

DOES RECOGNITION PICKETING VIOLATE THE TAFT-HARTLEY ACT?

Under the present state and federal construction of the Labor-Management Relations Act (Taft-Hartley) — an enactment in part designed to strengthen management's position by placing certain regulations on labor unions—it appears that labor unions have received an unexpected boon. The source of this boon is *Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776 (AFL)*,¹ a case which has been interpreted by state and federal courts as holding that recognition picketing² is an LMRA unfair labor practice and therefore can be regulated only by the National Labor Relations Board and not by the states. Under this view state tribunals have refused to enjoin recognition picketing where they otherwise would do so.³ The

1. 346 U.S. 485 (1953).

2. "Recognition picketing" is a term which is applied to picketing whose purpose is to apply economic pressure on an employer so he will compel his employees to join the picketing union. This type of picketing should be distinguished from "organizational picketing," where the purpose of the union is merely to persuade the employees to join the union. While state courts enjoined recognition picketing prior to *Garner*, they refused to enjoin organizational picketing, which has been held to be an exercise of free speech. The criteria used to distinguish the two types of picketing are not well defined. Courts which found the purpose of the picketing was to compel the employer to coerce his employees have stressed these facts: (1) the length of time that the picketing has continued; (2) the extent of economic harm caused; (3) the apparent unwillingness of the employees to join the union; and (4) the weak persuasive powers of a picket sign. In recent years there has been a controversy over the legitimacy of any distinction between recognition and organizational picketing. Several writers have advocated that all "stranger picketing," i.e., picketing where no union members are employees of the picketed business, should be restrained. For interesting discussions on the subject see Petro, *Picketing and Labor Strategy*, 2 LABOR L.J. 243 (1951); Rothenberg, *Organizational Picketing*, 5 LABOR L.J. 689 (1954).

A recent NLRB administrative ruling shows that the NLRB position is that stranger picketing, whether termed "recognition" or "organizational," is lawful where there is no certified union. 35 LAB. REL. REP. (Ref. Man.) 1533 (NLRB 1955).

3. Your Food Stores of Santa Fe, Inc. v. Retail Clerks Local No. 1564 (AFL), 121 F. Supp. 339 (D.N.M. 1954); Grimes & Hauer, Inc. v. Pollock, 119 N.E.2d 889 (Ohio App. 1954); Wisconsin ERB v. Chauffeurs, Teamsters & Helpers Local 200, 34 LAB. REL. REP. (Ref. Man.) 2390 (Wis. 1954). The result of these cases can be explained on the ground that the management lawyer in each case alleged that the activity was an LMRA unfair labor practice. All these cases apparently originated before the *Garner* case said that the NLRB had exclusive jurisdiction to adjudicate an LMRA unfair labor practice, and management counsel could not, of course, realize that a subsequent decision—*Garner*—would subject their complaint to dismissal. The decisions, then, can be explained on the ground that the courts simply took counsel at their word, as a subsequent recent decision requires the courts to do; the Supreme Court stated in *Weber v. Anheuser-Busch, Inc.*, 23 U.S.L. WEEK 4150 (U.S. March 28, 1955) at 4154:

[W]here the moving party itself alleges [LMRA] unfair labor practices . . . the state court must decline jurisdiction in deference to the tribunal which Congress has selected for determining such issues in the first instance.

The danger in these cases rests chiefly on the fact that the courts have written their opinions rather broadly. They have said that by the authority of *Garner*, the facts alleged, if true, would constitute a violation of the LMRA. If, in fact, Congress intended recognition picketing should not be an unfair labor practice, then the ready acceptance by the courts that recognition picketing is an unfair

NLRB, however, has not prosecuted actions against labor unions engaged in recognition picketing.⁴ Thus the unions happily find themselves in an unregulated no man's land free to work great economic loss on remediless employers.⁵

There are, however, two possible explanations of *Garner* other than that thus far accepted by the state and federal courts. A very real possibility exists that the Supreme Court did not actually decide that recognition picketing violates the LMRA, but only assumed it to be a violation. It is also possible that *Garner* established the doctrine, later made explicit in *Weber v. Anheuser-Busch, Inc.*,⁶ that a state cannot regulate conduct which *potentially* violates the LMRA, regardless of whether there is an *actual* violation,⁷ and therefore it was unnecessary

labor practice promises to create a difficult group of precedents which a lawyer may subsequently have trouble in overcoming if he argues that recognition picketing is not subject to restraint under the present interpretations by the NLRB.

4. This note will later show that the NLRB has restrained recognition picketing only where another union has been previously certified as bargaining representative of the employees. At present, all other peaceful stranger picketing apparently is free from NLRB restraint. See text supported by note 23 *infra*.

5. The situation treated in Administrative Ruling, 32 LAB. REL. REP. (Ref. Man.) 1464 (NLRB 1953) is a good example of the harmful effects recognition picketing may have on an employer. The picketing union had been rejected by a vote of the employees; thirty days of picketing followed this rejection. The employer's sales dropped \$116,000 in that month. The NLRB counsel refused to issue a complaint, saying no unfair labor practice had been alleged. Under most state laws the union would be subject to restraint if the employer had been engaged in intrastate commerce. Yet here, where interstate commerce was involved, if the employer had applied to the courts cited in note 3 *supra* he would have undoubtedly been told that the NLRB had exclusive power to restrain the activity.

6. 23 U.S.L. WEEK 4150 (U.S. March 28, 1955). The *Anheuser-Busch* case involved federal pre-emption issues but did not involve recognition picketing.

7. This might be called the "doctrine of partial pre-emption." It means that a state cannot regulate a type of activity which appears violative of the LMRA until the NLRB has ruled the type of activity does not transgress the statute. Here two situations should be distinguished: (1) where the NLRB has ruled as a matter of law, with or without a hearing on the facts, that the type of activity involved does not come within the federal statute, (2) where the NLRB has merely ruled that the facts are insufficient to prove what would be an LMRA unfair labor practice were the facts sufficient. In the first case the state courts could regulate the activity unless it were protected by federal law. In the second instance the state courts could not regulate the activity, for there would still be a potential violation in such a situation inasmuch as the facts could become more aggravated.

