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SOME DILEMMAS IN THE INJUNCTION AGAINST RECOGNITIONAL PICKETING

JAMES P. WHYTE*

Introduction

The history of the labor injunction in United States courts presents problems of social conflict within American industry which have not been solved satisfactorily by either courts or legislatures. Basically these problems concern whether a labor organization should be enjoined from engaging in concerted activities because of the harm caused to management or whether the benefit accruing to labor from the concerted activity is more important than the harm done. Strikes and picketing for recognition serve well to focus attention on this problem of value-weighting, for recognition of the union by management is basic to the achievement of union goals as is non-recognition sometimes basic to the aims of management. It is the purpose of this article to identify and partially explain the application of one or another of these values, as recognized in the National Labor Relations Act, as amended, mostly by the District courts of the United States when requested to issue an injunction against union conduct. In so doing no differentiation will be made in any phase of the discussion between organizational and recognitional picketing.

I.

The Anti-Injunction Period

Prior to the passage of the Norris-LaGuardia Act 1 in 1932, the granting of an injunction against picketing by a labor union came almost as a matter of course. Such concerted activity for the purpose of securing better wages was condemned as an interference with an employer's right to hire workers of his choice when the picketing had the effect of preventing the employer

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129 U.S.C.A. § 101 et seq.

from getting workmen.² Similarly when a union set up a picket in an effort to induce employees to join it, the picketing was considered to be an unlawful interference with a sort of property right — that of disposing of one's labor with full freedom.³ Indeed it was found violative of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States for a state to deny the use of the injunction in a special class of cases arising from labor disputes.⁴ Notwithstanding such conventional judicial attitudes, it was simultaneously realized that other interests than those belonging to the employer were at stake. Admitting that interference with the vested rights of the employer was caused by picketing his premises, the thought was introduced that such interference might be justified and hence not actionable.⁵ The justification, it was said, is found when the aspects of free competition are worth more to society than its costs.⁶ Hence the picket line was characterized as necessary to strengthen an association of working men and to give unity to their organization which was necessary for the success of the union in a society of free competition.⁷ But these enlightened viewpoints failed to find wide judicial acceptance, and it was not until Congress, after at least one unsuccessful attempt,⁸ enacted a law depriving

²*Vegelhan v. Gunter*, 167 Mass. 92, 44 N.E. 1077 (1896).

³*Plant v. Woods*, 176 Mass. 492, 57 N.E. 1011 (1900).

⁴*Truax v. Corrigan*, 257 U.S. 312 (1921).

⁵Holmes dissenting in *Vegelhan v. Gunter*, *supra* note 2.

⁶*Ibid.*

⁷Holmes dissenting in *Plant v. Woods*, *supra* note 3.

⁸The Clayton Act, 15 U.S.C.A. § 12 et seq., passed in 1914, § 20: "...no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney..." Such provision was initially considered by unions as a bar to an injunction against concerted activities. But *Duplex Printing Co. v. Deering*, 245 U.S. 443 (1921), in placing emphasis on the use of the term "lawful," invoked prevailing common law concepts and rendered the Clayton Act completely ineffectual as an anti-injunction law.

United States' courts of jurisdiction to issue an injunction against concerted activities involving a labor dispute,⁹ that labor's interest in economic competition was recognized as national policy.

Initial judicial reaction to the Norris-LaGuardia Act in cases involving picketing, the purpose of which was to organize the employees of an employer or secure recognition from the employer as the bargaining agent of his employees, was to treat the matter as not being a labor dispute. The rationale in such cases was to regard the anti-injunction law as one designed to protect employees in a dispute involving wages, hours, or other conditions of employment, and not as extending to negotiations merely leading to collective bargaining where such matters would ultimately be encountered.¹⁰ However, it was soon realized that § 13 of Norris-LaGuardia was sufficiently broad to cover organizational and recognitional picketing.¹¹ And it was stated that because the policy of Norris-LaGuardia was to provide employees full freedom of association, self-organization and designation of representatives of their own choosing, free from interference or restraint of their employer, did not mean that an injunction would be issued where there was otherwise a labor dispute.¹² Subsequent judicial developments gave the anti-injunction spirit of Norris-La Guardia such broad scope that injunctions were refused even where an employer by refusing to accede to the demands of a union picketing to secure organization or recognition might well violate §§ 7, 8(5) and 9(a) of the Wagner Act,¹³ by forcing his employees to join a union in violation of their right to freedom of choice, by forcing him to bargain with a union other than the labor organization representing the majority of his employees, and by failing to give due effect to the union selected by the majority of his employees as the exclusive representative of his employees.¹⁴ The

⁹*Supra* note 1

¹⁰See, e.g., *Oberman and Co., Inc. v. United Garment Workers of America, et al.*, 21 F. Supp. 20 (W.D. Mo. 1937).

¹¹29 U.S.C.A. § 163.

¹²*Lauf, et al. v. Skinner & Co.*, 303 U.S. 323 (1938).

¹³29 U.S.C.A. §§ 157, 158(a) (5), 159(a).

