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RECENT DEVELOPMENTS UNDER SECTION 8(b)(4)

by

Lester Asher*

THE scheme of the Taft-Hartley Act, made it an unfair labor practice for a union to induce or encourage "the employees of any employer to engage in a strike or a concerted refusal in the course of their employment" for certain specified objectives. However, since the Taft-Hartley Act carefully defines the words "employee" and "employer," the National Labor Relations Board held that it was not unlawful to induce supervisors, since they were not "employees" within the meaning of the Act; and that it was not unlawful to induce persons who worked for organizations such as municipalities, railroads, or airlines, since they were not "employers" within the meaning of the Act. Also in a few cases under Taft-Hartley, it was held that inducement of a single employee was not illegal since it did not involve a concerted refusal to work. Finally, and most important, since the language of the Taft-Hartley Act only prohibited inducing or encouraging "employees," the Board ruled that Section 8(b)(4) did not prevent a union from putting pressure directly on a secondary employer, as distinguished from his employees, to induce him to stop dealing with the primary employer. Direct pressure on the employer, even by outright threats of strikes or reprisals against him, was not an unfair labor practice under the scheme of the Taft-Hartley Act.

I. THE LANDRUM-GRIFFIN AMENDMENTS

The Landrum-Griffin Act plugged up these so-called loopholes by amending Section 8(b)(4) to set up two separate categories of

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4 Joliet Contractors Ass'n v. NLRB, 202 F.2d 606 (7th Cir. 1953); Glaziers Union, 99 N.L.R.B. 1391 (1952).

5 Raboin v. NLRB, 195 F.2d 906, 912 (2d Cir. 1952); Local 47, Teamsters Union (Texas Industries, Inc.), 112 N.L.R.B. 923, 925 (1955).


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prohibited conduct or activities. First, amended 8(b) (4) (i) forbids a union from inducing or encouraging “any individual employed by any person” to engage “in a strike or a refusal” in the course of his employment. It should be noted that in the amended section the words “employees” and “concerted” have been deleted. The amended law uses the term “individual employed by any person.” Clearly, under the scheme of Landrum-Griffin, the law would now apply to an employee of a municipality, a railroad, or a farm. Also, the loophole as to an individual employee is now closed, because the word “concerted” is dropped from the statute; thus, the inducement of a single employee of a secondary employer is now prohibited.

Landrum-Griffin also set up a second class of prohibited conduct or activities. Section 8(b) (4) (ii) makes it an unfair labor practice for a union or its agent “to threaten, coerce or restrain any person engaged in commerce” for any one of the illegal objectives. At this point, there are still two loopholes left unclosed: (1) the Taft-Hartley ruling that it was not unlawful to induce supervisors; and (2) the ruling that a union could induce, encourage, and put pressure upon an employer. Obviously, the objective of 8(b) (4) (ii) is to prohibit the threatening, coercing, and restraining of “any person,” and that would certainly include an employer.

A. “Individual Employed By Any Person”

Section 8(b) (4) (i) forbids a union from inducing “any individual employed by any person” to engage in a refusal to work in the course of his employment. What does this new term mean? Does it cover inducement of all management officials or refer only to low-level supervisors? The trial examiners of the National Labor Relations Board were much divided on this issue. The General Counsel urged that the term “individual employed by any person” covers all management officials. Finally in March 1961, in the leading case of *Carolina Lumber Co.*, the Board decided the issue. After analyzing the legislative history at length, the Board concluded:

The above quoted legislative history indicates that among the class of individuals to be insulated from “inducement” are supervisors who, although they are management’s representatives at a low level, are through their work, associations, and interests, still closely aligned with those whom they direct and oversee.

There are additional statements in the legislative history which indicate that only inducement of low level supervisors was meant to be outlawed by 8(b) (4) (i). In addition, the broad reading of “individual

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employed by any person” urged by the General Counsel would render 8(b)(4)(ii) largely superfluous. The latter refers to threats, restraint and coercion of “any person.” To threaten a person is to induce him. Accordingly, if “individual employed by any person” refers to all managerial officials, irrespective of placement in the hierarchy, the specific outlawing of coercive tactics was unnecessary. Any interpretation of the statute is to be avoided which would make one section of the Act meaningless. We believe that the two sections are in fact reconcilable. As indicated by the legislative history, the term “individual employed by any person” in 8(b)(4)(i) refers to supervisors who in interest are more nearly related to rank-and-file employees than to management, as the term is generally understood. On the other hand, the term “person” as used in 8(b)(4)(ii) would seem to refer to individuals more nearly related to the managerial level. So construed 8(b)(4)(i) would outlaw attempts to induce or encourage employees and some supervisors, to achieve the objectives proscribed by 8(b)(4). Similar attempts to induce or encourage others more nearly related to the managerial level for the same objectives would be lawful. However, if in the latter case the labor organization went beyond persuasion and attempted to coerce such managerial officials to accomplish the proscribed objectives, it would violate 8(b)(4)(ii).

This leaves for determination whether in a given case inducement was directed at a supervisor who is an “individual employed by any person” within the meaning of 8(b)(4)(i). No single across-the-board line on an organization chart can be drawn to determine in every case whether a supervisor is an “individual employed by any person.” The authority and position of supervisors vary from company to company. It will therefore be necessary in each case in determining this question to examine such factors as the organizational setup of the company, the authority, responsibility and background of the supervisors, and their working conditions, duties and functions on the job involved in this dispute, salary, earnings, perquisites and benefits. No single factor will be determinative.

