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John C. Hoover

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COMMENT

THE CURTIS DOCTRINE: THE RIGHTS OF A MINORITY UNION TO PICKET

In *Curtis Bros., Inc.*,[1] the National Labor Relations Board (NLRB) first enunciated the rule that picketing for recognition by a union representing a minority of the employees was an unfair labor practice because it violated section 8(b)(1)(A)[2] of the National Labor Relations Act. The doctrine has never had the full support of all Board members.[3] Moreover the initial reaction of the reviewing courts to this ruling has been unfavorable. The *Curtis* doctrine has been entirely rejected by the District of Columbia Court of Appeals,[4] upon review of the Board's decision of the case, and partially rejected by one Ninth Circuit Court of Appeals decision.[5] The NLRB has sought review by the Supreme Court of the unfavorable decision of the Court of Appeals for the District of Columbia. The Supreme Court has granted certiorari and the case is now pending in that Court.[6]

The purpose of this Comment is to inquire into the nature and rationale of the *Curtis* rule to determine, if possible, the probability of its ultimate acceptance by the Court. The significance of the rule should be apparent: It both operates as a barrier to the successful unionization of businesses and becomes an important weapon in the hands of an employer or non-union employee to prevent (if that is desired) the unionization of the employer's establishment.

THE HISTORICAL BACKGROUND

Section 8(b)(1)(A) of the "Taft-Hartley Act" states that it shall be an unfair labor practice for a labor organization or its agents to "restrain or coerce" employees in their rights guaranteed under Sec-

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[1] NLRB v. Drivers, Chauffers, Helpers Union, Local 639, 119 N.L.R.B. 232, 41 L.R.R.M. 1025 (1957); see, *Curtis Case and Section 8(b)(1)(A) of the Taft-Hartley Act*, 44 VA. L. REV. 741 (1958).

[2] 49 STAT. 452 (1935); 61 STAT. 140 (1947); 65 STAT. 601 (1951); 29 U.S.C. § 158(b) (1947), "It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7."

[3] Member Murdock dissented from the decision in the original case, 41 L.R.R.M. 1034, and Member Fanning has since had occasion to express his disagreement with the doctrine, 42 L.R.R.M. 1197 (1958).

[4] Drivers Local 639 v. NLRB, 43 L.R.R.M. 2156 (1958).

[5] NLRB v. International Ass'n of Machinists, 43 L.R.R.M. 2348 (1959).

[6] Docket No. 717, 27 LW 3293; *cert. granted*, 79 Sup. Ct. 876 (April 20, 1959).

tion 7[7] of the act. Those rights include the right to bargain collectively or to *refrain* from so bargaining.

The first important NLRB decision construing section 8(b)(1)(A) was the *National Maritime Union, CIO* case,[8] hereinafter referred to as the *NMU* case. In the *NMU* case the NLRB held that section 8(b)(1)(A) does not apply to peaceful picketing, declaring:

> The touchstone of a strike which is violative of Section 8(b)(1)(A) is normally the *means* by which it is accomplished, so long as its objective is directly related to the interests of the strikers, and not directed primarily at compelling other employees to forego the rights which Section 7 protects.[9]

In reaching this conclusion, the Board strongly relied on legislative history of the act to limit the apparent broadness of the section.[10] The NLRB also suggested its conclusion was reached on the theory that unless the section were limited, every peaceful strike opposed by any employee would be a violation of 8(b)(1)(A) and thus the section would negate the other provisions of the statute protecting collective bargaining.

The Board made another argument in the *NMU* case based upon section 8(b)(4)(C).[11] That section makes it an unfair labor practice for a union to "force or require" an employer to recognize or bargain with it when another labor organization has been certified by the Board. The Board argued that if 8(b)(1)(A) were applied to peaceful picketing, then section 8(b)(4)(C) would be rendered nugatory. Therefore, the argument goes, section 8(b)(4)(C) indicates congres-

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[7] 49 STAT. 542 (1935); 61 STAT. 140 (1947); 29 U.S.C. § 157 (1947). "Employees shall have the right to selforganization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be effected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

[8] 78 N.L.R.B. 971 (1948).

[9] *Id.* at 986.

[10] See, 93 CONG. REC. 4561-4563 (1947); 93 CONG. REC. 6136 (1947); Sen. Rep. No. 105, 80th Cong., 1st Sess., p. 50.