¹⁴*Fur Workers Union, Local No. 72, et al. v. Fur Workers Union No. 21238, et al.*, 105 F. 2d 1 (D.C. Cir. 1939), *aff'd, per curiam*, 308 U.S. 522 (1939).

explanation for leaving an employer in such an intolerable dilemma was that the Federal courts had no power to determine which of competing union was the lawful and appropriate bargaining agent for a given unit of employees, jurisdiction of such matters having been vested exclusively in the National Labor Relations Board.¹

The passage of the Wagner Act in 1935¹⁶ did nothing to change the effect of Norris-LaGuardia. On the contrary, it introduced a new theory into union organizing. While ostensibly the bringing of free elections to the plant levels so that workers would have the freedom to choose or reject a trade union advanced political democracy, there was nothing in the Wagner Act requiring the union to utilize election procedures or abandon self-help practices. It was possible for a union to picket for an election, and continue the picket when it lost. Further, a union could be successful in an election only to find that a rival by picketing was forcing the employer and his employees to abandon their free choice in favor of an unwanted rival.¹⁷ In short, in the area of economic competition recognized by the Wagner Act it made little difference whether unorganized workers joined a union because they wished it, because forced to join by the employer, or because power in the union to shut down their jobs left no alternative.¹⁸ If anything, the Wagner Act aided and abetted organizational and recognitional picketing.¹⁹

¹⁵*Ibid.*

¹⁶29 U.S.C.A. §§ 141, et seq.

¹⁷See, Fleming, *Title VII: The Taft-Hartley Amendments*, 54 N.W. U. L. REV. 666, 696 (1960).

¹⁸See Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 263 (1959).

¹⁹The notable picketing cases from 1935 to 1947, when the Taft-Hartley Act amendments to Wagner were passed, concerned primarily whether or not it was within the power of a state legislature to proscribe picketing as a matter of policy. *Senn v. Tile Layers' Union*, 301 U.S. 468 (1937), held that the Fourteenth Amendment did not prohibit Wisconsin from authorizing peaceful stranger picketing by a union attempting to organize a shop and prevent the employer from working in the shop as a laborer. *Thornhill v. Alabama*, 301 U.S. 88 (1940), held picketing in general subject to the protection of the free speech concepts of the Fourteenth Amendment as against a statute subjecting picketing and loitering to criminal penalties. *Milk Wagon Drivers v. Meadowmoor Dairies*, 312 U.S. 287 (1941), upheld a state injunction invoked against violent picketing, while *A.F.L. v. Swing*, 312 U.S. 321 (1941) held an injunction against peaceful

II.

*The Redevelopment of the Labor Injunction:
Taft-Hartley Act*

The Taft-Hartley Amendments²⁰ to the Wagner Act did not revive the use of the labor injunction in its traditional sense. It

picketing unconstitutional even though there was no immediate labor dispute between the employer and his employees. Then it was recognized that more than communication was involved in picketing, and state injunctions against secondary picketing were upheld in *Carpenters' Union v. Ritter's Cafe*, 315 U.S. 722 (1942), though picketing was generally not subject to injunction when its purpose was dissemination of truthful information. *Bakery Drivers v. Wohl*, 315 U.S. 769 (1942).

²⁰U.S.C.A. § 160 (1): "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8(b), or section 8(e) or section 8(b)(7) the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: *Provided further*, *That such officer or regional attorney shall not apply for any restraining order under section 8(b)(7) if a charge against the employer under section 8(a)(2) has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue.* Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to sections 8(b)(4)(D)." Landrum-Griffin amendments are indicated by italics.

has frequently been held that the provisions of Taft-Hartley permitting an injunction do not in any way abrogate the anti-injunction features of the Norris-LaGuardia Act. The courts of the United States still do not have jurisdiction to entertain a *private* suit in which an injunction is sought where a labor dispute is involved.²¹ The National Labor Relations Board, however, was authorized to seek an injunction in an appropriate Federal District Court whenever it was charged that any person has engaged in an unfair labor practice, the object of which was to induce or encourage the employees of any employer to engage in a concerted refusal to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities to perform any services where an object of such conduct was to force an employer to join a labor organization; to force any employer or other person to cease using, selling, handling, transporting, and the like, the products of any other producer, to cease doing business with any other person, or forcing any other employer to recognize or bargain with a labor organization as the representatives of his employees unless such labor organization has been so certified as the representative of such employees; or to force any employer to recognize or bargain with a particular organization as the representative of his employees if another labor organization has been certified as the representative of such employees.²²

²¹See *W. L. Mead, Inc. v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 217 F. 2d 6 (1st Cir. 1954); *Associated Tel. Co. v. Communications Workers of America*, 114 F. Supp. 334 (S.D. Cal. 1953); *United Packinghouse Workers of America v. Wilson & Co.*, 80 F. Supp. 563 (N.D. Ill. 1948).