In the Carolina Lumber Co. case, the Board found that a project superintendent who was free to exercise authority, including requisitioning and purchasing supplies, without immediate on-the-job supervision, was not an “individual.” However, the Board also found that a working foreman, who had no authority beyond supervising a small group of laborers, was an “individual” within the meaning of 8(b)(4)(i). To complete the statutory scheme, there must also be an illegal objective. Thus, where the Board found in the Carolina Lumber Co. case that the working foreman was an individual within the meaning of clause (i), it then went on to find that he had been induced by the union to cease using materials
supplied by the Carolina Lumber Company, which was an illegal objective under subparagraph (B) as follows:

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. . . .

The Board found that the working foreman, Clay, was working for the Persun Construction Company on a Marshall College job in Huntington, West Virginia. The union agents followed a truck of Carolina Lumber Company, against whom there was a labor dispute, and approached Clay, the working foreman, while he was working on some flooring which had been delivered by Carolina Lumber. The union agents told Clay, "You know it's wrong to handle that flooring. You will bust our union if you handle it." Clay then instructed his crew to stop handling the flooring. The Board found that the union violated 8 (b) (4) (i) (B) of the Act by inducing Clay and the workers employed by Persun Construction Company to cease using materials supplied by Carolina Lumber with an object of forcing Persun to stop doing business with Carolina Lumber.

B. "To Threaten, Coerce, Or Restrain"

How has the National Labor Relations Board interpreted the new language introduced by the Landrum-Griffin Act in Section 8 (b) (4) (ii)—"to threaten, coerce, or restrain any person. . . ."? In the Gilmore Constr. Co. case, the Board held that this new language was violated when the union picketed a construction project because the general contractor had employed a non-union subcontractor and the union informed the general contractor that the picketing would stop only if the subcontractor were removed from the job. The Board pointed out that picketing constituted the necessary "coercion and restraint" under the new language.

In the Consalvo Trucking case, the union president told officials of the general contractor that the project was "a union job and it was to remain a union job" and that no truck would operate unless all were driven by union members. Another union official said that the union would remove its members from the job unless all trucks on the project were union trucks. The Board held that these statements constituted threats within the meaning of the new language.

The Board also ruled\textsuperscript{10} that a warning to a company that it could expect trouble because it awarded a contract for carpentry work to a non-union contractor, with an object of forcing the company to cancel the contract violates 8(b)(4)(ii)(B). The Board also concluded that a work stoppage for a proscribed purpose clearly violates 8(b)(4)(ii).

In the \textit{Martin Co.} case,\textsuperscript{12} the Board found that the union induced and encouraged its members not to accept referral to and employment by Gable Electric Service, an electrical contractor. It found further that an object of the activity was to force the electrical contractor to cease handling cables prefabricated by the Martin Company and that such inducement and encouragement constituted a refusal to refer applicants for employment to Gable, the electrical contractor, as provided in the union’s area agreement. The Board found that when polling those in the hiring hall as to whether they would accept employment with Gable, Palmer, the union Business Agent,

was far from subtle as to the position of the union respecting the work Gable wanted done. Palmer’s statement that the work consisted of installing cables and that Gable wanted men to replace workers who had been discharged for refusing to install cables, clearly indicated to those in the hiring hall that they should not accept referral to Gable. Palmer’s action here was but a continuation of the union’s policy which had led to the original unlawful inducement and encouragement of Gable’s employees; the discouragement of those in the hiring hall from accepting employment with Gable was . . . tantamount to a categorical refusal to make a referral.

The Board concluded that this conduct, of inducing and encouraging members of the union not to accept referral to or employment by Gable, constituted a refusal to refer applicants for employment to Gable and also violated 8(b)(4)(ii)(B).

In the \textit{Riss & Co.} case,\textsuperscript{13} the Board held that the inducement of an employee, under the circumstances of that case, also coerced and restrained his employer. In \textit{Riss & Co.}, the Board found that the union agents had physically prevented the secondary employee from carrying out his assigned task by uncoupling his equipment and warning him to leave the premises. The necessary effect of the union seizure of this equipment owned by the secondary employer,

\textsuperscript{11} Local 825, Operating Engineers Union (Carleton Bros. Co.), 131 N.L.R.B. No. 67, 48 L.R.R.M. 1062 (1961).
\textsuperscript{12} Local 756, IUEW (Martin Co.), 131 N.L.R.B. No. 120, 48 L.R.R.M. 1172 (1961).
\textsuperscript{13} Highway Truckdrivers & Helpers (Riss & Co.), 130 N.L.R.B. No. 91, 47 L.R.R.M. 1403 (1961).
said the Board, was forcibly to obstruct the secondary employer from carrying on its business with the primary employer. The Board ruled that such conduct was directly coercive of the secondary employee and violative of 8 (b) (4) (ii) (B). However, the Board noted that "we do not mean to imply that any inducement or encouragement of a secondary employee, under 8 (b) (4) (i) (B), is necessarily restraint and coercion of his employer under 8 (b) (4) (ii) (B)."