The *Anheuser-Busch* doctrine of partial pre-emption should be compared to the theory of complete pre-emption which, prior to the *Anheuser-Busch* case, some authorities believed *Garner* had established. The complete pre-emption theory is that Congress, by the LMRA, pre-empted the entire field of regulation of labor affecting interstate commerce, and consequently that any labor practice not subject to regulation under the LMRA is free from any regulation, federal or state. This theory is predicated on the thesis that Congress realized the need of a uniform national labor policy and therefore decided in what activities unions and employers may engage and in what activities they may not engage, and the forbidden activities were expressly delineated in Section 8 of the LMRA; therefore, any activity not forbidden was intended by Congress to be protected from outside interference. Any state policy that would enjoin activities not pro-

for the Supreme Court to decide in *Garner* whether there was an actual violation.^{7*} If the Supreme Court did not decide the violation question, then the state courts may have unnecessarily limited their power to regulate by their view that *Garner* held recognition picketing to be a violation of the LMRA.⁸ It is the purpose of this note to examine whether recognition picketing is, or should be, an unfair labor practice under the LMRA.^{9*}

I. IS RECOGNITION PICKETING AN LMRA UNFAIR LABOR PRACTICE?

The question whether recognition picketing is an LMRA unfair labor practice can be divided into two parts: (A) Did *Garner* decide that recognition picketing is an LMRA unfair labor practice? (B) What other evidence is there that recognition picketing violates the LMRA?

hibited under Section 8 would therefore be in conflict with Congressional intent. This theory of complete pre-emption has been comprehensively discussed by various authors. COX, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297 (1954); COX and SEIDMAN, *Federalism and Labor Relations*, 64 HARV. L. REV. 211 (1950); PETRO, *Participation by the States in the Enforcement and Development of National Labor Policy* in PROCEEDINGS OF NEW YORK UNIVERSITY IN FIFTH ANNUAL CONFERENCE ON LABOR 1 (1952); RATNER, *Problems of Federal-State Jurisdiction in Labor Relations* in PROCEEDINGS OF NEW YORK UNIVERSITY IN FIFTH ANNUAL CONFERENCE ON LABOR 77 (1952).

The *Anheuser-Busch* case has specifically said that much of the labor relations area is still open for state regulation, and thus has laid to rest, at least for the present, the question of complete federal pre-emption.

Contrasted to the above pre-emption views is the view of *Garner* which those courts that have refused to regulate recognition picketing have apparently taken. These courts seem to proceed on the premise that the Supreme Court in the *Garner* case would have prohibited Pennsylvania from acting only if the Court found recognition picketing violative of the LMRA. See text supported by notes 13-16 *infra*.

7a. See text supported by notes 20a-20c *infra*.

8. Until the NLRB acts definitively, there is a possibility that recognition picketing, as defined (see note 2 *supra* and text at beginning of section II *infra*), might be held to violate the LMRA, for there are sections of the statute which might reasonably be interpreted to cover the activity (see text supported by notes 53-59 *infra*), and thus whenever recognition picketing is carried on there is a potential violation of the LMRA, which, according to the *Anheuser-Busch* case, precludes the state courts from regulating the conduct. However, a very strong argument can be made that the NLRB has acted definitively and has held that recognition picketing does not violate any of the sections of Taft-Hartley which it might reasonably be construed to violate. See text supported by notes 21-47 *infra*. If this argument is valid, the courts cited in note 3 *supra* have unnecessarily limited their power to regulate recognition picketing, assuming that these courts are incorrect in their conclusion that the Supreme Court held in *Garner* that recognition picketing is an unfair labor practice. Therefore, if a state court clearly purported to base regulation of recognition picketing on the ground that the NLRB has ruled that the practice does not violate the LMRA, the Supreme Court would probably be compelled either to affirm the state court or to overrule the NLRB's apparent position that recognition picketing does not violate the Taft-Hartley Act.

8a. There are two reasons why it is necessary to determine whether recognition picketing violates the LMRA. (1) If it does violate the LMRA, the NLRB should reverse the position it apparently has taken (see text supported by notes 21-47 *infra*) and should regulate the conduct. (2) If it does not violate the LMRA, the states which have accepted without analytical inquiry the proposition that

A. Did Garner Decide Recognition Picketing Is an Unfair Labor Practice?

In the *Garner* case the Pennsylvania State Labor Board, on the employer's application, found that the union's primary purpose in picketing was to cause economic harm to the employer so that he would coerce his employees to join the union. A lower court enjoined the picketing on the ground that this conduct was an unfair labor practice under the state labor relations act.⁹ The Pennsylvania Supreme Court, however, reversed the lower court.¹⁰ The state high court said the activity did violate the Pennsylvania statute but state courts had no jurisdiction to restrain the activity because the conduct also violated Section 8(b) (2) of the federal act and consequently the NLRB had exclusive jurisdiction over the controversy. The employer then applied for certiorari to the United States Supreme Court on the ground that the LMRA does not preclude a state from exercising concurrent jurisdiction with the NLRB to regulate a labor practice which may violate both state and federal statutes.¹¹ The Supreme Court upheld the state determination that the NLRB had exclusive jurisdiction.¹²

Before the *Anheuser-Busch* case provided an explicit basis on which *Garner* can be explained without difficulty, and thus resolved the in-

recognition picketing is an unfair labor practice may well be bypassing a major issue, *viz.*, whether recognition picketing is open to state regulation, or is affirmatively protected by Congress. For the arguments why it may be protected see text supported by notes 61-66 *infra*.

9. Central Storage Transfer Co. v. Teamsters, 30 LAB. REL. REP. (Ref. Man.) 2379 (Pa. C.P. 1951). In the lower court the union argued that the employer had alleged facts which constituted a violation of Section 8(b)(1)(A) of the LMRA and therefore the NLRB had exclusive jurisdiction to enjoin the activity. This section deals with direct coercion of employees. See text supported by note 32 *infra*. The lower court held that Section 8(b)(1)(A) was not violated but that the state act was violated and enjoined the picketing. Interestingly enough, when the case reached the Supreme Court of Pennsylvania that court did not discuss Section 8(b)(1)(A), but said a different section, 8(b)(2), which had not even been mentioned in the lower court, was violated and that the NLRB had exclusive authority to restrain the alleged violation. *Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776 (AFL)*, 373 Pa. 19, 28, 94 A.2d 893, 896 (1953). Section 8(b)(2) deals with union attempts to compel an employer to coerce his employees to join the union. See text supported by notes 21, 22 *infra*.

10. *Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776 (AFL)* 373 Pa. 19, 94 A.2d 893 (1953).

11. Justice Jackson said that the concurrent jurisdiction question was the sole issue before the court. *Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776 (AFL)*, 346 U.S. 485, 486 (1953).