²²29 U.S.C.A. § 158(b)(4)(A)(B)(C)(D): It shall be an unfair labor practice for a labor organization or its agents — . . . (4)(i) to engage in, or to induce or encourage [the employees of any employer] *any individual employed by any person engaged in commerce or in an industry affecting commerce* to engage in, a strike or a [concerted] refusal in the course of [their] his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain *any person engaged in commerce or in an industry affecting commerce*, where in either case an object thereof is —

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8 (e);

(B) forcing or requiring [any employer or other] 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, or forcing or requiring any other employer to recognize

In permitting the Board to seek an injunction against recognition picketing, emphasis is placed on picketing by non-certified unions. This emphasis has been respected by the Federal District courts as an essential consideration in granting injunctions even in instances where certification was in name only. Where a union was certified but within two years had lost its majority and was not actively functioning, a rival union was prohibited from concerted activities calculated to force the employer to recognize it.²³ The decisive factor was held to be certification, not majority

or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;*

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection (b) 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 Act: Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution." Landrum-Griffin amendments are indicated by italics. Portions now omitted are in brackets.

²³Parks v. Atlanta Pressmen and Assistants Union No. 8, et al., 243 F. 2d 284 (5th Cir. 1957), Cert. den. 354 U.S. 937 (1957). It should be noted that this case does not involve an injunction but, rather, a damage suit and an unfair labor practice charge without the exercise of § 10 (1) (note 20, supra). It has been criticized as extending the rule requiring certification beyond its justification on the premise that once an employer is relieved of the legal duty to bargain with a certified union, the only question is what techniques should be open to a union which may lawfully seek to become the majority choice of the employees in an appropriate unit. See Cox, supra note 18, at 264.

status or lack of it. Until, by Board action, certification is extinguished, "it has continued vitality to protect an employee against a raiding rival whose objective is 'forcing or requiring [such] employer to recognize or bargain with . . . [it] . . . as the representative of his employees.'"²⁴ And where an uncertified rival union induces the employees of the employer, who has recognized another certified union, to picket and refuse to handle goods, it is clear that an injunction may issue.²⁵

Even in instances where a picketing union has a plausible claim to being party to a collective agreement, certification of a rival union is controlling. Thus where union *A* represented *X*'s employees on certain ships, union *B* representing employees on *Y*'s vessels, which were purchased by *X*, and *B* was certified following election as the representative of *X*'s employees on the purchased ship, picketing by *A* was not successfully defended by its contract claim, the court holding its position ignored the necessity of certification.²⁶ Incidentally, the certification of an individual, in contrast to a labor organization, satisfies the certification requirement, for a labor organization is defined as *any agency*.²⁷

In situations where picketing by an uncertified union embodied features in addition to recognitional purposes, the picket-

²⁴*Id.*, at 290.

²⁵*NLRB v. Wholesale & Warehouse Workers' Union, Local 65*, 17 CCH Labor Cases ¶ 65,468 (S.D.N.Y. 1949) (hereafter cited L.C.).

²⁶*NLRB v. National Maritime Union of America*, 157 F. Supp. 691 (S.D.N.Y. 1957).

²⁷29 U.S.C.A. § 152(5). *NLRB v. Bonnaz, Hand Embroiderers, Tuckers, Stitchers, Pleaters Union*, 124 F. Supp. 919 (S.D.N.Y. 1954). See, also, *NLRB v. District Council of Ports of Puerto Rico, Int'l Longshoremen's Association*, 107 F. Supp. 235 (D. Puerto Rico 1952) where one union made an illegal raid on the governing body of the certified union in order to avoid the certification requirement. It should, of course, be noted here that respect of certification is a requirement applying to employers as well as labor organizations. Thus where union *A* petitioned for a certification election and pending the outcome the employer recognized and executed a collective agreement with *B* with which it had contracted for several years, and thereafter *A* was certified. It was held that an injunction would issue against the employer. *NLRB v. Cargill, Inc.*, 22 L.C. ¶ 67,074 (N.D. Ill. 1952). Even where there is a considerable lapse of time between a petition for an election and certification, an employer is not excused from contracting with the rival union. *NLRB v. Pacific Telephone & Telegraph Co.*, 218 F. 2d 542 (9th Cir. 1955).

ing union frequently claimed to escape the prohibition applying to recognitional picketing by claiming the real purpose of the picketing was for non-prohibited reasons which often reflected respected, traditional union goals. Generally such defenses to an injunction were to no avail, the courts stressing the prohibited recognitional feature. Such rulings were applied where, in addition to seeking recognition, a union picketed to demand reinstatement of workers allegedly unfairly discharged, and restoration of seniority and wages to striking employees;²⁸ where it was claimed the employer violated an arbitrator's award under a general agreement;²⁹ where new outlets of the employer's store business were opened after another union's certification;³⁰ where the non-certified union claimed a certain type of work properly belonged to it rather than the certified union;³¹ where an attempt was being made to protect a traditional area of coverage;³² where an attempt was to organize a few employees allegedly not covered by the certification;³³ and, where the certified union allegedly failed to process grievances thoroughly.³⁴

Now and again an attempt was made to escape the prohibition against recognitional picketing by distinguishing the picketing as organizational in nature. In one instance Union B, after picketing X for over four months, demanded X sign a collective agreement. X refused, however, as at the time it had no employees. Meanwhile an election had been conducted and union A was certified as the representative of X's employees. After such certification, B continued its picketing with signs reading: "This

²⁸NLRB v. Chauffeurs, Teamsters & Helpers, General Local 200, 25 L.C. ¶ 68,273 (E.D. Wis. 1954).

