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# NOTES

## THE CORPORATE ORGANIZING CAMPAIGN: A DOUBLE-EDGED SWORD\*

### I. INTRODUCTION

When the Taft-Hartley Act<sup>1</sup> was passed in 1947, labor unions represented almost twenty-four percent of all United States workers.<sup>2</sup> In stark contrast, union members comprised only seventeen percent of the work force on the Act's fiftieth anniversary in 1987.<sup>3</sup> Unionization of American workers has dropped six percent in the 1980s alone.<sup>4</sup>

In light of these dismal statistics, unions are constantly seeking new and innovative tactics to regain the lost membership of the American work force. One such tactic is the corporate organizing campaign.<sup>5</sup> Fundamentally different from traditional organizing tools, a corporate campaign targets an entire company instead of focusing only on particular employees at a particular locality. A union's organizational objective is accom-

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1. Labor-Management Relations Act of 1947, ch. 120, 61 Stat. 136.

2. See BUREAU OF LABOR STATISTICS, HANDBOOK OF LABOR STATISTICS 412 (1980). Thirty-four percent of nonagricultural workers were unionized in 1947.

3. See Daily Lab. Rep. (BNA) No. 15, at B-1 (Jan. 25, 1988).

4. In 1980 23% of civilian workers were union members. By 1984 the percentage of employees belonging to a labor organization was 18.8%, and by 1986 only 17.5% of American nonagricultural workers were unionized. See Daily Lab. Rep. (BNA) No. 34, at B-6 (Feb. 23, 1987).

5. Corporate campaigns may be useful in three situations: to make a strike more effective, to strengthen collective bargaining demands, and to organize nonunionized facilities. See C. PERRY, UNION CORPORATE CAMPAIGNS 3 (1987). This Note focuses exclusively on the corporate organizing campaign.

plished by cutting off the company, or "target employer," from its customers, suppliers, investors, and even the public through coordinated activities and planning.

A corporate organizing campaign offers a less rigid format than traditional organizing methods. Consequently, the target employer often does not know what to expect from the union and must deal constantly with new strategies and their unknown results. A campaigning union will not place primary emphasis on employee meetings and persuasion at a local level, but instead will focus on all of the target employer's vulnerabilities and pressure points in order to exploit them to achieve union goals. Face-to-face organizing, while still important, is merely a component of the larger program to force the target employer to recognize the union.<sup>6</sup>

A union considering a corporate campaign first will research the target company to identify its vulnerabilities, especially its sensitivity to adverse publicity.<sup>7</sup> The union likely will do a financial and economic analysis of the company, examining financial statements and documents filed with regulatory agencies to determine possible areas of sensitivity. Inquiry may be made into the names and occupations of corporate directors and their relationships to financial institutions.<sup>8</sup> In the organizing context, the union will also evaluate the treatment of employees, prevailing wage rates in the area, and other concrete data showing the tangible benefits of unionization.<sup>9</sup>

After making this analysis, the union will develop a strategy designed to intensify pressure on a target employer over time.<sup>10</sup> This strategy may involve the intimidation or harassment of business associates to induce them to cease doing business with the target employer.<sup>11</sup> Isolated from its business allies, the employer may be more easily coerced into recognizing the union.<sup>12</sup>

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6. See Craft & Extejt, *New Strategies in Union Organizing*, 4 J. LAB. RES. 19, 21 (1983) [hereinafter Craft].

7. See C. PERRY, *supra* note 5, at 123.

8. See Datz, Geffner, McLaughlin & Kellock, *Economic Warfare in the 1980's, Strikes, Lockouts, Boycotts and Corporate Campaigns*, 9 INDUS. REL. L.J. 82, 104 (1987) [hereinafter Datz].

9. See *id.* at 106.

10. *Id.*

11. See C. PERRY, *supra* note 5, at 5; Craft, *supra* note 6, at 21-22.

12. See Craft, *supra* note 6, at 21-22.

Confrontation with owners and managers is also a favorite corporate campaign tool. "Outside" members of the board of directors may be subjected to personal or professional harassment and embarrassment.<sup>13</sup> Firms associated with the target employer can be brought into the dispute, and threats of harmful publicity may cause them to cease dealing with the target employer or to pressure the employer to cease opposition to organizing efforts. The campaigning union also may use the annual stockholders' meeting to air alleged grievances and call for corrective action.

The union may attempt to portray the target employer as a corporate villain. For example, in at least two major corporate campaigns, the campaigning union characterized the employer as the nation's "number one labor law violator."<sup>14</sup> The union also could attempt to lure government into the campaign through legislative referenda or oversight hearings by regulatory agencies. Such governmental involvement often gives the union a public forum in which to air its grievances against a target employer.<sup>15</sup>

Other tactics include directing union investments away from companies that resist organizing efforts. A threat to withdraw pension funds is a common example. Indeed, one union threatened to withdraw two billion dollars in deposits and pension funds unless the depository bank recognized the union as its employees' bargaining agent.<sup>16</sup> In addition, boycotts and picketing have been used in several recent organizing campaigns. The success of these tactics, however, apparently depends less on their economic impact than on the adverse publicity they generate.<sup>17</sup>

The National Labor Relations Board (Board) has found that the use of the corporate campaign as a union tool to achieve bargaining goals does not violate the National Labor Relations Act (NLRA).<sup>18</sup> This organizational tactic, however, may not be used with impunity; discrete elements of the corporate campaign

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13. See *id.* at 61.

14. C. PERRY, *supra* note 5, at 19.

15. See *id.* at 51.

16. See Craft, *supra* note 6, at 23.

17. See *id.* at 23; C. PERRY, *supra* note 5, at 75.

18. See Daily Lab. Rep. (BNA) No. 195, at A-8 (Oct. 8, 1986). The text of the NLRA is found at 29 U.S.C. §§ 151-160 (1982).

may be unlawful under the NLRA. For example, picketing and handbilling must comply with the NLRA's provisions. Secondary pressure, often prevalent in a corporate organizing campaign, is also regulated by the NLRA.

Other federal and state laws may be implicated in the course of a corporate campaign. Conspiracy with the target employer's competitors or suppliers can violate the Racketeer Influenced and Corrupt Organizations Act or the antitrust laws. Similarly, injuries to an employer's business or property caused by union misconduct may subject the union to liability for compensatory and punitive damages. This Note will focus on these and other issues in an attempt to assess the legal implications of the corporate organizing campaign.

## II. NATIONAL LABOR RELATIONS ACT PROVISIONS

Because the NLRA governs so much union and employer conduct in the labor relations context, a review of its statutory provisions provides a logical starting point for evaluating the legitimacy of corporate organizing campaign conduct. Recognitional picketing, regulated by section 8(b)(7), can be implicated in almost any corporate organizing campaign. Boycotts and "hot cargo" agreements,<sup>19</sup> also typical campaign tools, are regulated by sections 8(b)(4) and 8(e). Employee coercion and violence, byproducts of a corporate campaign, are subject to regulation under sections 7 and 8(b)(1).

Organizational activity that violates any of these provisions allows a target employer to file unfair labor practice charges against a campaigning union. At the very least, such charges will divert the union's attention from its tactical battle. If the Board finds the charges meritorious and issues a cease-and-desist order, the union must re-evaluate its campaign strategy and conduct, perhaps causing a costly delay.

The utility of these sections to employers targeted by a corporate organizing campaign is explored in detail below. Also discussed in light of possible NLRA implications is the increased

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19. Under § 8(e) an employer may not agree with a union to refrain from dealing in the products of another employer or to cease doing business with another person. Such an agreement is known as a "hot cargo" agreement. See *infra* notes 145-47 and accompanying text.

use of employer-union neutrality agreements. These agreements often represent a possible employer vulnerability on which a campaigning union may capitalize. Finally, some attention is given to employer remedies under the NLRA and the Labor Management Relations Act (LMRA).

### A. *Liability for Unlawful Conduct*

Section 8(b) of the NLRA itemizes union unfair labor practices and refers to the prohibited activities of "a labor organization or its agents."<sup>20</sup> The agency relationship contemplated by this section may occur if the union in a corporate campaign enlists the aid of civil rights groups or religious organizations to pressure an employer. In the Amalgamated Clothing and Textile Workers Union (ACTWU) campaign against Consolidated Foods, for example, two members of the Sisters of Divine Providence, a religious order, effectively led the campaign. The nuns — not the union — formulated the central issues of the campaign; the union merely assisted in compiling data and providing documentary analysis.<sup>21</sup>

The nuns denied that they were acting for the union. Although this point was not litigated, such a denial would be ineffective to exonerate the union from any unlawful activity. Under section 2(13) of the NLRA,<sup>22</sup> implied or apparent authority of a person to act may be sufficient to impose liability on a campaigning union. Indeed, the Board may base a finding of an agency relationship on evidence that an individual . . . "was acting with the knowledge and acquiescence of the Union and that he had implied authority to do what he did." <sup>23</sup>

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20. 29 U.S.C. § 158(b) (1982) (emphasis added).

21. See C. PERRY, *supra* note 5, at 195. Cf. Butcher's Union Local 506, United Food & Commercial Workers (Coors Distr. Co.), 268 N.L.R.B. 475 (1983) (boycott of community festival distributing Coors beer organized by labor, religious, environmental, and ethnic organizations).

22. Section 2(13) provides: "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." 29 U.S.C. § 152(13) (1982).

23. NLRB v. Local 90, Operative Plasterers & Cement Masons' Int'l Ass'n, 606 F.2d 189, 192 (7th Cir. 1979) (quoting NLRB v. Local 135, Int'l Bhd. of Teamsters, 267 F.2d 870, 873 (7th Cir.), *cert. denied*, 361 U.S. 914 (1959)).

## B. *Recognitional Picketing*

One corporate campaign goal is to undermine an employer's resistance to a labor union's organization of its employees.<sup>24</sup> To this end, a union may choose to engage in recognitional or organizational picketing. Interference with an employer's business relations with suppliers and customers, as well as the economic loss necessarily incurred because of the picketing, may induce the employer to bargain with the campaigning union. Employees, impressed by the union's seeming control over the employer's business, also may look more favorably upon the prospects of union membership.<sup>25</sup>

Yet the use of recognitional picketing as an economic weapon in a corporate organizing campaign is not without limitation. The employer may invoke section 8(b)(7)(C)<sup>26</sup> to protect its business and employees from the protracted organizational picketing that may accompany a corporate campaign. This section prohibits recognitional or organizational picketing by an uncertified union unless an election petition is filed within a reasonable period of time — not more than thirty days after the commencement of the picketing. Failure to file a petition makes

24. See C. PERRY, *supra* note 5, at 3.

25. See R. GORMAN, *BASIC TEXT ON LABOR LAW* 220 (1976).

26. Section 8(b)(7)(A) makes it an unfair labor practice for a union to picket an employer that lawfully has recognized another labor organization. Section 8(b)(7)(B) stipulates that picketing an employer when a valid election has been conducted within the preceding 12 months is a violation of the Act. Subsection (C), however, is most likely to be violated by a union in the corporate organizing campaign situation. Section 8(b)(7)(C) provides, in pertinent part:

(b) It shall be an unfair labor practice for a labor organization or its agents . . . (7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees . . .

(C) where such picketing has been conducted without a petition under section [9(c)] being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided* . . . [t]hat nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services . . .

29 U.S.C. § 158(b)(7)(C) (1982) (emphasis in original).

continuation of the picketing an unfair labor practice.<sup>27</sup>

### 1. *Picketing Defined*

Although the NLRA contains no definition of “picket,” this term generally means a group of persons moving in front of an employer’s premises carrying placards that communicate a union’s claims.<sup>28</sup> The Board and the courts, however, have construed the word broadly in finding violations of section 8(b)(7)(C).

“The important feature of picketing appears to be the posting by a labor organization . . . at the approach to a place of business to accomplish a purpose which advances the cause of the union, such as keeping employees away from work or keeping customers away from the employer’s business.”<sup>29</sup> A coercive object — a “signal” effect<sup>30</sup> — may be found when union activities induce action by employees or third persons. Physical action is not a necessary ingredient of picketing;<sup>31</sup> the placement of signs in a snowbank<sup>32</sup> or on poles or trees<sup>33</sup> constitutes picketing if union members observe the signs from a nearby vantage point. Further, courts may view handbills distributed after actual patrolling is discontinued as a continuation of picketing if they constitute a signal to employees to take action usually evoked by

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27. See *Kobell v. United Food & Commercial Workers Int’l Union, Local 23*, 788 F.2d 189, 194 (3d Cir. 1986); *International Hod Carriers, Local 840 (C.A. Blinne Constr. Co.)*, 135 N.L.R.B. 1153, 1167 (1962).

28. See R. GORMAN, *supra* note 25, at 223; see also *NLRB v. Fruit & Vegetable Packers & Warehousemen Local 760*, 377 U.S. 58, 77 (1964) (*Tree Fruits*) (Black, J., concurring)(patrolling encompasses “standing or marching back and forth or round and round . . . generally adjacent to someone else’s premises”).

29. *Lumber & Sawmill Workers Local Union No. 2797 (Stoltze Land & Lumber Co.)*, 156 N.L.R.B. 388, 394 (1965). Cf. *San Diego Typographical Union No. 221 (Central Graphics)*, 264 N.L.R.B. 874, 874 n.1 (1982) (handbilling that accompanies traditional picketing constitutes picketing).

30. *Teamsters Local 688 (Levitz Furniture Co. of Missouri, Inc.)*, 205 N.L.R.B. 1131, 1133 (1973).

31. See *NLRB v. Local 182, Int’l Bhd. of Teamsters*, 314 F.2d 53, 58 (2d Cir. 1963); *Lawrence Typographical Union No. 570 (Kansas Color Press, Inc.)*, 169 N.L.R.B. 279, 283, *enforced*, 402 F.2d 452 (10th Cir. 1968).

32. See, e.g., *Local 182, Int’l Bhd. of Teamsters (Woodward Motors, Inc.)*, 135 N.L.R.B. 851 (1962), *enforced*, 314 F.2d 53 (2d Cir. 1963).

33. See, e.g., *United Furniture Workers (Jamestown Sterling Corp.)*, 146 N.L.R.B. 474, *remanded*, 337 F.2d 936 (2d Cir. 1964).



traditional picket lines.<sup>34</sup> The Board also has found that the prohibition against picketing in section 8(b)(7)(C) encompasses mere *threats* to picket a target employer, even if actual picketing never occurs.<sup>35</sup>

## 2. *Object of Picketing*

If recognition of the union is “an” object of picketing, the union must comply with section 8(b)(7)(C).<sup>36</sup> In an attempt to avoid the limitations of that section, the union may represent the objectives of its picketing as something other than recognition or organization.<sup>37</sup> The Board, of course, may find a recognitional object in picket signs or requests directed to a target’s employees to join the union.<sup>38</sup> In the corporate campaign context, union objectives may not be so clear-cut, but union literature and press releases may evince a recognitional objective.

34. See *Kroger Co. v. NLRB*, 477 F.2d 1104, 1108 (6th Cir. 1973) (handbilling that contained substantially the same message as picket placards and was conducted in the same area as the picketing was tantamount to picketing); see also *Hoffman v. Cement Masons Union Local 337*, 468 F.2d 1187, 1191 (9th Cir. 1972) (handbill that continued union’s message and to which readers were referred by picket sign constituted picketing), cert. denied, 411 U.S. 986 (1973); but see *Local 282, Int’l Bhd. of Teamsters (General Contractors Ass’n)*, 262 N.L.R.B. 528 (1982) (handbilling not picketing when no signal intended); *International Bhd. of Teamsters, Local 537 (Lohman Sales Co.)*, 132 N.L.R.B. 901, 905 (1961) (handbilling does not constitute picketing under § 8(b)(4)).

35. In *General Servs. Employees Union Local No. 73 (A-1 Security Serv. Co.)*, 224 N.L.R.B. 434, 436 (1976), enforced, 578 F.2d 361 (D.C. Cir. 1978), the Board recognized that the legislative history of § 8(b)(7)(C), even though it does not expressly address the question whether a threat to picket is within the section’s proscriptions, clearly evinces a congressional intent to prohibit both threats to picket and actual picketing. See also *Wackenhut Corp. Gen. Serv. Employees Union Local 73*, 287 N.L.R.B. No. 40, 127 L.R.R.M. (BNA) 1217 (Dec. 16, 1987); *Highway Drivers, Local 710 (University of Chicago)*, 274 N.L.R.B. 956 (1985); *Local Union No. 803, Int’l Bhd. of Teamsters (St. Luke’s-Roosevelt Hosp. Center)*, 274 N.L.R.B. 905 (1985); *Local 32E, Serv. Employees Int’l Union (Cadillac Fairview Shopping Centers, Ltd.)*, 259 N.L.R.B. 771 (1981).

36. See *Local 345, Retail Store Employees (Gem of Syracuse, Inc.)*, 145 N.L.R.B. 1168 (1964). Whether or not an object of picketing is for recognition or organization is a question of fact. See *Local 182, Int’l Bhd. of Teamsters (Woodward Motors, Inc.)*, 135 N.L.R.B. 851 (1962), enforced, 314 F.2d 53 (2d Cir. 1963).

37. For example, a union may clothe its picketing as a protest against the employer’s acts or policies. See *Waiters & Bartenders Local 500 (Mission Valley Inn)*, 140 N.L.R.B. 433 (1963) (commission of unfair labor practice); *Houston Bldg. & Constr. Trades Council (Claude Everett Constr. Co.)*, 136 N.L.R.B. 321 (1962) (area standards protests).