12. *Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776 (AFL)*, 346 U.S. 485 (1953). The Court said that the NLRB had exclusive jurisdiction to restrain an alleged unfair labor practice because Congress desired a uniform law throughout the country. Though the state courts might say that their law was the same law as that in the federal statute, their interpretations might be altogether different from the NLRB and thus, in effect, there would be a variance in the substantive law. *Id.* at 490, 491.

determinacy of the basis of *Garner*,¹³ there were reasonably strong arguments to support the contention that the *Garner* case did hold that recognition picketing violates the LMRA. The first of these arguments proceeds wholly, and the second partially, on the assumption that *Garner* was decided strictly on the issue whether a state can have concurrent jurisdiction to regulate what is determined to be an LMRA unfair labor practice, and was not predicated on a complete or partial pre-emption theory.¹⁴

For the Supreme Court to reach the concurrent jurisdiction point in *Garner*, it would, as a matter of logic, first have had to decide whether the picketing in question violated the LMRA. The state court said recognition picketing violates the Pennsylvania Labor Relations Act. Therefore, to have before the Court the question whether the two tribunals, the NLRB and the state court, had concurrent jurisdiction to restrain the conduct, it would be necessary to hold that the NLRB had jurisdiction, which, in turn, involves a holding that the conduct violates the LMRA since the NLRB has jurisdiction only over LMRA unfair labor practices. The finding that recognition picketing violates the LMRA would be necessary because the Supreme Court will not decide an abstract question.¹⁵ The question of concurrent jurisdiction would be abstract if there were no violation of the LMRA, for if there were no violation, the NLRB would not have jurisdiction and there would be no issue in the case requiring a decision on the concurrent jurisdiction point; and any statement on it by the Supreme Court would be a mere gratuity. This may be the reason why most authorities had taken the position prior to the *Anheuser-Busch* case that *Garner* did decide that recognition picketing is an unfair labor practice, and was probably the strongest argument for that position at that time.

A second argument which rather strongly supported the contention that *Garner* decided the violation issue was that the general tone of the opinion indicates the Court assumed in its decision that the LMRA was violated, and apparently was ready to accept the state court's determination to that effect. It is highly unlikely that a group of jurists of the stature of the Supreme Court Judges would overlook the significance of the specific issue of whether the federal statute was actually violated. If they did not overlook the issue, they must have assumed there was a violation in order to have decided the case as they did. It is arguable that such an assumption by the highest court in the land carries great significance as a precedent and is tantamount

13. See notes 3 and 7 *supra*; text supported by notes 6 and 7 *supra*; text supported by notes 20a-20c *infra*.

14. See note 7 *supra*.

15. ROBERTSON and KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES 279 (Wolfson and Kurland ed. 1951).

to a decision. A third argument that *Garner* decided the violation issue was that there are several specific statements in the opinion which would support the conclusion that the court actually held the LMRA was violated.¹⁶

Even before the *Anheuser-Busch* case, there were compelling arguments in favor of the contention that the Supreme Court did not actually decide that Taft-Hartley was violated, but merely accepted without independent inquiry the state findings that the activity violated the federal act. The employer was granted certiorari to the Supreme Court solely on the contention that the state had concurrent authority with the NLRB to regulate recognition picketing.¹⁷ The request for certiorari was not based on the ground that the state court had erred in holding recognition picketing violated the LMRA. In their briefs on argument neither petitioner nor respondent contested the violation issue, apparently assuming there was a violation, and chose to argue the question of the state's ability to exercise concurrent jurisdiction over the controversy. Only in an *amicus curiae* brief is there any suggestion that Section 8(b) (2) was not violated.¹⁸ In the Anglo-American system the courts do not normally decide questions which are not argued to the court. In view of this principle, and in view of the fact that the Supreme Court normally will decide only the question on which it granted certiorari and also will not consider is-

16. In *Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776 (AFL)*, 346 U.S. 485, 501 (1953), the Court said:

On the basis of the allegations, the petitioners could have presented this grievance to the National Labor Relations Board. The respondents were subject to being summoned before that body to justify their conduct.

The Court also said at p. 487:

The Supreme Court of the Commonwealth held, quite correctly, we think, that petitioners' grievance fell within the jurisdiction of the National Labor Relations Board to prevent unfair labor practices.

And in another part of the opinion, on p. 488, it was said:

This is not an instance of injurious conduct which the National Labor Relations Board is without express power to prevent. . . . [Italics added.]

17. See note 11 *supra*.

18. Brief for the CIO as *Amicus Curiae*, pp. 13-15, *Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776 (AFL)*, 346 U.S. 485 (1953). Interestingly enough, the NLRB filed an *amicus curiae* brief in which it took the position that the alleged activity was prohibited by the LMRA and that the state court therefore was precluded from acting. Brief for the NLRB as *Amicus Curiae*, pp. 12, 13, *Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776 (AFL)*, 346 U.S. 485 (1953). In the NLRB brief only a footnote was devoted to the issue of violation of federal law; the rest of the brief was an argument against concurrent state jurisdiction. The NLRB did not cite any direct authority where recognition picketing had been enjoined. Neither before nor after the case has the NLRB ever enjoined recognition picketing in the absence of another union being certified. This casts some doubt upon the validity of the short argument in the brief that recognition picketing is an unfair labor practice. The cavalier treatment of the issue in the brief would also seem to indicate that the board was more interested in obtaining a ruling that the state could not have concurrent jurisdiction than in establishing whether recognition picketing is or is not an unfair practice.

sues not argued in the briefs,¹⁹ the violation issue actually was not before the Court for decision because it was not urged nor argued to it.

The opinion indicates that the Court did assume, as did counsel, that the LMRA was violated; such an assumption, of course, is far from a decision. Not only is the assumption which is implicit in the opinion not a square decision of the violation issue, but it can be seen from the opinion itself that the Court did not believe it was deciding the issue. The opinion states that the only issue before the Court was the power of a state court to give an identical or additional remedy for activity subject to restraint by the LMRA.²⁰ Of even greater significance is the fact that there is no discussion of the legal or legislative history of the LMRA section supposedly violated. It goes almost without saying that the Supreme Court would not decide so close a question as whether recognition picketing violates the LMRA without discussing pertinent legal and legislative history. For these reasons alone the conclusion appears inescapable that the question was not decided in *Garner*.

Since *Garner*, moreover, the Supreme Court has decided the *Anheuser-Busch* case,^{20a} the explicit rationale of which can be applied to the *Garner* situation to provide an unequivocal basis for that case and to remove almost all of the difficulties encountered in an analysis of *Garner*.^{20b} Under the *Anheuser-Busch* rationale it is clearly unnecessary for a court to decide the violation issue in a *Garner* type situation. The *Anheuser-Busch* case held that the states cannot regulate conduct where there is an actual or potential violation of the LMRA. One situation falling within the pale of the *Anheuser-Busch* ban is that where the complainant has not gone to the NLRB but nevertheless asks a state court to enjoin conduct which might reasonably be prohibited by the LMRA, for in that situation there is a potential violation of the Act. Furthermore, the *Anheuser-Busch* opinion specifically states that

where the moving party itself alleges [LMRA] unfair labor practices, where the facts reasonably bring the controversy within the sections prohibiting these practices . . . the state court must decline jurisdiction in deference to the tribunal which Congress has selected for determining such issues in the first instance.^{20c}

Such was exactly the *Garner* situation.

19. The court in its discretion may allow the new question to be argued. Generally it will not. MOORE'S JUDICIAL CODE 587 (1949).

