279, 304-05 (1971).

41. 219 N.L.R.B. No. 158, 90 L.R.R.M. 1004 (July 30, 1975), Administrative Law Judge's Decision, Case 3-CC-808, slip opinion at 8.

42. 29 U.S.C. § 152(3) (1970).

43. H.R. REP. NO. 1147, 74th Cong., 1st Sess. 9 (1935), reprinted in 2 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, (1935), at 3056 [hereinafter cited as 2 HISTORY OF THE N.L.R.A.], quoted in *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 192 (1941).

44. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 189-197 (1941).

45. 370 U.S. 173 (1962).

46. *Id.* at 182. This is significant in that, unlike the cases which support applying the "organization" element to CULA, see notes 31-34 *supra*, *Marine Engineers* involved secondary picketing and an unfair labor practice charge against the organization. 370 U.S. at 183. The Court held that even though the organization consisted partially of supervisors, it could be considered an organization in which employees participate, *id.*



construction of the term "employee," it appears that a protest group composed only of unemployed persons who have not worked recently would fail to satisfy the "employee participation" element. Such an expansive interpretation may be of dubious validity whenever one's status as an employee is unrelated to the dispute.<sup>47</sup> To be distinguished, however, is the situation in which the employee previously worked for the company involved in the dispute or for one doing business with that company.

The "dealing" element, pivotal to *CULA*, is the most complex component of the term "labor organization,"<sup>48</sup> as evidenced by the various interpretations of that element articulated by the judge and Board. The judge, for example, stated in dicta that indirect dealing with an employer (dealing by means other than direct requests or face-to-face negotiations) fulfilled the literal definition of "dealing,"<sup>49</sup> but that this interpretation frustrated the spirit of the NLRA when applied to *CULA*.<sup>50</sup> He there-

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at 183-84, despite the definition in section 2(11) of the NLRA, 29 U.S.C. § 152(11) (1970), clearly distinguishing supervisors from employees.

For other cases refusing to narrow the scope of the definition despite the membership of supervisors or other exempt workers see *NLRB v. Edward G. Budd Mfg. Co.*, 169 F.2d 571, 576 (6th Cir. 1948); *Ravenna Arsenal, Inc.*, 98 N.L.R.B. 1, 29 L.R.R.M. 1283 (1952); *American Bdcstg. Co.*, 96 N.L.R.B. 1410, 27 L.R.R.M. 1585 (1951); *Teamsters, Local 87*, 87 N.L.R.B. 720, 721, 25 L.R.R.M. 1223 (1949).

47. For example, although it appears reasonable to classify as an employee a person who has recently been discharged by the company with which there is a dispute, there is no reason so to classify one who never has had any dealings with the company involved despite his employee status with another firm.

48. 29 U.S.C. 152(5) (1970). Notably, in determining whether an organization exists "for the purpose in whole or in part of dealing with employers," 29 U.S.C. § 152(5) (1970), case law has focused on both the declared purpose of the group as well as its actual dealings. The Court in *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959), noting that courts consistently had held that employee committees which functioned similarly to those in this case were labor organizations, *id.* at 212, expressly considered not only the declared purpose but also the actual function of the group. *Id.* at 213. Similarly, in *Indiana Metal Prods. Corp. v. NLRB*, 202 F.2d 613 (7th Cir. 1953), the court emphasized not only the purpose for which the committee was established but also the fact that "in practice the committee [had] functioned as a vehicle for the discussion . . . of working conditions." *Id.* at 621.

49. 219 N.L.R.B. No. 158, 90 L.R.R.M. 1004 (July 30, 1975), Administrative Law Judge's Decision, Case 3-CC-808, slip opinion at 8-10.