[11] 49 STAT. 452 (1935); 61 STAT. 140 (1947); 65 STAT. 601 (1951); 29 U.S.C. § 158(b)(4)(C) (1947). "It shall be an unfair labor practice for a labor organization or its agents . . . (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the cause of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services where an object thereof is . . . (C) Forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9."

sional intent to deal with recognitional picketing and thus sets the limits of the operation of 8(b)(1)(A) in that area. This analysis has some force, but it is not entirely accurate. It is possible that a union which had been certified after a Board election could lose its majority status to a rival union which picketed for recognition instead of seeking a Board election.[12] This picketing would be precluded by 8(b)(4)(C), but not by the *Curtis* doctrine (since the picketing union represented a *majority*), and hence section 8(b)(4)(C) is not rendered entirely nugatory by the *Curtis* definition of 8(b)(1)(A). Of course this is a restricted view of the operation of 8(b)(4)(C). Every other purpose which it would serve is also served by application of the *Curtis* doctrine. In lieu of accepting such a narrow scope for 8(b)(4)(C), it can be cogently argued that Congress intended that section to be the sole deterrent to peaceful picketing and that the *Curtis* doctrine is therefore erroneous.

There is another argument that section 8(b)(4)(C) is not rendered nugatory by the *Curtis* doctrine, predicated on the reasoning that section 10(*l*)[13] gives the NLRB additional powers and responsibilities in dealing with a violation of that section. Section 10(*l*) provides that the NLRB shall obtain injunctive relief against violation of 8(b)(4)(C) whereas the Board need not obtain an injunction under section 10(J).[14] Thus, it may be maintained that Congress intended that

[12] 49 STAT. 452 (1935); 61 STAT. 140 (1947); 65 STAT. 601 (1951); 29 U.S.C. § 159(c)(3) (1947). "No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote."

[13] 48 STAT. 926 (1934); 49 STAT. 453 (1935); 49 STAT. 1921 (1936); 61 STAT. 146 (1947); 62 STAT. 991 (1948); 63 STAT. 107 (1949); 29 U.S.C. § 160 (1947). "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 8(b) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the United States District Court for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief. . . . Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law. . . ."

[14] 48 STAT. 926 (1934); 49 STAT. 453 (1935); 49 STAT. 1921 (1936); 61 STAT. 146 (1947); 62 STAT. 991 (1948); 63 STAT. 107 (1949); 29 U.S.C. § 160 (J). "The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the United States District Court for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person

section 8(b)(4)(C) would enable the Board to prevent an especially serious violation of the act.

The later NLRB decisions more clearly delimited the extent of the restricted view of the scope of section 8(b)(1)(A). It became apparent from the early NLRB decisions following the *NMU* case that the principal impact of section 8(b)(1)(A) would be to prevent a union's use of physical violence.[15] The Board also applied the section to threats of business and economic retribution.[16] While the NLRB initially followed the *NMU* "means" test, the later decisions clearly have found that strikes which violate some other section of the act also violate

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resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper."

[15] W. T. Smith Co., 38 L.R.R.M. 1280 (1956); Sunset Line and Twine Co., 79 N.L.R.B. 1487 (1948); Higbee Co., 97 N.L.R.B. 654 (1951); Eagle Mfg. Corp., 112 N.L.R.B. 74 (1955). One assault has been held to be sufficient to violate section 8(b)(1)(A), Midwest Transfer Co., 112 N.L.R.B. 17 (1955); mass picketing by a union is a violation of 8(b)(1)(A), Sunset Line and Twine Co., *supra*. Further, blocking a gate plus the carrying of sticks coupled with other violence violates 8(b)(1)(A), Smith Cabinet Mfg. Co., 81 N.L.R.B. 886 (1949). *But see* Ryan Constr. Corp., 85 N.L.R.B. 417 (1949), where the Board found no violation from a gate locking incident when there was no stoppage of traffic. In Santa Anna Lumber Co., 87 N.L.R.B. 937 (1949), the Board found no violation of 8(b)(1)(A) from evidence that an employee was trailed. *But see* Sunset Line and Twine, *supra*.

In order to charge the union with a culpable act of violence, the Board must also find that the offensive acts were committed by the "labor organization or its agents." See n. 2 *supra*. While the statutory definition of "agent" contained in section 2(13) of the act is not helpful in determining what that term means, the NLRB has found a sufficient "agency" where a union official was present when the culpable acts occurred and did nothing to prevent them; *accord*, Sunset Line and Twine Co., *supra;* Corey Corp., 84 N.L.R.B. 972 (1949); see, Irwin Lyons, 87 N.L.R.B. 54 (1949), where there was no showing that any union officials were present. *But see,* Smith Cabinet Mfg. Co., *supra,* where it was stated that there is a presumption that all actions incident to a strike are attributable to the union. Section 2(13), 49 Stat. 450 (1935); 61 Stat. 137 (1947); 29 U.S.C. § 152 (1947), states: "In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

[16] Threats of business or economic retribution violate 8(b)(1)(A) if they are "reasonably calculated" to have a coercive effect on the listener in the exercise of his rights. Higbee, 97 N.L.R.B. 654 (1951); G. H. Hess, Inc., 82 N.L.R.B. 463 (1949) ("There's been a lot of rough stuff at these union elections."); Seamprufe, Inc., 82 N.L.R.B. 902 (1949) ("Those who don't join the union will eventually lose their jobs."); G. H. Hess, Inc., 82 N.L.R.B. 464 (1949) ("If you don't vote for the union the girls will refuse to work with you."). Statements made only to company officials are not coercive with regard to employees. Smith Cabinet Mfg. Co., *supra* n. 11; Perry Norvell Co., 80 N.L.R.B. 225 (1948).