20. See note 11 *supra*.

20a. 23 U.S.L. Week 4150 (U.S. March 28, 1955).

20b. The only difficulty it does not resolve is that the Court did not explicitly use the *Anheuser-Busch* rationale of partial pre-emption in *Garner*. However, it is a common, though perhaps a too easy and inaccurate, practice to dispose of a difficult case on the basis of subsequent development which harmonizes or removes the difficulties of the prior case.

20c. 23 U.S.L. Week 4150, 4154 (U.S. March 28, 1955).

B. What Other Evidence Is There That Recognition Picketing Violates the LMRA?

The decisions of the NLRB are of special significance in determining whether recognition picketing violates the LMRA. If *Garner* only assumed without deciding that recognition picketing is an unfair labor practice, it is important to have a holding on this point. If *Garner* is read as actually holding that the LMRA covered the activity, it may nevertheless be the case that the Court has not been adequately briefed on the coverage of the statute or, in its decision of *Garner*, was influenced by the fact that counsel for both sides virtually conceded that it was violated. It thus may very well be that a test case should be brought to enable the Court to clearly and accurately determine whether recognition picketing is prohibited. Under either view of the *Garner* holding, the decisions on recognition picketing rendered by the Board, the initial interpreter of the LMRA, will probably carry great weight and be highly important in any later decision. This section of the note will consider whether recognition picketing violates Section 8(b) (2), with which *Garner* dealt, or Section 8(b) (1) (A), or any other section of the LMRA.

Section 8(b) (2) provides that it is an unfair practice for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) . . ."²¹ Section 8(a) (3) provides that it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."²² From the wording of Section 8(a) (3) it might appear that recognition picketing violates the section by coercing the employer to create conditions or terms of employment to encourage membership in the picketing union. The NLRB, however, has never applied Section 8(b) (2) to enjoin a case of simple recognition picketing. It has, on the other hand, administratively ruled that such conduct does not violate the section.²³ Violations of Section 8(b) (2) have been found only: (1) where the union was attempting to negotiate an illegal security agreement;²⁴ (2) where the union was trying to have a particular employee discriminated against;²⁵ and (3) where the union was to continue picketing until the shop was one hundred per cent unionized.²⁶

21. 61 STAT. 141 (1947), 29 U.S.C. 158(b) (2) (1952).

22. 61 STAT. 140 (1947), 29 U.S.C. 158(a) (3) (1952).

23. Administrative Ruling, 35 LAB. REL. REP. (Ref. Man.) 1532 (NLRB 1955).

24. National Maritime Union of America, 78 N.L.R.B. 971 (1948).

25. Clara-Val Packing Co., 87 N.L.R.B. 703 (1949).

26. Denver Building Trade and Construction Trades Council, 90 N.L.R.B. 1768 (1950).

Clearly recognition picketing does not fall within either of the first two categories, and there has been only one NLRB decision²⁷ which falls within the third situation. In that case there was no certified union and a stranger union was carrying on recognition picketing and threatening to continue picketing until the workers were one hundred per cent unionized. The union's efforts were without significant effect on the employees. The Board's decision restraining the union in that case would appear to be authority for the position that recognition picketing is an unfair labor practice, for there, as in a recognition picketing situation, the union was not asking for a contract from the employer, and the whole group, rather than individual employees, was being coerced. The Board, however, did not emphasize the coercive aspects of the union activity but, rather, stressed the claim for one hundred per cent membership. The opinion indicates that the demand for one hundred per cent membership was just an indirect way to obtain the equivalent of a closed shop agreement, an illegal contract. A union will not be allowed to avoid so easily the restrictions of Taft-Hartley. In the usual recognition cases there is no demand for one hundred per cent membership and it is unlikely that the rationale of the Board's decision will have much application.

In fact, in a subsequent case²⁸ the Board found that a union's picketing had not violated Section 8(b) (2) because the evidence did not warrant any finding that the "clear objective of the strike was to compel the company to agree to a demand for an unlawful union shop agreement."²⁹ On the contrary, said the Board, all the evidence pointed to the conclusion that the objective of the union's strike activities was to secure recognition from the company.³⁰ Administrative rulings by the general counsel of the NLRB also show that the Board requires something more than proof of economic pressure before it will find a violation of Section 8(b) (2).³¹

27. *Ibid.*

28. Lumber and Sawmill Workers Union, 87 N.L.R.B. 937 (1949).

29. *Id.* at 939.

30. The NLRB language is susceptible of two interpretations. The employer had accused the union of demanding an illegal contract. The language of the NLRB could be read to say simply that the employer did not prove a demand for an illegal security agreement. The language, however, seems broader than that and the NLRB in dictum apparently indicated that the employer did not prove an unfair labor practice, for all he proved was an attempt to obtain recognition.

31. Administrative Ruling, 32 LAB. REL. RSP. (Ref. Man.) 1464 (NLRB 1953). In the case in which the ruling was issued the union had picketed the company for thirty days after the employees had voted against joining the union. Truck drivers refused to cross the picket line, and in one month there was a \$116,000 drop in sales. The general counsel said these facts were not sufficient to warrant any finding that the union was attempting to cause the employer to discriminate against his unwilling employees, and that there was no proof of a Section 8(b) (2) violation.

The NLRB has never expressly stated whether the *Garner* decision has affected its interpretation. There have been several administrative holdings since

In the early days of Taft-Hartley, employers claimed that recognition picketing violated Section 8(b)(1)(A) of the Act, which makes it an unfair labor practice for a union "to restrain or coerce . . . employees in the exercise of rights guaranteed under section 7 . . ." (which guarantees employees the right to freely choose to join, or not to join, a union).³² Section 8(b)(1)(A) deals with direct coercion of the employees by the union as distinguished from Section 8(b)(2) which deals with a union coercing an employer to coerce his employees. A reading of Section 8(b)(1)(A), as of 8(b)(2), might lead to a first impression that recognition picketing would be subject to restraint. In fact, in *Kinard Construction Co. v. Building Trades Council*,³³ the Alabama Supreme Court found that recognition picketing violated this section. The court held, however, that the labor conflict in issue did not affect interstate commerce—though the company was in fact engaged in interstate commerce—and that the state could thus regulate the activity. The United States Supreme Court reversed in a per curiam decision.³⁴ The Alabama court's novel theory about interstate commerce is not significant for this note. What is significant is the Supreme Court's apparent willingness to accept the state determination that Section 8(b)(1)(A) was violated. However, an interpreter of *Kinard* is confronted with interesting problems similar to those raised in interpreting the significance of *Garner*.³⁵

Despite *Kinard* and the statutory language, the Board has been as reluctant to find that recognition picketing violates Section 8(b)(1)(A) as it has been to find that it violates Section 8(b)(2). The Board has placed a very narrow construction on Section 8(b)(1)(A), saying that this section restrains only activities which are violent in nature or which involve threats of violence or economic loss to particular employees.³⁶ The Board's justification for its position has

Garner which indicate that *Garner* has not affected the Board's interpretation that recognition picketing is not an unfair practice where no union has been certified. In Administrative Ruling, 35 LAB. REL. REP. (Ref. Man.) 1532 (NLRB 1955), the NLRB counsel said that regardless of whether picketing is called "organizational" or "recognition" there is no unfair labor practice in the absence of another union being certified. *Accord*, Administrative Ruling, 35 LAB. REL. REP. (Ref. Man.) 1246 (NLRB 1954). See note 2 *supra*.

