

International Union, United Mine Workers of America, AFL-CIO; District 17, United Mine Workers of America, AFL-CIO; Local 2236, United Mine Workers of America, AFL-CIO and Hatfield Dock and Transfer, Inc. Cases 9-CP-314-1, -2, -3

April 5, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT, DEVANEY, AND OVIATT

On February 3, 1988, Administrative Law Judge Walter H. Maloney issued the attached decision. The Respondent and General Counsel filed exceptions and supporting briefs.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

I. BACKGROUND

The judge found that International Union, United Mine Workers of America, AFL-CIO (the Respondent) violated Section 8(b)(7)(C) by threatening to picket Hatfield Dock and Transfer, Inc. (the Employer or Hatfield) for the purpose of obtaining recognition.¹ The judge found the threatened picketing unlawful because the Respondent neither retracted the threat nor timely filed an election petition under Section 9(c) of the Act. Relying on the Board's decision in *A-1 Security*,² the judge held that a threat to picket for recognition, even when unaccompanied by actual picketing, is unlawful where the threat is not formally retracted "within a reasonable period of time not to exceed thirty days." As the Respondent never withdrew its September 1986 threat to picket Hatfield, the judge concluded that it violated Section 8(b)(7)(C).

The Respondent excepts, arguing that a single threat to picket, without more, does not violate Section 8(b)(7)(C). The Respondent contends that because a union lawfully can picket for recognition for a reasonable period not to exceed 30 days under Section 8(b)(7)(C), a statement of intent to carry out this lawful act should not be proscribed. The Respondent distinguishes its conduct from that in *A-1 Security*, in which the union could not have been certified.³ Thus, it contends that in *A-1 Security* the noncertifiable union legally could not threaten to picket for recognition, for any period of time at all, because the picket-

ing itself would be prohibited. Here, however, because the Respondent lawfully could picket for recognition under Section 8(b)(7)(C), it asserts that it has the concomitant right to threaten to picket. Finally, the Respondent argues that the Board has narrowly restricted *A-1 Security* to the facts of that case.⁴

For the following reasons, we agree with the Respondent that its threat to picket the Employer did not violate Section 8(b)(7)(C).

II. FACTS

The relevant facts are as follows. In September 1986, shortly after the Employer began operating a coal storage and equipment facility in Marmet, West Virginia, the Respondent's organizer, Mark March, visited that facility. March spoke with Hatfield's vice president, R. Allan Johnston, telling him that he would like the Employer "to be UMWA." Johnston responded that this decision was for the employees to make. After March described benefits and contract concessions that the Respondent could offer Hatfield, Johnston said that he would have to contact his boss. March promised to return the following week.

One week later, March telephoned Johnston and repeated his recognition request. Johnston replied that he was not interested, and that it was up to the employees to decide. Johnston then asked March not to come on the Employer's property in the future. March concluded the conversation by stating that he had done all he could to keep the pickets from shutting down the Employer, and that picketing would begin the following Monday. No picketing occurred.

III. ANALYSIS

A. Overview

We agree with the judge that March requested recognition from the Employer during his visit to the Marmet jobsite and in his subsequent telephone call to Johnston. We also agree that March, the Respondent's agent, threatened to picket the Employer with an object of forcing and requiring the Employer to recognize and bargain with the Respondent as the collective-bargaining representative of the Employer's employees. Contrary to the judge, however, we do not find that this conduct violates Section 8(b)(7)(C). Our analysis of the section, its legislative history, and extant case law persuades us that the Respondent's threat to picket is not within the ambit of Section 8(b)(7)(C). Instead, we interpret Section 8(b)(7)(C) as prohibiting threats to picket and picketing by a union which can be certified only when the union already has picketed for a reasonable period of time without the filing of a petition for

¹ No violation was found as to the other named Respondents.

² *Service Employees Local 73 (A-1 Security)*, 224 NLRB 434 (1976), enf. 578 F.2d 361 (D.C. Cir. 1987).

³ In *A-1 Security*, the union admitted into membership both guards and non-guards. Under Sec. 9(b)(3) of the Act, the union was disqualified from certification by the Board as a collective-bargaining representative.

⁴ *Carpenters Local 2361 (Adams Insulation)*, 248 NLRB 313 (1980), enf. 651 F.2d 61 (9th Cir. 1981).

a representation election.⁵ Because no picketing occurred in this case, the Respondent's September threat to picket the Employer did not violate the Act.