In *Layne-Western Co.*, the Board concluded that there was no violation of 8 (b) (4) (ii):

The complaint also alleges that Local 571 further threatened, restrained and coerced persons engaged in commerce or in an industry affecting commerce by letter Local 571 sent to all contractors in the Omaha area on October 26, 1960 purporting to inform them of the facts of Local 571's dispute with Layne-Western. The letter stated that Layne-Western had no signed collective bargaining agreement with Local 571, and had refused to pay the union scale and conditions to employees within the jurisdiction of Local 571. The letter went on to say that these facts were presented for "the purpose of information only . . .," and concluded with the statement: "The presence of Layne-Western Company on any job will create legal and economic problems for the members of our Union." As we do not find that this letter threatened, restrained or coerced any person within the meaning of Section 8 (b) (4) (ii) of the Act, we shall dismiss this allegation of the complaint.

Similarly, the Board decided in the *Floyd W. Drake* case that the giving of notice to the prime contractor of a prospective strike action against a subcontractor was not a violation of 8 (b) (4) (ii) (B).

In *Brewer's City Coal Dock*, the Board held that the union did not threaten, coerce, or restrain the secondary employer in violation of 8 (b) (4) (ii) (B) of the Act, when the union's business agent did not threaten the secondary employer with any reprisals if the secondary employer accepted the delivery of sand from the primary employer, but merely informed him of the existence of the strike against the primary employer and appealed to him not to use the primary employer's sand until the strike was over.

**II. Consumer Picketing and Consumer Handbilling**

What have been the National Labor Relations Board rulings concerning consumer picketing and consumer handbilling? The leading
case on consumer handbilling is *Lohman Sales Co.*, decided in August 1961, a four to one decision, with Board member Rodgers dissenting. The *Lohman* decision involves one of the "puzzling provisos" brought into the statute by the Landrum-Griffin Act. This proviso to Section 8(b)(4) protects

publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of 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; . . . .

The *Lohman* case grew out of a labor dispute between the International Brotherhood of Teamsters, Local 537, and Lohman Sales Company of Denver, Colorado, the primary employer, a wholesale distributor of cigars, cigarettes, candy, and sundries. The Teamsters visited several drug stores and supermarkets in Denver, which were purchasers of Lohman's products, and handed out "Do Not Buy" circulars on the sidewalks and in parking lots to customers of the retail stores. Some of the owners and other personnel of the retail stores were requested not to purchase from Lohman and were threatened with distribution of handbills if they did not stop dealing with Lohman. The Board, by a unanimous vote, found a violation of 8(b)(4)(i)(B) based upon the oral appeals by the union to neutral employees not to order or buy products from Lohman, the primary employer. However, it found no violations of 8(b)(4)-(ii)(B) and concluded that the handbilling was protected by the proviso. The Board also ruled the union's threat to handbill, made to neutral employers, was lawful under the Act because the handbilling was lawful. With respect to the handbilling, the major issue in the case was whether the secondary boycott proviso, permitting publicity other than picketing, applies only in situations where the primary employer is a manufacturer or whether it applies also where the primary dispute is with other types of enterprises. The four-member majority of the Board took the latter position. In view of the importance of this decision that handbilling is publicity which is protected by the proviso, it is quite certain that this case will be litigated up to the Supreme Court.

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The leading cases on consumer picketing are *Minneapolis House Furnishing Co.*,\(^{18}\) decided in July 1961, and the *Tree Fruits Labor Relations Comm.* case,\(^{19}\) decided late in August 1961. The *Tree Fruits* case points up the typical facts involved in a dispute which results in consumer picketing. The Tree Fruits Labor Relations Committee represented twenty-one fresh fruit packing and warehousing firms in Washington in collective bargaining with Teamsters Local 760. When negotiations broke down, the Teamsters called a strike against the employers and also promoted a consumer boycott of Washington State apples. The Teamsters instituted a program of picketing and handbilling at the premises of Safeway stores in Seattle, which were then selling apples obtained from employer-members of Tree Fruits.

In the *Tree Fruits* decision, the NLRB concluded as follows:

In that case [the *Perfection Mattress* case]\(^{20}\) a majority of the Board held that a picket line at the premises of a secondary employer necessarily invites employees to make common cause with the picketing union and to refrain from working behind the picket line, irrespective of the literal appeal of the legends on the picket sign. Accordingly, the majority concluded that the picketing of retail stores with signs urging customers not to buy products of the primary employer constituted inducement or encouragement of employees of neutral employers within the meaning of Section 8(b)(4)(i) of the Act. The Board has reconsidered this doctrine of the *Perfection Mattress* case and a majority has now decided that picketing of a secondary employer’s premises does not *per se* constitute inducement or encouragement of employees of neutrals within the meaning of clause (i) of Section 8(b)(4), nor does it raise an irrebuttable presumption as to the intent or probable consequences of the picketing. [*Minneapolis House Furnishing*] Whether in any given case picketing is intended or calculated to “induce or encourage” employees of secondary employers to engage in a work stoppage or refusal to perform services is to be determined by all the evidence in that particular case and not by an *a priori* assumption.

In the present case, all the evidence indicates that by their picketing of the Safeway stores, Respondents did not intend that employees of Safeway or of other neutral persons should engage in work stoppage; nor were cessations of work likely to occur as the result of such picketing. Thus, the picketing was confined to store customer entrances. The signs carried by the pickets were addressed specifically to consumers and urged them not to buy Washington State apples sold in the store.