50. *Id.* at 10-11. The judge did not articulate clearly why the dealing engaged in by *CULA* affronted the spirit of the NLRA. He apparently believed that the goal of the Act, to maintain industrial peace, was fulfilled by allowing employees to *select* representatives and *resolve* disputes with management. Positing that a group falling without this definition was not covered by the NLRA, the judge then implied that the required "resolving" element demanded more than such indirect dealing as picketing and leaf-letting. *Id.* It is submitted that the validity of this reasoning is questionable. See notes 74-89 *infra* & accompanying text.

fore refused to vest the group with labor organization status. The Board, however, eschewed the contention that indirect dealing manifested even the letter of the law, and held that the Act concerned only direct dealing consisting of face-to-face negotiations.<sup>51</sup> Finally, under the standard adopted by the judge as dispositive and by the Board in dicta,<sup>52</sup> to adhere to the spirit of the NLRA not only must the organization deal directly with the employer, but further, it must have been *selected* by the employees for the purpose of resolving their conflicts with employers.<sup>53</sup>

*The Direct and Indirect Dealing Tests: Which Is Warranted by the Act?*

In considering whether the letter of the law requires direct dealing only, it first should be noted that the cases construing the "dealing" element dictate a liberal interpretation.<sup>54</sup> In *NLRB v. Cabot Carbon Co.*,<sup>55</sup> the leading case interpreting the phrase, the Supreme Court stated that the term is more inclusive than "bargaining,"<sup>56</sup> thus corroborating the view that indirect dealing satisfies the letter of the law since bargaining requires *direct* negotiation. The labor organization in *Cabot Carbon*, however, in meeting with company officials to discuss wages, hours, and conditions of employment, did deal directly.<sup>57</sup> Notably though, because the organization did not deal at arms length, but rather, simply made recommendations subject to final disposition by the management,<sup>58</sup> it did not engage in collective bargaining.<sup>59</sup> In *NLRB v. Ampex*

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51. 219 N.L.R.B. No. 158, 90 L.R.R.M. 1004 (1975).

52. *Id.*

53. *Id.*, Administrative Law Judge's Decision, Case 3-CC-808, slip opinion at 10-11.

54. See notes 55-69 *infra* & accompanying text.

55. 360 U.S. 203 (1958). *Accord*, Jansen Electronics Mfg., Inc., 153 N.L.R.B. 1555, 1558, 59 L.R.R.M. 1750 (1965).

56. 360 U.S. at 210-14. The Court based its interpretation in part on the plain words of the statute, concluding that "[c]ertainly nothing in [the] section indicates that the broad term 'dealing with' is to be read as synonymous with the more limited term 'bargaining with.'" *Id.* at 211. Also considered significant was that the then Secretary of Labor's proposal to substitute the term "bargaining collectively" for "dealing" was not adopted. *Id.* See *Indiana Metal Prods. Corp. v. NLRB*, 202 F.2d 613, 620-21 (7th Cir. 1953) (advisory committee formed as *substitute* for bona fide bargaining representative held to be labor organization).

57. 360 U.S. at 213.

58. *Id.* at 214. But see Petro, *Labor Relations Law*, 35 N.Y.U.L. REV. 733 (1960), in which the author propounds that the Court in *Cabot Carbon* made a "specious and wooden interpretation of the statute" when it found that a group which did "nothing remotely resembling collective bargaining" was a labor organization. *Id.* at 765-66. Criticizing what he views as the Court's highly questionable interpretation of the expression, *id.* at 766, the author concludes that simple discussion of grievances does not constitute

*Corp.*<sup>60</sup> the Court of Appeals for the Seventh Circuit concurred in the *Cabot Carbon* determination as to the extent of dealing required for a labor organization.<sup>61</sup> Yet, by noting that the committee suggestions therein examined often resulted in action by management,<sup>62</sup> the court implied that some action must be taken upon such requests to satisfy the dealing requirement. Apparently, however, the more reasonable interpretation of *Cabot Carbon* is that mere communication of proposals constitutes dealing;<sup>63</sup> the management may act upon such suggestions, but it need not do so.<sup>64</sup> In further support of this more inclusive view, the Court of Appeals for the Seventh Circuit held in *NLRB v. Thompson Ramo Wooldridge, Inc.*<sup>65</sup> that even "express recommendations [are] not essential to 'dealing,' if discussion . . . was designed to remedy grievances."<sup>66</sup>