Initially, we note that the issue of whether a certifiable union violates Section 8(b)(7)(C) by making an unretracted and unrealized single threat to picket for recognition is one of first impression for the Board. Although the Board uniformly has held that unretracted threats to picket made by unions that cannot be certified are unlawful,⁶ the Board has never squarely resolved whether similar unexecuted threats by unions which do qualify for certification violate the Act. *Carpenters Local 2361 (Adams Insulation)*, 248 NLRB 313 (1980), *enfd.* 651 F.2d 61 (9th Cir. 1981).⁷

B. The Statute

In the absence of definitive precedent, we first examine the language of Section 8(b)(7)(C).⁸ In so doing, we undertake the "difficult and delicate responsibility" which Congress committed primarily to the Board of interpreting Section 8(b)(7).⁹ This task is a formidable one. Congress enacted Section 8(b)(7) in 1959 as a means of "ensur[ing] that employees were free to

⁵We will continue to determine on a case-by-case basis what constitutes a "reasonable period of time" for purposes of Sec. 8(b)(7)(C). See, e.g., *Retail Wholesale Union District 65 (Eastern Camera)*, 141 NLRB 991, 999 (1963); *Laborers Local 1184 (NVE Constructors)*, 296 NLRB 1325 (1989).

⁶*A-1 Security*, *supra*; *Teamsters Local 344 (Purolator Security)*, 228 NLRB 1379 (1977), *enfd.* 568 F.2d 12 (7th Cir. 1977); *Service Employees Local 73 (Andy Frain)*, 230 NLRB 351 (1977); *Service Employees Local 73 (Active Detective Agency)*, 240 NLRB 462 (1979); *Teamsters Local 803 (St. Luke's-Roosevelt)*, 274 NLRB 905 (1985); *Teamsters Local 710 (University of Chicago)*, 274 NLRB 956 (1985). See also *Teamsters Local 639 (Dunbar Armored Express)*, 211 NLRB 687 (1974).

⁷Although in *Laborers Local 652 (Richard Sewell)*, 238 NLRB 986 (1978), the Board adopted a judge's 8(b)(7)(C) finding where a certifiable union threatened to picket for recognition, it expressly noted the absence of exceptions. Similarly, although a certifiable union was alleged to have violated the Act in *Electrical Workers IBEW Local 265 (R P & M Electric)*, 236 NLRB 1333 (1978), *enfd.* 604 F.2d 1091 (8th Cir. 1979), by picketing and threatening to picket for recognition, only the actual picketing was found to violate Sec. 8(b)(7)(C). Finally, although a judge concluded in *Mine Workers District 12 (Truax-Traer Coal)*, 177 NLRB 213, 217 (1969), *enfd.* 76 LRRM 2828 (7th Cir. 1971), that threats to picket are outside the proscriptions of Sec. 8(b)(7)(C), apparently no exceptions were filed on this issue, as only the respondent union filed exceptions.

⁸Sec. 8(b)(7) provides in pertinent part that:

(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, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(b) of this Act.

(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing.

⁹*NLRB v. Iron Workers Local 103*, 434 U.S. 335, 350 (1978), quoting *NLRB v. Teamsters Local 449*, 353 U.S. 87, 96 (1957).

make an uncoerced choice of bargaining agent."¹⁰ The legislation that Congress passed for this purpose was a compromise reached following an "intense conflict between competing interests."¹¹ As a consequence, Section 8(b)(7) is "not notable for its clarity."¹² Indeed, courts and commentators frequently have characterized the language in this provision, and specifically that in Subsection 8(b)(7)(C), as "murky," "confusing," and inartfully drafted.¹³

As a starting point of our analysis, we note that some threats and picketing for recognition or organization clearly are outside the ambit of Section 8(b)(7). For example, a currently certified union lawfully may picket for recognition or organization of the employees it is certified to represent.¹⁴ Similarly, a noncertified union which represents a majority of unit employees may picket to enforce an existing contract with the employees' employer.¹⁵ Thus, the Board and the courts have limited Section 8(b)(7)'s reach to a noncertified union that seeks to force or require an employer *initially* to accept the union as the employees' collective-bargaining representative.¹⁶

Further, although the introductory language in the body of Section 8(b)(7) expansively covers uncertified unions that picket or threaten to picket employers for recognition or organizational purposes, this broadly drawn prefatory language is limited by three narrowly drawn subsections. Subsections (A) and (B), which clearly flow from the body of Section 8(b)(7),¹⁷ provide that threats or picketing delineated by the introductory language of 8(b)(7) are prohibited when another union already has been lawfully recognized by the employer as the representative of its employees, or when a valid election has been conducted within the preceding 12 months. Both (A) and (B) describe cir-

¹⁰*Id.* at 346.