38. See *Local 345, Retail Store Employees (Gem of Syracuse, Inc.)*, 145 N.L.R.B. 1168 (1964); *Retail Clerks Int’l Ass’n, Local 635 (Mays, Inc.)*, 145 N.L.R.B. 1091 (1964).

The Board will look at a union's overall conduct to ascertain the object of its picketing.<sup>39</sup> If, however, an employer can prove that the union's activities include even *one* recognitional object, the foundation is laid for a section 8(b)(7)(C) unfair labor practice charge.<sup>40</sup>

### 3. *Time Within Which a Union May Picket*

Section 8(b)(7)(C) does not define the "reasonable period of time" during which a union may conduct its recognitional picketing without filing an election petition; indeed, the section imposes only an outside limitation of thirty days. This determination is made by the Board on a case-by-case basis,<sup>41</sup> but after the reasonable time has elapsed, the union's picketing may be enjoined under section 10(1)<sup>42</sup> even if a petition is subsequently filed within thirty days.<sup>43</sup>

Union misconduct often shortens the normal thirty-day period. For example, picketing accompanied by violence and intimidation has been enjoined after ten days.<sup>44</sup> Twenty-six days of picketing was found to be unreasonable when a union's misconduct, including threats and violence, prevented a free election.<sup>45</sup> Physical assaults, as well as rock throwing and threats of bodily injury, also have shortened the thirty-day period.<sup>46</sup>

Unfortunately, a corporate campaign frequently encompasses violence and inflammatory actions on the picket line. Based on these decisions, a target employer faced with such misconduct may succeed in shortening the time within which the

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39. See *Theatre & Amusement Janitors Local 9* (United Artists Communications, Inc.), 272 N.L.R.B. 685 (1984); *Automotive Employees Union Local No. 618* (Congress of Indep. Unions), 193 N.L.R.B. 714 (1971).

40. See *IATSE, Local 15* (Albatross Prods., Inc.), 275 N.L.R.B. 744 (1985).

41. See *District 65, Retail Store Union* (Eastern Camera & Photo Corp.), 141 N.L.R.B. 991, 999 (1963).

42. See *infra* notes 187-89 and accompanying text.

43. See 2 *THE DEVELOPING LABOR LAW* 1096 (C. Morris 2d ed. 1983) [hereinafter *LABOR LAW*].

44. See *Cuneo v. United Shoe Workers*, 181 F. Supp. 324 (D.N.J. 1960).

45. 141 N.L.R.B. at 999.

46. See *Local 443, Teamsters* (Leon's Inc.), NLRB Gen. Couns. Mem., 115 L.R.R.M. (BNA) 1341, 1343 (Jan. 12, 1984). But see *International Ass'n of Bridge Workers, Local 782* (Fogel-Anderson Constr. Co.), NLRB Gen. Couns. Mem., 113 L.R.R.M. (BNA) 1084 (May 5, 1983) (threats of violence not accompanied by any threat to picket are insufficient to shorten the 30-day reasonable time period under § 8(b)(7)(C)).

union may picket, thereby limiting employees' exposure to campaign propaganda.<sup>47</sup>

#### 4. *Publicity Proviso*

Section 8(b)(7)(C) is subject to a publicity proviso that protects truthful informational picketing.<sup>48</sup> A union that pickets an employer for more than thirty days without filing a petition will not violate section 8(b)(7)(C) if the union can meet the criteria set forth in the proviso. Indeed, if the picketing satisfies the proviso requirements, it may continue indefinitely.<sup>49</sup>

To come within the proviso, a union first must show that its picketing is for the purpose of truthfully advising the public that the target employer has no union contract. The proviso protects picketing that is directed *only* to the public;<sup>50</sup> it affords no protection to picketing designed to appeal to other labor groups to exert economic pressure on an employer. Consequently, a union petitioning for recognition by a contractor may not enlist through picketing the support of a union representing a subcontractor.<sup>51</sup> Further, picketing directed to employees of the target employer or a secondary employer is clearly unprotected by the proviso.<sup>52</sup> As long as signs or handbills “‘embod[y] in substance the language of the publicity proviso,’”<sup>53</sup> the picketing is pro-

47. In the corporate campaigns against Hormel and Phelps Dodge, numerous incidents of violence were reported, resulting in the employers or the state attorney general calling in the National Guard. See C. PERRY, *supra* note 5, at 40.

48. See *supra* note 26.

49. See generally Local Joint Executive Bd. of Hotel & Restaurant Employees, Local 681 (Irwin), 135 N.L.R.B. 1183 (1962), *enforcement denied on other grounds sub nom.* Smitley v. NLRB, 327 F.2d 351 (9th Cir. 1964).

50. See Carpenters Local Union No. 2361 (Adams Insulation Co.), 248 N.L.R.B. 313, 314-15 (1980), *enforced without opinion*, 652 F.2d 61 (9th Cir. 1981). For examples of language that falls within and without the proviso, see United Food & Commercial Workers, Local 23 (Duncan Manor Foodland), NLRB Gen. Couns. Mem., 120 L.R.R.M. (BNA) 1345 (Sept. 25, 1985).

51. See, e.g., Hirsch v. Building & Constr. Trades Council, 530 F.2d 298, 804 (3d Cir. 1976) (signs that directed Teamsters to honor picket line found not within the proviso); see also Baldovin v. IATSE, Local 279, 570 F. Supp. 1314 (S.D. Tex. 1983).

52. See, e.g., General Serv. Employees, Local 73 (Active Detective Agency), 240 N.L.R.B. 462 (1979); see generally F. BARTOSIC & R. HARTLEY, LABOR RELATIONS LAW IN THE PRIVATE SECTOR 235, § 8.06(c)(3)(B) (2d ed. 1986).

53. United Food & Commercial Workers, Local 23 (Duncan Manor Foodland), NLRB Gen. Couns. Mem., 120 L.R.R.M. (BNA) 1345, 1346 (Sept. 25, 1985) (quoting Retail Clerks, Local 1404 (Jay Jacobs Downtown, Inc.), 140 N.L.R.B. 1344, 1346 (1963))

tected. If the signs do not convey that the employer does not employ members of or have a contract with the union, the message falls outside the protective scope of the proviso.<sup>54</sup>

Even though picketing is directed to the public, it still may be unlawful if it has the effect of inducing a work stoppage or interfering with pickups and deliveries.<sup>55</sup> Such effect will not be found, however, unless the picketing has "disrupted, interfered with, or curtailed the employer's business";<sup>56</sup> an isolated interruption or work stoppage is insufficient to withdraw proviso protection.<sup>57</sup> A substantial secondary effect — for instance, a third party's refusal to deliver goods — will be found unlawful under the proviso. A primary effect — as when employees cease working because of the picketing — is generally lawful.<sup>58</sup>

### C. Violation of Section 7 Rights (Coercion)

Notwithstanding the sophisticated tactics sometimes used in a corporate organizing campaign, individuals necessarily comprise a crucial component of that organizational effort. Those individuals, whether employees of a target employer or strangers to the dispute, are protected by section 8(b)(1)(A)<sup>59</sup> of the

(brackets in original) (footnote omitted).

54. See, e.g., Local 275, Laborers Int'l (S.B. Apts., Inc.), 209 N.L.R.B. 279, 280 (1974) (area standards language alone not within the scope of the proviso).

55. See International Bhd. of Elec. Workers, Local 211 (Atlantic County Improvement Auth.), 248 N.L.R.B. 168, 172 (1980); Local 217, Hotel & Restaurant Employees (Picadilly Square, Ltd.), 223 N.L.R.B. 1058, 1063-64 (1976).

56. Retail Clerks Local 324 (Barker Bros. Corp. & Gold's, Inc.), 138 N.L.R.B. 478, 491 (1962), *enforcement denied on other grounds*, 328 F.2d 431 (9th Cir. 1964).

57. Compare *Retail Clerks*, *id.* (Board found picketing lawful even though three drivers refused to make deliveries during twelve-week period and other deliveries delayed) with San Diego County Waiters & Bartenders Local 1500 (Hunt's), 138 N.L.R.B. 470 (1962) (driver employed by distributor refused to cross picket line at restaurant that was target of organizational campaign). See also San Francisco Local Joint Executive Bd. of Culinary Workers v. NLRB, 501 F.2d 794 (D.C. Cir. 1974); Building & Constr. Trades Council (Strescon Indus., Inc.), 222 N.L.R.B. 1276, *enforced without opinion*, 530 F.2d 298 (3d Cir. 1976).

58. See F. BARTOSIC & R. HARTLEY, *supra* note 52, § 8.06(c)(3)(B), at 236; see also NLRB v. Local 239, Int'l Bhd. of Teamsters, 289 F.2d 41 (2d Cir.), *cert. denied*, 368 U.S. 833 (1961).

59. Section 8(b)(1)(A) provides, in pertinent part:

(b) 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 guaran-

NLRA, which labels union coercion or restraint of employees in the exercise of their section 7 rights as an unfair labor practice. The United States Supreme Court has found that section 8(b)(1)(A) is a limited grant to the Board "to proceed against union tactics involving violence, intimidation, and reprisal or threats."<sup>60</sup> When a union uses these tactics to coerce or restrain persons in their search for or support of a union-free workplace, an unfair labor practice charge, filed by an employer or employee, likely will be successful.<sup>61</sup>

### 1. *Coercion of Employees*

When picketing or strike activity is an element of a corporate organizing campaign, violence is likely to occur. In fact, violence already has surfaced in several corporate campaigns. Strikers of Louisiana-Pacific Corp. allegedly struck with baseball bats and rocks a van carrying replacement workers.<sup>62</sup> In both the Phelps Dodge strike with the Steelworkers and the Hormel-UFCW strike, threats of picketing and violence led to police and national guard protection at the struck facilities.<sup>63</sup>

Fortunately for the employer, the Board is quick to find a section 8(b)(1)(A) unfair labor practice when a union restrains or coerces employees by violent means from exercising their section 7 rights. For example, an attack by picketers against an employee who desires to cross a picket line is impermissible.<sup>64</sup>

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teed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . .

29 U.S.C. § 158(b)(1)(A) (1982) (emphasis added).

Section 7 provides, in pertinent part:

Employees shall have the right to self-organization, 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 such activities . . .

29 U.S.C. § 157 (1982).

60. *NLRB v. Drivers Local 639*, 362 U.S. 274, 290 (1960).

61. Similarly, employers who engage in violence in an effort to prevent unionization may be charged with an 8(a)(1) violation. See *NLRB v. Village IX, Inc.*, 723 F.2d 1360, 1365 (7th Cir. 1983).

62. See *Daily Lab. Rep. (BNA)* No. 147, at A-6 (July 29, 1983).

63. See *C. PERRY*, *supra* note 5, at 40, 124; *Daily Lab. Rep. (BNA)* No. 14, at A-1 (Jan. 23, 1984).

64. See *Congreso de Uniones Industriales (Rosario)*, 279 N.L.R.B. 626 (1986); see

Damaging employee property also is prohibited.<sup>65</sup> Even nonviolent physical activity may constitute coercion and restraint of employees' section 7 rights; mere *threats* of violence, such as those directed at an employee who attempts to cross a picket line, may violate section 8(b)(1)(A).<sup>66</sup>

Mass picketing that prevents employees from gaining entrance to an employer's premises,<sup>67</sup> as well as name-calling or obscene gesturing,<sup>68</sup> may violate the NLRA. Further, the union may be held responsible for picket line violence despite its instructions to picket peacefully.<sup>69</sup>

## 2. Coercion of Nonemployees

Section 8(b)(1)(A) expressly prohibits only restraint and coercion of "employees."<sup>70</sup> The Board will find a violation of this section, however, when union representatives commit or

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also Service Employees Int'l Union, Local 87 (Pacific Tel. & Tel. Co.), 279 N.L.R.B. 168 (1986) (picket struck employee with sign); Teamsters Local 115 (Gross Metal Prods., Inc.), 275 N.L.R.B. 1547 (1985) (employees shoved, punched, and threatened by union representatives), *enforced*, 800 F.2d 1136 (3d Cir. 1986); *cf.* Produce Employees, Ill. Local 703 (Kennicott Bros.), 284 N.L.R.B. No. 115, 126 L.R.R.M. (BNA) 1033 (July 20, 1987) (union representatives' assaults of members were basis for setting election aside).

65. See District 30 United Mine Workers v. NLRB, 819 F.2d 651 (6th Cir. 1987). For an excellent treatise on union violence, see A. THIEBLOT & T. HAGGARD, *UNION VIOLENCE: THE RECORD AND THE RESPONSE BY COURTS, LEGISLATURES, AND THE NLRB* (1983). Chapter eleven considers violence in the § 8(b)(1)(A) context. See also Haggard, *Labor Union Violence as an Unfair Labor Practice*, 34 S.C.L. REV. 273 (1982).

66. See Redway Carriers, Inc. (Fraternal Ass'n of Special Haulers), 274 N.L.R.B. 1359 (1985) (employees threatened with bodily harm; rocks thrown at vehicles driven by nonstriking employees); Brotherhood of Ry. Carmen, Local No. 543 (North Am. Car Corp.), 248 N.L.R.B. 285 (1980) (employees and supervisors threatened).

67. See Cullum Mechanical Constr., Inc. (Wokasch), 281 N.L.R.B. 453 (1986) (mass picketing at site to intimidate employees); Nassau Ins. Co. (Local 917, Int'l Bhd. of Teamsters), 280 N.L.R.B. 878 (1986) (blocking ingress and egress from plant); Teamsters, 275 N.L.R.B. 1547; *Railway Carmen*, 248 N.L.R.B. 285. Mass picketing has been employed in the corporate campaign context on at least one occasion. See generally Daily Lab. Rep. (BNA) No. 14, at A-13 (Jan. 22, 1986).

68. See, e.g., Construction, Prod. & Maintenance Laborers' Local 383 (Carter-Glogau Laboratories, Inc.), 260 N.L.R.B. 1340 (1982).

69. See District 30 United Mine Workers v. NLRB, 819 F.2d 651, 655-56 (6th Cir. 1987); Local Lodge 758, Int'l Ass'n of Machinists (Menasco, Inc.), 267 N.L.R.B. 1147 (1983); *cf.* United Tel. Answering & Communications Serv. Union, Local 780 (Federated Communications Serv., Inc.), 276 N.L.R.B. 507 (1985). But see International Union, United Mine Workers (Fletcher Mining Co.), 271 N.L.R.B. 20 (1984) (mass picketing and violence did not violate § 8(b)(1)(A) even though union president present at picket line).

70. See *supra* note 59.

threaten violence in the presence of nonemployees or when employees are likely to hear about such conduct.<sup>71</sup> Violence actually directed at nonemployees, such as supervisors or company officials, also has been found to violate the NLRA.<sup>72</sup>

### 3. Union Rules

A union generally is free to discipline a member by internal rules without violating the NLRA.<sup>73</sup> The Supreme Court, however, carved an exception in *Scofield v. NLRB*:<sup>74</sup> “[I]f the [union] rule invades or frustrates an overriding policy of the labor laws the rule may not be enforced, even by fine or expulsion, without violating [section] 8(b)(1)(A).”<sup>75</sup> Under this rationale, disciplining employees for refusal to engage in unlawful or unprotected activity (such as an unlawful secondary boycott in connection with a corporate campaign) violates section 8(b)(1)(A).<sup>76</sup>

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71. See District 65, Retail, Wholesale & Dep’t Store Union (B. Brown Assocs.), 157 N.L.R.B. 615 (1966), *enforced*, 375 F.2d 745 (2d Cir. 1967); see also *Railway Carmen*, 248 N.L.R.B. 285.

72. See Teamsters Local 115 (Oakwood Chair Mfg. Co.), 277 N.L.R.B. 694 (1985) (threats to and assaults of supervisors); Teamsters Local 115 (Gross Metal Prods., Inc.), 275 N.L.R.B. 1547 (1985) (company officials slapped, spat upon, held captive by mass pickets), *enforced*, 800 F.2d 1136 (3d Cir. 1986); Local 1291, Int’l Longshorem’n Ass’n (Trailer Marine Transp. Corp.), 266 N.L.R.B. 1204 (1983) (threat of reprisals to trucking company driver if he tried to cross picket line), *enforced without opinion*, 738 F.2d 423 (3d Cir. 1984). *But see* Plateau Coal Sales, Inc. (District 29, United Mine Workers), 279 N.L.R.B. 1151 (1986) (scuffle with co-owner no violation).

73. See *supra* note 59.

74. 394 U.S. 423 (1969).

75. *Id.* at 429. The Court held that it would sustain union discipline that “left the collective bargaining process unimpaired, breached no collective contract, required no pay for unperformed services, induced no discrimination by the employer against any class of employees, and represent[ed] no dereliction by the union of its duty of fair representation.” *Id.* at 436. See also *International Alliance of Theatrical Stage Employees* (Adrian Penner), 223 N.L.R.B. 959 (1976); *cf.* *Pattern Makers’ League v. NLRB*, 473 U.S. 95 (1985).

76. See *NLRB v. Stationary Eng’rs, Local 39*, 746 F.2d 530 (9th Cir. 1984); *District Council of Painters* (J.A. Stewart Constr. Co.), 278 N.L.R.B. 1012 (1986); *United Ass’n of Journeymen* (T.S. Hanson Plumbing), 277 N.L.R.B. 1231 (1985), *petition for enforcement granted*, 827 F.2d 579 (9th Cir. 1987); *United Food & Commercial Workers Union, Local 1439* (Rosauer’s Supermarkets, Inc.), 275 N.L.R.B. 30 (1985); *Hospital & Institutional Workers Union, Local 250* (Associated Hosps.), 254 N.L.R.B. 834 (1981). See also 2 LABOR LAW *supra* note 43, at 171; R. GORMAN, *supra* note 25, at 682.