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dealing; rather, something more "formal and binding, along the lines of a collective agreement," is necessary. *Id.* In *Cabot Carbon*, he maintains, the committee did not deal but merely "advised with." The author concurs, therefore, with the opinion of the Fifth Circuit in *Cabot Carbon Co. v. NLRB*, 256 F.2d 281 (5th Cir. 1958), rejected by the Supreme Court, that, as the proscriptions against unfair practices were meant to preclude employers from coercing employees' decisions regarding unionization and as no coercion was present, Section 9(a), explicitly authorizing employees to present grievances to their employers and to have such grievances resolved, was the more pertinent provision to apply. Petro, *Labor Relations Law*, 35 N.Y.U.L. REV. 733, 766-67 (1960).

59. For a description of the bargaining procedure which does entail proposals and counterproposals see H.R. REP. NO. 245, 80th Cong., 1st Sess. 21-23 (1947), reprinted in 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 312-14 (1947) [hereinafter cited as 1 HISTORY OF THE L.M.R.A.].

60. 442 F.2d 82 (7th Cir. 1971).

61. *Id.* at 84.

62. *Id.*

63. But see *Holland Mfg. Co.*, 129 N.L.R.B. 776, 784, 47 L.R.R.M. 1067 (1960); *Whirlpool Corp.*, 126 N.L.R.B. 1117, 1133, 45 L.R.R.M. 1445 (1960) (in both cases, the Board concluded that because of specific action taken on numerous complaints the committees were labor organizations that existed not merely to transmit information but also to settle grievances and to deal with management).

64. See, e.g., *Clapper's Mfg., Inc.*, 186 N.L.R.B. 324, 333, 75 L.R.R.M. 1349 (1970). (although specific action was taken to remedy some complaints, management made no promises to act but simply to consider and look into matters); *Utrad Corp.*, 185 N.L.R.B. 434, 441, 75 L.R.R.M. 1069 (1970) (despite the corporate president's statement that he could not negotiate but would only consider proposals, labor organization status was affirmed). Notably, in *Utrad*, even though the group functioned principally as a social organization, it was considered a labor organization because it existed in part for purposes of working with management concerning employee complaints.

65. 305 F.2d 807 (7th Cir. 1962).

66. *Id.* at 810. See also *NLRB v. Jas. H. Mathews & Co.*, 156 F.2d 706 (3d Cir. 1946). In *Thompson Ramo Wooldridge, Inc.* 132 N.L.R.B. 993, 48 L.R.R.M. 1470 (1961),

Because the cases discussed above involved direct exchanges, the broad construction of "dealing" established by them is not dispositive of whether "dealing" may be indirect. An organization, for example, may convey its demands to management by printing requests on signs carried by pickets rather than by conveying them in oral confrontation. Does such indirect communication constitute "dealing"? One Board decision, *Porto Mills, Inc.*,<sup>67</sup> answered this question affirmatively when it found that striking and picketing by a militant anti-union group for the ouster of a union employee constituted dealing with respect to the working conditions of the company.<sup>68</sup> By adopting the direct dealing standard in *CULA*, however, the Board overruled *sub silentio* its decision in *Porto Mills, Inc.*<sup>69</sup>

ARE THE REQUIREMENTS THAT A GROUP BE SELECTED BY EMPLOYEES FOR RESOLVING CONFLICTS WITH EMPLOYERS MERITED UNDER THE ACT?

As previously noted, the administrative law judge in *CULA* departed from a literal interpretation of section 2(5) and added two elements to the statutory definition of "labor organization" when he stated that such a group must be *selected by* employees with the basic objective of *resolving* their disputes with employers.<sup>70</sup> Apparently, the judge

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*enforced as modified*, 305 F.2d 807 (7th Cir. 1962), even an agreement between the organization and the employer that the association was not to act as a labor organization was held not determinative.