32. 61 STAT. 136 (1947), 29 U.S.C. § 158(b)(1)(A) (1952).

33. 258 Ala. 500, 64 So.2d 400 (1953).

34. *Building Trades Council v. Kinard Construction Co.*, 346 U.S. 933 (1953).

35. See text supported by notes 17-20 *supra*.

36. See National Maritime Union, 78 N.L.R.B. 971 (1948). This case did not involve recognition picketing. The defendant union was striking to force the employer to agree to an illegal proviso in a new collective bargaining agreement. This demand for an illegal agreement violated Section 8(b)(2) and the employer argued that it also violated Section 8(b)(1)(A). The court rejected the latter argument, and said Section 8(b)(1)(A) was intended only to restrain violence or threats of violence. This early dictum has been used as authority in later cases by the NLRB. See, e.g., Local 74, United Brotherhood of Carpenters and Joiners, 80 N.L.R.B. 533 (1948).

consisted of statements by Congressmen in committee, on the floor of Congress and in public.³⁷

The Board has applied its narrow interpretation of Section 8(b)(1)(A) to a recognition picketing situation and has held that recognition picketing does not violate the section.³⁸ The employer had claimed that the loss in business caused by the union's picketing and the consequent threat of economic harm to the employees (they might lose their jobs or suffer a salary decrease) violated Section 8(b)(1)(A) since the employees would be forced against their will to join the union in order to maintain their position. The Board rejected this claim with an ambiguous statement.³⁹ It is unclear

^{37.} National Maritime Union, 78 N.L.R.B. 971, 982-987 (1948). The Board relied principally on statements made by Senator Taft and Senator Ball. Senator Taft had been asked what would be examples of coercion and what would not be union coercion. He replied:

I would say, in the first place, that I understand the present section against employers has been used by the Board to prevent employers from making threats to employees . . . or dissuade them from joining a labor union. They may be threats to fire the man, of course, in the extreme case. They may be threats to reduce his wages, they may be threats to visit some kind of punishment on him within the plant if he undertakes to join a union. Those are the usual types of coercion which have been held to be a violation of the section on the part of the employers. In the case of employers, there have also been some cases of threats of violence. . . .

The effect of the pending amendment is that the Board may call the union before them, exactly as it has called the employer, and say, "Here are the rules of the game. You must cease and desist from coercing and restraining the employees who want to work from going to work and earning the money which they are entitled to earn." The Board may say, "You can persuade them; you can put up signs; you can conduct any form of propaganda you want to in order to persuade them, but you cannot, by threat of force or threat of economic reprisal, prevent them from exercising their right to work." As I see it, that is the effect of the amendment.

. . . I can see nothing in the pending measure which, as suggested by the Senator from Oregon, would in some way outlaw strikes. It would outlaw threats against employees. . . . It would not prevent anyone using the strike in a legitimate way, conducting peaceful picketing or employing persuasion. All it would do would be to outlaw such restraint and coercion as would prevent people from going to work. . . .

³⁹ CONG. REC. 4435, 4436 (1947).

Senator Ball said in a radio broadcast that the only purpose of Section 8(b)(1)(A) "is to protect the rights of employees, to free them from the coercion of goon squads and other strong-arm organizing techniques which a few unions use today." CONG. REC. A2252 (1947).

^{38.} Local 74, United Brotherhood of Carpenters and Joiners, 80 N.L.R.B. 533 (1948). The theory that the employer was advocating was not that the union was attempting to indirectly coerce the employees through the employer (the typical argument in a Section 8(b)(2) case), but that the union was causing economic loss to the employees in an effort to coerce them directly.

^{39.} *Id.* at 547. The Board said:

That this expected result [the union knew picketing would cause a loss in sales] was obtained can be inferred from the record. It is assumed, also, that at least some of the installation employees, aware that the advertising was having an adverse effect on the business of their employer, considered the economic advantage of joining the Union. This is not to say that, because the picketing brought some results in loss of business to the employer, it follows that the employees, in order to protect their jobs, were forced to

whether the Board ruled that the picketing was proper because there was no showing that any employee had in fact responded to it, or because this type of stranger picketing is proper activity and not coercive in the sense used by Congress. The latter interpretation is the one more readily deducible from the Board's language. The Board itself has never made its position unequivocal. It certainly has never applied Section 8(b) (1) (A) to a case where threats against particular employees were not involved; yet it has never said that it would never find economic coercion of the employees as a group to be a violation.

The Court of Appeals for the Ninth Circuit has criticized the Board for its narrow interpretation of Section 8(b) (1) (A) and has held that the Board is incorrect.⁴⁰ The court took the view that economic pressure upon employees through action against their employer can be just as coercive as threats or violence against any particular employee. Moreover, the court said, Congress intended to restrain such activity because it intended by Section 8(b) (1) (A) to make a union liable in the same situations that an employer would be liable under Section 8(a) (1),⁴¹ and it would not be necessary for an employer to use force or threats against particular employees before Section 8(a) (1) is violated.⁴² The Board, however, has not expressly indicated whether it will follow the Ninth Circuit ruling,⁴³ and under

join the Union, especially where no threats were involved. In the case before us it is noted that it actually had no such effect, as there is no evidence that any of Watson's [plaintiff's] employees joined the Union. The most that can be said in that respect is that the picketing was intended to demonstrate to the non-union members that it was to their advantage to become union members. It did not constitute restraint or coercion of those employees in the exercise of rights guaranteed under the Act, nor did it have that effect.

40. *Capital Service, Inc. v. NLRB*, 204 F.2d 848 (9th Cir. 1953), *aff'd on other grounds*, 347 U.S. 501 (1954).

41. *Capital Service, Inc. v. NLRB*, 204 F.2d 848, 853 (9th Cir. 1953). For example, Senator Ball said:

The purpose of the amendment is simply to provide that where unions in their organizational campaigns indulge in practices which, if an employer indulged in them, would be unfair labor practices, such as making threats or false promises or false statements, the unions shall be guilty of unfair labor practices.