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The handbills similarly only urged consumers not to buy such apples. Written instructions to pickets issued by Respondents cautioned the pickets to limit their picketing to consumer entrances, and not to interfere with store employees or with pickups and deliveries. The notice to store managers gave the cause of the dispute and specifically stated that it was not intended that any employees cease work as the result of the picketing. This notice also asked store managers to report any work stoppages or difficulties with pickups or deliveries so that Local 760 could take steps to correct the situation immediately. Finally, the picketing had no effect on store employees or on employees of suppliers.

As the foregoing evidence indicates that Respondents' picketing was directed at consumers only, and was not intended to "induce or encourage" employees of Safeway or of its suppliers to engage in any kind of action, we find that by such picketing Respondents did not violate Section 8(b)(4)(i)(B) of the Act.

Although the picketing followed here did not violate Section 8(b)(4)(i)(B), it did violate Section 8(b)(4)(ii)(B). In the Minneapolis House Furnishing case the Board unanimously reiterated that "by literal wording of the proviso [to Section 8(b)(4)] as well as through the interpretive gloss placed thereon by its drafters, consumer picketing in front of a secondary establishment is prohibited." Such picketing "threaten[s], coerce[s], or restrain[s]" persons within the meaning of Section 8(b)(4)(ii). And when it has for an object forcing or requiring any person to cease selling or handling the products of any other producer or processor the picketing violates Section 8(b)(4)(ii)(B). In the present case the picketing had one of these proscribed objectives. The purpose of picketing the Safeway stores was to persuade consumers not to purchase nonunion Washington State apples which Safeway in turn purchased from members of Tree Fruits. The natural and foreseeable result of such picketing, if successful, would be to force or require Safeway to reduce or to discontinue altogether its purchases of such apples from the struck employers. It is reasonable to infer, and we do, that Respondents intended this natural and foreseeable result. Accordingly, we find that the foregoing picketing violated Section 8(b)(4)(ii)(B) of the Act.

It can certainly be expected that these rulings on consumer picketing will be carried to the highest court by the labor unions involved.

III. THE "GATE" CASES

It is important to note in this discussion of Section 8(b)(4) cases that the Landrum-Griffin Act did not change the concepts of what is proper primary activity. The first proviso of the three new provisos which Landrum-Griffin added to Section 8(b)(4) is appended to Section 8(b)(4)(B) and states that "nothing contained in this
clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.”

On May 29, 1961, the United States Supreme Court decided *Local 761, IUEW v. NLRB,* and set forth an excellent analysis of the NLRB decisions and the importance of the distinction between legitimate “primary activity” and banned “secondary activity.” The facts in this case were as follows: General Electric Corporation operated a plant outside Louisville, Kentucky, known as Appliance Park. The plant had five gates. One of the gates, known as Gate 3-A, was designated for the use of all employees of independent contractors who worked on the premises of Appliance Park. GE employees were required to use other gates. The independent contractors, whose employees used Gate 3-A, were utilized for a great variety of tasks. Some did construction work on new buildings; some installed and repaired ventilation and heating equipment; some engaged in retooling and rearranging operations necessary to the manufacture of new models; others did “general maintenance work.” Local 761 of the IUEW was the certified bargaining representative for the GE production and maintenance workers. On July 27, 1958, the Union called a strike because of unsettled grievances with the Company. Picketing occurred at all of the gates including Gate 3-A. The signs carried by the pickets at all gates read: “Local 761 on Strike. G.E. Unfair.” Due to the picketing, almost all the employees of independent contractors refused to enter the company premises. The Company contended that the picketing before Gate 3-A was prohibited by the provisions of 8 (b) (4) (A) of the Taft-Hartley Act.23

The Supreme Court remanded the case to the National Labor Relations Board to determine what kind of work was being done by the independent contractors whose employees were using Gate 3-A. The Court held that if the Gate was being used solely by workers of independent contractors who were performing tasks unconnected to the normal operations of GE (such as construction work on the Company’s buildings) the picketing of Gate 3-A was illegal. However, if the separate gate were being used for regular plant deliveries, the barring of picketing at that location would be a clear invasion of the rights of the union to appeal to neutral employees whose tasks aid the employer’s everyday operations. If the gate was being used by the employees of both types of independent contractors, then the picketing of Gate 3-A was legal. In the words of the Court:

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24 Under the Landrum-Griffin amendments of 1959, this became § 8(b)(4)(B).
The legal path by which the Board and the Court of Appeals reached their decisions did not take into account that if Gate 3-A was in fact used by employees of independent contractors who performed conventional maintenance work necessary to the normal operations of General Electric, the use of the gate would have been a mingled one outside the bar of Section 8(b)(4)(A). In short, such mixed use of this portion of the struck employer’s premises would not bar picketing rights of the striking employees. While the record shows some such mingled use, it sheds no light on its extent.

The Court further stated that if the amount of maintenance work performed by the employees of independent contractors using the gate was inconsequential in comparison to the amount of construction work performed, then the maintenance work could be disregarded by the Board in reaching a decision as to whether the picketing of Gate 3-A was legal.