67. 149 N.L.R.B. 1454, 57 L.R.R.M. 1504 (1964). This decision is relied upon heavily by the dissent in *CULA*, 219 N.L.R.B. No. 158, 90 L.R.R.M. at 1006.

68. 149 N.L.R.B. at 1472. The principal activity of the committee was striking and picketing. As noted by the Board, however, a group of anti-union employees had also personally informed the manager of their stance. *Id.* at 1472 n.35. The committee had contended it was not a labor organization because its sole purpose was to oppose unionism. *Id.* Although accepting this to be the committee's primary goal, and recognizing the anomaly of holding that an anti-union group qualifies as a labor union, *id.* at 1472, the Board complied with the congressional intent to extend coverage beyond conventional labor organizations to include those which might effectively thwart employee self-organization and selection of collective bargaining representatives, and concluded that the committee was a labor organization. *Id.*

69. Another case, Local 8505, UMW, 146 N.L.R.B. 652, 55 L.R.R.M. 1368 (1964), which may be interpreted as involving indirect dealing with employers by means of pickets, reached the opposite result from *Porto Mills, Inc.* The decision, however, is not determinative of the need for direct dealing in that it was predicated not on the absence of *direct* communication with the employer, but rather on the *lack* of any dealing at all with management.

70. 219 N.L.R.B. No. 158, 90 L.R.R.M. 1004, Administrative Law Judge's Decision, Case 3-CC-808, slip opinion at 11. (July 30, 1975). This test was approved by the Board in dicta.

derived his two-step test from section 1 of the NLRA,<sup>71</sup> which states that the means for achieving the Act's overriding policy of eliminating obstructions to the free flow of commerce is "by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of *their own choosing*, for the purpose of *negotiating* the terms and conditions of employment or other mutual aid or protection."<sup>72</sup> Notably, the policy statement quoted by the judge mentions choosing groups not only for the purpose of negotiating, but also for other "mutual aid or protection," implying that a group which does not seek to resolve disputes but merely attempts to make recommendations would fulfill the cited policy objectives as well. Because policy statements are not designed to serve as constructs for the development of rigid tests, however, it is submitted that the two-step test developed by the judge in *CULA* is both artificial *and* unduly narrow.<sup>73</sup> Moreover, assuming *arguendo* that the NLRA mandates such

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71. 29 U.S.C. § 151 (1970).

72. 219 N.L.R.B. No. 158, 90 L.R.R.M. 1004, Administrative Law Judge's Decision, Case 3-CC-808, slip opinion at 10 n.11, *quoting* 29 U.S.C. § 151 (1970) (emphasis supplied). The judge's focus on negotiation was based on a narrow conception of the policy or spirit of the Act. Legislative history does offer some support for the narrower view. For example, S. REP. NO. 573, 74th Cong., 1st Sess. 2 (1935), *reprinted in* 2 HISTORY OF THE N.L.R.A., *supra* note 43, at 2301, asserts that 25 percent of all strikes result from the failure to use collective bargaining and that the NLRA should create the machinery to facilitate collective bargaining. This supports the emphasis on negotiation. However, legislative history can also be evoked to challenge this narrower view.

H.R. REP. NO. 245, 80th Cong., 1st Sess. 10-11 (1947), *reprinted in* 1 HISTORY OF THE L.M.R.A., *supra* note 59, at 301-02, explains that Congress intended section 2 to mean that workers should be protected in exercising their rights to collectively bargain, "but *only* when they wished to do so." *Id.* (emphasis supplied). Significantly, the Report notes that the Board had mistakenly interpreted the language as commanding employees to bargain collectively "even against their will." *Id.* at 302. In other words, collective bargaining is admittedly an encouraged but not a compelled means of achieving industrial peace. So long as an opportunity is provided whereby one may freely choose representatives who may then, if desired, bargain collectively, the Act's mandate is vindicated for "the underlying concept of the act [is] that an effective guarantee to employees of the right to organize and to bargain collectively *or to refrain from such activity* [will] allay industrial disruption . . ." Ordman, *The National Labor Relations Act: Current Developments*, N.Y.U. 24TH CONF. ON LABOR 115, 117 (1971).