### D. Secondary Pressure

Secondary pressure is an integral part of an effective corporate campaign. Through picketing, handbilling, and similar publicity, a union can induce a person with whom it has no dispute, a secondary person, to cease doing business with the person with whom it *does* have a dispute — namely, a target employer. For example, in the J.P. Stevens campaign, ACTWU succeeded in causing New York Life Insurance Company to oust its Stevens board member and to pressure Stevens to deal with the union. Similarly, unions threatened to withdraw their assets from trust funds managed by Manufacturers Hanover Trust Co. because a Stevens director sat on the Manufacturers Hanover board.<sup>77</sup>

Secondary pressure by unions is regulated by section 8(b)(4)(ii) of the NLRA, which provides in pertinent part:

(b) It shall be an unfair labor practice for a labor organization or its agents—

. . .  
(4)(ii) to threaten, coerce, or restrain any person engaged in commerce . . . , where . . . an object thereof is

. . .  
(B) forcing or requiring any person to cease using . . . or otherwise dealing in the products of any other producer, . . . or to cease doing business with any other person . . . .<sup>78</sup>

A careful reading of section 8(b)(4)(ii)(B) is critically important in understanding its application to secondary pressure. First, the union's activity is prohibited only when directed at a neutral person;<sup>79</sup> a person allied with the primary employer is not entitled to the protection of section 8(b)(4)(ii)(B). The activity also must be threatening, coercive, or restraining. If it is, the activity is prohibited under section 8(b)(4)(ii)(B) if its object is intentionally to cause the neutral person to cease or refrain from doing business with the primary target. One caveat exists: if conduct falls within the proviso to section 8(b)(4)(ii)(B), a union may exert economic pressure on a secondary person with

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77. See Craft, *supra* note 6, at 22.

78. 29 U.S.C. § 158(b)(4)(ii)(B) (1982).

79. A "person" under the NLRA "includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, . . . or receivers." *Id.* § 152(1).



impunity.<sup>80</sup>

### 1. *Separate and Allied Employers*

A union engaged in a corporate organizing campaign may exert pressure on a target employer by boycotting the employer's subsidiary or division. For example, a campaign aimed at General Motors or Ford may direct its efforts toward local automobile dealers. Similarly, boycotting a company whose officer or director is also an officer or director of the target employer is not uncommon in a corporate campaign.

In determining the legality of such activity, the first question to ask is whether the secondary employer, in light of its relationship with the primary employer, is entitled to the protection of section 8(b)(4)(ii)(B). If the secondary employer is "allied" with the target employer, it is not neutral and must endure any union pressure.<sup>81</sup> If, however, the secondary employer is found to be a separate employer under the NLRA, it will be entitled to the protection given to neutral persons under section 8(b)(4)(ii)(B).

The Board and the courts look to several factors to determine whether union activity involves separate employers or allies. The ally doctrine generally is applied when the employer is either a "struck work" ally — it performs work that it would not have performed except for the strike — or engages in a "straight-line" operation through its identification with the primary employer. As the Board noted in its *Curtin Matheson*<sup>82</sup> decision, however, the "question of neutrality [] 'cannot be answered by the application of a set of verbal formulae.'"<sup>83</sup> Consequently, determining whether an employer is in fact neutral will depend on the extent of the mutual interest between the two entities, regardless of the nature of that interest. Lack of common ownership, management, and financial control are signifi-

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80. See *infra* notes 112-13 and accompanying text.

81. See F. BARTOSIC & R. HARTLEY, *supra* note 52, § 8.07(e), at 249; see also Newspaper & Mail Deliverers' Union (Gannett Co.), 271 N.L.R.B. 60, 67 (1984).

82. Teamsters Local 560 (Curtin Matheson Scientific, Inc.), 248 N.L.R.B. 1212 (1980).

83. *Id.* at 1214 (quoting *Vulcan Materials Co. v. United Steelworkers*, 430 F.2d 446, 451 (5th Cir. 1970), *cert. denied*, 401 U.S. 963 (1971)). See also 2 LABOR LAW, *supra* note 43, at 1165-66.

cant indications that the two entities are single employers.<sup>84</sup> The interrelationship of business operations, which includes interchanges of employees or equipment, common insurance or pension funds, and mutual advertising, also is weighed.<sup>85</sup>

The degree of labor relations centralization, however, appears to be the most important factor in this analysis.<sup>86</sup> For example, in *Local 456 Teamsters (Carvel Corp.)*<sup>87</sup> the Board focused upon this criterion to the exclusion of all other factors that indicated ally status. Here, a union whose primary dispute was with the franchisor picketed a franchisee. In evaluating the union's claim that the two were allies, the Board disregarded the significant integration of operations between the franchisor and franchisee. Similarly, it found unpersuasive the franchisee's dependency on the franchisor for substantially all of the products sold in its stores<sup>88</sup> and essentially ignored its own finding that the franchisee's economic survival depended on the franchisor. The Board focused instead on the independence of labor relations policies between the franchisor and the franchisee.<sup>89</sup> Because the franchisee could hire, fire, and set terms and conditions of employment free from approval or interference by the franchisor, the Board found that the franchisee was a neutral third party entitled to the NLRA's protection.<sup>90</sup>

A franchise relationship symbolizes an almost total interrelationship between two entities. The Board's *Carvel* opinion, however, indicates that this interrelationship is not controlling; indeed, it is almost irrelevant. This finding may be of limited comfort to the beleaguered secondary employer because *Carvel* involved unique considerations relevant to the status of neutrality and may be fact-specific.<sup>91</sup> Nonetheless, the case signifies the importance attached to labor relations independence and the

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84. See *Gannett Co.*, 271 N.L.R.B. 60; *United Food & Commercial Workers, Local 1059 (Albrecht's Ohio Inns, Inc.)*, 268 N.L.R.B. 595 (1984).

85. See *Gannett Co.*, 271 N.L.R.B. at 68; *Albrecht's*, 268 N.L.R.B. at 598-99.

86. See, e.g., *Teamsters Local 456 (Carvel Corp.)*, 273 N.L.R.B. 516, 520 (1984).

87. *Id.*

88. See *id.* at 519.

89. See *id.* at 519-20.

90. See *id.* at 520.

91. See *Bennett v. Local 456, Teamsters & Chauffeurs Union*, 459 F. Supp. 223, 229-30 (S.D.N.Y. 1978) (enumerating the difficulty of determining the franchisee's neutral status).

latitude given by the Board when that independence is found.<sup>92</sup>

## 2. Proscribed Conduct

The union in the Louisiana-Pacific corporate campaign threatened retailers with boycotts if they continued to stock Louisiana-Pacific products.<sup>93</sup> This type of union conduct triggers the part of the section 8(b)(4)(ii) analysis that focuses upon “the coercive nature of the [union] conduct, whether it be picketing or otherwise.”<sup>94</sup>

The Supreme Court most recently considered the coercion question in deciding whether section 8(b)(4)(ii) prohibited the distribution of handbills advocating a complete boycott of a secondary retailer. In *Edward J. Debartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*<sup>95</sup> the Court found no “clear indication in the relevant legislative history that Congress intended [section] 8(b)(4)(ii) to proscribe peaceful handbilling, unaccompanied by picketing, urging a consumer boycott of a neutral employer.”<sup>96</sup> The majority noted that whether secondary activity is coercive is not tied solely to the issue of economic loss by the neutral:<sup>97</sup> “The loss of customers because they read a handbill urging them not to patronize a business, and not because they are intimidated by a line of picketers, is the result of mere persuasion, and the neutral who reacts is doing no more than what its customers honestly want it to do.”<sup>98</sup>

92. For a similar case, see *Quick Shop Mkts., Inc. v. Retail Clerks Int'l Ass'n*, 446 F. Supp. 733, 739 (E.D. Mo. 1978), *rev'd on other grounds*, 604 F.2d 581 (8th Cir. 1979).

93. See Fletcher, *The Corporate Campaign — Labor's Ultimate Weapon or Suicide Bomb?*, 65 N.C.L. Rev. 85, 88 (1986).

94. *NLRB v. Fruit & Vegetable Packers & Warehousemen Local 760*, 377 U.S. 58, 68 (1964) (*Tree Fruits*). See *United Scenic Artists, Local 829 v. NLRB*, 762 F.2d 1027, 1032-33 (D.C. Cir. 1985) (Board may make an unlawful secondary boycott determination only if it finds that the union intended to coerce a neutral employer); *Local Union No. 501, IEW v. NLRB*, 756 F.2d 888, 892 (D.C. Cir. 1985) (Board must establish that union conduct reveals intent to involve neutrals in labor disputes to establish secondary boycott violation); *Kroger Co. v. NLRB*, 647 F.2d 634, 639 (6th Cir. 1980) (statute “is concerned with the purpose of the picketing, not with its actual effect”).

95. 108 S. Ct. 1392 (1988).

96. *Id.* at 1402.

97. See *Tree Fruits*, 377 U.S. at 72.

98. 108 S. Ct. at 1400.

### 3. *Proscribed Objects*

Even if union activity against a neutral employer is coercive, that coercion is prohibited only when it has an "object" of forcing a person to cease or refrain from doing business with any other person.<sup>99</sup>

The United States Supreme Court has found picketing that only persuades a customer not to buy a struck product and that is closely confined to the primary dispute does not have an unlawful object. In *NLRB v. Fruit & Vegetable Packers, Local 760 (Tree Fruits)*<sup>100</sup> the Court found that "struck product" picketing, which is directed at customers to encourage them not to purchase the primary employer's product, was not prohibited by the NLRA.<sup>101</sup> The Court distinguished peaceful consumer picketing designed to persuade customers of the secondary employer to cease all trading with the employer from struck product peaceful picketing of the secondary employer:

In the latter case, the union's appeal to the public is confined to its dispute with the primary employer, since the public is not asked to withhold its patronage from the secondary employer, but only to boycott the primary employer's goods. On the other hand, a union appeal to the public at the secondary site not to trade at all with the secondary employer goes beyond the goods of the primary employer, and seeks the public's assistance in forcing the secondary employer to cooperate with the union in its primary dispute.<sup>102</sup>

Thus, picketing that "merely follow[s] the struck product" and

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99. See *Boxhorn's Big Muskego Gun Club, Inc. v. Electrical Workers Local 494*, 620 F. Supp. 1073 (E.D. Wis. 1985), *aff'd in part, vacated in part, remanded in part*, 798 F.2d 1016 (7th Cir. 1986); *Allentown Racquetball & Health Club, Inc. v. Building & Constr. Trades Council*, 525 F. Supp. 156, 161 (E.D. Pa. 1981) (prohibited appeal is one that encourages consumers to boycott the neutral employer completely rather than just the product of the primary employer); *Teamsters Local 456 (Carvel Corp.)*, 273 N.L.R.B. 516 (1984).

100. 377 U.S. 58 (1964).

101. Picketing directed not to customers of the employer, but to its employees, is prohibited by § 8(b)(4)(ii). See *Kroger Co. v. NLRB*, 477 F.2d 1104, 1107 (6th Cir. 1973); *American Bread Co. v. NLRB*, 411 F.2d 147, 154-55 (6th Cir. 1969). Further, "where the union chooses to engage in secondary picketing, the union must accept the burden of properly identifying the struck products." *NLRB v. San Francisco Typographical Union No. 21*, 465 F.2d 53, 56 (9th Cir. 1972).

102. *Tree Fruits*, 377 U.S. at 63-64 (footnote omitted).

does not “create[] a separate dispute with the secondary employer”<sup>103</sup> does not fall within the proscriptions of section 8(b)(4)(ii)(B).

After *Tree Fruits* the Board and the lower courts consistently held that a struck product boycott was prohibited when the product comprised an integral part of the secondary company’s business.<sup>104</sup> Sixteen years after *Tree Fruits*, the Supreme Court itself agreed that this type of “total” secondary boycott was unlawful. In *NLRB v. Retail Store Employees Union, Local 1001 (Safeco)*<sup>105</sup> the Court found that a union’s picketing of title companies to induce customers to cancel their Safeco insurance policies was “‘reasonably calculated to induce customers not to patronize the neutral parties at all,’ ”<sup>106</sup> and, thus, was “distinctly different”<sup>107</sup> from the *Tree Fruits* scenario.

In *Tree Fruits* the picketed product was only one of many produced by the retailer. Conversely, in *Safeco* the title companies sold only Safeco’s product. Therefore, “[s]econdary picketing against consumption of the primary product leaves responsive consumers no realistic option other than to boycott the title companies altogether. If the appeal succeeds, each company ‘stops buying the struck product . . . in response to pressure designed to inflict injury on [its] business generally.’ ”<sup>108</sup>

Under this rationale, injury to neutral employers from secondary picketing that only discourages purchase of a struck product is a “natural consequence”<sup>109</sup> of primary activity. For example, a union engaged in a corporate campaign against a meat-packing company may picket a supermarket with signs that ask customers, “Please Don’t Buy X Sausage Here.”<sup>110</sup> On the other hand, when the union advocates boycotting the secondary company’s only product or when a product boycott in

103. *Id.* at 72 (footnote omitted).

104. *See, e.g.*, *Honolulu Typographical Union No. 37 v. NLRB*, 401 F.2d 952, 955 (D.C. Cir. 1968); *Teamsters Local 327 (American Bread Co.)*, 170 N.L.R.B. 91 (1968), *enforced*, 411 F.2d 147 (6th Cir. 1969).

105. 447 U.S. 607 (1980).

106. *Id.* at 610 (quoting *Retail Store Employees Union, Local 1001 (Land Title Ins. Co.)*, 226 N.L.R.B. 754, 757 (1976)).

107. *Id.* at 614.

108. *Id.* at 613 (quoting *NLRB v. Fruit & Vegetable Packers Local 760*, 377 U.S. 58, 72 (1964) (*Tree Fruits*)) (brackets in original).

109. 447 U.S. at 614.

110. *See Fletcher, supra* note 93, at 98.

which a primary employer's product is so merged into the secondary company's total offering to the public that the primary's product is not clearly identifiable,<sup>111</sup> section 8(b)(4)(ii)(B) is triggered and the union may be found guilty of unlawful conduct. Thus, if a local Ford dealership is not an ally of Ford Motor Company, a union engaged in a corporate campaign with Ford could not picket the local dealership with signs urging consumers not to buy Ford products.

#### 4. *The Publicity Proviso*

The prohibition in section 8(b)(4)(ii)(B) against threatening, coercing, or restraining any person is subject to a proviso allowing unions to exert some forms of economic pressure even if that pressure constitutes a secondary boycott.<sup>112</sup> Under the proviso, a union's boycott of a neutral company through truthful publicity — for example, handbilling, letters, or advertisements — is lawful unless it results in a refusal to deliver or pick up goods at the secondary site.<sup>113</sup>

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111. In *Kroger Co. v. NLRB*, 647 F.2d 634 (6th Cir. 1980), the court noted a "well-established exception to the *Tree Fruits* exception to § 8(b)(4)(ii)(B)," *id.* at 637, which exists for products

so merged with the secondary employer's total offering to the public that for all practical purposes, a boycott of the struck product is not separable from a boycott of the secondary employer. . . . In both cases, a successful boycott of the struck product entails a boycott of substantially all of the secondary employer's business, thereby forcing it to choose between survival and severance of ties with the primary employer.

*Id.* See also *Solien v. Carpenters Dist. Council*, 623 F. Supp. 597 (E.D. Mo. 1985); *Allentown Racquetball & Health Club, Inc. v. Building & Constr. Trades Council*, 525 F. Supp. 156 (E.D. Pa. 1981); *Teamsters Local 327 (American Bread Co.)*, 170 N.L.R.B. 91 (1968), *enforced*, 411 F.2d 147 (6th Cir. 1969).

112. The publicity proviso of § 8(b)(4) provides in pertinent part:

[T]hat for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public . . . that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer . . . to refuse to pick up, deliver, or transport any goods, or not to perform any services . . . .

29 U.S.C. § 158(b)(4)(ii)(B) (1982).

113. See R. GORMAN, *supra* note 25, at 261.

### a. Publicity Content

The proviso protects only truthful information directed to the public.<sup>114</sup> Further, the union's publicity may only: (1) advise the public of the nature of its dispute with the primary employer; (2) detail the secondary employer's relationship to the primary employer; and (3) ask for a permissible boycott of the employer.<sup>115</sup> Indeed, as the Ninth Circuit held in *Hospital & Service Employees Local 399 v. NLRB*,<sup>116</sup> the publicity may not include additional information, such as accident or consumer complaint information, which is totally unrelated to the primary dispute.<sup>117</sup> Consequently, a campaigning union cannot use the proviso as a safe harbor when it generates broad adverse publicity about a target employer.

### b. Producer/Distributor Requirement

The protection afforded by the proviso is further limited to publicity advising the public that a product "produced by an employer" is being "distributed by" another employer.<sup>118</sup> The Supreme Court has given a broad interpretation to the term "producer." In *NLRB v. Servette, Inc.*<sup>119</sup> the Court found that a wholesale distributor that did not physically produce any products was a "producer" within the terms of the proviso. At least one court interpreted *Servette* to hold that an advertiser of products manufactured by another is a "producer" within the proviso.<sup>120</sup> Under this analysis, a union that otherwise conforms

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114. See *Boxhorn's Big Muskego Gun Club, Inc. v. Electrical Workers Local 494*, 798 F.2d 1016 (7th Cir. 1986); F. BARTOSIC & R. HARTLEY, *supra* note 52, § 8.07(g), at 256; accord *Allentown Racquetball & Health Club, Inc. v. Building & Constr. Trades Council*, 525 F. Supp. 156 (E.D. Pa. 1981) (court justified requiring less than total accuracy in a publication by holding that a newspaper ad concerning a primary dispute was protected by the publicity proviso as long as there was a reasonable belief at the time of publication that the information was true).