¹¹*NLRB v. Suffolk County District Council of Carpenters*, 387 F.2d 170, 174 (2d Cir. 1967).

¹²*Id.*

¹³See, e.g., *McLeod v. Hotel & Restaurant Employees Local 89*, 286 F.2d 727, 729 (2d Cir. 1961); Metzler, *Organizational Picketing and the NLRB: Five on a Seesaw*, 30 U. Chi. L. Rev. 78, 81-83 (1962); Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 Minn. L. Rev. 257, 270 (1959); Dunau, *Some Aspects of the Current Interpretation of Section 8(b)(7)*, 52 Geo. L.J. 220, 220-221 (1964); Comment, *Labor Relations—"Recognition" Picketing in the Garment Industry—Garment Unions Granted Protected Status Under Section 8(b)(7)(C) of the National Labor Relations Act*, 50 N.Y.U. L. Rev. 436, 445 (1975).

¹⁴*Laborers Local 840 (C. A. Blinne Construction)*, 135 NLRB 1153, 1162 (1962).

¹⁵*NLRB v. Iron Workers Local 103*, *supra*, 357 U.S. at 343, and cases cited.

¹⁶*Id.* But see *Hassett Storage Warehouse*, 287 NLRB 735, 736 (1987).

¹⁷Subsecs. (A) and (B) do not specifically repeat the terms "to picket" or "threaten to picket" which are stated in the introduction to Sec. 8(b)(7). Neither do they, however, mention any other specific, proscribed activity or activities. On this basis, and given the apparent grammatical flow between the body of Sec. 8(b)(7) and (A) and (B), these subsections uniformly have been held to prohibit both picketing and threats to picket where a question concerning representation cannot be raised and where a valid election has been conducted in the preceding 12 months, respectively. See, e.g., *A-1 Security*, *supra*, 224 NLRB at 436, 437, 440.

cumstances in which recognitional and organizational threats and picketing are completely prohibited.

Subsection (C), unlike Subsections (A) and (B), does not ban all recognitional or organizational picketing or picketing threats. It only prohibits conduct by a certifiable union that occurs after the union has picketed for a reasonable period of time without an election petition being filed. And, unlike Subsections (A) and (B), Subsection (C) does not readily flow from the prefatory language of Section 8(b)(7). Instead, Section 8(b)(7)(C) is further qualified by the introductory phrase “where such [recognitional or organizational] picketing has been conducted.”¹⁸ (Emphasis added.) Despite this further limiting language, however, we do not read Section 8(b)(7)(C) as privileging all threats of recognitional or organizational picketing.¹⁹ Rather, by interpreting the qualifying language in Subsection (C) in conjunction with the broad prefatory language of the body of Section 8(b)(7),²⁰ we read the statute to provide that organizational and recognitional picketing and a certifiable union’s threats to engage in such picketing are unlawful once the criteria of 8(b)(7)(C) have been met. Thus, once picketing for recognition or organizational purposes by a certifiable union has continued for a reasonable period, not to exceed 30 days, without a petition’s being filed, any additional picketing or picketing threats will violate Section 8(b)(7)(C).²¹ We find that this construction of 8(b)(7)(C) is a reasonable reading of the statute and consonant with Congress’ articulated purpose in enacting this provision.

C. Legislative History

In reaching our conclusions, we have examined the legislative history of Section 8(b)(7)(C) in an effort to determine Congress’ intent in enacting this provision. The legislative history has proved inconclusive on the issue of whether, and under what circumstances, Congress intended threats to be proscribed under Subsection (C). The history also fails to address what was

intended by use of the prefatory words “where such picketing” in Section 8(b)(7)(C), rather than the introductory language used in Subsections (A) and (B).²² In the absence of a clearly enunciated congressional intent, we have attempted to interpret the statute in a manner that reasonably construes its language and comports with those concerns that Congress *did* articulate. One clearly enunciated congressional concern was the effect of threatened picketing on unorganized employers.

In proposing legislation that culminated in Section 8(b)(7), Congress clearly sought to limit “top down” and “blackmail” organizing tactics through which unions used economic weapons to force themselves on employees, regardless of employee wishes.²³ When debating the evils of “top down” organizing, various legislators cited examples of coercive union conduct which illustrated the need for restrictive legislation. Several of these examples involved union threats to shut down employer operations unless recognition was granted or contracts signed.²⁴

No doubt Congress was concerned about the coercive impact of threats apart from picketing. But, there is nothing in the legislative history that suggests that Congress wanted to limit the use of threats to a greater extent than actual picketing. Because Congress was willing to permit picketing for “a reasonable period of time not to exceed thirty days,” it is reasonable to infer that Congress must also have been willing to permit a warning that such picketing could or would happen.