²⁹NLRB v. Int'l Longshoremen's Association, Independent & Local, 1814, 177 F. Supp. 905 (E.D.N.Y. 1959).

³⁰NLRB v. Clerk's Int'l Association, Local 1460, 26 L.C. ¶ 68,674 (N.D. Ind. 1954).

³¹NLRB v. Local 2247, United Brotherhood of Carpenters and Joiners of America, 34 L.C. ¶ 71,289 (3rd Div. Alaska 1958).

³²NLRB v. Sheet Metal Workers Int'l Association, 161 F. Supp. 161 (N.D. Ohio 1958).

³³NLRB v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 85 F. Supp. 473 (S.D.N.Y. 1949).

³⁴NLRB v. District 50, United Mine Workers of America, 21 L.C. ¶ 66,966 (E.D. Tenn. 1952).

is organizational picketing. We appeal to all workers applying for employment in the shop of [X], and to any workers already hired, to join our union and enjoy its benefits . . ." As in cases where there were features other than recognitional, it was held that while the signs merely were an appeal to join B, it was inferable that the true object of the picketing was to exert pressures on X, its employees, and the employees of other employers to compel X to recognize B and bargain with it.³⁵

Implicit in many of the foregoing situations is the requirement that for an injunction to issue there must be conduct tantamount to a refusal to perform normal services with an object of requiring any employer to recognize or bargain with a particular union if another union is certified.³⁶ In essence such concerted activity must include significant elements of coercion. Otherwise the limitations expressed in § 13 of the National Labor Relations Act, as amended, stating that nothing, except as specifically provided for, shall be construed either to interfere with, impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right, are controlling.³⁷ The Supreme Court of the United States has held in the case of a non-certified union which picketed an employer to secure recognition and "encouraged" the employees of a neutral employer to refuse to deliver goods, which "encouragement" consisted of only an isolated incident of such employees refusing to cross a picket line, that such coercion did not result in the type of concerted activity proscribed by § 8(b)(4). To apply the Act in such instances would be to diminish the traditional right to strike, for there was no concerted conduct by the employees of the neutral employer nor any attempt to induce such action.³⁸ Hence concerted activities for recognition are not per se illegal. Definite coercive pressures must also be exerted.³⁹

³⁵NLRB v. Knit Goods Workers' Union Local 155, International Ladies' Garment Workers' Union, 27 L.C. ¶ 68,802 (E.D.N.Y. 1954).

³⁶Cox, *supra* note 18, at 263-4; see cases cited in notes 28-35, *supra*.

³⁷29 U.S.C.A. § 163.

³⁸NLRB v. International Rice Milling Company, Inc., et al., 341 U.S. 665 (1951).

³⁹NLRB v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 121 F. Supp. 145 (S.D. Tex. 1954).

The emphasis placed on § 13 of the Act continues to have significant meaning when the National Labor Relations Board construes recognitional picketing as violative of other sections of the Act. This is clearly seen in the history of the so-called *Curtis* doctrine. While this doctrine deals with an unfair labor practice rather than an injunction per se, its relationship to the issuance of injunctions is clear. In this case, union A was certified in 1953 as the exclusive representative of certain of Curtis' employees. However, a strike the next year depleted A's membership and, when, after another year Curtis petitioned for another election, A wrote the Board that it did not claim to represent a majority of the employees. Thereafter the employees voted "no union." Nonetheless, A thereafter established a peaceful picket at Curtis' retail store. The signs carried by the pickets simply stated, in substance, that Curtis did not employ union workers and that A wished Curtis' employees to join it to gain union wages, hours and working conditions. Ultimately Curtis made such conduct the subject of an unfair labor practice charging that A had restrained or coerced its employees in the exercise of their right not to join a labor union,⁴⁰ because the picketing was recognitional designed to force Curtis to recognize A as the exclusive bargaining representative of its employees even though A did not represent a majority of the employees. The Board, seeing such conduct as economic pressure on Curtis which hurt employees continuing to work, held that the Act applied to indirect, as well as direct, coercion of employees, and issued a cease and desist order.⁴¹ The Court of Appeals, however, set aside the Board's order, holding § 8(b)(1)(A) inapplicable to peaceful picketing whether organizational or recognitional in nature.⁴²

On appeal to the Supreme Court, the Court of Appeals was affirmed.⁴³ Realizing that tension existed between the right of

⁴⁰29 U.S.C.A. §§ 157, 158(b)(1)(A).

⁴¹Matter of Drivers, Chauffeurs, and Helpers Local 639 and Curtis Bros., Inc., 119 N.L.R.B. No. 33 (1957).

⁴²Drivers, Chauffeurs and Helpers, Local 639, Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers, 274 F. 2d 551 (D.C. Cir. 1958); accord, NLRB v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local No. 182, 272 F. 2d 85 (2nd Cir. 1959); contra, NLRB v. United Cork, Linoleum and Plastic Workers, 269 F. 2d 694 (4th Cir. 1959), reversed, per curiam, 362 U.S. 329 (1960).