Subsequent to the Supreme Court’s decision in the Local 761 case, the Board decided the Carrier Corp.3 case in which a spur of the New York Central Railroad ran alongside and immediately south of the Carrier plant. The Carrier plant was bounded on the west by Thompson Road. The railroad spur was used to serve Carrier and other plants in the adjacent area. The railroad right-of-way, which was owned by the railroad, was enclosed by a chain fence along its south boundary, which fence was a continuation of one enclosing the Carrier property on the west. Access to the right-of-way was provided by a chain link gate immediately east of the point where the spur crossed Thompson Road. The Steelworkers, who were on strike against Carrier, maintained pickets at the Thompson Road railroad gate, threatened railroad personnel and blocked the trains passage. Contrary to the Trial Examiner, the NLRB, by a 4-1 vote, with member Rodgers dissenting, ruled that the Steelworkers had not violated 8(b)(4)(i) and (ii)(B) of the Act. The Board held that the Local 761 decision of the Supreme Court was dispositive of the issue in this Carrier Corp. case and stated:

While the gate here through which the New York Central train passed was not one reserved by Carrier for the New York Central’s use, but was in fact one on a right-of-way owned by the railroad, we do not consider this fact to be material. The "key to the problem," as the Court stated, is to be found in the type of work being done by those passing through the gate. If the work is unrelated to the normal operations of the primary employer, picketing at that gate will violate the secondary boycott prohibition of the Act. On the other hand, if this work is related to normal plant operations, the secondary boycott

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prohibition does not apply. As stated above, the services performed by New York Central for Carrier—the delivery of empty box cars to Carrier and the transportation of Carrier products—clearly were related to Carrier's normal operations. For this reason we find that the Respondents did not violate Section 8(b)(4)(i)(B) or 8(b)(4)(ii)(B)....

The Board also took particular pains to point out:

Contrary to our dissenting colleague, we are not seeking to revive a doctrine that railroads and railroad employees are not, respectively, "employers" and "employees" within the meaning of the secondary boycott provisions of the Act. By its 1959 amendments, Congress underscored its intention to give railroads the protection against secondary boycotts accorded other employers. But it did not seek to give railroads or any other secondary employers immunity from lawful primary picketing at entrances to the premises of primary employers. This is further shown by the express proviso to Section 8(b)(4)(B), which Congress also adopted in 1959, namely, that "nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."

IV. SECTION 8(b)(4)(C)

The illegal objective prohibited by clause (C) is "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. . . ."

Early in October 1961, the NLRB, by a 3-2 decision, with members Rodgers and Leedom dissenting, handed down an extremely important decision in the Calumet Contractors Ass'n case.24 An independent union had been certified by the Board. Hod Carriers Local 41 engaged in picketing for the purpose of obtaining prevailing rates and conditions. The president of Local 41 testified that there would have been no picketing had the Association met the prevailing rates of pay and conditions. It was stipulated by the parties at the hearing that Local 41 did not request recognition or demand bargaining. In its first decision issued in February 1961, the Board ruled that one of the objects of Respondent's picketing was to force DeJong and the Association to meet the "prevailing rate of pay and conditions" for the area. It is well established that a Union's picketing for prevailing rates of pay and conditions of employment constitutes an attempt to obtain conditions normally resulting from collective bargaining, and constitutes an attempt by the union to force itself on employees as their bargaining agent.

Upon reconsideration, however, the Board dismissed the complaint and held that

Respondent's admitted objective to require the Association and DeJong to conform standards of employment to those prevailing in the area, is not tantamount to, nor does it have an objective of, recognition or bargaining. A union may legitimately be concerned that a particular employer is undermining area standards of employment by maintaining lower standards. It may be willing to forego recognition and bargaining provided subnormal working conditions are eliminated from area considerations. We are of the opinion that Section 8(b)(4)-(C) does not forbid such an objective.

It may be argued—with some justification—that picketing by an outside union when another union has newly won Board certification is an unwarranted harassment of the picketed employer. But this is an argument that must be addressed to Congress. Section 8(b)(4)(C), as we read it, does not contain a broad proscription against all types of picketing. It forbids only picketing with the objective of obtaining "recognition and bargaining." On the record before us, Respondent clearly disclaimed such an objective and sought only to eliminate subnormal working conditions from area considerations. As this objective could be achieved without the Employer either bargaining with or recognizing Respondent, we cannot, reasonably conclude that Respondent's objective in picketing DeJong was to obtain "recognition or bargaining." Accordingly we find no violation of Section 8(b)(4)(C) of the Act in the circumstances of this case.

It should be noted that Section 8(b)(7) contains the same prohibited object and makes it an unfair labor practice "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. . . ."

In the Lewis Food Co. decision which was issued during 1956,25 with another union being certified, Local 626, Meat and Provision Drivers Union, picketed the employer for the purpose of forcing him to reinstate certain employees who were discharged, allegedly because they were members of Local 626. Local 626 notified the employer shortly after the picketing had begun that the picketing would be terminated if the employer would reinstate the discharged employees. The Board held that this was a strike to force or require the employer to recognize and bargain with Local 626 as to this matter, and, therefore, constituted a violation of 8(b)(4)(C).