93 CONG. REC. 4016 (1947).

42. Employers have been liable for peaceful attempts to influence their employees not to join a union. *Joy Silk Mills v. NLRB*, 185 F.2d 732 (D.C. Cir. 1950) (speeches and interrogatories which were coupled with defamatory remarks about the soliciting union); *NLRB v. Bailey Co.*, 180 F.2d 278 (6th Cir. 1950) (promises of future benefits); *NLRB v. Bird Mach. Co.*, 161 F.2d 589 (1st Cir. 1947) (letter to employees disparaging the union).

43. There have been no NLRB cases subsequent to the *Capital Service* case which have expressly raised the point. There were several issues in *Capital Service, Inc. v. NLRB*, 204 F.2d 848 (9th Cir. 1953). The employer appealed to the Supreme Court on an issue not involving the recognition picketing question. The Supreme Court affirmed the case on the issue appealed. As the case then stood the NLRB had not yet passed on the merits of the question whether an unfair labor practice had been committed. There have been no further indications in

the present Board interpretation recognition picketing does not violate Section 8(b) (1) (A).⁴⁴

An employer has also contended⁴⁵ that recognition picketing violates Section 8(b) (4) which provides that it is an unfair labor practice for a labor organization or its agents

to induce or encourage the employees of any employer to engage in . . . a concerted refusal to . . . transport or otherwise handle or work on . . . materials . . . or perform any services where an object thereof is:

(A) forcing or requiring any employer . . . to cease doing business with any other person;

(B) forcing or requiring any other employer to recognize or bargain with a particular labor organization as the representative of his employees unless such labor organization has been certified . . .⁴⁶

In the case in which the contention was made, some truck drivers had refused to cross a union's picket line to deliver their products to the employer. The Board, on complaint of the employer, found that the union was encouraging the truck drivers (the employees of another employer) to refuse to perform any services and thus (A) force their employer to cease doing business with the picketed employer and (B) force the picketed employer to recognize the picketing union. The Supreme Court agreed with the Board ruling that neither Section 8(b) (4) (A) nor Section 8(b) (4) (B) was violated, pointing out that only a few of the truck drivers refused to cross the picket line. The picketing, said the Court, was not an attempt to induce a *concerted* refusal by the truck drivers, and an acceptance of the complainant's rationale would mean that all primary picketing would be outlawed, which Congress certainly did not intend.

The Court did not indicate what the result would be if the employees refused en masse to cross the picket line, or what would be the effect of a refusal of a large number to cross the line. The decisions of the NLRB do not seem to be affected by the fact that a large number of another employer's employees refused to cross the line.⁴⁷

II. SHOULD RECOGNITION PICKETING BE HELD TO BE AN UNFAIR LABOR PRACTICE UNDER THE LMRA?

Since the law concerning whether recognition picketing violates the LMRA is at least unclear, apposite here is an examination of what

the reports that the Board ever decided this case. It is probable that some agreement was reached between the employer and the union.

44. There have been administrative rulings subsequent to *Capital Service, Inc. v. NLRB*, *supra* note 43, which have said that recognition picketing is not an unfair labor practice in the absence of a certified union. See note 31 *supra*.

45. *NLRB v. International Rice Milling Co.*, 341 U.S. 665 (1951).

46. 61 STAT. 136 (1947), 29 U.S.C. § 158(b)(1)(A) (1952).

47. See, e.g., *Building Trade Councils*, 34 LAB. REL. REP. (Ref. Man.) 1258 (NLRB 1954).

the Supreme Court should hold when squarely and clearly presented with the issue. It is submitted that the Supreme Court should hold that recognition picketing violates the LMRA. In support of this contention consideration will be given to the practical operation of recognition picketing, the statutory language involved, and answers to the arguments supporting the position that recognition picketing does not violate the LMRA.

Just what does recognition picketing do? Is there any sound policy argument why recognition picketing is justified? Is the union interest in picketing so important that such picketing should be allowed? Consider these questions in light of the following discussion.

A union, wishing to organize a bakery, begins organizational activity among the employees. The employer does nothing to hinder the union. He lets the union speak and distribute its leaflets to his employees without interference. His employees in a secret election, perhaps conducted by the NLRB, reject the union. The union nevertheless begins to picket. The picketing goes on for months or even years. Some customers stop buying. But sales drop chiefly because truck drivers will not cross the picket line to deliver the supplies needed to produce pastries. Perhaps the bakery also sells to some retail grocers; these naturally require a guaranteed supply and must turn to other sources. The employer finds that his business is being irreparably harmed by the picketing.

At this point the persuasive and intellectual value of picketing as a mode of free speech is very slight, particularly after the union has been given an opportunity to present its views through speeches, leaflets and other mediums of speech. The harmful economic effects of picketing on the other hand are quite strong. The purpose of the picketing is not to persuade the employees, but is to cause economic harm to the business and thereby either force the employer to coerce his employees to join the union against their will,⁴⁸ or directly coerce the employees to join the union.⁴⁹ Faced by the loss of their livelihood, it is obvious that the employer and employees are likely to yield to the union's pressure.

There is a sound basic appeal to the proposition that one group in our society — the picketing unions — should not be allowed to arbitrarily cause great economic harm to another group or groups—the

48. The employer would commit an unfair labor practice if he tried to coerce his employees to join the union. Section 8(a)(1) provides that it is an unfair labor practice for an employer to "interfere," "restrain," or "coerce" employees in the exercise of their rights under Section 7. 61 STAT. 140 (1947), 29 U.S.C. § 158 (a)(1) (1952).

49. This union interference is in contravention of the rights intended to be guaranteed to the employees in Section 7 of the LMRA. 61 STAT. 140 (1947), 29 U.S.C. § 157 (1952). This section provides that an employee shall have the right to freely choose to join or not to join a union.

employers or employees—nor should that group be allowed to infringe upon other persons' freedom to choose the conditions under which they will earn their livelihood. It does not seem that the union's interests in this situation are so important that the picketing should be allowed.

Truly, no legal question presents a black and white picture, but a considered investigation into the reasons and policies for and against recognition picketing leads to the conclusion that the equities of the argument lie with those who advocate restraint. In past years there might have been a stronger argument for allowing a union to picket in the situation under discussion. In the past there was a strong employer dislike for unions; there was no federal law preventing employer interference with union attempts at organization; state courts often tended to favor employers; there was no NLRB to enjoin unfair labor practices and to certify those unions which an employer was required to recognize.

There are, nevertheless, some legitimate reasons even today for stranger picketing. Even in 1955 employers do not always gladly embrace unions. There may be hidden employer interference not susceptible of proof before the NLRB. The union and labor in general may have very large, although less immediate, interests at stake in battling against a particular employer and his unwilling employees. Unionized shops may be losing money, unable because of their higher labor costs to meet the competition of the nonunion shops. Should not sympathetic consumers and suppliers be informed so that they may deal with union shops? Perhaps the employees, influenced by the words on the picket signs and the strength of the union, will change their minds without coercion and join the union.