Further, if the union enters into a contract including an illegal security provision (closed shop), then upon the execution of the contract with the employee's knowledge, there is a violation of 8(b)(1)(A). Permanente S.S. Corp., 107 N.L.R.B. 1111 (1954); New York State Employers Ass'n, 93 N.L.R.B. 127 (1951), *enforced,* 196 F.2d 78 (2d Cir. 1952). It is immaterial whether the agreement was enforced. Monolith Portland Cement Co., 94 N.L.R.B. 1358 (1951).

section 8(b)(1)(A).[17] However, with the exception of strikes which comprised an unfair labor practice under the act, the NLRB consistently had refused to go so far as to hold that peaceful picketing could be a violation of 8(b)(1)(A).[18] Thus, the scope of 8(b)(1)(A) was tending to be quite limited since, although a union could be enjoined from "coercing" employees (*i.e.*, threatening or assaulting them), the principal weapons of the union, the strike and the picket line, remained unaffected.

THE CURTIS DOCTRINE

In the *Curtis Bros., Inc.*, decision, the NLRB impliedly overruled its prior decisions and stated that any picketing for recognition by a minority union was a violation of 8(b)(1)(A). The Board, however,

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[17] The specific sections referred to are sections 8(b)(2), 8(b)(4)(A), and 8(b)(4)(C). Section 8(b)(2), 49 STAT. 452 (1935); 61 STAT. 140 (1947); 65 STAT. 601 (1951); 29 U.S.C. § 158(b)(2) (1947), states: "It shall be an unfair labor practice for a labor organization or its agents . . . (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) . . . (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (C) . . ." (For contents of subsection (C), see n. 11, *supra.*)
(1) Violations of 8(b)(2) were at first held not to be violations of 8(b)(1)(A). International Typographical Union, 86 N.L.R.B. 951 (1949); In the Matter of American Radio Ass'n, 82 N.L.R.B. 1344 (1949); In the Matter of Amalgamated Meat Cutters, 81 N.L.R.B. 1052 (1949); Clara-Val Packing Co., 87 N.L.R.B. 703 (1949), *enforcement denied,* 191 F.2d 556 (9th Cir. 1951). However, the later decisions clearly came to a contrary result. Pinkerton's Nat'l Detective Agency, Inc., 90 N.L.R.B. 205 (1950), *enforced,* 202 F.2d 230 (9th Cir. 1953); Englander Co., 108 N.L.R.B. 38 (1954); Randolph Corp., 89 N.L.R.B. 1490 (1950); Kogap Lumber Indus., 96 N.L.R.B. 165 (1951); Hollywood Ranch Mkt., 93 N.L.R.B. 1147 (1951). Forcing a discriminatory discharge is also a violation. Ann Bodrog, 111 N.L.R.B. 460 (1955), *enforced,* 228 F.2d 425 (3d Cir. 1955)
(2) Prior to 1957, the NLRB held that violations of 8(b)(4)(C) were not also violations of 8(b)(1)(A). Tungsten Mining Corp., 106 N.L.R.B. 903 (1953); Miami Copper Co., 92 N.L.R.B. 322 (1950); *cf.* Perry Norvell Co., 80 N.L.R.B. 225 (1948) (holding that a strike did not violate 8(b)(1)(A) merely because the strike violated the union's contract). The NLRB had also held that violations of 8(b)(4)(A) were not also violations of 8(b)(1)(A). Watson's Specialty Store, 80 N.L.R.B. 533 (1948); Kanawha Coal Operator's Ass'n, 94 N.L.R.B. 1731 (1951). However, the NLRB now holds that 8(b)(4)(A) violations also violate 8(b)(1)(A). Ruffalo's Trucking Service, Inc., 41 L.R.R.M. 1270 (1958) (inducing employees of a neutral employer not to deliver to the struck employer's plant); Alling & Corey Co., 42 L.R.R.M. 1347 (1958) (following the employer's truck and requesting the other employees not to handle the goods); Virginia-Carolina Freight Lines, 43 L.R.R.M. 1475 (1959) (union representative stated that "if this keeps up someone will get hurt.")

[18] Clara-Val Packing Co., see n. 17, *supra;* Perry Norvell Co., see n. 17, *supra;* Watson's Specialty Store, see n. 17, *supra.*

continued to apply 8(b)(1)(A) to the established "coercive" activities of the union such as physical violence.[19]

The Board in the *Curtis* case specifically reserved the issue of whether an organizational strike is a violation of 8(b)(1)(A) and placed its decision upon the finding that the picketing of the Curtis Company was recognitional.