⁴³NLRB v. Drivers, Chauffeurs, etc., Local 639, 362 U.S. 274 (1960).

employees to refrain from joining a labor organization and their right to do so,⁴⁴ it was nevertheless held that, in this case, the Board's order would impede the right to strike, unless § 8(b)(1)(A) provided otherwise.⁴⁵ Hence § 13 of the Act is treated as "a command of Congress to the courts to resolve doubts and ambiguities in favor of an interpretation of 8(b)(1)(A) which safeguards the right to strike as understood prior to the passage of the Taft-Hartley Act."⁴⁶ It was concluded that Taft-Hartley

authorized the Board to regulate peaceful 'recognitional' picketing only when it is employed to accomplish objectives specified in 8(b)(4); and that 8(b)(1)(A) is a grant of power to the Board limited to authority to proceed against union tactics involving violence, intimidation, and reprisal or threats thereof — conduct involving more than general pressures upon persons employed by the affected employers implicit in economic strikes.⁴⁷

The Taft-Hartley Amendments to the National Labor Relations Act, then, remedied some of the injustices prevailing under the combined approach of the Norris-LaGuardia and Wagner Acts. Still there are features that have been considered shortcomings. It has been pointed out that a union might be legally recognized by an employer without an election or certification so that § 8(b)(4)(C) would not apply. Also, if a union insisted successfully it was interested only in organization, not recognition, an employer would have no basis to ask for an election since there was no claim for recognition.⁴⁸ It has further been demonstrated that § 8 (b)(4)(C) was, in part, incomplete. For a contract with a majority union bars an election for a reasonable period, and minority picketing for recognitional or organizational purposes during such period, like picketing during the first year of certification, seeks to override the will of the majority and to compel an employer to violate his legal obligations.⁴⁹

⁴⁴29 U.S.C.A. § 157.

⁴⁵NLRB v. Drivers, Chauffeurs, etc., Local 639, *supra* note 43, at 282.

⁴⁶*Id.*, at 282.

⁴⁷*Id.*, at 290.

⁴⁸Fleming, *supra* note 17, at 697.

⁴⁹Cox, *supra* note 18, at 264.

III.

*Further Redevelopments of the Labor Injunction:
Effect of the Landrum-Griffin Amendments*

To cure the foregoing alleged shortcomings of the Taft-Hartley Amendments and also to prevent what harshly, yet vaguely, came to be known as "blackmail" picketing and "sweetheart" agreements, the Landrum-Griffin Act, effective November 13, 1959, added an entirely new section, 8(b)(7)(C),⁵⁰ to the National Labor Relations Act. Passage of such amendments has provoked a great deal of well informed comment and predictions of what effect these amendments will have.⁵¹

⁵⁰29 U.S.C.A. § 158(b)(7)(C). It shall be an unfair labor practice for a labor organization or its agents . . . (7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees: (A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act. (B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or (C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b).

⁵¹E.g., Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 851, 1086 (1960); Come, *Picketing under the 1959 Amendments to the National Labor Relations Act*, N.Y.U. THIRTEENTH ANNUAL CONFERENCE ON LABOR 105 (1960); Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257 (1959); Fairweather, *An Evolution of the Changes in Taft-Hartley*, 54 NW. U. L. REV. 711 (1960); Fleming, *Title VII: The Taft-Hartley Amendments*, 54 NW. U. L. REV. 666

It is first to be noted that the Landrum-Griffin Amendments treat recognitional and organizational picketing as the same. It would be inaccurate to say that such picketing is prohibited (though to date such is the effect), rather it is made subject to other complex and ambiguous restrictions. Briefly, Landrum-Griffin makes it an unfair labor practice for a labor organization to picket any employer if *an object* thereof is to force recognition, bargaining or organization where: (A) the employer has lawfully recognized another union and a question concerning representation may not be raised under section 9(c); (B) where, within 12 months an election has been held under 9(c); or (C) when such picketing has been conducted without a 9(c) petition having been filed within a reasonable period of time not to exceed 30 days from the commencement of the picketing. Two provisos of (C) declare, first, that when such petition has been filed the Board shall forthwith certify the results thereof without regard to 9(c)(1) or the absence of a showing of substantial interest on the part of the union; and, second, that informational picketing remains inviolate unless *an effect* of the picketing is to induce any individual employed by any other person in the course of his employment not to render normal services.⁵²

While probably sufficient time has not yet passed for litigation to show the myriad of problems raised by § 8(b)(7) in practical application, there are indications the most significant troubles will come from subsections (A) and (C) and (C)'s second proviso both internally and from tensions with other portions of the National Labor Relations Act. Subsection (A) goes beyond the protection afforded in § 8(b)(4)(C)⁵³ in protecting one union from attack by another. Formerly a union was entitled to an election even though the employer was willing to grant recognition without one.⁵⁴ Consequently certification is made to carry a high degree of assurance that an incumbent union is the free

(1960); McDermott, *Recognitional and Organizational Picketing under Amendments to the Taft-Hartley Act*, 11 LAB. L. J. 727 (1960); Ronayne, *Picketing under Landrum-Griffin*, N.Y.U. THIRTEENTH ANNUAL CONFERENCE ON LABOR 227 (1960); Van Arkel, *Picketing under the 1959 Amendments*, *Ibid.* 201; and Young, *Picketing under the 1959 Amendments*, *Ibid.* 213.