Probably the most serious question to be faced in considering whether to restrain recognition picketing is whether the effective restraint of recognition picketing would unduly injure other important interests which should be maintained. Certain scholars have urged that all picketing exhibits the same basic elements as recognition picketing and that to outlaw recognition picketing is to outlaw all effective picketing.⁵⁰ These same scholars, however, have said that even though this would be true, still recognition picketing should be outlawed.⁵¹

Regardless of whether it is justifiable to say that it would be sound policy to outlaw all picketing, the premise that prohibition of recognition picketing would have such all-inclusive results may be an

50. Petro, *Picketing and Labor Strategy*, 2 LABOR L.J. 243 (1951); Rothenberg, *Organizational Picketing*, 5 LABOR L.J. 689 (1954).

51. See note 50 *supra*. These authors take the position that there is no real difference between organizational and recognition picketing, and that all stranger picketing should be enjoined because it unjustifiably produces disastrous results.

unrealistic position. Can picketing be permitted in limited situations? The Supreme Court has suggested an affirmative answer,⁵² which seems correct, and the growing body of experience in the labor regulation field reinforces this view. Even though the criteria by which to classify picketing as permitted or prohibited may still be nebulous and open to objection, could not some more definite criteria be used in the future? For example, a time limit could be set on picketing; the union could be required to prove employer interference with its organizational activities in order to be allowed to picket; picketing could be limited to the period prior to the time that either the employer or the union demands a Board election. Certainly these and similar criteria would permit legitimate picketing and also provide more concrete standards to remove the abuses of the unions.

Despite the merits of restraining recognition picketing, the federal courts cannot prohibit this practice without statutory authority. Is there such statutory authority in the language of the Taft-Hartley Act? An affirmative answer, which has already been suggested to this question,⁵³ seems the proper view. Section 8(b) (2)⁵⁴ provides that it is an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3)," which provides that it is an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."⁵⁵ By definition, recognition picketing is an activity whereby a union is attempting to cause the employer to compel or coerce his employees to join the union. What more likely form of coercion would there be than to discriminate in terms, condition or tenure of employment against employees who refuse to join the union? The statutory wording of Section 8 (b) (2) would seem almost explicitly to cover the situation where a union is engaging in recognition picketing.⁵⁶

52. In *Building Service Employees International Union v. Gazzam*, 339 U.S. 532 (1950), the Court upheld a state court decision enjoining recognition picketing. The union had argued that for the state to enjoin recognition picketing would mean that the state would also restrain organizational picketing, which restraint would be unconstitutional as a denial of free speech. Mr. Justice Minton pointed out that there was a difference between the two types of picketing and that there was no showing that organizational picketing was illegal under the state law. This indicates that the Court thinks there is a difference between types of picketing and some types may be constitutionally immune from state regulation.

53. See text following notes 22 and 32 *supra*.

54. 61 STAT. 141 (1947), 29 U.S.C. § 158(b)(2) (1952).

55. 61 STAT. 140 (1947), 29 U.S.C. § 158(a)(3) (1952).

56. The Board's narrow interpretation of Section 8(b)(2) is open to criticism. The NLRB has restricted the application of this section to cases where there has been an actual demand for an illegal security agreement or for discrimination against particular employees. See text supported by notes 24-26 *supra*. Is such a restriction reasonable? The probable result of recognition picketing is that

Section 8(b) (1) (A) makes it an unfair labor practice for a union "to restrain or coerce . . . employees in the exercise of rights guaranteed in section 7 . . ." (which provides that an employee shall have the right to freely choose to join or not to join a union).⁵⁷ The word "coerce" often means to compel by physical force⁵⁸ but it is not necessarily limited to this meaning. It can also refer to the use of moral force or any type of pressure.⁵⁹ Under this broader definition, coercion could certainly mean compulsion through threat of economic force. Indeed, with the existing regulations on the scope of union activity, coercion by economic pressure on the employees would seem to be the unions' most effective weapon.

With such clear statutory justification for the position that recognition picketing is unlawful, and in view of the policy against such picketing, it seems that recognition picketing should be held unlawful unless Congress intended otherwise.⁶⁰

Did Congress intend that recognition picketing should be lawful? An investigation and analysis of the reasons which have been advanced to support the position that Congress did so intend indicates that the question cannot be answered in the affirmative.

Applying the *exclusio alterius* maxim of statutory construction, the Board has taken the position that Congress did not intend that recognition picketing should be regulated.⁶¹ Congress has specifically forbidden stranger picketing where there is a certified union;⁶² it did not forbid such conduct where there is no certified union. Therefore,

the employer will attempt to coerce his employees to join the union against their wishes. To achieve his purpose the employer would almost necessarily have to apply some sort of discriminatory practice against those employees who refused to join the union. It seems unrealistic to limit the meaning of discrimination to discrimination against particular persons when the clear meaning of the word also includes what in practice may happen, *viz.*, discrimination against a group—those who refuse to join the union.

57. 61 STAT. 141 (1947), 29 U.S.C. § 158(b)(1)(A) (1952).

58. WEBSTER, NEW INTERNATIONAL DICTIONARY 519 (2d ed. 1934).

59. *Ibid.*

60. There has been some suggestion that recognition picketing could not be unlawful because it involves constitutionally protected free speech. The constitutional question is no longer significant. The Supreme Court in 1950 made it clear that all picketing activities are not necessarily justified as an exercise of free speech. *Hughes v. Superior Court*, 339 U.S. 460 (1950); *International Brotherhood of Teamsters v. Hanke*, 339 U.S. 470 (1950); *Building Service Employees v. Gazzam*, 339 U.S. 532 (1950). The underlying theory behind the Supreme Court cases in which picketing was regulated is that free speech is not an absolute value; a problem involving free speech must be evaluated in view of the purposes of free speech, the reasonable limitations upon it and the countervailing values in the particular situation. *International Brotherhood of Teamsters v. Hanke*, 339 U.S. 470, 474 (1950). The Supreme Court has made it clear that picketing can be unlawful where it is not used as a means of communication and persuasion, but merely as a means of coercion to cause economic harm to an employer and his employees. *Building Service Employees v. Gazzam*, 339 U.S. 532 (1950).

61. Painter's Union, 29 LAB. REL. REP. (Ref. Man.) 1151 (NLRB 1951).

62. 61 STAT. 141 (1947), 29 U.S.C. § 158(b)(4)(c) (1952).

reasons the NLRB, Congress did not intend recognition picketing to be unlawful in itself, and the Board has thus required proof that the union actually either tried to force the employer to discriminate or demanded an illegal contract,⁶³ or that the union agents had engaged in or threatened violent activity.⁶⁴

To support their position under the *exclusio alterius* maxim, the Board has relied on an episode of the act's legislative history.⁶⁵ Both the bill passed by the House and an early committee version of the Senate Bill contained provisions which would have made recognition picketing illegal.⁶⁶ These provisions, however, are not in the present law; the NLRB takes this history as proof that Congress did not intend to outlaw recognition picketing where there is no certified union.