115. See *Solien v. Carpenters Dist. Council*, 623 F. Supp. 597, 604 (E.D. Mo. 1985); see also *Hospital & Serv. Employees Union, Local 399 (Delta Air Lines, Inc.)*, 263 N.L.R.B. 996 (1982), *enforced in part and remanded*, 743 F.2d 1417 (9th Cir. 1984).

116. 743 F.2d 1417 (9th Cir. 1984).

117. See *id.* at 1422.

118. See *supra* note 112; see also *Boxhorn's*, 798 F.2d at 1019.

119. 377 U.S. 46 (1964).

120. See *Great W. Broadcasting Corp. v. NLRB*, 356 F.2d 434 (9th Cir.), *cert. denied*, 384 U.S. 1002 (1966).

to the proviso's limitations may, for example, advocate a total boycott of companies advertising on a struck television or radio station.<sup>121</sup>

Although the Court affords an expansive definition to the term "producer," it has limited the proviso's reach to publicity "intended to inform the public that the primary employer's product is 'distributed by' the secondary employer."<sup>122</sup> In *Edward J. DeBartolo Corp. v. NLRB*,<sup>123</sup> High, a construction contractor who was building a store in a shopping center, became embroiled in a labor dispute with the Building and Construction Trades Council. While the store was under construction, the Council distributed handbills at the shopping center entrances, asking consumers not to patronize any of the stores in the mall until the mall owner, DeBartolo Corporation, promised that all construction would be performed by contractors who paid fair wages.<sup>124</sup> The Board found that the union's conduct was protected by the publicity proviso<sup>125</sup> and the Fourth Circuit agreed.<sup>126</sup> The Supreme Court vacated the Fourth Circuit's decision.

The Court assumed that High, the primary employer, was a producer within the meaning of the publicity proviso.<sup>127</sup> It noted, however, that the "distributed by" requirement was intended to "'shield[] unoffending employers and others from pressures in controversies not their own.'"<sup>128</sup> Here, the handbills called not only for a product boycott of the store under construction but also for a boycott of the products sold by its cotenants, none of whom had any business relationship with High.<sup>129</sup> Consequently, the Court found "no justification for treating the products that the cotenants distribute to the public as products produced by" the contractor.<sup>130</sup>

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121. See F. BARTOSIC & R. HARTLEY, *supra* note 52, § 8.07(g), at 255.

122. *Edward J. DeBartolo Corp. v. NLRB*, 463 U.S. 147, 155 (1983).

123. *Id.* at 155.

124. See *id.* at 150, 150 n.3.

125. *Florida Gulf Coast Bldg. Trades Council (Edward J. DeBartolo Corp.)*, 252 N.L.R.B. 702 (1980).

126. *Edward J. DeBartolo Corp. v. NLRB*, 662 F.2d 264 (4th Cir. 1981).

127. DeBartolo conceded this point. See 463 U.S. at 155.

128. *Id.* at 156 (quoting *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 674, 692 (1951)).

129. See *id.* at 156-57.

130. *Id.* at 157.



In *Local No. P-9, United Food & Commercial Workers Union (George A. Hormel & Co.)*<sup>131</sup> the Board applied the *DeBartolo* criteria to union publicity arising out of a corporate campaign against the Hormel company. When the UFCW struck Hormel in 1985, a Hormel director served as president of First Bank Systems, Inc. Similarly, the president of Hormel served on the board of directors of two of First Bank's subsidiaries.<sup>132</sup> Anticipating some Hormel vulnerability because of this relationship, the union engaged in picketing and handbilling at seven First Bank subsidiaries. It characterized First Bank as a "corporate ally" and asserted that "Hormel and First Bank [Are] Unfair to Labor."<sup>133</sup>

The Board found that First Bank was a neutral secondary employer and that the union's publicity was not protected by the proviso.<sup>134</sup> Although the handbills did not meet the truthfulness requirement inherent in the proviso,<sup>135</sup> the critical determination was that First Bank did not "distribute" Hormel's products.<sup>136</sup> The Board noted that although three of the seven involved subsidiary banks received money for banking services from Hormel, they had no connection with the chain of distribution of Hormel's food products.<sup>137</sup> The Board further rejected the Union's argument that revenue was a Hormel "product." Such a finding "could mean that any person or business that has any contact with any money generated by Hormel is a distributor of Hormel's products, and therefore may be enmeshed in any of Hormel's primary labor disputes."<sup>138</sup>

This decision and *DeBartolo* will have a major impact on union secondary pressure tactics in corporate campaigns. Under the Board's rationale, coercive boycotts directed at insurance companies or even corporate shareholders may not be saved by the publicity proviso and, thus, may violate the NLRA.<sup>139</sup>

131. 281 N.L.R.B. 986 (1986).

132. *See id.* at 986.

133. *Id.* at 987.

134. The Board similarly found that the picketing engaged in by the union violated § 8(b)(4)(ii)(B). *See id.* at 986.

135. The handbills misleadingly claimed that First Bank was involved in Hormel's labor policies. *See id.* at 987.

136. *Id.* at 988.

137. *See id.*

138. *Id.*

139. *Local P-9* also illustrates that nonconventional boycott activity such as is fre-

### 5. First Amendment Issues

Unions have invoked the protections of the first amendment to the United States Constitution in their attempts to defend against unfair labor practice charges based upon handbill distributions.<sup>140</sup> No court has reached the constitutional question; indeed, the Supreme Court recently avoided the issue in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*.<sup>141</sup> Noting that the handbill distribution at issue was peaceful and unaccompanied by picketing or patrolling, the Court in *DeBartolo* found that such "expressive activity"<sup>142</sup> could be considered commercial speech entitled to first amendment protection. Nevertheless, the Court read section 8(b)(4)(ii) "as not covering nonpicketing publicity . . . urging a complete boycott of the retailer because he handles products produced by nonunion shops."<sup>143</sup> It therefore evaded consideration of the constitutional issue.<sup>144</sup>

#### E. Hot Cargo Agreements

Under section 8(e)<sup>145</sup> an employer may not agree with a

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quently used in corporate campaigns can be coercive under § 8(b)(4)(ii)(B). *See also* United Scenic Artists (Theatre Techniques, Inc.), Local 29, 243 N.L.R.B. 27 (1979) (threat of monetary sanctions is unlawfully coercive), *enforcement denied on other grounds*, 655 F.2d 1267 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 990 (1982); Datz, *supra* note 8, at 89 n.34.

140. *See* Catalytic, Inc. v. Monmouth & Ocean County Bldg. Trades Council, 829 F.2d 430 (3d Cir. 1987), *cert. denied*, 108 S. Ct. 1573 (1988); Florida Gulf Coast Bldg. & Constr. Trades Council v. NLRB, 796 F.2d 1328 (11th Cir. 1986), *aff'd*, 108 S. Ct. 1392 (1988); *accord* Edward J. DeBartolo Co. v. NLRB, 463 U.S. 147, 157-58 (1983) (Court avoided first amendment issue by remanding to Board for consideration of whether handbilling was "coercive" within meaning of § 8(b)(4)(ii)(B)).

141. 108 S. Ct. 1392 (1988).

142. *Id.* at 1397.

143. *Id.* at 1401 (footnote omitted).

144. *See id.* at 1398. The Court relied on the rule of construction espoused in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979): "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." 108 S. Ct. at 1397 (citing 440 U.S. at 499-501, 504).

145. Section 8(e) provides, in pertinent part:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains . . . from handling . . . or otherwise dealing in any of the products of any other employer, or to cease doing business with

union to refrain from dealing in the products of another employer or to cease doing business with another person. The prohibition against these "hot cargo" agreements may be triggered in the corporate organizing campaign context by an unlawful secondary boycott that has the effect of preventing the secondary company from dealing with the target employer.

For example, a union may picket and distribute handbills at Joe's Restaurant, a secondary neutral, advocating that the customers cease patronizing Joe's because the restaurant deals with Sunshine Baking Co., a target employer. This type of secondary pressure clearly is unlawful under section 8(b)(4)(ii)(B) and the Supreme Court's *Safeco*<sup>146</sup> decision if it has the effect of inducing Joe's Restaurant to cease doing business with Sunshine Baking Co. In addition, any agreement — express or implied — between Joe's Restaurant and the union to refrain from trading with Sunshine Baking Co. constitutes an unfair labor practice under section 8(e).<sup>147</sup>

### F. Neutrality Agreements

A significant objective of any corporate organizing campaign is to restrain a target employer from opposing a union's organizational efforts.<sup>148</sup> In order to achieve its goal, a union often pressures an employer through publicity, boycotts, and similar tactics discussed above. In some circumstances, however, an employer in the early stages of a campaign will voluntarily enter

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any other person, and any . . . [such] agreement shall be to such extent unenforceable and void.

29 U.S.C. § 158(e) (1982).

146. 447 U.S. 607 (1980).

147. See Fletcher, *supra* note 93, at 105. The "work preservation" exception to the proscriptions of § 8(e) is unlikely to arise in a corporate organizing campaign. Under this exception, when the union's boycott objective is to preserve the work of the primary employer's employees—a primary and not a secondary objective—any agreement by the primary employer to refrain from dealing with the secondary is lawful. See *NLRB v. Enterprise Ass'n of Steam Pipefitters, Local Union No. 638*, 429 U.S. 507, 528 (1977); *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 645 (1967) ("The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-à-vis* his own employees" or whether it seeks to benefit "other than the boycotting employees or other employees of the primary employer."); cf. *Local 388, United Ass'n of Journeymen (Daily Heating & Air Conditioning, Inc.)*, 280 N.L.R.B. 1260 (1986).

148. Cf. *Daily Lab. Rep. (BNA)* No. 6, at A-7 (Jan. 9, 1987).

into a neutrality agreement with a campaigning union.<sup>149</sup>

An employer may agree with a union "neither [to] discourage nor encourage the Union efforts to organize [certain] employees."<sup>150</sup> It similarly may agree not to oppose the union actively if the union conducts itself in a proper manner.<sup>151</sup> These agreements commonly require an employer to remain "neutral" toward union organizing efforts at its nonunion facilities.<sup>152</sup> The agreement makes a union's organizational campaign easier; without active employer opposition, the union's chance for a successful campaign is enhanced.<sup>153</sup>

The use of a neutrality agreement to forestall organizational resistance may not completely ensure employer neutrality. Indeed, such an agreement may be challenged in several ways. Neither the Board nor the courts have determined whether a neutrality agreement is a mandatory, permissive, or illegal subject of bargaining, although commentators suggest that it is a permissive subject.<sup>154</sup> An employer who wishes to isolate its subsidiaries from its neutrality pledge may argue that the scope of any agreement is limited only to a single facility. Similarly, a rival union, one not a party to any neutrality agreement between an employer and another union, may challenge the agreement's enforceability.

### 1. *Subsidiary of Contracting Employer*

A neutrality agreement is a contract that clearly binds two parties: an employer and a union. Both parties agree to be bound by the terms of that agreement. Not so clearly defined, however, is the effect of a neutrality agreement on any nonu-

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149. According to one commentator, a neutrality agreement more likely will be used by a large corporation with a strong union history and the need for centralized bargaining negotiations. See Guzik, *Employer Nonadversarial Model of Labor Relations*, 6 INDUS. REL. L.J. 421, 439 (1984).

150. *Id.* at 435, 437 n.3.

151. See *id.* at 438-39.

152. See *id.* at 422; Kramer, Miller & Bierman, *Neutrality Agreements: The New Frontier in Labor Relations — Fair Play or Foul?*, 23 B.C.L. REV. 39, 39 (1981) [hereinafter Kramer].

153. See generally Daily Lab. Rep. (BNA) No. 211, at D-1 (Oct. 29, 1980).

154. See Craft, *The Employer Neutrality Pledge: Issues, Implications, and Prospects*, 31 LAB. L.J. 753, 759 (1980); Kramer, *supra* note 152, at 49-53; Guzik, *supra* note 149, at 447.

nionized, wholly-owned independent subsidiary of the employer. For example, Widget & Bolt Co. enters into a neutrality agreement with a union. Later, the union expresses an intention to organize the employees at Widget Parts Corp., a wholly owned subsidiary of Widget & Bolt Co. In order to avoid the restrictions imposed by the agreement, Widget & Bolt Co. asserts that the subsidiary is not a party to the agreement and cannot be bound by its terms. Following this rationale, Widget Parts Corp. has no obligation to remain neutral toward the union's organizing efforts at its facility.

Under the NLRA, wholly owned subsidiaries are treated as "separate employers" if there is no interrelation of operations, common management, common ownership or financial control, or centralized control of labor relations.<sup>155</sup> Because a Board finding that a subsidiary is a separate employer under the NLRA may exempt it from a parent employer's obligations,<sup>156</sup> the subsidiary may make a persuasive argument that it should not be bound by a neutrality agreement entered into between the parent company and the union. As one commentator has noted, the parties initially are free to denominate which subsidiaries are to be bound by the neutrality agreement; if they choose not to exercise this privilege, the independent subsidiary should not be held to the parent's obligation.<sup>157</sup>

## 2. Section 8(a)(2) Allegations

Assume the following scenario: the Teamsters and the Auto Workers compete to organize employees at Gofast Car Co. Although the Auto Workers and Gofast have entered into a neutrality agreement, the Teamsters may choose to challenge the validity of that agreement under section 8(a)(2),<sup>158</sup> which pro-

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155. See *South Prairie Constr. Co. v. Local No. 627, Int'l Union of Operating Eng'rs*, 425 U.S. 800, 802 & n.3 (1976); *Radio & Television Broadcast Technicians Local 1264 v. Broadcast Serv. of Mobile, Inc.*, 380 U.S. 255, 256 (1965) (per curiam); *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055 (1st Cir. 1981); *Alabama Metal Prods., Inc. (Aluminum Brick & Glass Workers)*, 280 N.L.R.B. 1090 (1986); see also *supra* notes 84-86 and accompanying text.

156. See *Frank N. Smith Assocs. (Finger Lakes & Vicinity Dist. Council of Carpenters)*, 194 N.L.R.B. 212, 218 (1971).

157. See *Kramer*, *supra* note 152, at 54. For a discussion to the contrary, see *Guzick*, *supra* note 149, at 445-47.

158. Section 8(a)(2) provides, in pertinent part:

vides that an employer cannot "interfere with" or "contribute financial or other support to" a labor organization. The Teamsters can argue that the neutrality agreement between the Auto Workers and Gofast constitutes unlawful support to the Auto Workers; the restriction of Gofast's ability to oppose the Auto Workers's organizing efforts interferes with and supports organization of Gofast's employees by the Auto Workers.<sup>159</sup> If the agreement is found to be unlawful, the Auto Workers will lose any advantage gained from Gofast's contractually imposed neutrality, thereby putting the Teamsters in a more equally balanced campaign position.

Should a rival union, like the Teamsters in the example above, make a section 8(a)(2) allegation, the Board will examine whether the "natural tendency" of the neutrality agreement is to "inhibit employees in their choice of a bargaining representative."<sup>160</sup> Discriminatory conduct favoring one rival union over another clearly violates section 8(a)(2). For example, an employer may not recognize a favored union except in certain circumstances.<sup>161</sup>

Undeniably, an employer may noncoercively declare a preference for one union over another without violating section 8(a)(2).<sup>162</sup> To employees, however, a neutrality agreement may appear to be not only an expression of preference for the signatory union but also an indication that the employer is more will-

(a) It shall be an unfair labor practice for an employer . . .

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . .

29 U.S.C. § 158(a)(2) (1982).

159. See Kramer, *supra* note 152, at 39.

160. Kaiser Found. Hosps., Inc. (American Fed'n of Nurses, Local 535), 223 N.L.R.B. 322, 322 (1976).

161. See Signal Transformer Co. (Local 431, Int'l Union of Elec. Workers), 265 N.L.R.B. 272 (1982) (employer must remain neutral when presented with a majority of cards by an insurgent union); RCA Del Caribe, Inc. (Rafael, Cuevas Kuinlam & Local 2333, Int'l Bhd. of Elec. Workers), 262 N.L.R.B. 963 (1982) (employer may recognize and bargain with incumbent union even after rival union has filed a petition); Bruckner Nursing Home (Local 1115, Joint Bd. Nursing Home & Hosp. Employees), 262 N.L.R.B. 955 (1982) (employer can recognize one of two rival unions if the recognized union represents a majority of employees and no valid petition for representation has been filed); see also Estreicher & Telsey, *A Recast Midwest Piping Doctrine: The Case for Judicial Acceptance*, 36 LAB. L.J. 14 (1985).