Recognition is a technical word under the act,[20] involving an employer's admission that a union represents a majority of his employees and that he will recognize this union as the exclusive bargaining agent for wages, working conditions, etc. A union may also utilize the picketing method to organize employees. That is, the union may picket to persuade the employees to join in the hope that it will eventually represent a majority of the employees.

The rationale, then, of the *Curtis* case is:

> [Since 8(b)(1)(A) is not restricted by any provision of the act] employees who chose to continue working while the union is applying this economic hurt to the employer, can not escape a share of the damage caused to the business on which their livelihood depends. Damage to the employer during such picketing is a like damage to his employees. That the pressure thus exerted upon the employees—depriving them of the opportunity to work and be paid—is a form of coercion cannot be gainsaid. There is nothing in the statutory language of Section 8(b)(1)(A) which limits the intendment of the words 'restrain or coerce' to direct application of pressure by the Respondent Union of the employees. The diminiution of their financial security is not the less damaging because it is achieved indirectly by a preceding curtailment of the employer's interests.[21]

The Board defended its organizational-recognitional distinction by arguing that the picketing for organization purposes is not "tainted"

[19] Union Packinghouse Co., 43 L.R.R.M. 1460 (1959); Ohio Tel. Co., 43 L.R.R.M. 1033 (1958). *But see*, Midland Elec. Races, 43 L.R.R.M. 1205 (1959), where the Board refused to find a violation of 8(b)(1)(A) from a showing of mere pushing coupled with no physical injury. Such violation can occur after the picketing is finished. Lau Blawing Co., 43 L.R.R.M. 1411 (1959).

The Board has adhered to its later 8(b)(2) decisions, holding that violation of 8(b)(2) also violate 8(b)(1)(A). Spector Freight Lines, 43 L.R.R.M. 1358 (1959); Wyatt Mfg. Co., 34 Labor Cases 71,409 (1958).

[20] 49 STAT. 452 (1935); 61 STAT. 140 (1947); 65 STAT. 140 (1951); 29 U.S.C. § 158(a)(5) (1947). This enactment states that it shall be an unfair labor practice "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." 49 STAT. 453 (1935); 61 STAT. 143 (1947); 65 STAT. 601 (1951); 29 U.S.C. § 159(a) (1947) states that "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment."

[21] 119 N.L.R.B. at 237.

with the commission of an unfair labor practice, whereas, "there can be no more direct deprivation of the employee's freedom of choice than to impose upon them a collective bargaining agent they have not chosen or have expressly rejected."[22]

The Board bolstered its theory by arguing that since section 8(a)(1)[23] requires that the employer not interfere with his employees' rights under section 7, the employer would be violating those rights if he recognized a minority union. On the other hand, it can be argued that a comparison of the "interfere, restrain, and coerce" language of 8(a)(1) with the "restrain and coerce" language of 8(b)(1)(A) would indicate that Congress intended section 8(b)(1)(A) to have a more narrow scope than 8(a)(1).

The *Curtis* doctrine is limited in its application to picketing by a minority union because of several provisions of the act. Section 9(a)[24] of the act provides that a union shall be selected for the purpose of collective bargaining if that union is selected by a majority of the employees in an appropriate unit. Further, 8(a)(5)[25] places a duty on the employer to bargain collectively with such a majority union. Thus, the act clearly makes concerted activity by a union representing a majority of the employees protected activity. However, with the possible exception of 8(b)(1)(A), the act does not deal with the activities of a minority union.

The Board answered the argument contained in the *NMU* case with regard to the legislative history by stating that: (1) the legislative history of this section is ambiguous, and (2) that an ambiguous legislative history ought not override the "clear policy" of the section to outlaw a strike by a minority union for recognition.

Recognitional picketing. The NLRB has consistently followed the precepts of the *Curtis* case in its later decisions. The inquiry, then, is to determine the extent and importance of the doctrine as it is normally applied in these subsequent NLRB decisions.

In order to examine this development, it will first be necessary to consider what sort of facts the NLRB will require to find that picket-

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[22] 119 N.L.R.B. at 239.

[23] 49 STAT. 452 (1935); 61 STAT. 140 (1947); 65 STAT. 601 (1951); 29 U.S.C. § 158(a)(1) (1947) states that "It shall be an unfair labor practice for an employer— (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."

[24] 49 STAT. 453 (1935); 61 STAT. 143 (1947); 65 STAT. 601 (1951); 29 U.S.C. 159(a) (1947). See n. 20 *supra*.

[25] 49 STAT. 452 (1935); 61 STAT. 140 (1947); 65 STAT. 601 (1951); 29 U.S.C. § 158(a)(5) (1947). See n. 20 *supra*.

ing is "recognitional" under the *Curtis* doctrine. It is not difficult to determine that the strike is recognitional if the union representative says to the employer, "We are striking for recognition and will continue to picket until you recognize our union." The difficult factual problems arise when the union does not demand recognition or disclaims any interest and yet continues to picket the employer.