⁵²*Supra* note 50. *Italics* added.

⁵³*Supra* note 22.

⁵⁴*Cf.*, Fleming, *supra* note 51, at 697-8.

majority choice which is not achieved by the mere signing of a contract.⁵⁵ Literally § 8(b)(7)(A) prohibits recognitional picketing if an employer has a contract with a union representing only a unit of workers. It might also outlaw organizational picketing if a question of representation could not appropriately be raised under 9(c) simply because of the union's inability to prove it had been designated by 30% of the employees in the bargaining unit.⁵⁶ It is further noted that since § 8(b)(7) applies only to picketing, a question arises as to whether a union could strike, incite a secondary boycott or pass out handbills in support of a demand for recognition even though an employer has recognized another certified union. If so the conduct would violate § 8(b)(4)(C).⁵⁷ Specifically § 8(b)(7)(C) would bar such conduct though the principle of according lawful recognition the same status as certification would require an opposite answer.⁵⁸ There are, as yet, no judicial answers to these explicit questions.

The proscription in § 8(b)(7)(B) from picketing within twelve months of a valid election is said to do more than simply protect the rights of employees to refrain from engaging in collective bargaining, for the prohibition applies equally to any union wishing to organize employees. Emphasis here is placed on promoting industrial stability rather than the unrestricted freedom of employees to bargain collectively through representatives of their own choosing, for even though one union may be rejected by a unit of employees, another union presumably finding favor with them cannot either picket for recognition or secure an election for twelve months.⁵⁹ Thus far District Courts have interpreted § 8(b)(7)(B) literally when finding reasonable cause to issue injunctions. Neither pleas of freedom of speech,⁶⁰ nor that the picketing was for lawful reasons in addition to recognition⁶¹

⁵⁵Cf., Cox, *supra* note 51, at 264-5.

⁵⁶Cf., Aaron, *supra* note 51, at 1103; Cox, *supra* note 51, at 265.

⁵⁷*Supra* note 22.

⁵⁸Aaron, *supra* note 51, at 1102; Cf., McDermott, *supra* note 51, at 728-9.

⁵⁹Cf., Aaron, *supra* note 51, at 1103-4; McDermott, *supra* note 51, at 732.

⁶⁰NLRB v. Local 344, Retail Clerks International Ass'n, 38 L.C. ¶ 65,987 (S.D. Ill. 1959).

⁶¹NLRB v. Auto Mechanics Lodge 701, Int'l Ass'n of machinists, 39 L.C. ¶ 66,188 (N.D. Ill. 1960).

have been acceptable defenses.⁶² Thus the courts have so far dodged the issue of whether freedom to organize has been unduly restricted.

It is § 8(b)(7)(C), however, which has to date produced the most litigation, reflecting problems of a serious and complex nature. The banning of recognitional picketing for "reasonable" time not to exceed 30 days is seen by one commentator as so vague and uncertain that it raises Constitutional issues.⁶³ Notwithstanding, the Courts have treated the matter as dependent on the facts involved in the picketing. Where rendition of normal services to the employer was not affected in that deliveries continued as usual, 27 days was held to be a reasonable time.⁶⁴ But when threats and violence accompanied the picketing, a ten-day delay in filing a petition for an election was unreasonable,⁶⁵ as was a delay of 15 days when the picketing stopped deliveries and the rendition of services to the picketed employer.⁶⁶

The reference to § 9(c) of the act in the first proviso to subsection (C) is likewise apt to produce litigation because of ambiguity. It is stated in § 9(c)(1) that either party may file for an election. However, if under § 8(b)(7)(C) an election is directed without regard to § 9(c)(1), and § 9(c)(1) nonetheless calls for an election and hearing, it is difficult to see how the Board may proceed without regard to § 9(c)(1).⁶⁷

Even more complex are the problems created by the second proviso of § 8(b)(7)(C). Here, in accordance with general principles of free speech, informational picketing is recognized as legitimate union activity. Yet it must not have the effect of inducing any person employed by any other person not to render normal services to the picketed employer. Supposing the pick-

⁶²NLRB v. Dist. 76, Retail, Wholesale and Department Store Union, 39 L.C. ¶ 66,419 (E.D. Pa. 1960).

⁶³Aaron, *supra* note 51, at 1109-10.

⁶⁴NLRB v. Local 239, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers, 179 F. Supp. 481 (E.D.N.Y. 1960).

⁶⁵NLRB v. United Shoe Workers of America, 181 F. Supp. 324 (D.N.J. 1960).

⁶⁶NLRB v. Sapulpa Typographical Union No. 619, Int'l Typographical Union, 38 L.C. ¶ 66,020 (N.D. Okla. 1959).