We believe that our interpretation of Section 8(b)(7)(C) accords with Congress’ intent in enacting 8(b)(7)(C)—it renders both the threat and the picketing unlawful once the picketing has been conducted without a petition being filed within a reasonable time. This interpretation draws additional support from official postenactment summaries of Section 8(b)(7)(C) in which legislators stated that Section 8(b)(7) outlaws recognitional or organizational picketing or threatened

¹⁸We find the phrase “such picketing” used in Subsec. (C) to be a reference to the picketing described in the introductory language of Sec. 8(b)(7), i.e., recognitional or organizational picketing by a noncertified union. See the Conclusion section, *infra*.

¹⁹Thus, we do not adopt the positions of former Chairman Murphy and Member Fanning in *A-1 Security*, *supra*, and its progeny, that “threats” are expressly excluded from the proscriptions of Sec. 8(b)(7)(C).

²⁰We agree with the District of Columbia Court of Appeals in *Service Employees Local 73 v. NLRB*, 578 F.2d 361, 366–367 (1978), that Subsec. (C) should be read and interpreted in conjunction with the introductory language of Sec. 8(b)(7). Indeed, the Board previously acknowledged in *Laborers Local 840 (C. A. Blinne Construction)*, 135 NLRB 1153, 1159 (1962), that “structurally, as well as grammatically, Subparagraphs (A), (B), and (C) are subordinate to and controlled by the opening phrases of Section 8(b)(7).”

²¹Of course, only one object of the threat or picketing need be organizational or recognitional for a violation to be found. *Building Service Employees Local 87 (Liberty House/Rhodes)*, 223 NLRB 30, 33 (1976); *Food & Commercial Workers Local 1063 (Heathman Enterprises)*, 249 NLRB 372, 378 (1980), *enfd.* 656 F.2d 901 (D.C. Cir. 1981); *Stage Employees IATSE (Albatross Productions)*, 275 NLRB 744, 745 (1985).

²²Congress proposed and considered several bills before enacting Sec. 8(b)(7)(C). Those bills which included provisions substantively similar to the current law all prefaced this section with the phrase “where such picketing has been conducted [or engaged in].” (See S. 748–H.R. 3540 (“Administration Bill”), 1 Leg. Hist. 145 (LMRDA 1959); H.R. 8400 (“Landrum-Griffin Bill”), 1 Leg. Hist. 684–685 (LMRDA 1959); Pub. L. 86–257 (“Conference Committee Bill”), 2 Leg. Hist. 1918–1919 (LMRDA 1959).) We found no explanation in the legislative history why this prefatory language was used. Nor did our investigation disclose any evidence that legislators specifically discussed strike threats when debating Sec. 8(b)(7)(C). Instead, as the Board previously acknowledged in *A-1 Security*, *supra*, 224 NLRB at 436, “the legislative history does not specifically address the issue of whether a threat to picket is encompassed within the proscriptions of Section 8(b)(7)(C).”

²³See S. Rep. No. 187, 86th Cong., 1st Sess. 74–80 (1959) (minority report of Senators Dirksen and Goldwater), 105 Cong. Rec. 6647–6671 (1959) (debate on McClellan amendments to the Landrum-Griffin bill). See also *Connell Construction Co. v. Plumbers Local 100*, 421 U.S. 616, 632 (1975).

²⁴See, e.g., “Legislative Recommendations of the President in the Labor-Management Field,” statement by the Secretary of Labor, February 4, 1959; 2 Leg. Hist. 994 (LMRDA 1959); Senators McClellan, Lausche, Dirksen, April 24, 1959, 2 Leg. Hist. 1174–1180 (LMRDA 1959).

picketing in *three* circumstances, i.e., those described in Subsections (A) through (C).²⁵

D. Conclusion

Policy considerations, the overall objective of the legislation, and our own analysis of the statutory language and legislative history lead us to reject portions of the Board's and reviewing court's analyses in *A-1 Security*.²⁶ In particular, we do not accept the assertions that the words "such picketing" in Subsection (C) are mere abbreviations for the body of Section 8(b)(7)'s more cumbersome phrase: "to picket, or cause to be picketed, threaten to picket or cause to be picketed."²⁷ Thus, we do not adopt any finding in *A-1 Security* that unretracted recognitional or organizational picketing threats become unlawful under Section 8(b)(7)(C) once a reasonable period of time elapses without the filing of an election petition. Instead, we will hold recognitional and organizational picketing and threats to the same standard and proscribe both