In the *Curtis* case, the union had lost a certification election by a vote of twenty-eight to one and had disclaimed any interest in demanding recognition; yet, it still continued to picket the employer's place of busines. The union's sign before the election read: "Curtis Brothers on Strike. Unfair to Organized Labor. Driver, Helpers and Warehousemen of Local 639 (AF of L)." After the election the signs read: "Curtis Brothers Employs Non-union Drivers, Helpers, Warehousemen . . . Unfair to Teamsters Union No. 639 (AF of L)."[26] The Board held, notwithstanding the union disclaimer of intent to demand recognition, the signs indicated a dissatisfaction with the company's position which related back to the original dispute. The Board also indicated that even if this was only an appeal to the customers not to patronize the Curtis Brothers Company, it was, nonetheless, economic pressure exerted by the union on the employer and thus indirectly "coerced" his employees.

The factual pattern in which a union (1) demands recognition, and (2) then retracts its demand either before or after a certification election, has occurred often enough to make it profitable to consider the cases in that pattern. To begin with, in the *J. C. Penney Co.*[27] case, the NLRB stated there is a strong but not unrebuttable presumption that picketing which continues after the union loses a certification election is recognitional. It is clear that merely changing the wording on the signs carried by the pickets will not rebut this presumption.[28] Furthermore, it was held not to make any difference that the signs declared: "Local 5367 . . . wants all employees to join them to gain wages, hours, and working conditions,"[29] or, as the *Curtis* case would suggest, that the appeal of the union on its signs was primarily directed at the employer's customers.[30]

The Board has also used as evidence the statements made by the

[26] 119 N.L.R.B. at 237.
[27] 120 N.L.R.B. 189, 42 L.R.R.M. 1198 (1958). The union lost the election six to zero. The language on the sign was changed from "We do not patronize J. C. Penney Co." to "The retail clerks in this store are not members of . . . Retail Clerks Union."
[28] Haron Inc. & En Tour, 42 L.R.R.M. 1034 (1958).
[29] Casper Mfg. Co., 43 L.R.R.M. 1413 (1959).
[30] Layne Bryant Inc., 42 L.R.R.M. 1415 (1958).

union representatives to the employer.[31] Thus, the NLRB found the picketing to be recognitional when, in response to the employer's request that there be an election rather than a continuance of the picketing, the union president said, "We'll get you first. Then the men will automatically be in."[32]

In the *Andrew Brown* case,[33] the NLRB set out the sort of evidence that would rebut the inference that picketing which continues after the union loses an election is recognitional. That case required that there be evidence of organization activities such as sending circulars to employees, personal solicitations, picketing, urging workers to join, and other measures calculated to persuade employees to join the union, in order to rebut the presumption. The NLRB found a complete absence of those factors in the *Andrew Brown* case.

It is not clear what type of union organization activities will satisfy the test recited in the *Andrew Brown* case. For example, in *Louisville Cap Co.*,[34] the NLRB found the picketing to be recognitional in spite of the union's protestations that: (1) it had printed handbills and handed them out to the employees, (2) the picket's signs appealed to the workers to join the union, and (3) the union contacted the employees at their homes and requested them to join the union. In the *Louisville Cap Co.* case, the union at first requested recognition and then later disclaimed interest in obtaining recognition.

The Board found non-recognitional picketing in the *Radio Broadcast Technicians' Union* case.[35] The union in that case represented six radio and two television stations in one city. The union had a dispute with the owners of the various stations with regard to whether its members or the members of an announcers' union would be permitted to operate a new "combo-control." At no time after the election did the union demand recognition (prior to the election the union had been recognized as the exclusive bargaining agent). The union did not picket the employer until after it had started a campaign asking the employer's advertisers not to do business with the employer. The union clearly indicated to those who approached the picket line that the union was not striking, but was merely informing the public of the situation. In view of the fact that the other station owners had requested a change in their contracts concerning the new "combo-

[31] H. A. Rider & Sons, 42 L.R.R.M. 1238 (1958).
[32] Midland Elec. States, 43 L.R.R.M. 1238 (1958).
[33] 43 L.R.R.M. 1195 (1959).
[34] 43 L.R.R.M. 1416 (1959).
[35] 43 L.R.R.M. 1464 (1959).

control," and of the aforementioned union activities, the Board felt that the union was only acting to protect its interests in maintaining its bargaining position with respect to the other stations. Therefore, the Board held that this was not a strike for recognition.

The foregoing cases would seem to indicate the NLRB will find non-recognitional picketing only if the union both refrains from demanding recognition at any time and employs the picketing technique as an adjunct to other organizational activities. However, this view must be taken with some hesitation, for it is too early to reach a definitive conclusion on this problem.