73. The judge's argument also fails to consider that the NLRA provides other means for accomplishing its overriding aim of obviating industrial disruption: for example, the proscription of secondary boycotts under the Taft-Hartley amendments. As evinced by the legislative history, one of the primary goals of the Taft-Hartley amendments was to end prevalent industrial disturbances, not as in the NLRA, through the encouragement of collective bargaining, but rather, through the restriction

a test, the impracticality of its application becomes clear once the "selected by" and "resolved" elements are properly defined.

The "selected by" element should be deemed satisfied not only when an organization has been selected by employees, but also when an organization seeks to represent or seeks to be selected by employees. A contrary conclusion would emasculate section 8(b)(7)<sup>74</sup> of the NLRA,

of secondary boycotts. See H.R. REP. NO. 245, 80th Cong., 1st Sess. 3-6 (1947), reprinted in 1 HISTORY OF THE L.M.R.A., *supra* note 59, at 294-97, quoted in Brief for Charging Party at 16. Picketing a neutral employer's place of business was outlawed in the NLRA because, as the report noted, such businesses often had been incapacitated and the flow of commerce thus impeded by disputes to which the employer was not a party and in which he had no interest. *Id.* For both a detailed analysis of the statute's history and an explication of the interrelation of section 8(b)(4)(B), which proscribes secondary boycotts, with other sections see *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612 (1967). See generally 3 JENKINS, LABOR LAW 423-507 (1974).

By precluding labor organizations from coercing a neutral employer to stop trading with the primary employer, the amendments sought to inhibit industrial conflicts. As a group must be a labor organization to be subject to the prohibitions of the NLRA, the judge's more restrictive standard arguably is unjustified. A counterargument, however, to concluding that the policy against secondary boycotts supports a more expansive definition is that the examples of disruptive, undesirable secondary activity cited by the proponents of the amendments are distinguishable from picketing by protest groups, in that they involved traditional unions and generally dealt with boycotts in which control over the employees, not over the employer, was sought. A central theme recurrent throughout these provisions is the desire to promote industrial well-being and especially to protect employers from union pressures aimed at involving him in disputes not his own. The proponents of the amendments cited numerous examples of such attempts to involve neutral employers: 93 CONG. REC. 3534 (1947) (remarks of Representative Hart), reprinted in 1 HISTORY OF THE L.M.R.A., *supra* note 59, at 613-14; 93 CONG. REC. 3359 (1947) (remarks of Representative Budi), reprinted in 1 HISTORY OF L.M.R.A., *supra* note 59, at 658-59 (both citing attempts by unions to force employees to join by refusing to deliver or handle employers' goods); 93 CONG. REC. 3954 (1947) (remarks of Senator Taft), reprinted in 2 HISTORY OF L.M.R.A., *supra* note 43, at 1012 (citing as one type of action a union's refusal to handle an employer's product because it was made by another union); 93 CONG. REC. 5147 (1947) (remarks of Senator Ball), reprinted in 2 HISTORY OF THE L.M.R.A., *supra* note 43, at 1497 (primary objective of the majority of secondary boycotts is not the employer but the employee over whom control is sought). Although picketing such as CULA's, in front of a retail establishment, is exertion of economic pressure against the business, it is different from the preceding examples in that the pickets are addressing their message to the public in general rather than to the employees or other union affiliates. However, although the examples are different in that sense from CULA's activity, the congressmen made it clear they were illustrating one type of secondary activity.