²⁵ See Senate Committee on Labor and Public Welfare's "Section-by-Section Analysis" of the Landrum-Griffin Act, reported September 10, 1959, after both houses had passed the statute, 1 Leg. Hist. 966-967 (LMRDA 1959); and Senator Goldwater's September 14, 1959 comments on the Landrum-Griffin Compromise Bill enacted the same day, 2 Leg. Hist. 1858 (LMRDA 1959).

We recognize that these postenactment descriptions of Sec. 8(b)(7) are not definitive or binding statements of Congress' intent in enacting Sec. 8(b)(7)(C). See generally *Pierce v. Underwood*, 487 U.S. 552, 566-567 (1987). However, like the District of Columbia Circuit Court of Appeals in *A-1 Security*, supra, 578 F.2d at 367-368, we find that these statements offer some guidance in determining Congress' purpose in enacting Sec. 8(b)(7)(C).

²⁶ We also emphasize, however, that the analysis in *A-1 Security* resulted from an entirely different set of facts from those before us. *A-1* involved threats by a union that statutorily could not be certified. Under those circumstances, we would continue to find that any recognitional threat or picketing violates Sec. 8(b)(7). See, e.g., *Rapid Armored Truck Corp.*, 281 NLRB 371 fn. 1 (1986); *Wackenhut Corp.*, 287 NLRB 374 (1987). Thus, a union is not free to achieve through threats that which it could not obtain by even the briefest picketing.

²⁷ *A-1 Security*, supra, 224 NLRB at 436; *Service Employees Local 73 v. NLRB*, supra, 578 F.2d at 368. In *A-1 Security*, the dissenting Board Members argued that Subsec. (C)'s introductory language "where such picketing has been conducted" indicated that the subsection applied only to picketing and not to threats to picket. In apparent response to this view, the majority, who found the threat to picket by the noncertifiable mixed guard-nonguard union lawful, took the position that the language "where such picketing has been conducted" incorporated both picketing and threats to picket, as it was a reference to the language "to picket or cause to be picketed, or threaten to picket or cause to be picketed" in the initial paragraph of Sec. 8(b)(7). The reviewing court, in a divided decision, endorsed the latter view.

As our analysis above indicates, we find neither extreme persuasive. On one hand, Subsec. (C)'s mention of picketing does not negate the language of the initial paragraph of 8(b)(7) declaring both recognitional and organizational picketing and threats to engage in such picketing unlawful under the circumstances set forth in Subsecs. (A), (B), and (C). On the other hand, finding the language "where such picketing has been conducted" to incorporate not just picketing but also threats to picket is a highly strained and implausible reading of this provision. Indeed, even the reviewing court admitted that "the introductory phrase of 8(b)(7)(C) is not easily amenable to an interpretation which includes threats to picket within the subparagraph's expressed purview." 578 F.2d at 367. The legislative history relied on by the court to support that reading signifies nothing more than that Sec. 8(b)(7)(C) applies to both picketing and threats to picket. The interpretation we have adopted in this opinion is fully consistent with that view of congressional intent.

when picketing has been conducted without a petition's being filed within a reasonable period of time.²⁸

In sum, we hold that a union violates Section 8(b)(7)(C) either by picketing or threatening to picket for a recognitional or organizational object when it has picketed for that object for a reasonable time without a representation petition's being filed. As no picketing occurred in this case, we find that the Respondent did not violate Section 8(b)(7)(C) by threatening to picket the Employer in September 1986.

ORDER

The complaint is dismissed.

MEMBER CRACRAFT, dissenting.

In 1976 the full Board considered the meaning of the words "such picketing" in Section 8(b)(7)(C) of the Act in light of the legislative history and the statutory purpose. The Board construed those words to refer to the language of the initial paragraph of the section and incorporate by reference the phrase "to picket or cause to be picketed, or threaten to picket or cause to be picketed." Stated differently, the Board held that Section 8(b)(7)(C) proscribes threats to picket to the same extent as actual picketing. *Service Employees Local 73 (A-1 Security)*, 224 NLRB 434, 436 fn. 8 (1976), enf'd. 578 F.2d 361 (D.C. Cir. 1987).