162. See Rold Gold, Inc. (American Bakery & Confectionary Workers), 123 N.L.R.B. 285, 286 (1959).

ing to negotiate with one union than another.<sup>163</sup> Because of that agreement, employees arguably may be denied the congressional imperative of “complete and unfettered freedom of choice” in choosing a bargaining representative.<sup>164</sup>

### 3. Other NLRA Implications

In addition to raising section 8(a)(2) issues, a neutrality agreement may implicate other NLRA provisions. For example, section 8(c)<sup>165</sup> protects noncoercive employer speech to employees during an organizing campaign. By its terms, a neutrality agreement usually prohibits an employer from expressing to its employees its views on union organization. Because of the employer’s voluntary waiver of its first amendment rights through the agreement, employees hear only a union’s viewpoint and make their decision regarding representation on that basis alone.<sup>166</sup>

The Sixth Circuit considered the validity of such a waiver in *International Union, United Automobile Workers v. Dana Corp.*<sup>167</sup> There, although a union and an employer were parties to a neutrality agreement, the union sought to enjoin the employer for disseminating antiunion communications to employees during an organizing campaign. The court found that the employer had waived its rights to communicate with its employees. Noting that a valid waiver of constitutional rights is one that is voluntarily, intelligently, and knowingly made “with full awareness of the legal consequences,”<sup>168</sup> the court held that the

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163. See Kramer, *supra* note 152, at 66 (citing R. WILLIAMS, P. JANICE & K. HUHN, NLRB REGULATION OF ELECTION CONDUCT 203 (same material is in 1985 revised edition at page 237)).

164. See NLRB v. Link-Belt Co., 311 U.S. 584, 588 (1941).

165. Section 8(c) provides:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

29 U.S.C. § 158(c) (1982).

166. For a more comprehensive discussion of this issue, see Kramer, *supra* note 152, at 72-74.

167. 679 F.2d 634 (6th Cir. 1982).

168. *Id.* at 645 (citing D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 187 (1972)). See also Guzik, *supra* note 149, at 458-59.

employer had voluntarily assumed a restriction of its first amendment rights.<sup>169</sup>

The waiver issue is also pertinent to the question of whether a neutrality agreement implicates employees' section 7<sup>170</sup> rights to vote in a free election. Congress envisioned that employees should have a "free and untrammelled choice"<sup>171</sup> in making representation decisions. By eliminating employer opposition, a neutrality agreement essentially waives that freedom of choice which, as noted by the Supreme Court in *Central Hardware Co. v. NLRB*,<sup>172</sup> "depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others."<sup>173</sup>

The public interest and national labor policy favoring free elections also must be considered in the context of a neutrality agreement.<sup>174</sup> The "laboratory conditions" of an election, required by the NLRA, may be spoiled by any restriction of an employer's speech to employees and may violate both the spirit and the policy of the NLRA. Consequently, a neutrality agreement that significantly restricts the dissemination of employer views on unionism may be challenged under section 7 as a violation of employees' entitlement to the free exercise of their organizational rights.<sup>175</sup>

#### 4. Enforcement

A controversy involving a neutrality agreement need not be litigated before the Board. Indeed, the Fourth Circuit has found that a cause of action based on a breach of a neutrality agree-

169. See 679 F.2d at 645-66.

170. Section 7 provides, in pertinent part:

Employees shall have the right to self-organization, 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 . . . .

29 U.S.C. § 157 (1982).

171. *NLRB v. General Shoe Corp. (Boot & Shoe Workers Union)*, 77 N.L.R.B. 124, 126 (1948), *enforced*, 192 F.2d 504 (6th Cir. 1951), *cert. denied*, 343 U.S. 904 (1952).

172. 407 U.S. 539 (1975).

173. *Id.* at 543. See also *Hudgens (Local 315, Retail Store Union)*, 230 N.L.R.B. 414, 416 (1977) (employees have a "right to receive information" during an organizational campaign).

174. See *Bausch & Lomb, Inc. v. NLRB*, 451 F.2d 873, 879 (2d Cir. 1971).

175. See *Kramer*, *supra* note 152, at 76-77.



ment properly may be heard by a district court under section 301(a) of the LMRA.<sup>176</sup> In *Amalgamated Clothing & Textile Workers Union v. Facetglas, Inc.*<sup>177</sup> ACTWU and Facetglas agreed on an election to be held among employees at a new plant. The election agreement stipulated that Facetglas would “be neutral in the election and let any selection be strictly up to its employees.”<sup>178</sup> Despite this agreement, Facetglas allegedly made antiunion statements to employees and indirectly participated in the distribution of antiunion literature prior to the election. The union sued for breach of contract, asserting jurisdiction under LMRA section 301(a). The Fourth Circuit reversed the district court’s dismissal of the claims relating to breach of the election agreement, finding that any representational issues (which should be decided by the Board) were severable from the contractual issues relating to the agreement. The contract itself, the court concluded, was enforceable under section 301.<sup>179</sup>

The Fourth Circuit did not indicate whether Board decisions or ordinary contract principles would govern the neutrality agreement at issue in *Facetglas*. A court, however, may resort to any law consistent with the implementation of federal labor policy.<sup>180</sup> Applying this rationale to the parent-subsidiary issue, a court may find that a subsidiary is indeed a single employer under Board principles and may determine that it is not bound by any neutrality agreement entered into by the parent company. On the other hand, if the court resorts to ordinary contract principles, the enforceability of the agreement against a wholly owned subsidiary would depend upon the interpretation of that agreement in light of the unambiguous language and circumstances existing at the time of formation.<sup>181</sup>

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176. Section 301(a) provides, in pertinent part:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . , may be brought in any district court of the United States having jurisdiction of the parties without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a) (1982).

177. 845 F.2d 1250 (4th Cir. 1988).

178. *Id.* at 1251 (quoting election agreement).

179. *See id.* at 1253.

180. *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957).

181. In *Facetglas* the union sought monetary damages. 845 F.2d at 1253. An injunc-

## G. Remedies

The Board has substantial power to remedy unfair labor practices during a corporate organizing campaign. Under NLRA section 10(a),<sup>182</sup> it can “draw on enlightenment gained from experience”<sup>183</sup> in fashioning a particular remedy<sup>184</sup> and will enjoy considerable judicial deference by the courts.<sup>185</sup> Consequently, a target employer should be aware both of the remedies available and their limitations.

### 1. Injunctive Relief

Injunctive relief sometimes is available prior to a final unfair labor practice determination.<sup>186</sup> For example, the Board’s General Counsel must seek a section 10(1)<sup>187</sup> injunction in fed-

tion, however, also may be an appropriate remedy because of the continuing and irreparable damage to the election process.

182. This section provides, in pertinent part: “The Board is empowered . . . to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . .” 29 U.S.C. § 160(a) (1982).

183. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 216 (1964) (citing *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1952)).

184. Under § 10(c) of the Act, the Board may require the offending party to “cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of the Act.” 29 U.S.C. § 160(c) (1982). See also *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945); *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 348 (1938).

185. See *NLRB v. Link-Belt Co.*, 311 U.S. 584, 600 (1941); *International Ass’n of Machinists, Lodge 35 v. NLRB*, 311 U.S. 72, 82 (1940).

186. See generally Schatzki, *Some Observations About the Standards Applied to Labor Injunction Litigation Under Sections 10(j) and 10(1) of the National Labor Relations Act*, 59 IND. L.J. 565 (1983-84).

187. This section provides, in pertinent part:

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section [8(b)], or section [8(e)] or section [8(b)(7)], the preliminary investigation of such charge shall be made forthwith and given priority over all other cases. 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 . . . petition any district court of the United States . . . for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper . . .

29 U.S.C. § 160(1) (1982).

eral court for certain unfair labor practices that are likely to cause significant damage to an employer in a short time.<sup>188</sup> The petition to enjoin alleged violations of sections 8(b)(7), 8(b)(4)(ii)(B), and 8(e) must be filed with the court if the General Counsel finds reasonable cause to believe that the NLRA has been violated. The court then may grant appropriate relief.<sup>189</sup>

A section 10(j)<sup>190</sup> injunction is available for *any* violation of the NLRA, but the General Counsel is not required to petition the court for this relief. If he does, the district court may again grant such relief as it deems proper.<sup>191</sup>

## 2. Cease-and-Desist and Other Remedies

The prevalent remedy for union unfair labor practices is a cease-and-desist order coupled with the posting of a notice informing employees of the order's contents.<sup>192</sup> More substantial consequences, of course, may be imposed on an offending union. In section 8(b)(1)(A) cases involving serious physical force and violence, for example, the Board may revoke the union's certification.<sup>193</sup> Section 8(b)(4) violations normally are temporarily remedied by a section 10(1) injunction,<sup>194</sup> but the union also may be required to advise employees and others that it is withdrawing its objections to their patronage of the target employer.<sup>195</sup>

188. See 2 LABOR LAW, *supra* note 43, at 1649.

189. See *Eisenberg v. Hartz Mountain Corp.*, 519 F.2d 138 (3d Cir. 1975).

190. This section provides, in pertinent part: "The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States . . . for appropriate temporary relief or restraining order . . ." 29 U.S.C. § 160(j) (1982).

191. See NLRB Case Handling Manual (CCH) ¶ 30,162, at 10,348 (1979) (General Counsel report on the use of § 10(j) injunction proceedings).

192. See generally 2 LABOR LAW, *supra* note 43, at 1654-63, 1682-92.

193. See *Union Nacional de Trabajadores (Carborundum Co.)*, 219 N.L.R.B. 862 (1975), *enforced*, 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977). This drastic remedy is rarely imposed, however. See *Union Nacional de Trabajadores*, 540 F.2d 1 (1st Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

194. See *supra* notes 187-89 and accompanying text.

195. See, e.g., *Teamsters Local 554 v. NLRB*, 262 F.2d 456 (D.C. Cir. 1958).

### 3. Damage Actions

Section 303<sup>196</sup> of the LMRA provides a damage remedy to a party injured by a section 8(b)(4) violation.<sup>197</sup> Under this section, a private party injured by prohibited secondary activity may sue the union for damages in federal or state court<sup>198</sup> and obtain a jury trial.

The language of section 303(b) creates a right of action in "[w]hoever shall be injured in his business or property" by the unlawful activity and provides that the injured party may "recover the damages by him sustained."<sup>199</sup> Recovery of damages is limited to actual compensatory damages,<sup>200</sup> which must be non-

196. This section provides:

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section [8(b)(4)] of the National Labor Relations Act, as amended.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefore in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

29 U.S.C. § 187 (1982). *See International Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp.*, 342 U.S. 237 (1952) (sections 8(b)(4) and 303 are independent remedies); Note, *Sections 8(b)(4) and 303: Independent Remedies Against Union Practices Under the Taft-Hartley Act*, 61 YALE L.J. 745, 745-47 (1952).

197. *See Shepard v. NLRB*, 459 U.S. 344 (1983) (section 303 provides a remedy only for violations of § 8(b)(4)).

198. The jurisdiction conferred on the courts by § 303(b) is also subject "to the limitations and provisions of" section 301. 29 U.S.C. § 187 (1982). For example, there is no minimum monetary requirement and no need for diversity of citizenship in order for an injured party to sue in federal court. *See Juneau Spruce*, 342 U.S. at 241.

199. 29 U.S.C. § 187(b) (1982). Although a § 303 action for damages accrues at the time damage occurs, the limitation period begins to run only when the damages become reasonably ascertainable. *See Railing v. United Mine Workers*, 445 F.2d 353 (4th Cir. 1971). Section 303 contains no statute of limitations; therefore, the law of the forum state determines the timeliness of a § 303 action. *See United Mine Workers v. Meadow Creek Coal Co.*, 263 F.2d 52, 61 (6th Cir.), cert. denied, 359 U.S. 1013 (1959); *see also Carruthers Ready-Mix, Inc. v. Cement Masons Local No. 521*, 113 L.R.R.M. (BNA) 2077 (W.D. Tenn. 1983) (six-month statute of limitations contained in § 10(b) would be applied in an action under § 303).

200. The Supreme Court has held that "[p]unitive damages for violations of § 303 conflict with the congressional judgment, reflected both in the language of the federal statute and in its legislative history, that recovery for an employer's business losses caused by a union's peaceful secondary activity proscribed by § 303 should be limited to actual compensatory damages." *Local 20, Teamsters Union v. Morton*, 377 U.S. 252, 260

speculative and the direct and proximate result of the proscribed conduct.<sup>201</sup> Attorneys' fees are not recoverable.<sup>202</sup> Further, section 303 actions may be brought only against a union, not against individuals, since the unlawful conduct must be an unfair labor practice committed by a labor organization.<sup>203</sup>

A Board determination of a section 8(b)(4) violation generally will be given *res judicata* effect with respect to a subsequent section 303 suit. Similarly, Board dismissal of an unfair labor practice complaint will bar a section 303 suit.<sup>204</sup> If the General Counsel refuses to issue a complaint on a section 8(b)(4) charge, however, a later section 303 suit is not barred because the refusal to act is the result of an *ex parte* investigation rather than Board adjudication.<sup>205</sup>

### III. PENSION FUND LEVERAGE

In 1985, as a show of support for the Steelworkers' corporate campaign against Phelps Dodge Corporation, the American

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(1964) (footnotes omitted). Further, injunctive relief is not available under § 303. *See Amalgamated Ass'n of St. Employees v. Dixie Motor Coach Corp.*, 170 F.2d 902 (8th Cir. 1948); *City of Galveston v. International Org. of Masters*, 338 F. Supp. 907 (S.D. Tex. 1972).

201. *See Morton*, 377 U.S. at 261; *Wickham Contracting Co. v. Board of Educ.*, 715 F.2d 21 (2d Cir. 1983); *Abreen Corp. v. Laborers' Int'l Union*, 709 F.2d 748 (1st Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984); *C & K Coal Co. v. United Mine Workers*, 704 F.2d 690 (3d Cir. 1983). Mathematical exactness and precision are not required. *See Story Parchment Co. v. Patterson Parchment Co.*, 282 U.S. 555 (1931). For a summary listing of damages that may be awarded, see 2 LABOR LAW, *supra* note 43, at 1184 & Supp. 1982-86, at 458.

202. *See Summit Valley Indus. v. Local 112, United Bhd. of Carpenters & Joiners*, 456 U.S. 717 (1982) (reasonable attorneys' fees incurred in bringing about the cessation of the illegal work stoppage, including proceedings before the Board, are not recoverable under the "American Rule"); *see also Abreen*, 709 F.2d at 760; *C & K Coal*, 704 F.2d at 698.

203. *See Meier & Pohlmann Furniture Co. v. Gibbons*, 233 F.2d 296 (8th Cir. 1956). Further, a union will not be held liable for the acts of individual members unless "some one or more persons in authority were responsible for what transpired." *International Longshoremen's & Warehousemen's Union v. Hawaiian Pineapple Co.*, 226 F.2d 875 (9th Cir. 1955), *cert. denied*, 351 U.S. 963 (1956); *see also Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

204. *See International Wire v. Local 38, Bhd. of Elec. Workers*, 475 F.2d 1078 (6th Cir. 1973) (*per curiam*), *cert. denied*, 414 U.S. 867 (1973); *Truck Transport, Inc. v. Industrial Workers*, 113 L.R.R.M. (BNA) 2313 (N.D. Ill. 1982).

205. *See Clark Eng'g & Constr. Co. v. United Bhd. of Carpenters & Joiners*, 510 F.2d 1075 (6th Cir. 1975); *see generally* 2 LABOR LAW, *supra* note 43, at 1182.

Federation of Teachers removed \$450 million in pension fund assets from Manufacturers Hanover Trust Company. Not coincidentally, the chairman of the copper company sat on the board of directors of Manufacturers Hanover.<sup>206</sup> This type of pension fund leverage<sup>207</sup> rapidly could become a favorite tactic in any corporate campaign. By threatening the withdrawal of pension funds, a bank may be pressured to cease lending to a target employer. The resulting financial pressure placed on the employer may compel it to recognize the union.<sup>208</sup>

The Employees' Retirement Income Security Act of 1974 (ERISA)<sup>209</sup> covers all nongovernmental pension funds that may be used as leverage in a corporate organizing campaign. A union using this tactic may violate any number of ERISA sections<sup>210</sup> and, thus, may be liable for losses resulting from a breach of fiduciary duty in addition to attorneys' fees.<sup>211</sup> Unfortunately for a target employer, however, only certain parties have standing to sue in federal court to prevent an ERISA violation: a participant in the plan, a beneficiary, a fiduciary, or the Secretary of Labor.<sup>212</sup>

A more viable remedy for a target employer exists under the NLRA. Pension fund leverage may constitute illegal secondary activity under section 8(b)(4)(ii) if an employer can prove the criteria required by that provision. A showing that coercive economic leverage has the object of causing any person to cease doing business with another person<sup>213</sup> will be sufficient to invoke

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206. See Daily Lab. Report (BNA) No. 34, at A-2 (Feb. 20, 1985).

207. See Kaiser, *Labor's New Weapon: Pension Fund Leverage — Can Labor Legally Beat Its Plowshares Into Swords?*, 34 RUTGERS L. REV. 409, 412 (1982). See generally Northrup & Northrup, *Union Divergent Investing of Pensions: A Power, Non-Employee Relations Issue*, 2 J. LAB. RES. 191 (1981).

208. See Kaiser, *supra* note 207, at 413.

209. 29 U.S.C. §§ 1001-1381 (1982).