74. 29 U.S.C. § 158(b)(7) (1970). The section provides that it shall be an unfair labor practice to picket "[W]here an object thereof is . . . forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative . . ." *Id.*

which restricts organizational and recognitional picketing by an uncertified labor union; for clearly a union picketing to organize or be recognized by workers has not yet been selected by those workers.<sup>75</sup>

Moreover, a broad definition of the "selected by" element is consistent with case law that has deemed as labor organizations groups which lack a formal structure, a constitution, officers, and dues or membership requirements.<sup>76</sup> Thus, in the *Cabot Carbon* line of cases,<sup>77</sup> company-dominated grievance committees were deemed labor organizations, indicating the selection of a group need not be entirely the unrestricted choice of employees. And in *Porto Mills, Inc.*<sup>78</sup> a committee formed solely to oppose unionization was deemed a labor organization although the group was not selected by the employees but rather, sought to represent the workers in expressing their grievances.<sup>79</sup> Significantly, in finding that the committee was a labor organization, the trial examiner focused upon the fact that the group acted in concert in striking and picketing rather than that it acted as the representative of the employees.<sup>80</sup> Finally, as noted earlier, in *NLRB v. Kennametal, Inc.*<sup>81</sup> an ad hoc group that spontaneously decided to present grievances to an employer was deemed a labor organization.<sup>82</sup>

The apparent conclusion to be drawn from these cases and from the language of section 8(b)(7) is that a group acting for the benefit of employees and exhibiting some indicia of employee approval of its activities will meet the "selected by" element. That element, then, requires no more than the previously discussed broadly-defined requisite that a labor organization be a group evidencing "employee participation." It therefore serves no purpose and is in fact potentially dangerous, for if utilized, it may be construed too narrowly, the result of which would be to deny labor organization status to groups embodying both the letter and spirit of the NLRA.<sup>83</sup>

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75. Such an interpretation is suggested by *Simmons, Inc. v. NLRB*, 287 F.2d 628 (1st Cir. 1961), which stated: "If . . . it sought to have itself recognized or bargained with, then it acted as a labor organization." *Id.* at 629.

76. See notes 33-40 *supra* & accompanying text.

77. See notes 55-56 *supra* & accompanying text.

78. 149 N.L.R.B. 1454, 1471, 57 L.R.R.M. 1504 (1964).

79. It sought to represent workers in that it sought to convey to management the desire of the worker not to have a union. In a sense, it competed with the union for the right to represent workers. *Id.* Arguably, because of the existence of officers, a selection process occurred, but the Board did not discuss this point.

80. *Id.* at 1472.

81. 182 F.2d 817 (3d Cir. 1950).

82. See note 38 *supra* & accompanying text.

83. Although CULA may not have been selected by Farah employees in any

The meaning of the "resolving" element is equally problematic. The administrative law judge apparently concluded that existing for the purpose of resolving does not mean existing for the purpose of petitioning and persuading, for although he asserted that CULA "exists clearly, in part, to petition and persuade employers to specific conduct in labor disputes,"<sup>84</sup> he determined that CULA "did not exist for the purpose of adjusting or resolving the disputes in which [it had] become involved."<sup>85</sup> Clearly, as evinced in the Supreme Court's holding in *Cabot Carbon* that a group need not collectively bargain to be a labor organization, the judge could not have intended that resolving means collective bargaining.<sup>86</sup>

What then does resolving mean if it must entail something more than "petitioning and persuading" but less than collective bargaining or negotiating? If a group in dealing with employers advances beyond petitioning or persuading it appears that it then must entertain proposals and submit further counter-proposals: in short, negotiate or bargain.<sup>87</sup> As no intermediate step apparently exists, the judge's "resolving" test is rendered meaningless. As such, not only does the element add nothing to the statutory language, "exists . . . for the purpose of dealing with . . . ,"<sup>88</sup> it also compels the conclusion that CULA's activities suffice.<sup>89</sup>

### THE IMPLICATIONS OF CULA

As manifested in *CULA*, the crucial element in interpreting the term "labor organization" is "dealing." Consistent with an expansive interpretation of *Cabot Carbon*, the Board overruled *sub silentio* its earlier

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sense, see note 24 *supra* & accompanying text, CULA's activities in general seem to meet the proper *selected by* test; see note 23 *supra* & accompanying text; and in determining whether a group is a labor organization, its activities in general control.