The alleged union unfair labor practice under the *Curtis* doctrine, typically, is presented to the NLRB after the union has lost a certification election, since the employer may initiate a certification election under section 9(c)(1)(B).[36] The employer will be inclined to demand a certification election, not only because it will constitute good evidence in the subsequent unfair labor practice proceedings, but also if the union does in fact have a majority, the employer will be guilty of violating section 8(a)(5)[37] by refusing to bargain with the authorized agent of the employees. Of course, the fact that the union suffers a decisive loss in the election will constitute persuasive evidence that the union represents only a minority of the employees.

Replaced strikers. There is yet another problem with regard to whether a union represents a majority of the employees. In two cases[38] the NLRB has held that where some of the union members were not qualified to vote at the certification election, the union was a minority union within the meaning of the *Curtis* doctrine. In both of those cases the union members could not vote because they had been permanently replaced by other employees. NLRB member Fanning, in his dissent to the *Machinery Overhaul Co.* case,[39] contended that while the replaced strikers could not vote at the election, they were still employees under the act. Thus, the argument goes, for this purpose they should be considered as making up a majority of the workers.

It should be noted in both cases that the union received a majority

[36] 49 Stat. 453 (1935); 61 Stat. 143 (1947); 65 Stat. 601 (1951); 29 U.S.C. § 159(c)(1)(B) (1947) provides that a certification election may be initiated by "an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section."

[37] 49 Stat. 452 (1935); 61 Stat. 140 (1947); 65 Stat. 601 (1951); 29 U.S.C. § 158(a)(5) (1947). See n. 20 *supra*.

[38] O'Sullivan Rubber Corp., 121 N.L.R.B. 185, 42 L.R.R.M. 1567 (1958); Machinery Overhaul Co., 42 L.R.R.M. 1527 (1958).

[39] 42 L.R.R.M. at 1529 (1958).

of the votes cast at an election, but the replaced employees had no right to vote. Thus, the union can be placed in the anomalous position of receiving a majority vote and later finding that it had committed an unfair labor practice by picketing to enforce its demands.

Other modes of economic pressure. Up to this point, the *Curtis* doctrine has been referred to as if it applied only to picketing. In *Alloy Mfg. Co.*,[40] a companion case to *Curtis Bros., Inc.* the NLRB stated: "As the restraint and coercion brought to play on the employees is an economic one through curtailment or extinction of their employer's business, it is not really material whether the pressure is applied through the acting of picketing, and thereby hurting the business, or by other equally effective method."[41] Using this rationale, the NLRB held the union's action in placing the employer's place of business on the Spokane Labor Council's "We do not patronize" list was a violation of 8(b)(1)(A). Later NLRB decisions have reaffirmed this theory.[42] While there has been very little elaboration of this theory by the NLRB, it would appear that the rule of the *Alloy Mfg. Co.* case can be logically extended into any sort of activity which tends to put economic pressure on the employer.

The NLRB has also reached the conclusion that refusing to handle products in pursuance of a jurisdictional dispute is a violation of 8(b)(1)(A). In the *York Corp.* case,[43] the employees of Limback Corporation refused to handle the products of York Corporation because of a dispute whether Limback's employees would have the right to fabricate some window boxes. The jurisdiction dispute differs somewhat from the other applications of the *Curtis* doctrine because in such a dispute the union's purpose is not to represent some employees, but rather to deprive them of employment.

It can be seen from the foregoing discussion that the NLRB has reached the conclusion that section 8(b)(1)(A) is designed to control two different sorts of union behavior; namely, (1) the union's use of economic pressure on the employer to coerce employees, in violation of their rights under section 7, and (2) the more direct method of coercing the employees by the use of physical violence and threats of economic or physical retribution.

[40] 119 N.L.R.B. 38 (1957).
[41] *Id.* at 40.
[42] Layne Bryant Inc., 42 L.R.R.M. 1415 (1958); Andrew Brown, 43 L.R.R.M. 1195 (1958).
[43] 42 L.R.R.M. 1420 (1958).

PRE-EMPTION

It is a truism that any valid statute passed by the Congress of the United States is superior to any state action in the area controlled by the statute.[44] However, unless Congress expressly delimits the activity to be so controlled, it is up to the courts to determine the permissible state action within the area controlled by the statue. It is to this "pre-emption" problem in relation to the National Labor Relations Act that this section is devoted.

While the Supreme Court has not yet expressed its views on the *Curtis* doctrine and its implications, if any, in the pre-emption area, there have been a number of important recent decisions regarding pre-emption which have bearing upon the states' power to deal with the problems covered by section 8(b)(1)(A). To begin with, the state courts or legislatures may control union behavior which involves physical violence or mass picketing.[45] Further, in a recent decision of the Supreme Court,[46] a state court was permitted to enjoin shouting which reasonably might have led to violence.