⁶⁷Aaron, *supra* note 51, at 1107.

eting is truly informational, will the fact that deliverymen refuse to cross the picket line bring the case within *NLRB v. International Rice Milling Company*,⁶⁸ so as to make this section of the Act continually uncertain in its operation? Or will the courts look narrowly to the fact that normal services are being interrupted? As far as finding reasonable cause for the issuance of an injunction is concerned, present holdings indicate the impeding of services is conclusive.⁶⁹ Yet in such cases elements of "coercion" and "inducement" are hard to find.

Informational picketing can take many forms. Mostly it seeks to advise the public that the picketed employer does not have a union contract, or that union wages and working conditions are not being met. It cannot be denied that a long-standing union objective is to raise wages and improve working conditions. In the equality of economic competition envisioned by Holmes⁷⁰ and attempted in the National Labor Relations Act, as amended, it is essential that union-organized business not be forced to compete at a disadvantage with non-union competitors. It is clear, then, that informational picketing does not necessarily contemplate recognition or organization. Yet it is impossible to ignore the fact that such objectives are not accomplished by merely talking about them. Wages are not usually raised nor working conditions ordinarily improved until the union secures recognition from the "offending" employer and organizes his employees. For these reasons there is a dilemma encountered whenever a question of informational picketing is raised.

Perhaps unfortunately the matter is treated in too superficial a fashion by the Board. As has been suggested, the basic premise is that any picketing by a union not recognized or certified is unlawful. This result is reached summarily by the General Counsel asking the union whether picketing will stop if recognition is given. The answer, naturally, is in the affirmative, and this is considered to show that *an* object of the picketing is recogni-

⁶⁸341 U.S. 665 (1951).

⁶⁹See *NLRB v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers*, *supra* note 64, and *NLRB v. Sapulpa Typographical Union No. 619, Int'l Typographical Union*, *supra* note 66.

⁷⁰Dissenting in *Vegelhan v. Gunter*, 167 Mass. 92, 44 N.E. 1077 (1896) and *Plant v. Woods*, 176 Mass. 492, 57 N.E. 1011 (1900).

tion.⁷¹ Yet in the courts inquiring whether reasonable cause exists for the issuance of an injunction, two opposing views are emerging. On one hand, it has been held that the second proviso of § 8(b)(7)(C) has no application and does not apply where an object of the picketing is to force recognition from an employer or to force organization of his employees, even though another purpose of the picketing is to truthfully advise the public that the employer does not employ union members or have a collective bargaining agreement with a union. This, it is said, is so *whether or not* the effect of the picketing is to impede the flow of normal services and incidents of daily business.⁷²

Conversely, where there is no impeding of normal services, emphasis is put on the absence of inducement to obstruct the flow of normal services. In regard to the employer's contention that the exception for informational picketing had no application where the picketing was for recognition, one court said that it was difficult to imagine any kind of informational picketing where another object would not be ultimate recognition, for in most cases the aim of the picketing could only be to bring economic pressure on the employer to recognize and bargain with the union. To adopt the employer's viewpoint would be to render the statutory consent to informational picketing meaningless.⁷³ In considering the unfair labor practice aspects of recognition as opposed to informational picketing, the National Labor Relations Board has interpreted the Act literally and narrowly, although placing a great deal of emphasis on the picketing impeding normal services.⁷⁴ It follows from this viewpoint that any recognition picketing is not excused because of the presence of another,

⁷¹Van Arkel, *supra* note 51, at 202.

⁷²NLRB v. Retail Hose Employees Union Local 400, Retail Clerks Int'l Ass'n, 39 L.C. ¶ 66,201 (D.C. 1960); NLRB v. Int'l Ladies' Garment Workers' Union, 38 L.C. ¶ 66,051 (M.D. Tenn. 1959).

⁷³NLRB v. Bartenders & Hotel & Restaurant Employees Union, Local 58, 181 F. Supp. 738 (N.D. Ind. 1960).

⁷⁴Local 89, Chefs, Cooks, Pastry Cooks and Assistants, Hotel and Restaurant Employees Union *and* Stork Restaurant, Inc., 130 N.L.R.B. No. 67 (1961); Local Joint Executive Board of Hotel Restaurant Employees and Bartenders Int'l Union of Long Beachland *and* Irwin, 130 N.L.R.B. No. 68 (1961); Local 840, Int'l Hod Carriers' Bldg. & Common Laborers' Union *and* Blinne Construction Co., 130 N.L.R.B. No. 69 (1961).

legitimate object such as discrimination against union employees or other unfair labor practices.⁷⁵