84. 219 N.L.R.B. No. 158, 90 L.R.R.M. 1004, Administrative Law Judge's Decision, Case 3-CC-808, slip opinion at 9.

85. *Id.* at 11.

86. See note 55 *supra* & accompanying text.

87. For a description of the bargaining procedure which does entail proposals and counter proposals see H.R. REP. NO. 245, 80th Cong., 1st Sess. 21-23, *reprinted in* 1 HISTORY OF THE L.M.R.A., *supra* note 58, at 312-14.

88. 29 U.S.C. § 152(5) (1970).

89. In the dispute leading to the CULA litigation it is less than clear that CULA's purpose was to deal with Farrah, but CULA's other activities indicate that given this interpretation of the "resolving" element CULA did exist to deal with Farrah. See note 23, *supra* & accompanying text. As previously noted, the administrative law judge found that CULA met the test of the statutory language. See note 49 *supra* & accompanying text.



decision in *Porto Mills* by refusing to sanction an indirect dealing test. By approving, in dicta, the judge's "selected by" and "resolving" tests, however, the Board departed from a liberal construction of *Cabot Carbon* and cast doubt once again upon the continuing viability of *Porto Mills*.

The decision in *CULA*, that the protest labor group involved therein did not possess labor organization status, represents only a partial victory for CULA. Although the result permits groups such as CULA to engage in secondary boycotts unhampered by the prohibitions of the NLRA, it also may deny them the protections provided by certain sections of the Act. For example, section 8(a)(1)<sup>90</sup> makes it an unfair labor practice for an employer to interfere with employees desiring to form, join, and assist *labor organizations*. By implication, then, an employer could prevent his employees from participating in the activities of a protest group not deemed to be a labor organization. Moreover, section 8(a)(3)<sup>91</sup> prohibits discrimination with respect to hiring or tenure of employment as a means of discouraging membership in a labor organization, implying such discrimination could be employed to discourage membership in a non-labor organization. Once it is established that an organization does not fall within the ambit of the NLRA, federal preemption is not invoked,<sup>92</sup> and the group's activities, rather than being subject to the Board's exclusive jurisdiction,<sup>93</sup> may fall under the state law of trespass and interference with prospec-

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90. 29 U.S.C. § 158(a)(1) (1970).

91. 29 U.S.C. § 158(a)(3) (1970).

92. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 246 (1959) (espoused principle that whenever subject matter of an action involved conduct arguably protected or prohibited under the NLRA, subject matter was generally immune to other federal or state regulation). See also *Marine Eng'rs Beneficial Ass'n v. Interlake Steamship Co.*, 370 U.S. 173, 184 (1962) (dicta) (underlying issue on which Board's jurisdiction depended was determination that group was a labor organization).

93. See Petro, *Labor Relations Law*, 35 N.Y.U.L. REV. 733-47 (1960), for a penetrating criticism of *Garmon* and of the preemption doctrine, the effect of which has been a "series of catastrophic and destructive miscarriages of justice." *Id.* at 740. The author declares that in reality the preemption doctrine and *not* the participation of state courts in adjudicating unfair practice cases is thwarting national goals of alleviating industrial discord. *Id.*

For cases that have made inroads in *Garmon* see for example: *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971); *International Bhd. of Boilermakers v. Hardeman*, 401 U.S. 233 (1971); *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970). Furthermore, there are certain areas in which the states have been permitted to exercise jurisdiction despite *Garmon*. See, e.g., *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966); *Hanna Mining Co. v. District 2, Marine Eng'rs Beneficial Ass'n*, 382 U.S. 181 (1965).