210. See, e.g. *id.* § 1104 (a) (fiduciary has duty of loyalty to act for the exclusive benefit of plan beneficiaries).

211. See *id.* § 1132(g).

212. See *id.* § 1132(a).

213. Neither a union nor its agents must be involved in a labor dispute for their actions to be governed by § 8(b)(4)(ii):

There need not be an actual dispute with the boycotted employer . . . for the activity to fall within this category, so long as the tactical object of the agreement . . . is that employer, or benefits to other than the boycotting employees or other employees of the primary employer thus making the agreement or boycott secondary in its aim.

the NLRA's protection.<sup>214</sup> Alternatively, an employer may seek damages for improper economic leverage under section 303 of the LMRA.<sup>215</sup>

#### IV. ANTITRUST LIABILITY

Even beyond the prohibitions imposed by the NLRA against unfair labor practices, a union's actions in conducting a corporate organizing campaign may violate the antitrust laws.<sup>216</sup> For example, a union may attempt to coerce a manufacturer not to deal with a nonunion distributor<sup>217</sup> or may combine with non-labor groups as a method of pressuring the target employer.<sup>218</sup> Use of antitrust laws should be a favorite employer remedial tool because the campaigning union will be liable for treble damages and attorneys' fees if its conduct is found to be illegal.<sup>219</sup>

Some union conduct is exempted from antitrust scrutiny under the immunity granted by the Clayton Act.<sup>220</sup> Courts have interpreted this so-called "statutory exemption" to apply to uni-

National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 645 (1967) (footnote omitted). See also Kaiser, *supra* note 207, at 439.

214. See *supra* notes 99-111 and accompanying text.

215. See *supra* notes 196-205 and accompanying text.

216. The antitrust laws have been asserted infrequently against an employer who resists union organization. In *Amalgamated Clothing & Textile Workers Union v. J.P. Stevens & Co.*, 475 F. Supp. 482 (S.D.N.Y. 1979), *vacated on other grounds*, 638 F.2d 7 (2d Cir. 1980), however, the union's suit against Stevens alleged employer antitrust violations such as wage-fixing, blacklisting, and use of antiunion publicity campaigns. The court, noting that the union failed to show a restraint on competition in marketing, *id.* at 488, rejected the union's claims. It found that the union's allegations did "no more than complain of efforts to impede its activities as a union entirely unaccompanied or uncomplicated by any element of monopolistic effect upon competition in the marketplace for goods or services." *Id.* at 490. See also Kaminsky, *The Antitrust Labor Exemption: An Employer Perspective*, 16 SETON HALL L. REV. 4, 31 (1986); Miller, *Antitrust: A New Tool for Organized Labor*, 131 U. PA. L. REV. 127 (1982).

217. See, e.g., *United States v. Olympia Provision & Baking Co.*, 282 F. Supp. 819 (S.D.N.Y. 1968), *aff'd*, 393 U.S. 480 (1968).

218. See, e.g., *Adolph Coors Co. v. Wallace*, 115 L.R.R.M. (BNA) 3100 (N.D. Cal. 1984).

219. Section 4 of the Sherman Act provides, in pertinent part:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . , without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (1982).

220. *Id.* §§ 12-27, 44; 29 U.S.C. §§ 52, 53 (1982).

lateral conduct by the union<sup>221</sup> when the union acts in its own self-interest and not in combination with a nonlabor group.<sup>222</sup> The courts also have applied a nonstatutory exemption in particular situations not covered by the Clayton Act. This exemption has primary application in the collective bargaining context, but courts have expansively interpreted the nonstatutory exemption to apply to some organizing activity as well.<sup>223</sup> As with the statutory exemption, however, conduct of the union and employers or employer groups will be exempt only if the union's objectives are lawful and are aimed at protecting wages and working conditions.<sup>224</sup>

### A. The Statutory Exemption

At one time, union activities clearly were regulated under the antitrust laws. The Sherman Act of 1890 prohibited "conspiracies, combinations in the form of trusts or otherwise, and agreements in restraint of trade" and "monopolies."<sup>225</sup> Because the Sherman Act focused on free market control by powerful entities, alone or in combination with competitors, it was easily offended by labor organizations seeking to increase the price of labor and monopolize the labor supply.<sup>226</sup>

In the *Danbury Hatters* case,<sup>227</sup> the Supreme Court found that a product boycott designed to force a manufacturer to unionize its shops violated the Sherman Act. In later cases, how-

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221. See, e.g., *United States v. Hutcheson*, 312 U.S. 219, 236 (1941) (section 20 immunizes "trade union activities"); see also Kaminsky, *supra* note 216, at 25; *accord Amalgamated Clothing & Textile Workers Union v. J.P. Stevens & Co.*, 475 F. Supp. 482, 488 (1979) (section 6 exemption only for benefit of labor and cannot be asserted by employer), *vacated*, 638 F.2d 7 (2d Cir. 1980).

222. See *Hutcheson*, 312 U.S. at 219; *Adams, Ray & Rosenberg v. William Morris Agency*, 411 F. Supp. 403, 407 (C.D. Cal. 1976).

223. See *Connell Constr. Co. v. Plumbers Local Union No. 100*, 421 U.S. 616, 625-26 (1975); *Richards v. Nielsen Freight Lines*, 810 F.2d 898, 905 (9th Cir. 1987); *Larry V. Muko, Inc. v. Southwestern Penn. Bldg. & Constr. Trades Council*, 609 F.2d 1368, 1373 (3d Cir. 1979) (en banc), *cert. denied*, 459 U.S. 916 (1982).

224. See, e.g., *Altemose Constr. Co. v. Building & Constr. Trades Council*, 751 F.2d 653, 659-60 (3d Cir. 1985), *cert. denied*, 459 U.S. 916 (1986).

225. 15 U.S.C. §§ 1, 2 (1982).

226. See R. BORK, *THE ANTITRUST PARADOX* 20 (1978); Marks, *Labor and Antitrust: Striking a Balance Without Balancing*, 35 AMER. U.L. REV. 699, 704 (1986).

227. *Loewe v. Lawlor*, 208 U.S. 274 (1908) (plaintiff alleged that hat manufacturers' union illegally boycotted its business).



ever, the Sherman Act often was narrowly construed, and the Court determined that Congress intended to prohibit only unreasonable restraints of trade.<sup>228</sup> Nevertheless, Congress sought to close the loopholes of the Sherman Act when it enacted the Clayton Act in 1914. Under section 6 of the Clayton Act, “the labor of a human being is not a commodity or article of commerce,”<sup>229</sup> and therefore, a union is not subject to antitrust prohibitions if it “lawfully carr[ies] out [its] legitimate objects.”<sup>230</sup> Section 20 of the Clayton Act prohibits injunctions against peaceful strikes, picketing, boycotts, and other employee conduct in a labor dispute involving “terms or conditions of employment.”<sup>231</sup>

Although Congress evidently believed that sections 6 and 20 of the Clayton Act provided labor unions with an exemption from the antitrust laws, the Supreme Court had its own interpretation. In *Duplex Printing Press Co. v. Deering*<sup>232</sup> the Court found that a union’s secondary boycott was not exempt from antitrust scrutiny because section 6 protected only the “lawful” ac-

228. See, e.g., *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911).

229. 15 U.S.C. § 17 (1982).

230. *Id.*

231. Section 20 provides, in pertinent part:

No restraining order or injunction shall be granted by any court of the United States, . . . in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms and conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law. . . .

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged, in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

29 U.S.C. § 52 (1982). Clearly, § 20 does not exempt or apply to secondary activities.

232. 254 U.S. 443 (1921).

tivities of the union and section 20 protected only a labor dispute between employees and their immediate employer.<sup>233</sup> In response, Congress passed the Norris-LaGuardia Act,<sup>234</sup> which relieved the federal courts of authority to issue injunctions against peaceful union conduct. Section 4 of the Norris-LaGuardia Act further exempted certain types of conduct from injunction.<sup>235</sup> It also repudiated the *Duplex Printing* holding by defining a labor dispute to include any dispute about terms or conditions of employment "regardless of whether or not the disputants stand in the proximate relation of employer and employee."<sup>236</sup>

Although the Supreme Court did not immediately retreat,<sup>237</sup>

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233. *Id.* at 469-70; see also *Bedford Cut Stone Co. v. Journeyman Stone Cutters' Ass'n*, 274 U.S. 37 (1927); *Coronado Coal Co. v. United Mine Workers*, 268 U.S. 295 (1925); *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344 (1922).

234. 29 U.S.C. §§ 101-115 (1982).

235. Section 4 provides, in pertinent part:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts:

- (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
- (b) Becoming or remaining a member of any labor organization or of any employer organization . . . ;
- (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;
- (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;
- (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
- (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;
- (g) Advising or notifying any person of an intention to do any of the acts heretofore specified;
- (h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and
- (i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified . . . .

*Id.* § 104.

236. *Id.* § 113(c).

237. See *Local 167 of Int'l Bhd. of Teamsters v. United States*, 291 U.S. 293 (1934) (Sherman Act violated by combination of nonlabor conspirators).

its *Apex Hosiery Co. v. Leader*<sup>238</sup> decision signalled a new view of the relationship between union conduct and the antitrust laws. In *Apex* the union conducted a violent sitdown strike aimed at enforcing its demands for a closed shop. The Court refused to enjoin this activity, finding that it did not violate antitrust laws because the employer did not show that the strike "operated to restrain commercial competition in some substantial way."<sup>239</sup> The Court further noted that:

Since the enactment of the declaration in [section] 6 of the Clayton Act . . . it would seem plain that restraints on the sale of the employee's services to the employer, however much they curtail the competition among employees, are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act.<sup>240</sup>

A subsequent decision, *United States v. Hutcheson*,<sup>241</sup> criticized the "unduly restrictive judicial construction"<sup>242</sup> of sections 6 and 20 of the Clayton Act and section 4 of the Norris-LaGuardia Act. The *Hutcheson* Court held that the protected activities enumerated in section 4 of the Norris-LaGuardia Act also were entitled to antitrust immunity under section 20 of the Clayton Act "[s]o long as a union acts in its self-interest and does not combine with non-labor groups."<sup>243</sup>

In *H. A. Artists & Associates v. Actors' Equity Association*<sup>244</sup> the Supreme Court found that a union must act in its own self-interest and not in combination with a nonlabor group in order to benefit from the statutory exemption.<sup>245</sup> Because section 6 immunizes unions that "lawfully carry[] out' their 'legitimate object[ives],"<sup>246</sup> the first prong of the test requires that a union's activities occur in the context of a "labor dispute" — any controversy concerning terms and conditions of employment.<sup>247</sup> The second prong requires that a union act

238. 310 U.S. 469 (1940).

239. *Id.* at 497.

240. *Id.* at 502-03.

241. 312 U.S. 219 (1941).

242. *Id.* at 236.

243. 312 U.S. at 232 (footnote omitted).

244. 451 U.S. 704, 715 (1981).

245. *See id.* at 714-16.

246. *Id.* at 714.

247. *Id.* at 714 n.14; *See also* California State Council of Carpenters Inc. v. Associ-

"unilaterally."<sup>248</sup>

In sum, the statutory exemption will apply only if: (1) the labor organization acts in its own self-interest by lawful means in pursuit of legitimate union objectives,<sup>249</sup> and (2) the labor organization does not combine with any nonlabor groups. If the union meets these criteria, a court will not examine "the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means."<sup>250</sup>

### 1. Union Self-Interest

Application of the statutory exemption depends in part on whether the union lawfully pursues a legitimate objective.<sup>251</sup> Because the *Hutcheson* Court<sup>252</sup> read the definition of "labor dispute" to encompass both secondary and primary activity, both types of union conduct were found to be "legitimate objects" and were included within the section 20 exemption.<sup>253</sup> Under this interpretation, a union, as part of its corporate organizing campaign, could engage in secondary pressure and still be immune from antitrust liability.<sup>254</sup>

Subsequent lower court decisions, however, have limited this expansive reading of the statutory exemption. In *IPC Distributors v. Chicago Moving Picture Machine Operators Union*,

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ated Gen. Contractors, Inc., 648 F.2d 527, 533-34 (9th Cir. 1980), *rev'd on other grounds*, 459 U.S. 519 (1983).

248. See *H.A. Artists*, 451 U.S. at 717; *Allen Bradley Co. v. International Local Union No. 3*, 325 U.S. 797, 807-09 (1945); *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 531 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983). Although § 6 does not exempt union combinations with nonlabor groups, it does protect combinations of unions and other labor groups. See *American Fed'n of Musicians v. Carroll*, 391 U.S. 99, *reh'g denied*, 393 U.S. 902 (1968).

249. For the statutory exemption to apply, both requirements must be satisfied. See *United States v. Drivers Local Union No. 639*, 32 F. Supp. 594 (D.D.C. 1940).

250. *Hutcheson v. United States*, 312 U.S. 219, 232 (1941).

251. See *Adams, Ray & Rosenberg v. William Morris Agency, Inc.*, 411 F. Supp. 403, 410 (C.D. Cal. 1976) ("[T]he test to determine if a union's actions are in its 'self-interest' has not been precisely formulated. But the principle that emerges from the relevant cases is that a union's acts are in its 'self-interest' . . . if they bear a reasonable relationship to a legitimate union interest.").

252. *Hutcheson*, 312 U.S. 219 (1941).

253. See *id.* at 233-36.

254. See *Miller*, *supra* note 216, at 59.

*Local 110*,<sup>255</sup> for example, the district court for the Northern District of Illinois held that a union's refusal to show a particular movie did not trigger the statutory exemption when the refusal was not pursuant to any bargaining aim. The court found that legitimate objectives were those "normally related to some aspect of the employer-employee relationship."<sup>256</sup> This interpretation of the *Hutcheson* rationale is the prevailing viewpoint.<sup>257</sup>

Thus, labor dispute objectives that clearly involve terms and conditions of employment — higher wages, shorter hours, and improved working conditions<sup>258</sup> — fall within the exemption. This encompasses elements of many corporate organizing campaigns. Union actions that only are tangentially related to terms and conditions of employment are not legitimate objectives. For example, a union that owns a store cannot use its bargaining power to require an employer to deal exclusively with that store.<sup>259</sup>

The circuit courts of appeals disagree about whether a union objective that results in an unfair labor practice is illegitimate. In the Fifth and Eighth Circuits, the test appears to be that unlawful activity grows out of a labor dispute — and, thus, is a legitimate object entitled to the statutory exemption — if the employers are "substantially aligned."<sup>260</sup> A union engaging in illegal secondary pressure pursues an illegitimate objective only if the secondary employer is not "substantially aligned"

255. 132 F. Supp. 294 (N.D. Ill. 1955).

256. *Id.* at 299.

257. See *United States v. Employing Lathers Ass'n*, 212 F.2d 726 (7th Cir. 1954); *Miller*, *supra* note 216, at 58-60.

258. See *National Ass'n of Women's & Children's Apparel Salesmen, Inc. v. FTC*, 479 F.2d 139, 144 (5th Cir.), *cert. denied*, 414 U.S. 1004 (1973); *Great Atl. & Pac. Tea Co. v. Amalgamated Meat Cutters & Butcher Workmen, Local Union No. 88*, 410 F.2d 650, 653 (8th Cir. 1969).

259. See *Marks*, *supra* note 226, at 729; see also *H. A. Artists & Assocs. v. Actors' Equity Ass'n*, 451 U.S. 704, 722 (1981); *Thompson Newspapers, Inc. v. Toledo Typographical Union No. 63*, 387 F. Supp. 351, 355 (E.D. Mich. 1974); *Streiffer v. Seafarers Sea Chest Corp.*, 162 F. Supp. 602, 607 (E.D. La. 1958). But see *Jacksonville Bulk Terminals, Inc. v. ILA*, 457 U.S. 702, 713 n.12 (1982); *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552, 559-61 (1938).

260. See *Ashley, Drew & N. Ry. Co. v. United Transp. Union*, 625 F.2d 1357, 1364-65 (8th Cir. 1980) (case involves or grows out of a labor dispute only when the offending activity furthers union's economic interest in a labor dispute); *Brotherhood of R.R. Trainmen v. Atlantic Coast Line R.R. Co.*, 362 F.2d 649, 651 (5th Cir.), *aff'd by an equally divided court*, 385 U.S. 20 (1966).

with the primary employer. The Ninth Circuit has established an even broader test. It has held that if a "labor dispute" exists, the objective is legitimate, even if the union is engaging in unlawful secondary activity.<sup>261</sup>

## 2. Nonlabor Groups

A typical corporate campaign involves cooperation with a variety of nonlabor entities, including citizens groups, environmental groups, stockholders, and competitors of the employer. This raises a question about which of these groups may combine with the union without destroying the union's antitrust immunity. Clearly, a union may petition a governmental body to take action favorable to it.<sup>262</sup> Further, the Supreme Court has reasoned that a union is acting unilaterally — and, thus, is exempt from antitrust scrutiny — when it agrees to combine with persons or groups with whom the union has " 'job or wage competition or some other economic interrelationship affecting legitimate union interests.' "<sup>263</sup> For example, in *H. A. Artists & Associates v. Actor's Equity Association*<sup>264</sup> the Court found that "some other economic interrelationship"<sup>265</sup> existed between actors' agents and an actors' union that regulated the fees agents could charge. The agents were independent contractors and did not compete with the actors for jobs or wages. Nevertheless, the agents controlled the actors' access to jobs and could undermine the wage structure established by the union.

Particularly analogous to the corporate campaign context is the California District Court decision in *Adolph Coors Co. v. Wallace*.<sup>266</sup> There, several citizens' groups and coalitions assisted a union boycott against Coors, persuading a radio station to can-

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261. *Smith's Management Corp. v. IBEW Local Union No. 357*, 737 F.2d 788, 792 (9th Cir. 1984).

262. See *United Mine Workers v. Pennington*, 381 U.S. 657, 669-72 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961).