While the provisions of § 8(b)(7)(C) create problems when compared to several other sections of the National Labor Relations Act, as amended,⁷⁶ it is when compared with the prohibitions of employer unfair labor practices⁷⁷ that some of the most perplexing dilemmas arise. Suppose union A, uncertified, has demanded recognition and bargaining from employer X, claiming to represent 100% of X's employees in an appropriate unit. X declines to recognize A, and A commences picketing, not bothering to file for an election. Meanwhile X discharges the employees A claims to represent. A files an unfair labor practice charge as a result of which the discharged employees are ordered back to work by the National Labor Relations Board. However, the employees refuse to return to work until X recognizes A. A claims, when X seeks an injunction against the picketing, it having continued throughout, that no accelerated election under § 8(b)(7)(C) is needed when it represented a majority of employees in defending an unfair labor practice charge, and that the question of majority representation can be heard when the National Labor Relations Board hears the § 8(b)(7) charge. On this set of facts it has been held: (1) Delay in filing for an election within 30 days after the commencement of recognitional picketing is more than a technical violation; (2) the Act does not apply solely to minority unions; and, (3) it would destroy the purpose of the Act to forego application of bars against recognitional picketing every time an unfair labor practice charge is lodged.⁷⁸ This holding appears to be technically correct, for § 8(b)(7) would not ordinarily

⁷⁵See cases cited *supra* note 72. NLRB *accord*: Local 705, Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers and Cartage and Terminal Management Corporation, 130 N.L.R.B. No. 70 (1961). It should be noted, however, that when a charge has been filed alleging domination or interference with the formation or administration of any labor organization or financial support thereof, and there is reasonable cause to believe the charge is true, regional attorneys are not to apply for a restraining order. See *supra* note 20.

⁷⁶See: Aaron, *supra* note 51 at 1104-5; Fairweather, *supra* note 51, at 733; Fleming, *supra* note 51, at 700; and McDermott, *supra* note 51, at 730, 731.

⁷⁷29 U.S.C.A. § 158(a)(5).

⁷⁸NLRB v. International Typographical Union, Local 285, 39 L.C. ¶ 66,109 (D.C. 1960).

apply to picketing against unfair labor practices, such not usually being designed for recognition or organization. Yet here the picketing necessarily sought recognition as a remedy for an unfair labor practice. Literally, then, the picketing fell within the prohibitions of § 8(b)(7) since *an* object was recognition.⁷⁹

But should the basic right to picket against unfair labor practices be abridged by § 8(b)(7) when no intent to do so appears in the statute? And should the union be required to choose between unfair labor practice procedures and the picket line when any unlawful refusal to bargain puts it in a less favorable position than if the employer had not committed an unfair labor practice? The Board has held that a representation proceeding is inconsistent with a refusal to bargain proceeding.⁸⁰ Yet the union may, having to petition for an election, lose it because of the employer's unfair labor practice.⁸¹

Finally, a brief discussion of what effect the Landrum-Griffin Amendments are apt to have on the *Curtis*⁸² case is justified. The case itself found § 8(b)(7)(C) to be a "relevant consideration."⁸³ And a memorandum "dissent" suggested return of the case to the National Labor Relations Board for reconsideration on the basis of the new legislation.⁸⁴ It may be that § 8(b)(7) was intended to change the Court's decision, thus permitting injunctions against picketing potentially coercive of employee rights to select representatives of their own choosing.⁸⁵ Or it may be that the *Curtis* doctrine will continue except where limited by § 8(b)(7).⁸⁶ But more likely the major question will be the effect of § 8(b)(7)(C) on labor's Constitutional right to picket as an expression of free speech.⁸⁷ Short of a decision

⁷⁹Come, *supra* note 51, at 193.

⁸⁰Aiello, et al. and C.I.O., 110 N.L.R.B. 1365 (1954).

⁸¹Come, *supra* note 51, at 194-5.

⁸²*Supra* note 43.

⁸³*Id.* at 291.

⁸⁴*Id.* at 292-3.

⁸⁵*Cf.*, Ronayne, *supra* note 51, at 234.

⁸⁶Fairweather, *supra* note 51, at 714.

⁸⁷Young, *supra* note 51, at 216.

holding § 8(b)(7) unconstitutional, it seems likely that § 13⁸⁸ of the National Labor Relations Act, as amended, will be applied to resolve the section's inherent ambiguities in favor of the right to strike and picket for traditional labor objectives upon the same basis as the conflict between §§ 8(b)(4) and 8(b)(1)(A) was resolved.

Conclusion

In summary, it may be stated that the problems inherent in enjoining recognitional picketing still seek adequate and complete answers. Here, possibly more so than in any other aspect of the labor-management struggle, basic concepts are at war. Industry needs a high degree of stability in order to fulfill its promise of efficient production. Labor must be recognized in order to fulfill its promise of bettering the lot of the employee. It is unfortunate that Holmes' concept of economic competition has found expression in legislation which from time to time seeks merely to balance one value against another, resulting in a hodgepodge of vague, uncertain and confusing legislation with which the courts can do little more than pinpoint dilemmas or avoid them by narrow reliance on the specific statutory wording. The assumption that what is good for industry alone is good for the country is no more true than the assumption that what is good for labor alone is good for the country. If the idea that labor-management competition ought to be on an equal basis can be ascribed to Holmes, it should be remembered that he also envisioned such free competition as being worth more to society than its costs. Yet the interest of the public finds little or no expression in the National Labor Relations Act, as amended. This omission, except as partially expressed for National Emergency situations, may well be the leavening factor needed to resolve what are now intolerable dilemmas.

⁸⁸29 U.S.C.A. § 163.