On October 27, 1961, the Board decided the Fanelli Ford Sales

case which arose under 8(b)(7). In the Fanelli case, which involved only one union, the object of the union’s picketing was to protest the discharge of an employee and to have him returned to work. The Board’s decision, from which member Rodgers dissented, concluded as follows:

It may not be gainsaid, of course, that picketing for an employee’s reinstatement may in some circumstances be used as a pretext for attaining recognition as collective bargaining representative of all the employees in a certain unit. But before we are willing to infer such broader objective, some more affirmative showing of such object must be made than exists here. So far as this record indicates, Respondent’s picketing would have ceased if the Employer, without recognizing or, indeed, exchanging a word with the Respondent, had reinstated Marrone. We find in this case that the picketing was directed solely at securing Marrone’s reinstatement. We further find that such conduct does not violate Section 8(b)(7), of the Act. We accordingly overrule Lewis Food to the extent inconsistent herewith.

V. SECTION 8(e)

The Landrum-Griffin Act makes it an unfair labor practice for a labor organization or its agents to engage in the prohibited conduct set forth in Section 8(b)(4)(i) and (ii) for the proscribed objective (A), i.e., “to enter into any agreement which is prohibited by Section 8(e).” Section 8(e) which was added to the law by Landrum-Griffin, without its provisos reads as follows:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void. . . .

The Board’s thinking in this connection is best reflected by studying the clauses which have been found to be valid.27 In the Miami Lithographers case,28 the Board upheld the validity of the “Struck Work” paragraph (Section 19) with these words:

“Struck Work”

The “struck work” paragraph contains two parts: a general statement

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27 The best way to understand the rulings of the NLRB with respect to the kinds of agreements that are prohibited by the terms of § 8(e) and the kinds of agreements that might be permissible is to set them out together. The leading decisions interpreting § 8(e) are set out in the Appendix.
that the contracting company will not render production assistance to any employer whose plant is struck by a local of the International, and an implementation clause which provides that in carrying out the above employees shall not be required to handle any lithographic work “farmed out” by such employer, other than work which the contracting employer has customarily performed for the struck employer.

The general statement, if standing alone, would be unlawful because it embodies more than the “ally” doctrine. However, the general statement must be read together with and in the context of the implementation clause. According to the latter, employees are not to be required to handle farmed out “struck work,” unless the contracting employer has customarily performed such work for the struck employer. We read the two clauses, the general with the particular, as embodying nothing more than the Board and the court sanctioned “ally” doctrine which Congress clearly intended to preserve. As so construed, the “struck work” paragraph is lawful.

With respect to the “Chain Shop” provision (Section 20) the Board stated:

“Chain Shop”

This clause in substance recognizes the right of employees to strike if employees in another lithographic plant “wholly owned and controlled by the company or commonly owned and controlled” are on strike or have been locked out. In the recent Alexander Warehouse case, the Board held that, where a dispute existed at one of three, geographically separated plants of an employer, picketing at the plants where no dispute existed was lawful, primary activity. The above clause therefore merely embodies the union’s statutory right, unless the reference to a company “commonly owned and controlled” extends the right to strike beyond the statutory permission, that is, to a situation where the company at which a primary strike occurs is not a single employer together with the contracting company at which the sympathy strike occurs. However, in the Dearborn Oil & Gas case, the Board said:

Generally speaking, in those unfair labor practice cases in which the Board and the courts have held that a legal entity may be held for the acts of another, because both constituted a single employer, it appeared that both were not only subject to com-

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30 Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 942, 1007, 1189 (U.S. Gov’t Printing Office 1959). The present clause is significantly different from the “struck work” clause in the San Francisco case. In the latter, the “struck work” clause precluded the contracting employer from doing not only farmed out “struck work,” but also work customarily done for the struck employer. In the present case, the clause specifically preserves the employer’s right to continue to do work which the employer has customarily done for the struck employer.
32 Dearborn Oil & Gas Corp. (Oil, Chemical, & Atomic Workers), 125 N.L.R.B. 645 (1959).
Centralized control of labor relations is a factor frequently stressed by the Board in finding common control of separate legal entities. Accordingly, we construe the “chain shop” clause as saying that, a strike at the plant of the contracting employer in sympathy with a strike at the plant of another company which is a separate legal entity is permitted, provided that, the two legal entities because of common control and ownership as the Board uses these terms, constitute a single employer within the meaning of the Act. Such a clause is therefore lawful.

The Board also found the “Right to Terminate” clause (Section 21) to be valid and said: “As we have found that the ‘struck work’ clause is lawful, the ‘right to terminate’ clause intended to give the Union a remedy for the breach of the former is equally lawful.”

The most difficult questions under 8(e), however, will arise in connection with subcontracting clauses, which prohibit employers from subcontracting work which is normally done within the bargaining unit, and picket line clauses which allow employees to refrain from crossing a picket line. In the Minnesota Milk Co. case, the Board stated in part as follows:

Finally, we do not agree with the broad conclusions of the Trial Examiner that Section 8(e) bars all agreements prohibiting the subcontracting of work. The Trial Examiner states:

It is clear from this legislative history that Congress clearly intended as a matter of public policy thereby [the enactment of Section 8(e)] to outlaw not only traditional “hot cargo” clauses in contracts made by the Teamsters and other unions in the transportation industry, but beyond that all similar clauses which directly or indirectly required an employer to cease doing business by contract, subcontract or in any other manner, with any other person.