On the union's petition for review, the Court of Appeals for the District of Columbia Circuit conducted a painstaking review of Section 8(b)(7)(C), including its legislative history, and held that "the Board's interpretation . . . [is] the most reasonable reading of the statute" Accordingly, the court enforced the Board's decision in all respects. 578 F.2d 361, 368.

Although Section 8(b)(7)(C) has remained unchanged, the Board today holds that the words "such picketing" mean something entirely different from what the Board and court said they meant a decade and a half ago. Jettisoning the Board's and court's analysis in *A-1 Security*, my colleagues hold for the first time that Congress did not intend to outlaw a certifiable union's threats to picket for a recognitional or organizational objective so long as no actual picketing occurs.

In the absence of any compelling reason to depart from Board precedent that has been endorsed by the reviewing judiciary, I would adhere to the reasoning of *A-1 Security*. Accordingly, I would adopt the judge's decision finding that the Respondent violated Section 8(b)(7)(C) by threatening to picket the Charging Party, with an object of forcing or requiring it to recognize and bargain with the Respondent, and failing to retract

²⁸ Indeed, this analysis is consistent with the current remedial practice in 8(b)(7)(C) cases of ordering respondent unions to cease and desist from further picketing or threatening to picket for a recognitional or organizational object. See, e.g., *Laborers Local 1140 (Central States Paving)*, 275 NLRB 739, 742-743 (1985); *Electrical Workers IBEW Local 3 (Telecom Plus)*, 286 NLRB 235, 242-243 (1987), enf'd. 861 F.2d 44 (2d Cir. 1988). Our approach also avoids the arguably incongruous result that one isolated picketing threat will be proscribed, while 30 days of actual picketing for the same object will be privileged.

the threat for a period in excess of 30 days, when the Respondent has not been certified and no petition has been filed under Section 9(c) of the Act.

Andrew Lang, Esq., for the General Counsel.

Stephen A. Yokich, Esq., of Chicago, Illinois, for Respondent UMWA International.

James M. Haviland, Esq., of Charleston, West Virginia, for Respondent UMWA District 17.

Grant Crandall, Esq., of Charleston, West Virginia, for Respondent UMWA Local 2236.

Anna Norton Dailey, Esq. and *Forrest H. Roles, Esq.*, of Charleston, West Virginia, and *Barbara L. Krause, Esq.* and *Lynn M. Rausch, Esq.*, of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

WALTER H. MALONEY, Administrative Law Judge. This case came on for hearing before me on a consolidated unfair labor practice complaint, issued by the Regional Director for Region 9,¹ which alleges that Respondents International Union, United Mine Workers of America (International or UMWA), District 17, United Mine Workers of America (District 17), and Local 2236, United Mine Workers of America (Local 2236)² violated Sections 8(b)(1)(A) and 8(b)(7)(C) of the Act. More particularly, the consolidated complaint alleges that the Respondents threatened to picket Hatfield for recognition, later picketed Hatfield for recognition, and, while on the Charging Party's premises, engaged in threats and acts of physical violence in pursuit of their object of achieving recognition. The Respondents, and each of them, entered formal denials of these allegations but did not present any evidence at the hearing in this case, nor did they file briefs. In the posthearing settlement agreement of Case 9-CB-6661 et al., the Respondents admitted that the conduct set forth in the complaint respecting the 8(b)(1)(A) violations occurred, as alleged. On this state of the record the issues were joined.

¹ The principal docket entries in this case are as follows:

Charges filed by Hatfield Dock & Transfer, Inc., against Respondents UMWA, District 17, and Local 2236, on January 13, and January 14, 1987; consolidated complaint issued against all Respondents by the Regional Director, Region 9, on July 2, 1987; answers of the respective respondents filed on July 20, 1987; hearing held in Charleston, West Virginia, on September 16, 1987; briefs filed by the General Counsel and the Charging Party with me on or before December 8, 1987; formal settlement to a portion of this case submitted to me and recommended to the Board for approval by me on January 25, 1988, which settlement agreement severed Case 9-CB-6661 et al. from Case 9-CP-314 et al. and placed it directly before the Board.

² Respondents admit, and I find, that Charging Party Hatfield Dock & Transfer, Inc. is a Florida corporation which maintains its principal place of business at Marmet, West Virginia, where it is engaged in the purchase, sale, and loading of coal for shipment. During the preceding 12 months, a representative period, the Charging Party sold and shipped from its Marmet, West Virginia place of business directly to points and places located outside the State of West Virginia, goods and materials valued in excess of \$50,000. Accordingly, it is an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. The Respondents, and each of them, are labor organizations within the meaning of Sec. 2(5) of the Act.