263. *American Fed'n of Musicians v. Carroll*, 391 U.S. 99, 106 (quoting *Carroll v. American Fed'n of Musicians*, 241 F. Supp. 865, 887 (S.D.N.Y. 1965)), *reh'g denied*, 393 U.S. 902 (1968); see also *Warnick v. Washington Educ. Ass'n*, 593 F. Supp. 66, 70 (E.D. Wash. 1984); *Home Box Office, Inc. v. Directors Guild, Inc.*, 531 F. Supp. 578, 588-89 (S.D.N.Y. 1982), *aff'd*, 708 F.2d 95 (2d Cir. 1983).

264. 451 U.S. 704 (1981).

265. *Id.* at 721-22.

266. 115 L.R.R.M. (BNA) 3100 (N.D. Cal. 1984).

cel “Coors Day,” during which Coors employees were to help raise money for the station. Coors sued under the antitrust laws, alleging that the boycott of Coors products was in restraint of trade and had the purpose of driving Coors out of business.<sup>267</sup> The court held<sup>268</sup> that these groups were not “non-labor” because that term necessarily applies to only “entities with commercial or competitive goals [contrary] to that of the targeted” employer.<sup>269</sup>

In a corporate organizing campaign, union tactics may include combination with a target employer’s competitors to pressure that employer. Under the *Coors* test, any agreement by competitors to boycott the target employer in exchange for the union’s promise to cease secondary activity against them would violate the antitrust laws unless that agreement is protected by the nonstatutory exemption.<sup>270</sup>

### B. The Nonstatutory Exemption

The nonstatutory exemption often is used when allegedly unlawful conduct affects parties to a collective bargaining agreement.<sup>271</sup> The courts, however, have applied this exemption to other union-employer agreements. Those agreements that arise in the organizing context are discussed below.

#### 1. Development

In *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*<sup>272</sup> the Supreme Court found the antitrust laws did not reach a proposed collective bargaining agreement clause

267. See *id.* at 3103.

268. The court also found that the boycott was a “labor dispute”; the union committee’s concern that Coors engaged in “union-busting” activities concerned “terms and conditions of employment” within § 13(c) of the Norris-LaGuardia Act. *Id.* at 3106-07.

269. *Id.* at 3107.

270. See Fletcher, *supra* note 93, at 117.

271. See Kaminsky, *supra* note 216, at 32-34.

272. 381 U.S. 676 (1965). *Jewel Tea* has no majority opinion, but many commentators believe that Justice White’s opinion is the authoritative view of the law. See, e.g., Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 623 (1973); Case Comment, *Establishing an Objective Intent Standard for the Labor Antitrust Exemption*: Consolidated Express, Inc. v. New York Shipping Association, 64 MINN. L. REV. 1275, 1280-84 (1980).

that restricted the hours during which butchers could operate their businesses. In so holding, the basic test for the nonstatutory exemption emerged:

Employers and unions are required to bargain about wages, hours and working conditions, and this fact weighs heavily in favor of antitrust exemption for agreements on these subjects. But neither party need bargain about other matters and either party commits an unfair labor practice if it conditions its bargaining upon discussions of a nonmandatory subject.

. . .

Thus the issue in this case is whether the marketing-hours restriction, like wages, and unlike prices, is so *intimately related* to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act. We think that it is.<sup>273</sup>

The Court reformulated this "intimately related" test in 1975 in *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*.<sup>274</sup> There, a union conducting an organizing campaign forced a general contractor to agree to subcontract only to union firms in accordance with the rest of a multiemployer bargaining association. When the contractor sued the union under sections 1 and 2 of the Sherman Act, the Court found that the union was not exempt from antitrust liability under either the statutory or nonstatutory exemption: "[T]he methods the union chose are not immune from antitrust sanctions," the Court stated, "simply because the goal is legal. . . . This kind of direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not *follow naturally* from the elimination of competition over wages and working conditions."<sup>275</sup>

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273. 381 U.S. at 689-90 (emphasis added) (footnote omitted).

274. 421 U.S. 616 (1975).

275. *Id.* at 625 (emphasis added). According to one commentator, "A direct market restraint is one that, by its own terms, relates to the output (product or service) of the firm." Marks, *supra* note 226, at 742 n.231.



## 2. *Applicability of the Nonstatutory Exemption Outside the Collective Bargaining Context*

As noted by the Supreme Court in *Connell Construction*, the antitrust laws cannot be used to frustrate employees' right to organize and act to improve working conditions.<sup>276</sup> Unless union restraints "follow naturally from the elimination of competition over wages and working conditions,"<sup>277</sup> the nonstatutory exemption will not apply.

Undeniably, the court will look to certain factors to determine whether to apply the nonstatutory exemption to direct restraints outside a collective bargaining relationship. An industry-wide boycott of employers directed toward employees in which the union has no representational interest is not entitled to protection.<sup>278</sup> Other factors allowing a court to deny the nonstatutory exemption include a union's arbitrary exclusion of nonunion firms from competition, freezing the terms by which the industry conducts business, and consolidating control of a market to one or a group of employers.<sup>279</sup>

### C. *Effect of Labor Law Determinations*

In actions involving alleged union violations of the antitrust laws, a court will look first to labor law to determine the legality of the union's conduct.<sup>280</sup> A finding of illegality under the NLRA, however, is not dispositive of the exemption issue.<sup>281</sup> In fact, circuit courts disagree on the weight to be accorded to labor law determinations.

The Second Circuit has held that when the Board has deter-

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276. See 421 U.S. at 622; see also *Richards v. Neilson Freight Lines*, 810 F.2d 898, 905 (9th Cir. 1987).

277. 421 U.S. at 625.

278. See *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 653 n.8 (noting the "novel" organizational tactic used in *Connell*), *reh'g denied*, 459 U.S. 899 (1982).

279. See 810 F.2d at 906.

280. See *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 688-90 (1965); *Mackey v. National Football League*, 543 F.2d 606, 615 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

281. See *Berman Enters. v. Local 333, United Marine Div., Int'l Longshoremen's Ass'n*, 644 F.2d 930, 933, 935-37 (2d Cir.), *cert. denied*, 454 U.S. 965 (1981); see also *Commerce Tankers Corp. v. National Maritime Union*, 553 F.2d 793, 801-02 (2d Cir.), *cert. denied*, 434 U.S. 923 (1977).

mined the lawfulness of a union's conduct, relitigation of those issues may be precluded in an antitrust action.<sup>282</sup> The court of appeals formulated a two-part test for application of the collateral estoppel doctrine: (1) the issue in the antitrust suit must be identical to the issue adjudicated in the prior suit, and (2) the findings in the prior suit must have been essential to the determination.<sup>283</sup> The Third Circuit, however, has limited the applicability of the doctrine to cases in which it is asserted against a defendant who controlled its side of the litigation in the prior determination. In *Altmore Construction Co. v. Building & Construction Trades Council*<sup>284</sup> the court rejected a collateral estoppel claim asserted against a plaintiff, finding that the Board's General Counsel, not the plaintiff, had control over the unfair labor practice proceedings below.<sup>285</sup>

These decisions indicate that an employer may have difficulty prevailing on an antitrust claim against a union that has committed unfair labor practices. Further, when the challenged activity is expressly or implicitly protected by the NLRA — for example, product boycotts — the courts are likely to find the conduct immune from scrutiny.<sup>286</sup> Although there is some authority to indicate that illegal conduct under the NLRA may be entitled to the antitrust exemption,<sup>287</sup> several courts have found that national labor policy is furthered if such conduct is not exempt.<sup>288</sup>

282. See *Wickham Contracting Co. v. Board of Educ.*, 715 F.2d 21 (2d Cir. 1983).

283. See *id.* at 26-27 (citing *RX Data Corp. v. Department of Social Servs.*, 684 F.2d 192, 197 (2d Cir. 1982)); see also *Montana v. United States*, 440 U.S. 147, 153, 157 (1979); *International Wire v. Local 38, IBEW*, 475 F.2d 1078, 1079 (6th Cir.), *cert. denied*, 414 U.S. 867 (1973).

284. 751 F.2d 653 (3d Cir. 1985), *cert. denied*, 475 U.S. 1107 (1986).

285. See *id.* at 661-62.

286. See, e.g., *Granddad Bread, Inc. v. Continental Baking Co.*, 612 F.2d 1105, 1109-10 (9th Cir. 1979), *cert. denied*, 449 U.S. 1076 (1981); *Falstaff Brewing Corp. v. Local No. 153, Int'l Bhd. of Teamsters*, 479 F. Supp. 850, 856 (D.N.J. 1978), *aff'd without opinion*, 609 F.2d 501 (3d Cir. 1979), *cert. denied*, 444 U.S. 1079 (1980); see also *Marks, supra* note 226, at 752.

287. See, e.g., *Iodice v. Calabrese*, 512 F.2d 383, 388, 390-91 (2d Cir. 1975); *East Tex. Motor Freight Lines v. International Bhd. of Teamsters, Local Union No. 568*, 163 F.2d 10, 11-12 (5th Cir. 1947).

288. See *Consolidated Express, Inc. v. New York Shipping Ass'n*, 602 F.2d 494, 518-19 (3d Cir. 1979), *vacated*, 448 U.S. 902 (1980); *Altmore Constr. Co. v. Building & Constr. Trades Council*, 751 F.2d 653, 661 (3d Cir. 1985), *cert. denied*, 475 U.S. 1107 (1986); *Frito-Lay, Inc. v. Retail Clerks Union Local No. 7*, 629 F.2d 653, 660-63 (10th Cir. 1980); *James Julian, Inc. v. Raytheon Co.*, 593 F. Supp. 915, 923-24 (D. Del. 1984); cf. *Sun-Land*

In *Connell Construction Co. v. Plumbers*<sup>289</sup> the Supreme Court denied the antitrust exemption because a restrictive subcontracting clause did not “follow naturally” from the elimination of labor market competition.<sup>290</sup> In addition, the Court found that the clause was illegally made and, thus, violated section 8(e) of the NLRA. The Court apparently considered the labor law and antitrust issues separately, as later indicated in *Kaiser Steel Corp. v. Mullins*.<sup>291</sup> “In *Connell*, we decided the [section] 8(e) issue in the first instance. It was necessary to do so to determine whether the agreement was immune from the antitrust laws.”<sup>292</sup> This language seems to indicate that the application of antitrust considerations will turn on an unfair labor practice finding.<sup>293</sup>

The Third Circuit, in *Consolidated Express, Inc. v. New York Shipping Association (Conex)*,<sup>294</sup> held that the presence of an unfair labor practice sometimes is dispositive of the exemption question. When a plaintiff seeks only injunctive or declaratory relief, a finding of illegality under the NLRA always should remove the antitrust exemption.<sup>295</sup> When the plaintiff seeks damages, however, the nonstatutory exemption is still available if the defendants could not have foreseen that their actions would be found unlawful and if they “reasonably believed” that their agreement was directly related to a lawful goal.<sup>296</sup>

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*Nurseries, Inc. v. Southern Cal. Dist. Council of Laborers*, 793 F.2d 1110 (9th Cir. 1986) (valid subcontracting clause cannot serve as the basis of an antitrust claim), *cert. denied*, 479 U.S. 1090 (1987).

289. 421 U.S. 616 (1975).

290. See *supra* note 275 and accompanying text. The Court found that: [T]he methods the union chose are not immune from antitrust sanctions merely because the goal is legal. . . . This kind of direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions. It contravenes antitrust policies to a degree not justified by congressional labor policy . . . .

421 U.S. at 625.

291. 455 U.S. 72 (1982).

292. *Id.* at 85.

293. For an argument that this proposition is nonsensical, see Zifchak, *Labor-Antitrust Principles Applicable to Joint Labor-Management Conduct*, 21 Duq. L. REV. 365, 373 (1983).

294. 602 F.2d 494 (3d Cir. 1979), *vacated and remanded on other grounds*, 448 U.S. 902 (1980).

295. See *id.* at 519.

296. See *id.* at 520-21. Two cases in the Third Circuit have adopted the *Conex* approach. See *Feather v. United Mine Workers*, 711 F.2d 530, 542-43 (3d Cir. 1983); *In re*

### D. Nonexempt Conduct

If a court determines that neither the statutory nor the non-statutory exemption is available to protect a union's conduct, liability does not automatically result. Instead, the court will use traditional antitrust analysis to determine whether the conduct violates antitrust laws.<sup>297</sup>

A labor-related antitrust case may be subjected to one of two traditional antitrust standards of review. Under the "rule of reason" standard, a court will look at all the circumstances: "the facts peculiar to the business to which the [unlawful] restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable."<sup>298</sup> Under the "per se" approach, a court may find that the union's conduct is inherently anticompetitive and will impose liability without a detailed inquiry into the actual competitive effect of that conduct.<sup>299</sup>

The circuit courts are split on which analysis to apply to labor-related cases. The Second Circuit has adopted the rule of reason, focusing on the restraint's overall impact on competitive conditions.<sup>300</sup> The Eighth Circuit similarly has found that the

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Bituminous Coal Wage Agreements Litigation, 580 F. Supp. 670, 680-81 (W.D. Pa. 1984), *vacated*, 756 F.2d 284 (3d Cir.), *cert. denied sub nom. Duquesne Light Co. v. International Union, United Mine Workers*, 474 U.S. 863 (1985). No other courts have discussed this approach, although prior to *Conex* the Second Circuit rendered an analogous decision. *See Commerce Tankers Corp. v. National Maritime Union*, 553 F.2d 793 (2d Cir.), *cert. denied*, 434 U.S. 923 (1977).

297. *See Federal Maritime Comm'n v. Pacific Maritime Ass'n*, 435 U.S. 40, 61 & n.19 (1978); *Larry V. Muko, Inc. v. Southwestern Pa. Bldg. & Constr. Trades Council*, 670 F.2d 421, 427 (2d Cir.), *cert. denied*, 459 U.S. 916 (1982); *Conex*, 602 F.2d at 522; *Republic Prods., Inc. v. American Fed'n of Musicians*, 245 F. Supp. 475, 476 (S.D.N.Y. 1965); *see generally* Kirkpatrick & Johnson, *Antitrust Analysis of Non-Exempt Employee or Employer Activities*, 21 Duq. L. Rev. 401 (1983).

298. *Board of Trade v. United States*, 246 U.S. 231, 238 (1918); *see also* *National Society of Professional Eng'rs v. United States*, 435 U.S. 679, 687-88 (1978).

299. *See Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 559 (1st Cir. 1974) (per se violations include "price fixing, group boycotts, market allocation, restrictive practices involving patents, and certain competition-preclusive conduct by monopoly groups"), *cert. denied*, 421 U.S. 1004 (1975).

300. *See Berman Enters., Inc. v. Local 333 Int'l Longshoremen's Ass'n*, 644 F.2d 930, 936-37 (2d Cir.), *cert. denied*, 454 U.S. 965 (1981); *Commerce Tankers Corp. v. National Maritime Union*, 553 F.2d 793, 802 & n.8 (2d Cir.), *cert. denied*, 434 U.S. 923 (1977).

rule of reason is to be applied, with the emphasis upon whether the restraint imposed is justified by legitimate business purposes and is not unduly restrictive.<sup>301</sup> Other circuits have found the per se approach to be the appropriate standard of review. The First and Fourth Circuits have relied on United States Supreme Court decisions interpreting the particular conduct at issue.<sup>302</sup> The Third Circuit, while applying the per se rule in at least one case,<sup>303</sup> later cautioned that "[a] finding that particular union conduct has anticompetitive effects . . . should not drive a court inexorably to the conclusion that the union has violated the antitrust laws."<sup>304</sup>

### *E. Coerced Employer Exemption*

A target employer may concede to union pressure when faced with a strike or boycott and may enter into an agreement with which it otherwise would not involve itself. Although early cases found that this type of combination was indeed subject to antitrust scrutiny,<sup>305</sup> the Supreme Court has noted recently that under section 1 of the Sherman Act, there must be "a conscious commitment to a common scheme designed to achieve an unlawful objective."<sup>306</sup> Courts have applied this same rationale in labor antitrust cases to exonerate employers who were not

301. See *Mackey v. National Football League*, 543 F.2d 606, 620 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

302. See *National Elec. Contractors Ass'n v. National Constr. Ass'n*, 678 F.2d 492, 501 (4th Cir. 1982) (citing *United States v. Solony-Vacuum Oil Co.*, 310 U.S. 150 (1940)) (price fixing), *cert. dismissed*, 463 U.S. 1233 (1983); *Allied Int'l, Inc. v. International Longshoremen's Ass'n*, 640 F.2d 1368, 1380 (11th Cir. 1981) (citing *Fashion Originators Guild v. FTC*, 312 U.S. 457 (1941)) (group boycott), *aff'd on other grounds*, 456 U.S. 212 (1982), *cert denied*, 458 U.S. 1120 (1982).

303. See *Consolidated Express, Inc. v. New York Shipping Ass'n, Inc.*, 602 F.2d 494, 522 (3d Cir. 1979) (citing *Associated Press v. United States*, 326 U.S. 1 (1945)) (concerted refusals to deal), *vacated*, 448 U.S. 902 (1980).

304. *Larry V. Muko, Inc. v. Southwestern Pa. Bldg. & Constr. Trades Council*, 670 F.2d 421, 426 (2d Cir.), *cert. denied*, 459 U.S. 916 (1982); see also *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1979); *Ackerman-Chillingworth Div. of Marsh & McLennan, Inc. v. Pacific Elec. Contractors Ass'n*, 579 F.2d 484 (9th Cir. 1978), *cert. denied*, 439 U.S. 1089 (1979).

305. See, e.g., *United States v. Paramount Pictures*, 334 U.S. 131, 161 (1948); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226-27 (1939).

306. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984) (quoting *Edward J. Sweeny & Sons v. Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), *cert denied*, 451 U.S. 911 (1981)).