We find no justification in the statute for so sweeping a generalization. With respect to contracts and agreements prohibiting an employer from the contracting or subcontracting out of work regularly performed by his employees we shall examine each such contract or agreement as it comes before us. The language used, the intent of the parties and the scope of the restriction vary greatly in such agreements and each must meet scrutiny in terms of the statutory restraint on its own.

Subcontracting contracts, it can safely be predicted, will provide an area for important debate and litigation.

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APPENDIX

NLRB Decisions Governing Validity of Clauses Under 8(e)

Amalgamated Lithographers of America, 130 N.L.R.B. No. 102, 47 L.R.R.M. 1374 (1961), held the following clauses to be invalid and violative of Section 8(e):

SECTION 22. TRADE SHOP WORKS: (a) The parties agree that all the terms of this contract have been negotiated on the assumption that all lithographic production work will be done under approved union wages and conditions. In the event any employer covered by this contract requests any employee to handle any lithographic production work made in any shop which was not under contract with the Amalgamated Lithographers of America and authorized to use the union label of the Amalgamated, then the Union in its discretion by notice in writing, may re-open the contract as to that employer for negotiations as to the whole or any part thereof. In the event of failure to agree on all terms within ten days after such re-opening, the Union shall have the right to terminate the contract forthwith as to that employer by giving written notice to such employer.

(b) Union trade shops must affix the Union label on all their products before sending them to any other shop.

(c) Finished lithographic press plates which are sent out of any plant (unless for regraining) shall have the Union label and the name of the plant in the plate, except that as to plates heretofore made this may be done by otherwise attaching the Union label and name of the plant to the plate. Any negatives or positives sent out of a plant shall bear the Union label and the name of the plant.

(d) Upon request by the shop delegate an employer shall advise him of the source of any lithographic work brought into the plant from the outside. Such request shall not interfere with the normal production of the plant.

SECTION 23. STRUCK WORK: (a) The Employers agree that they will not render assistance to any lithographic employer any of whose plants is struck by any Local of the Amalgamated Lithographers of America or the International or where members of any such Local or the International are locked out, and accordingly agree that in implementation of this purpose the employees covered by this contract shall not be requested to handle any lithographic work (other than work actually in process in the plant) customarily produced by such employer.

(b) The Employers agree that the employees covered by this contract shall not be requested to handle any work in any plant if in another plant of any employer or of any subsidiary of such employer in any part of the United States or Canada any Local of the Amalgamated Lithographers of America or the International is on strike or members of such Local or the International are locked out.

SECTION 24. TERMINATION: In the event an employer requests any employee to handle any work described in paragraph (Section 23) above, or requests any employee to handle any work received from or
destined for any employer involved in such strike or lockout, directly or indirectly (other than work actually in process in the plant), the Union, in addition to the other rights and remedies the employees and the Union have under this contract or the law, shall have the right in its discretion to terminate the contract forthwith as to that employer by giving written notice to said employer.

SECTION 25. REFUSAL TO HANDLE: The Employers agree that they will not discharge, discipline or discriminate against any employee because such employee refuses to handle any lithographic production work which was made in a shop not under contract with the Amalgamated Lithographers of America or not authorized to use the union label of the Amalgamated or because such employee refused to handle any struck lithographic work of the type described in Sections 23 and 24.

Amalgamated Lithographers of America (Employing Lithographers of Greater Miami, Florida), 130 N.L.R.B. No. 107, 47 L.R.R.M. 1380 (1961), held the following clauses to be lawful:

STRUCK WORK

Section 19. The company agrees that it will not render production assistance to any lithographic employer, any of whose plants is struck by any local of the Amalgamated Lithographers of America or the International, or where members of any such local or the International are locked out, and accordingly agrees that in implementation of this purpose the employees covered by this contract shall not be required to handle any lithographic work farmed out directly or indirectly by such employer, other than work which the employer herein customarily has performed for the employer involved in such strike or lock-out.

CHAIN SHOP

Section 20. Each Company agrees that its employees shall not be requested to handle any work in the plant covered by this contract if in another lithographic plant which is wholly owned and controlled by the company or commonly owned and controlled, in any part of the United States or Canada, any Local of the Amalgamated Lithographers of America is on strike, or members of such Local or International are locked out.

RIGHT TO TERMINATE

Section 21. In the event the Company requests any employee to handle any work described in Section 19 above, the Union, in addition to the other rights and remedies the employees and the Union have under this contract or the law, shall have the right in its discretion to terminate the contract forthwith by giving written notice to the company.

Local 107, Teamsters Union (E. A. Gallagher & Sons), 131 N.L.R.B. No. 117, 48 L.R.R.M. 1158 (1961), found the following contract provisions unlawful under Section 8(e):

Paragraph 9: Article VII of the current contract shall be amended so as to provide in addition that it is the Operator's obligation to see that all trucks arriving in this area from over the road are brought to the
terminal before making any delivery or pickup unless otherwise agreed upon.

ARTICLE VII: All local area operation work which in the past, MTLR, Operator, and a particular Union agree should or was to be performed solely by employees covered by this Agreement shall be performed by employees represented by Union.

ARTICLE XVII: Local area operations include all work performed within the city of Philadelphia or within a radius of forty (40) miles from City Hall, Philadelphia.