FINDINGS OF FACT

I. THE UNFAIR LABOR PRACTICES ALLEGED

In September 1986, Hatfield Dock & Transfer, Inc. (Hatfield), opened a coal storage and shipment facility near Charleston, West Virginia. Hatfield's premises comprise about 8 to 10 acres of land and are located between Route 61 and the Kanawha River. It receives coal by truck from nearby mines, stores it temporarily in piles, and then loads it on barges for shipment. At the time of the incident in question, its premises were unfenced and had no gates. There were two spots along Route 61, located about 500 feet apart, which were normally used for entrance and egress. There are two buildings located at the facility, a scale house near one of the entrances, and a so-called blue building or tool building located some 300 feet from the scale house.

In January 1987, Hatfield employed five individuals, who held positions designated as scale person, front-end loader, and barge loader operator. None of them were represented by any labor organization. The operation was and is directed by R. Allan Johnston, the vice president of the Company.

Not long after the facility opened for business, Mark March, an organizer for the UMWA, visited the premises and spoke with Johnston in the Blue Building. After identifying himself, March told Johnston that he would like the Company "to be UMWA." Johnston replied that this decision was up to his employees and that they were free to join if they wanted. In the course of the conversation March told Johnston that the Company would be excused from making any payments to the UMWA pension fund and any royalty payments which unionized companies are required to pay. He also told Johnston that the UMWA could help the Company in case it got into any trouble with public authorities by operating overweight trucks. Johnston insisted that he could not make any decision in this regard and that he would have to be in touch with his boss. March replied that this would be fine and that he would be in touch with Johnston the following week.

Sometime during the following week March phoned Johnston and again requested recognition for the UMWA. Johnston replied that Hatfield was not interested and that any such representation was a matter for its employees to decide. He asked March not to come on company property in the future but said that he would be glad to talk with March at a downtown location. March's parting shot was that he had done all that he could to keep pickets from shutting down the Company, adding that they would be there the following Monday. No picketing occurred the following Monday nor in the weeks and months which followed, and no contact between the UMWA and Hatfield of any kind took place until Saturday, January 10.

On January 10, some but not all of Hatfield's employees reported for work and were assigned to perform maintenance work. No coal was received or shipped that day and none was expected. About noon Johnston was eating lunch at a nearby fast food restaurant when he received a phone call from an employee who notified him that a group of men had entered the premises and requested that Johnston return to the plant immediately. On returning to the plant Johnston observed several cars parked inside the plant premises in a semicircle in an open space near a coal pile. He further observed that about 12-15 men were sitting in cars or were

standing near the cars talking with each other. Record evidence establishes that March, Clifford Crum, executive board member of Respondent District 17, and Donnie Samms, vice president of Local 2236, were among those present.

Johnston parked his car and got out. He was approached by March and two or three others near the scale house. March told Johnston that they would “kick ass or do what they had to do” but that they were going to organize Hatfield. He stated further that, if Johnston thought they had a lot of men present, he could just wait and they would be back with more.

A few minutes later, March approached Johnston in the open area of the company premises and told him that, no matter what he did—whether it was to recognize the Steelworkers or get a court injunction—March would not let up till the Company went UMWA. He added, “Don’t — with me, you little s.o.b.” An unidentified individual then added, “This ain’t going to be no scab dock. We’re UMWA and we’re here to stay. We know who you are. You’re Florida Power.” At this point Johnston was struck on the side of the head by an unidentified assailant and fell to the ground. As he was getting up, Samms told him not to get up or he would knock him back down. Samms then egged Johnston to come over to where Samms was standing and said that someone would shoot Johnston if he did not do so. Samms then hollered, “Go ahead and shoot him.”

No shots were fired. Instead, all the men who had gathered on the premises got in their vehicles and left the plant very quickly. Two Hatfield employees, Charles Rogers and Lindol Hossler, were at work that day. Both had worked in the coal industry for a period of time and were acquainted with some of the visitors to the premises. Rogers testified that he heard March speak to Johnston in a hostile tone while uttering the remarks noted above which were made at the scale house. He did not see the incident during which Johnston was knocked to the ground inasmuch as he was eating lunch in the tool house with Hossler at the time. Rogers spoke casually to the individuals whom he recognized and testified that no one tried to block his movements in or about the coal yard. Hossler was also eating lunch at the time of the assault on Johnston. His only conversation with the individuals on the premises were two short, friendly conversations with two men whom he had known from previous jobs.