“‘willfully, deliberately, or knowingly participants in a conspiracy.’”<sup>307</sup> Thus, an employer’s coerced involvement in a union scheme that violates the antitrust laws may not automatically subject it to liability.

## V. RICO LIABILITY

Another employer response to a corporate organizing campaign is to file suit under the Racketeer Influenced and Corrupt Organizations Act (RICO).<sup>308</sup> Eastern Airlines, for example, filed a \$1.5 billion RICO suit against the Air Lines Pilot Association and the Machinists in 1988, charging them with conducting a “smear campaign” to ruin Eastern’s reputation.<sup>309</sup> A comprehensive analysis of this increasingly popular cause of action is beyond the scope of this Note; nevertheless, a discussion of the basic structure of the statute may be helpful.

Designed as a criminal statute, RICO prohibits several types of activities. Persons who receive income through a pattern of racketeering activity or who acquire an interest in any racketeering enterprise may be liable under the statute. Similarly, the statute prohibits attempts to control a business affecting interstate commerce through various illegal means and actions of persons employed by or associated with an enterprise who conduct or participate in the conduct of the enterprises’s affairs though a pattern of racketeering activity.<sup>310</sup>

“Racketeering activity” includes an act or threat involving arson or extortion that is punishable under state law<sup>311</sup> and a “pattern” of that activity requires at least two acts occurring within ten years.<sup>312</sup> Further, the act that combines to produce the pattern of activity must have “continuity plus relationship.”<sup>313</sup>

307. *Webb v. Bladen*, 480 F.2d 306, 308 (4th Cir. 1973) (quoting plaintiff’s counsel); see also *Intercontinental Container Transp. Corp. v. New York Shipping Ass’n*, 426 F.2d 884, 888 (2d Cir. 1970); *Suburban Beverages, Inc. v. Pabst Brewing Co.*, 462 F. Supp. 1301, 1309-10 (E.D. Wis. 1978).

308. 18 U.S.C. §§ 1961-68 (1982).

309. See *Daily Lab. Rep. (BNA)* No. 89, at A-12 (May 9, 1988).

310. 18 U.S.C. § 1962 (1982).

311. See *id.* § 1961(1); see generally *Yellow Bus Lines, Inc. v. Drivers Local Union 639*, 127 L.R.R.M. (BNA) 2607, 2611-16 (D.C. Cir. 1988).

312. See 18 U.S.C. § 1961(5) (1982).

313. See *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), which states:

RICO also provides for a civil right of action for any person injured in his business or property by reason of the prohibited activities.<sup>314</sup> Eastern Airlines apparently proceeded under this provision. If successful, an employer may recover treble damages, costs, and attorneys' fees.<sup>315</sup>

Despite this apparently all-encompassing employer remedy, RICO may not reach conduct regulated by the NLRA. At least one court has refused to hear a civil RICO suit because of its concern that the plaintiff was attempting to circumvent the exclusive jurisdiction of the Board.<sup>316</sup>

## VI. STATE CAUSES OF ACTION

An employer may choose to rely on state law remedies against union misconduct in either a state or federal court suit. Unless its claim is preempted, the employer may be entitled to an injunction or compensatory and punitive damages. In a corporate organizing campaign, which involves nontraditional tactics and activities, the union is more likely to run afoul of non-preempted state laws than when it is coordinating traditional organizing activity.

### A. The Preemption Doctrine

Defendants often invoke the doctrine of federal preemption to displace state jurisdiction over disputes that substantially implicate national labor policy.<sup>317</sup> This doctrine is not statutorily

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[W]hile two acts are necessary, they may not be sufficient. . . . The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern."

*Id.* at 496 n.14, quoted in Shepard, Horn & Duston, *RICO and Employment Law*, 3 LAB. LAW. 267, 285 (1987) (brackets and emphasis in original).

314. See 18 U.S.C. § 1964(c) (1982).

315. See *id.*

316. See Local 355, *Hotel Employees v. Pier 66 Co.*, 599 F. Supp. 761 (S.D. Fla. 1984); see also Note, *Exclusive Jurisdiction of the NLRB as a Limitation on the Application of RICO to Labor Disputes*, 76 KY. L.J. 201 (1987-88).

317. See generally F. BARTOSIC & R. HARTLEY, *supra* note 52, at 37-57; 2 LABOR LAW, *supra* note 43, at 1504-42.

imposed;<sup>318</sup> instead, it is premised on the supremacy clause of the United States Constitution,<sup>319</sup> with the task falling to the judiciary to determine congressional intent.<sup>320</sup>

In *San Diego Building Trades Council v. Garmon*<sup>321</sup> the Supreme Court established one of the tests now used to analyze the applicability of the preemption doctrine:

When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by [section] 7 of the National Labor Relations Act, or constitute an unfair labor practice under [section] 8, due regard for the federal enactment requires that state jurisdiction must yield.

When an activity is arguably subject to [section] 7 or [section] 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.<sup>322</sup>

Under the *Garmon* test a state court cause of action is preempted by Board jurisdiction if the labor activity is: (1) protected under section 7; (2) prohibited by section 8; or (3) arguably protected or prohibited by those sections. If, however, the conduct at issue is only of peripheral concern to the labor laws<sup>323</sup> or “touches interests so deeply rooted in local feeling and responsibility,”<sup>324</sup> the employer may bring the claim under state law.

Some conduct that is neither expressly protected nor prohibited under the NLRA is nevertheless implicitly protected by federal law because Congress intended that it be unregulated. As noted in *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*,<sup>325</sup> the reviewing court’s inquiry should focus upon “whether ‘the exercise of ple-

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318. See *Brown v. Hotel Employees Union Local 54*, 468 U.S. 491, 501-02 (1984) (NLRA contains no explicit preemptive language).

319. U.S. CONST. art. VI, § 2.

320. See *Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters*, 436 U.S. 180, 188 n.12 (1978).

321. 359 U.S. 236 (1959).

322. *Id.* at 244-45 (citations omitted).

323. *Id.* at 243. Cf. *Lingle v. Norge Div. of Magic Chef, Inc.*, 108 S. Ct. 1877 (1988).

324. 359 U.S. at 244.

325. 427 U.S. 132 (1976).



nary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the [NLRA's] processes.'"<sup>326</sup> Therefore, states may not impose restrictions on economic activities of self-help unless Congress contemplated those restrictions.<sup>327</sup> States also must review the structure of federal labor law to determine whether the particular activity is meant to be unregulated.<sup>328</sup>

Whether the conduct at issue fits within the *Garmon* or *Machinists* tests, application of the preemption doctrine requires balancing the state's interests in regulating conduct against the interference with the Board's ability to adjudicate disputes under the NLRA and the risk that the state will punish conduct permitted by the NLRA.<sup>329</sup> Clearly, though, the preemption doctrine does not apply if the parties are not covered by the NLRA, if the enterprise involved does not "affect commerce," or if the Board declines to assert jurisdiction over the dispute.<sup>330</sup> Similarly, the doctrine does not apply when the plaintiff-employer has had no opportunity for direct review of the union's conduct.<sup>331</sup>

In *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*<sup>332</sup> the Supreme Court held that a state may enforce its trespass laws against nonemployee union picketers. Although the Act arguably protected and prohibited the union's activity, the Court declined to rely on the *Garmon* primary jurisdiction rationale.<sup>333</sup> Instead, it looked to other factors. The fact that the employer could not have brought the matter directly before the Board without committing an independent unfair labor practice was significant; without such a review, pre-

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326. *Id.* at 147-48 (quoting *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 390 (1969)).

327. See *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 614-15 (1986).

328. See *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 749-50 n.27 (1985).

329. See *Belknap, Inc. v. Hale*, 463 U.S. 491, 498-99 (1983); see also *Local 926, Int'l Union of Operating Eng'rs v. Jones*, 460 U.S. 669, 676 (1983); *Farmer v. United Bhd. of Carpenters, Local 25*, 430 U.S. 290, 300 (1977); *Vaca v. Sipes*, 386 U.S. 171, 180 (1967).

330. See F. BARTOSIC & R. HARTLEY, *supra* note 52, at 40.

331. See Gregory, *The Labor Preemption Doctrine: Hamiltonian Renaissance or Last Hurrah?*, 27 WM. & MARY L. REV. 507, 541 (1986).

332. 436 U.S. 180 (1978).

333. See *id.* at 200 (rationale is "relative[ly] unimportan[t] in this context").

emption of state law would deny the employer a forum to adjudicate his claim.<sup>334</sup> The *Sears* decision thus creates an exception to the "arguably protected" prong of *Garmon*: When the party seeking relief in state court has "no right to invoke [the Board's] jurisdiction"<sup>335</sup> and the party that does have the right to invoke the Board's jurisdiction fails to do so,<sup>336</sup> the preemption doctrine is inapplicable.

### B. Picketing and Violence

State court actions to enjoin picketing or to recover damages generally are preempted<sup>337</sup> unless the picketing involves violence, intimidation, or similar misconduct.<sup>338</sup> In permitting state regulation of labor activity containing elements of violence or threats of violence, the Supreme Court has found that "state-court actions to redress injuries caused by . . . [this type of misconduct] are consistent with effective administration of the federal scheme."<sup>339</sup> For example, a state court may enjoin picketing that results in traffic congestion and threats of violence as an exercise of its powers to maintain peace in the community.<sup>340</sup> In the corporate campaign context, the target employer involved in a corporate campaign could use this case law to curb union demonstrations outside a shareholder meeting.

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334. *See id.* at 202.

335. *Id.* at 207.

336. *See* 2 LABOR LAW, *supra* note 43, at 1528.

337. *See* *Garner v. Teamsters Local Union No. 776*, 346 U.S. 485 (1953); 2 LABOR LAW, *supra* note 43, at 1530 (discussing fact that right to picket is a basic protected activity under § 7).

338. *See* *International Union, Auto. Workers v. Russell*, 356 U.S. 634 (1958); *Youngdahl v. Rainfair*, 355 U.S. 131 (1957); *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1954); *see also* A. THIEBLOT & T. HAGGARD, *supra* note 65, at 225-44.

339. *Farmer v. United Bhd. of Carpenters, Local 25*, 430 U.S. 290, 299-300 (1977).

340. *See* *General Elec. Co. v. Local 182 Int'l Union of Elec. Workers*, 47 N.C. App. 153, 266 S.E.2d 750 (1980); *see also* *Charles D. Bonanno Linen Serv., Inc. v. McCarthy*, 708 F.2d 1 (1st Cir.), *cert. denied*, 464 U.S. 936 (1983); *Adolph Coors Co. v. Sickler*, 608 F. Supp. 1417 (C.D. Cal. 1985); *Mississippi Gulf Coast Bldg. & Constr. Trades Council v. Brown & Root*, 417 So. 2d 564 (Miss. 1982) (trial court had jurisdiction to issue an injunction regulating union picketing where picketers' conduct threatened the public order); *PTA Sales, Inc. v. Retail Clerks Local 462*, 96 N.M. 581, 633 P.2d 689 (1981) (trial court properly enjoined union picketing when union conduct was marked by violence). *See* *United Auto. Workers*, 356 U.S. 634; *United Constr. Workers*, 347 U.S. 656.

### C. *Tortious Interference with Business Relations*

Isolation of the target employer from business associates is often a primary focus of a corporate organizing campaign. Although state claims for tortious interference with business relations generally are preempted,<sup>341</sup> there is some indication that courts no longer are automatically rejecting these suits. In 1983 the Washington Supreme Court addressed a claim for tortious business interference caused by the publication of "Don't Patronize" articles in a union newspaper. The court did not discuss whether this cause of action was preempted. Instead, it found that the articles were constitutionally protected under the first amendment to the United States Constitution and could not give rise to liability for tortious interference.<sup>342</sup> The Ninth Circuit went even further in *Rainbow Tours, Inc. v. Hawaii Joint Council of Teamsters*.<sup>343</sup> It found that an employer could recover for business losses caused by illegal mass picketing if that picketing coerced or intimidated the employer's employees from crossing the picket line.<sup>344</sup>

### D. *Trespass*

A favorite corporate campaign tactic is to invade stockholder meetings in order to air alleged grievances. When picketing and other concerted activities occur on private property, state courts often are empowered to adjudicate any controversy arising from that conduct. Any state decision, however, must ac-

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341. See *In re Sewell*, 690 F.2d 403 (4th Cir. 1982); *Palm Beach Co. v. Journeymen's & Prod. Allied Serv. Union Local 157*, 519 F. Supp. 705 (S.D.N.Y. 1981); *Stanton v. Texaco*, 113 L.R.R.M. (BNA) 2731 (C.D. Cal. 1982); *Glass Bottle Blowers Ass'n v. Certainfeed Corp.*, 111 L.R.R.M. (BNA) 2363 (M.D. Ga. 1981); *Pike v. Dan River, Inc.*, 112 L.R.R.M. (BNA) 2452 (S.C. Ct. Common Pleas 1982); *Oil Workers Local 1-1978 v. Standard Oil Co.*, 112 L.R.R.M. (BNA) 2108 (W.D. Wash. 1982).

342. See *Caruso v. Local Union No. 690, Int'l Bhd. of Teamsters*, 33 Wash. App. 201, 653 P.2d 638, *rev'd and remanded on other grounds*, 100 Wash. 2d 343, 670 P.2d 240 (1983).

343. 704 F.2d 1443 (9th Cir. 1983).

344. See *id.* at 1447-48; see also *Pantex Towing Corp. v. Glidewell*, 763 F.2d 1241 (11th Cir. 1985); *Sheet Metal Workers Int'l Ass'n v. Seay*, 696 F.2d 780 (10th Cir. 1983); cf. *Local P-9 v. Wynn*, No. 86-1259 (D.D.C. May 6, 1986) (complaint filed by local union against international alleging campaign to undermine local) (discussed in *Daily Lab. Rep.* (BNA) No. 88, at A-9 (May 7, 1986)).

commodate section 7 rights as well as private property rights.<sup>345</sup> If the reviewing state court finds the activity to be unprotected, it may apply its local trespass laws.<sup>346</sup>

### E. Defamation

In generating the adverse publicity about a target employer that often is crucial to the success of a corporate organizing campaign, a union may be found liable for defamation. In *Linn v. United Plant Guard Workers, Local 114*<sup>347</sup> the plaintiff, an assistant manager of the employer, sued a union for distributing allegedly defamatory leaflets during an organizing campaign. The Court found that the NLRA did not preempt the state court from awarding the damages sought under state law. Nonetheless, the Court noted that in order to recover, the plaintiff had to plead and prove that the allegedly defamatory statements were made with malice and that he suffered actual injury.<sup>348</sup> Several state courts have allowed actions to proceed under the "malicious libel" test of *Linn*.<sup>349</sup> Other courts have found such conduct defamatory per se.<sup>350</sup>

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345. See *Sears, Roebuck & Co. v. San Diego County Dist. Council*, 436 U.S. 180, 204-07 (1978).

346. See *Brown Jug, Inc. v. International Bhd. of Teamsters Local 959*, 688 P.2d 932 (Alaska 1984); *Bertuccio v. Superior Court*, 118 Cal. App. 3d 363, 173 Cal. Rptr. 411 (1981); *Smitty's Super Mkts., Inc. v. Retail Store Employees Local 322*, 637 S.W.2d 148 (Mo. Ct. App. 1982); *John Price Assocs. v. Utah State Conference*, 615 P.2d 1210 (Utah 1980).

347. 383 U.S. 53 (1966).

348. The Court held:

In order that the recognition of legitimate state interests does not interfere with effective administration of national labor policy . . . [we] therefore limit the availability of state remedies for libel to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage.

The standards enunciated in *New York Times Co. v. Sullivan* . . . are adopted by analogy, rather than under constitutional compulsion. We apply the malice test to effectuate the statutory design with respect to pre-emption. *Id.* at 64-65. See also *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264 (1974) (Court reaffirmed *Linn* rule in that defamation under the nation's labor laws would be viewed in essentially same manner as defamation under first amendment).

349. See, e.g., *Capital Parcel Delivery Co. v. Teamsters, Local 150*, 105 L.R.R.M. (BNA) 3351 (E.D. Cal. 1980); *Thomas v. Flavin*, 58 A.D.2d 1031, 397 N.Y.S.2d 286 (1977).

350. Cf. *Barss v. Tosches*, 785 F.2d 20 (1st Cir. 1986); *Davis Co. v. United Furniture Workers*, 674 F.2d 557 (6th Cir.), cert. denied, 459 U.S. 968 (1982); *Aarco, Inc. v. Baynes*,

## VII. CONCLUSION

The “limited nuclear weapon”<sup>351</sup> that is the corporate campaign may be even more limited than unions anticipate. Even if conducted legally, the success of such a campaign depends in large part on the target employer and how it responds to union pressure. Further, the target employer has a wealth of remedies at its disposal and the opportunity to apply these remedies in a new context. A target employer faced with a corporate organizing campaign need not capitulate to the union’s demands. Through careful analysis and use of established case law, the target employer has the leverage required to combat the campaign successfully. Unfair labor practice charges, as well as federal and state claims, can make a corporate organizing campaign a liability that the union will be eager to forget.

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391 Mass. 560, 462 N.E.2d 1107 (1984); *Yeager v. Local Union 20, Teamsters*, 6 Ohio St. 3d 369, 453 N.E.2d 666 (1983); *Cushman v. Edgar*, 44 Or. App. 297, 605 P.2d 1210 (1980).

351. See Remarks of Alfred DeMaria, Daily Lab. Rep. (BNA) No. 30, at C-1, C-2 (Feb. 13, 1985).