ARTICLE XXI: No Operator may lease or hire outside equipment to supplement his own equipment unless all of Operator's available, useable equipment is working. No outside driver shall be permitted to operate leased or hired equipment unless and until all available employees on the seniority list of Operators have been assigned to work in seniority list order; this provision shall not apply to specialized equipment not normally driven by Operator's employees. When Operator leases or hires equipment with a driver, operator shall give first preference to employers having a contract with a local of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Merchandising & Distribution Employees Union (American Feed Co.), 133 N.L.R.B. No. 23, 48 L.R.R.M. 1622 (1961), found the following clause unlawful and prohibited by Section 8(e):

There is hereby excluded from the job duties, course of employment or work of employees covered by this agreement, any work whatsoever in connection with the handling or performing any service whatsoever on goods, products or materials coming from or going to the premises of an Employer where there is any controversy with a Union.

Operating Engineers Union (Vandenberg Development Corp.), 131 N.L.R.B. No. 75, 48 L.R.R.M. 1081 (1961), involved employers in the construction industry. The Board upheld the validity of the following clause:

1-D. If the CONTRACTORS, parties hereto, sub-contract job site work falling within the recognized jurisdiction of the UNION, provision shall be made in such sub-contract for the compliance by said sub-contractor with terms not less than those contained herein. A sub-contractor is defined as any person, firm or corporation who agrees, under contract with the general contractor or his sub-contractor, to perform on the job site any part or portion of the work covered by this Agreement, including the operating of equipment, performance of labor, and the furnishing and installation of materials.

In the Brown Transp. Corp. (Teamsters Union) (10-CE-1, 10-CC-460) case, the General Counsel of the National Labor Relations Board challenged the legality of the following Protection-of-Rights clause and a Trial Examiner ruled the clause to be illegal:
SECTION A. PROTECTION OF RIGHTS

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

2. Struck Goods. Recognizing that many individual employees covered by this contract may have personal convictions against aiding the adversary of other workers, and recognizing the propriety of individual determination by an individual workman as to whether he shall perform work, labor or service which he deems contrary to his best interests, the parties recognize and agree that:

   It shall not be a violation of this Agreement and it shall not be a cause for discharge or disciplinary action if any employee refuses to perform any service which, but for the existence of a controversy between a labor union and any other person (whether party to this Agreement or not), would be performed by the employees of such person.

   Likewise, it shall not be a violation of this Agreement and it shall not be a cause for discharge or disciplinary action if any employee refuses to handle any goods or equipment transported, interchanged, handled or used by any carrier or other person, whether a party to this Agreement or not, at any of whose terminals or places of business there is a controversy between such carrier, or person, or its employees on the one hand and a labor union on the other hand; and such rights may be exercised where such goods or equipment are being transported, handled or used by the originating, interchanging or succeeding carriers or persons, whether parties to this Agreement or not.

   The Employer agrees that it will not cease or refrain from handling, using, transporting, or otherwise dealing in any of the products of any other employer or cease doing business with any other person, or fail in any obligation imposed by the Motor Carriers' Act or other applicable law, as a result of individual employees exercising their rights under this Agreement or under law, but the Employer shall, notwithstanding any other provision in this Agreement, when necessary, handle, use, transport or otherwise deal in such products and continue doing such business by use of other employees (including management and representatives), other carriers, or by any other method it deems appropriate or proper.

3. Grievances. Within five (5) working days of filing of grievance claiming violation of this Article the parties to this Agreement shall proceed to the final step (Article ____, Sections_____) of the Grievance Procedure, without taking any intermediate steps, any other provisions of this Agreement to the contrary notwithstanding.

4. Sympathetic Action. In the event of a labor dispute between any Employer or Union, party to this Agreement, during the course of which such Union engages in lawful economic activities which are not in violation of this Agreement, then any other affiliate of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America having an agreement with such Employer shall have the right
to engage in lawful economic activity against such Employer in support of the Union which is party to this Agreement notwithstanding anything to the contrary in the Agreement between such Employer and such other affiliate.

Section B contained a Protection-of-Rights Clause which the General Counsel stipulated may be enforced pending determination of the validity of Section A:

SECTION B. SAVINGS CLAUSE

Pending a determination by the National Labor Relations Board that the above Article ______, Section A, is valid, or in the event of a determination by such Board that such Article is invalid, then pending final determination by the Court, the Union and the Employer shall comply with and enforce only the following modification thereof:

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

2. Struck Goods. It shall not be a violation of this Agreement and it shall not be a cause for discharge or disciplinary action if any employee refuses to perform any service which his employer undertakes to perform for an Employer or person whose employees are on strike, and which service, but for such strike, would be performed by the employees of the Employer or person on strike.

3. Grievances. Within five (5) working days of filing of grievance claiming violation of this Article, the parties to this Agreement shall proceed to the final step (Article______, Section______) of the grievance procedure, without taking any intermediate steps, any other provision of this Agreement to the contrary notwithstanding.

4. Sympathetic Action. In the event of a labor dispute between any Employer or Union, party to this Agreement, during the course of which such Union engages in lawful economic activities which are not in violation of this Agreement, then any other affiliate of the International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America having an Agreement with such Employer shall have the right to engage in lawful economic activity against such Employer in support of the Union which is party to this Agreement notwithstanding anything to the contrary in the Agreement between such Employer and such other affiliate.