With regard to peaceful union activity, including picketing, the picture is somewhat different. Despite an earlier, contrary decision,[47] the Supreme Court has held that the state may not enjoin a secondary boycott.[48]

Further, with regard to the factual pattern of the *Curtis* case, *i.e.*, the peaceful picketing by a union representing a minority of the workers, the Supreme Court has clearly held that the state cannot enjoin that union activity by statute or otherwise.[49] The state is not empowered to act, whether or not the NLRB exercises its power to the full extent given to it by the statute.[50] While at one time state courts were permitted to award damages even though they could not enjoin

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[44] U.S. CONST. art. VI. See Samoff, *Picketing and The Power of State Courts—From Thornhill to Vogt*, 9 LAB. L. J. 889 (1958); *State Power to Regulate Labor Relations—Major Developments During the Supreme Court's 1957-58 Term*, 33 WASH. L. REV. 364 (1958).

[45] Allen Bradley v. Wisconsin Employment Relations Board, 315 U.S. 740 (1941); UAW v. Wisconsin Employment Relations Board, 351 U.S. 266, 38 L.R.R.M. 2165 (1956); *cf.* UAW v. Russell, 356 U.S. 634, 42 L.R.R.M. 2142 (1958) (suit was for damages).

[46] Youngdahl v. Rainfair, 355 U.S. 131, 41 L.R.R.M. 2169 (1957).

[47] Local 10, United Ass'n of Journeymen Plumbers v. Graham, 345 U.S. 192 (1953).

[48] Teamster's Union v. New York, N.H. & H. R.R., 350 U.S. 155, 37 L.R.R.M. 271 (1956); Weber v. Anheuser-Busch Co., 348 U.S. 468, 35 L.R.R.M. 2367 (1955).

[49] Amalgamated Meat Cutters v. Fairlawn Meats, Inc., 353 U.S. 20 (1957); Garner v. Teamsters Union, 346 U.S. 486 (1953); San Diego Bldg. Trades Council v. Garmon, 353 U.S. 26 (1957).

[50] Guss v. Utah Labor Relations Board, 353 U.S. 1, 39 L.R.R.M. 2567 (1957).

the peaceful activity,[51] a recent Supreme Court decision has expressly denied a state court that right.[52]

The power of the NLRB is restricted to those unions whose members' employer is engaged in "interstate commerce."[53] If the employer is engaged in interstate commerce, then a state cannot control the union's behavior. The Washington court has recognized this fact.[54] It is of some interest to note that the Washington rule is less restrictive of peaceful union activity than is the *Curtis* doctrine. The rule in Washington is that picketing may be enjoined only if the union has *no* members employed at the employer's business.[55]

PROGNOSIS OF THE CURTIS DOCTRINE

The *Curtis* doctrine had not been passed on by the United States Supreme Court at the time this Comment was written. Inasmuch as there are some serious objections which can be made to the validity of the doctrine, it will be necessary to make an inquiry into the soundness of its rationale.

Constitutionality. The constitutionality of the governmental power to control union picketing is a long and tortuous path and no attempt will be made to trace it out here. Suffice it to say that, beginning with *Thornhill v. Alabama*,[56] it became apparent that picketing involved an element of "free speech" under the federal constitution.[57] The power of a state to enjoin picketing underwent some development[58] until becoming the present rule that a state may enjoin union activity. This statement must be qualified by the language contained in *International Bhd. of Teamsters, AFL v. Vogt*[59]: "Of course, the mere fact that there is 'picketing' does not automatically justify its restraint

[51] United Construction Workers v. Laburnum Constr. Corp., 347 U.S. 656, 34 L.R.R.M. 2229 (1954).

[52] San Diego Bldg. Trades Council v. Garmon, 43 L.R.R.M. 2838 (1959).

[53] 48 STAT. 926 (1934); 49 STAT. 453 (1935); 49 STAT. 1921 (1936); 61 STAT. 146 (1947); 62 STAT. 991 (1948); 63 STAT. 107 (1949); 29 U.S.C. § 160(a) (1947). "The Board is empowered, as hereinafter provided, to prevent any persons from engaging in any unfair practice (listed in section 158 of this title) affecting commerce." The definition of the term "interstate commerce" is not within the scope of this Comment.

[54] Stoddard-Wendle Motor Co. v. Lodge 942, Int'l Ass'n of Machinists, 48 Wn.2d 519, 295 P.2d 305 (1956).

[55] Audubon Homes Inc. v. Spokane Bldg. & Constr. Trades Council, 49 Wn.2d 145, 298 P.2d 1112 (1956). See, Wollett, *Another Look at Picketing in Washington*, 26 WASH. L. REV. 169 (1951).

[56] 310 U.S. 88 (1940).

[57] U.S. CONST. amend. I, limiting the state's power through the fourteenth amendment.

[58] See, Carpenters & Joiners Union v. Ritter's Cafe, 315 U.S. 722 (1942); Baker and Pastry Drivers v. Wohl, 315 U.S. 769 (1942); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949) (held that a state could enjoin a strike on the basis of public policy).