The Board's conclusion does not necessarily follow from the facts and there is a tenable argument that the Board is wrong. It well may be that Congress felt that stranger picketing should always be unlawful where another union was certified, but did not want to take an express position where no union was certified for fear of outlawing too much. Congress may have intended that other picketing should be restrained under other appropriate sections of the act when it was found to be abusive and for coercive purposes, and may have felt that it was unnecessary and even dangerous to have a specific section which might prove to unreasonably outlaw certain picketing.

Apart from its *exclusio alterius* type of interpretation to support its position that recognition picketing is not an unfair labor practice, the Board has relied on statements made by Congressmen on the floor, in committee and in public.⁶⁷ Most of these statements concerned the coverage of Section 8(b) (1) (A).⁶⁸ Senator Taft assured Senator Morse that Section 8(b) (1) (A) was intended to restrain unions only where its agents had engaged in or threatened violent activity, activity

63. See notes 24-28 *supra* for cases dealing with Section 8(b) (2).

64. See notes 33, 34, 36, 38-40 *supra* for cases dealing with Section 8(b) (1) (A).

65. Painter's Union, 29 LAB. REL. REP. (Ref. Man.) 1151, 1152 (NLRB 1951).

66. *Ibid.*

67. See note 37 *supra*.

68. Research in the Congressional debates did not reveal any discussion of the applicability or inapplicability of Section 8(b) (2) to the restraint of recognition picketing. Neither *Garner* nor any other case has analyzed whether there are statements by Congressmen pertinent to the question whether recognition picketing violates Section 8(b) (2). In the debates, the Congressmen were not always explicit as to which section they were discussing. Some of their broader statements concerning picketing might be considered applicable to Section 8(b) (2) as well as to Section 8(b) (1) (A). When the Congressmen were explicit, they usually referred to Section 8(b) (1) (A). This failure to expressly discuss the restraint of recognition picketing under Section 8(b) (2) is fairly strong evidence that Congress did not intend to restrain recognition picketing under such section, even though the statutory language would seem to encompass the activity. This could mean that the only section which should be interpreted to restrain recognition picketing is Section 8(b) (1) (A).

which was intended to prevent people from going to work. The section, said Taft, was not intended to restrain legitimate strikes or picketing for the purpose of peaceful persuasion.⁶⁹

It is submitted that Senator Taft's statements are inconclusive. They are arguments made to an opponent of the bill.⁷⁰ They can be used to show Congress did not intend to restrain all picketing of the type considered; it is another thing to say that all picketing is to be free from federal restraint unless it is specifically outlawed by particular provisions of the statute. As previously mentioned, the Court of Appeals for the Ninth Circuit has recently held that the NLRB has interpreted Section 8(b) (1)(A) too narrowly.⁷¹ The court pointed out that Section 8(b) (1)(A) was intended to restrain activities in the same situations where employers would be liable under Section 8(a) (1).⁷² An employer may be liable for activities far less serious than violence or threats of violence. He may be liable if he makes speeches too near election time,⁷³ if he asks intimidating questions of his employees,⁷⁴ if he promises bonuses to employees who do not join the union,⁷⁵ or if he makes defamatory remarks about unions.⁷⁶ If a union is intended to be subject to the same type of restraints, as the very language of Section 8(b) (1)(A) would indicate,⁷⁷ the NLRB interpretation of the section would seem far too narrow. The Ninth Circuit also pointed out that economic coercion can be just as devastating as violence in its effect on the employees.⁷⁸ Certainly the statements of Congressmen relevant to this problem are at least inconclusive, and an interpreter of the statute should not let specific statements from the volumes of reports influence its decision without a consideration of all other relevant factors.⁷⁹

69. 93 CONG. REC. 4436 (1947).

70. Senator Morse had argued that the wording of Section 8(b) (1)(A) could be interpreted to outlaw all picketing.

71. Capital Service, Inc. v. NLRB, 204 F.2d 848 (9th Cir. 1953), *aff'd on other grounds*, 347 U.S. 501 (1954). See text supported by notes 40, 41 *supra*.

72. 61 STAT. 140 (1947), 29 U.S.C. § 158(a)(1) (1952). See Senator Ball's statement which is quoted in note 41 *supra*.

73. Joy Silk Mills v. NLRB, 185 F.2d 732 (D.C. Cir. 1950).

74. *Ibid.*

75. NLRB v. Bailey Co., 180 F.2d 278 (6th Cir. 1950).

76. NLRB v. Bird Mach. Co., 161 F.2d 589 (1st Cir. 1947).

77. Section 8(a)(1) provides that an employer should not "restrain," "interfere" or "coerce." Practically the same language is used in Section 8(b)(1)(A) which says a union shall not "restrain" or "coerce." It is a canon of statutory construction that words are presumed to have the same meaning when used in different parts of the same statute. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 334 (1891). In addition to this canon, a statement by Senator Ball gives further support to the proposition that the words in Section 8(b)(1)(A) were to have the same meaning as those in Section 8(a)(1). See note 41 *supra*.

78. Capital Service, Inc. v. NLRB, 204 F.2d 848, 853 (9th Cir. 1953).

79. The treatment in this note of legislative intent does not purport to be based on a consideration of all the statements by Congressmen while the bill was before them. There are volumes devoted to the report of these statements. The analysis is based on a consideration of those statements by Congressmen which

SUMMARY

This note has attempted to analyze the problem of the status of recognition picketing and to suggest approaches to the problem. The case law on recognition picketing is not conclusive of its legality or illegality. The most famous case, *Garner*, can be explained on several grounds and thus is doubtful authority for any one of them⁸⁰; furthermore, the case apparently did not hold that recognition picketing is an unfair labor practice.

To date, the NLRB has refused to enjoin recognition picketing. Its position is that Congress did not intend to make it unlawful. The NLRB position is supported by doubtful authority, and at least one federal court has said the NLRB is wrong.

Recognition picketing certainly produces results in society which are not justified by the union's interest, and there is in the present statute clear language under which recognition picketing could be restrained. In addition, there is no clear evidence of legislative intent that recognition picketing is lawful. For these reasons it is submitted that recognition picketing should be held to be an LMRA unfair labor practice.

LEO I. COLOWICK

the courts and the NLRB have relied on. On the basis of these statements it is submitted that the intent of the legislature concerning the legal status of recognition picketing is indeterminate.

80. Consider, however, the subsequent decision in the *Anheuser-Busch* case. See text supported by notes 20a-20c *supra*.