tive advantage with their corresponding remedies of damages and injunction.<sup>94</sup>

Significantly, *CULA* creates the possibility that unions may circumvent the prohibition against secondary boycotts and violate the principal goal of allaying industrial strife by encouraging protest groups to use such proscribed tactics. The judge in *CULA* acknowledged that this is a serious and valid concern,<sup>95</sup> for although a union that provokes or instigates a wrong is a party to that wrong,<sup>96</sup> it may prove difficult to establish the requisite agency relationship so as to impute liability.<sup>97</sup>

Juxtaposed to the primary concern of promoting industrial harmony is that of guaranteeing, under the first amendment, the freedom to publicize peacefully a labor dispute.<sup>98</sup> By restricting the definition of

94. The imposition of state sanctions will be subject to first amendment protections. See *Thornhill v. Alabama*, 310 U.S. 88 (1940), in which picketing was proclaimed to be a form of first amendment speech.

95. Administrative Law Judge's Decision, Case No. 3-CC-808, slip opinion at 11.

96. *Selby-Battersby & Co. v. NLRB*, 259 F.2d 151, 157 (4th Cir. 1958); *IBEW, Local 501 v. NLRB*, 181 F.2d 34, 38 (2d Cir. 1950).

97. For example, a worker who was a member of a union could, without the knowledge or authorization of union leadership, organize a protest group to do what the union could not, knowingly circumventing the law to further the union's goal. Yet, unless an agency relationship could be established, the union could not be held responsible for the protest group's acts. But see *Sealright Pacific, Ltd.*, 82 N.L.R.B. 271, 23 L.R.R.M. 1572 (1949), in which the Board asserted that the question of the union's responsibility is not necessarily dependent upon whether specific acts performed were actually authorized, but rather that the authority will be implied whenever the conduct of the principal manifests an intent to confer such authority.

98. See *Thornhill v. Alabama*, 310 U.S. 88 (1940), in which the Court held unconstitutional an Alabama statute forbidding picketing for the purpose of injuring a lawful business. Picketing was held to be a useful means whereby those directly involved could inform the public of the nature and causes of a labor dispute. *Id.* at 104. In a companion case, *Carlson v. California*, 310 U.S. 106 (1940), the Court declared that peaceful publicity of the facts of a labor dispute through appropriate means, such as pamphlets, word of mouth or placards, "must now be regarded as within that liberty of communication which is secured to every person by the Fourteenth Amendment against abridgment by a state." *Id.* at 113.

For a brief discussion of the Court's subsequent retreat from the pronouncement in *Thornhill* that picketing was a form of first amendment speech and of the recent revival of the first amendment protection provided picketing see Gould, *Black Power in the Unions: The Impact Upon Collective Bargaining Relationships*, 79 YALE L.J. 46, 79 (1969). As discussed in 3 JENKINS, LABOR LAW 271-72, 333-36 (1974), the free speech defense is inapplicable to violations involving picketing of secondary employers.

In Cox, *Strikes, Picketing and the Constitution*, 4 VAND. L. REV. 574 (1951), the author argues that the crucial inquiry in determining if first amendment immunity for picketing may be invoked is whether the employees' message is directed to the general public, primarily to express their views and to obtain publicity, or whether it is addressed to other employees, dependent not on persuasiveness, but on the severity of economic threats for its effectiveness.

labor organization so that more groups are outside the purview of the NLRA, and their picketing thus not subject to federal remedies, the Board has implicitly decided this conflict in favor of freedom of expression. In so doing, the Board has reaffirmed the principle of *Thornhill v. Alabama*<sup>99</sup> that free discussion concerning labor disputes and conditions in industry is essential to the effective and intelligent use of democracy to shape the destiny of modern industrial society.<sup>100</sup>

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99. 310 U.S. 88 (1940).

100. *Id.* at 103, *quoted in* Brief for Respondent at 26.