[59] 354 U.S. 284 (1957).

without an investigation into its conduct and purposes. State courts, no more than state legislatures can enact blanket prohibitions against picketing."[60]

The previously cited cases are authority only for the proposition that the *states* have power to control union behavior. There is authority, however, for the proposition that the *NLRB* has the constitutional power to control peaceful union activity. In both *Garner v. Teamsters*[61] and *San Diego Bldg. Trades Council v. Garmon*,[62] the Supreme Court mentioned that the NLRB was empowered under the National Labor Relations Act to control all peaceful picketing. Those two decisions, coupled with the *Vogt* case, would seem to indicate that the NLRB may constitutionally control peaceful picketing in interstate commerce. This conclusion, however, does not mean that these cases indicate Supreme Court approval of the *Curtis* case's construction of the statute. It only means that the Constitution does not prohibit such control.

Construction of Section 8(b)(1)(A). The other problem with regard to the *Curtis* doctrine is whether the federal courts will accept the construction of 8(b)(1)(A) made by the NLRB in the *Curtis* case.

Both the *Curtis Brothers* case and the *Alloy Mfg. Co.* case have been reviewed by a federal court of appeals. The District of Columbia court[63] refused to enforce the NLRB decision in the *Curtis Brothers* case. The Ninth Circuit[64] did not rule on the *Curtis* doctrine in the *Alloy Mfg. Co.* case, because it found that the union failed to object properly to the Board's decision. But it did refuse to follow the NLRB holding that non-picketing activities were a violation of section 8(b)(1)(A).

The District of Columbia decision was primarily based upon the rationale of the *NMU* decision. The court believed that the legislative history of the section indicated that 8(b)(1)(A) was intended only to prohibit physical violence and threats of physical and economic retribution. It also picked up the *NMU* theory that 8(b)(4)(C) would be redundant unless section 8(b)(1)(A) were taken to exclude all peaceful picketing from its purview.

The Ninth Circuit ruling concerning non-picketing activity took a different tack. The court pointed out that cases such as *Teamsters v.*

[60] *Id.* at 294, 295.
[61] 346 U.S. 486 (1953).
[62] 43 L.R.R.M. 2838 (1959).
[63] Drivers Local 639 v. NLRB, 43 L.R.R.M. 2056 (1958).
[64] NLRB v. International Ass'n of Machinists, 43 L.R.R.M. 2348 (1958).

Vogt, supra, decided the "free speech" problem only with reference to picketing, not as to other modes of expression. Thus, the court held such expressions were clearly free speech. The argument of the Ninth Circuit that an injunction against non-picketing activity is unconstitutional seems to have some merit, but the validity of its conclusions must await a Supreme Court decision.

The decision of the Ninth Circuit seems somewhat surprising in view of the earlier *Capital Service v. NLRB*[65] case. In the *Capital Service* case the Ninth Circuit indicated that it felt the NLRB should apply section 8(b)(1)(A) to peaceful picketing. The court in the *Capital Service* case stated that it believed the legislative history of section 8(b)(1)(A) was not ambiguous and that it supported a broader view of the section.

From the standpoint of statutory construction, the *Curtis* doctrine is also possibly vulnerable for the reason that, arguably, "coercion" is not identical with the union's use of economic pressure.

Conclusion

This Comment has demonstrated that there are two sound and conflicting analyses of section 8(b)(1)(A), and at least three views of the effect of its legislative history. Thus, the construction of 8(b)(1)(A) is likely to be fought on the battleground of public policy. This public policy argument is apt to turn on the effectiveness and desirability of restricting unionization to the electoral process. It may also be contended that the economic interest of the union in protecting its already organized union shops from competition with non-union employers should override the interest of employees who desire to remain non-union.[66]

In any event, the *Curtis* case effects a vital consideration in the field of labor law.[67] Moreover, there is little doubt that if the *Curtis* case

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[65] 204 F.2d 848 (9th Cir. 1953).

[66] See, Gregory, Labor and the Law, 141-157 (1949); Slichter & Sumner, Union Policies and Industrial Management, 370-391 (1941).

[67] One should consider the effect of the new "Labor-Management Reporting Act of 1959" (S.1555), passed by the Senate; Section 708(b) which states that it shall be an unfair labor practice, "(B) Where within the preceding nine months a valid election under 9(C) of this act had been conducted unless such labor organization has been certified as representative of the employees of such employer pursuant to such election or unless such labor organization has been designated or selected as a representative for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes. . . . (7) to picket or cause to be picketed or threaten to picket or threaten to cause to be picketed, any employer with the object of forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their bargaining agent."

were overruled, the prior rules of law would apply.[68] Hence, the fate of the *Curtis* doctrine in the pending Supreme Court decision is to be awaited with considerable expectation.

JOHN C. HOOVER

[68] NLRB v. Local 140, United Furniture Workers, CIO, 233 F.2d 539 (1959); Progressive Mine Workers v. NLRB, 187 F.2d 298 (7th Cir. 1959). *But see,* J. W. Banta Towing, 41 L.R.R.M. 2610 (7th Cir. 1951). These cases applied the earlier Board rules.