After the unwanted visitors left the premises, Johnston cleaned himself up and told the employees to shut the plant down at 1 p.m. Later on that afternoon, he sought medical attention. The following Monday he reported the incident to the local police. None of the people who were present at the plant on January 10 have returned since this incident.

II. ANALYSIS AND CONCLUSIONS

A. *The Admission of Certain Exhibits*

At the conclusion of his case, the General Counsel moved the admission into evidence of several settlement agreements, decisions, or orders in previous cases involving some or all of the respondents. Objections were lodged to their admission and the question was taken under advisement. The notations contained on these documents in the exhibit file do not accurately reflect the disposition of these proffers, so the matter must be clarified at this point.

Normally a formal settlement agreement is not admissible in a future proceeding, either to show proclivity to violate the Act or for any other purpose, if the agreement contains a nonadmission clause. *Raymond Buick, Inc.*, 173 NLRB 1292 (1968). Such an agreement completely settles the matter at hand and, as part of the quid pro quo for relieving the General Counsel of the burden of proving a violation, there is an assurance to the respondent that the matter will not come back to haunt him in some future but unrelated proceeding. However, where the agreement is silent as to its future use and contains no such undertaking, an order of the Board which emanates from a formal agreement may be relied on by the General Counsel at a future time to show a proclivity on the part of the respondent to violate the Act, and it may form the basis for a request that the Board grant a broader and more inclusive remedy than it might otherwise be disposed to do. *Teamsters Local 945 (Newark Disposal)*, 232 NLRB 1 (1977).

I have examined the documents proffered by the General Counsel which relate to previous cases involving either the UMWA International or District 17, and now admit or reject them, as follows, based on the above-stated criteria:

Admitted—General Counsel’s Exhibits 3, 5, 6, 8, 11, and 12.

Rejected—General Counsel’s Exhibits 2, 4, 9, and 10.

General Counsel’s Exhibit 7 is incomplete in the folder submitted to me so I am unable to determine its admissibility based on these criteria.

B. *The Settlement of the 8(b)(1)(A) Violation*

As indicated in footnote 1, the parties have recently executed a formal settlement agreement of the 8(b)(1)(A) allegations, the effect of which is to sever from this proceeding the principal portion of the consolidated case and to place it before the Board for routine approval. The agreement contains a broadly drawn proposed order which, when entered, will prohibit each of the three respondents from engaging in threats of violence to secure recognition, committing assaults or batteries, or committing any other acts of violence, attempts at violence, or threats and exertion of force against Hatfield, the employees of Hatfield, or any other employer located within the geographical jurisdiction of District 17. The protection contained in the proposed order also extends to suppliers and customers of protected employers. The agreement contains language by which the Respondents admit engaging in the 8(b)(1)(A) conduct alleged in the consolidated complaint, and they consent to the use of admitted conduct in establishing a violation of Section 8(b)(7)(C). All that is left is a determination as to whether any of the Respondents threatened to picket Hatfield for recognition without filing a representation petition within the required time and whether, in fact, such picketing took place. On the basis of the facts of this case, as well as the evidence of misconduct by the Respondents in other cases, the General Counsel and the Charging Party request the issuance of a broad 8(b)(7)(C) order, prohibiting the picketing not only of Hatfield but of any employer for a reasonable period of time not in excess of 30 days for the purpose of organizing or gaining recognition.

C. *The 8(b)(7)(C) Allegations*

Central to the position of the General Counsel and the Charging Party is the contention that the conduct of the Respondents, and each of them, at the Hatfield premises on January 10 constituted picketing within the meaning of Section 8(b)(7)(C) of the Act. Neither that section nor any other section of the Act defines picketing. A number of cases were cited in briefs submitted pointing out what the General Counsel does *not* have to establish in order to make out a case of illegal recognitional or organizational picketing. Regrettably no cases or other authorities were presented as to what must be proven before an allegation of illegal recognitional or organizational picketing can be established. While the General Counsel and the Charging Party do not formally say so, their position comes close to a contention that any 8(b)(1)(A) violation committed while a union and an employer are in an organizational mode constitutes recognitional or organizational picketing. Neither Congress nor the Board have gone quite that far.

The Board has held that placing banners on stakes or fence posts near the entrance to a plant constitutes picketing, even though individuals are not carrying the signs back and forth. *Mine Workers Local 1329 (Alpine Construction)*, 276 NLRB 415 (1985). Placing signs in a snow bank or on safety cones and barricades has been held to be picketing. *Teamsters Local 182 (Woodward Motors)*, 135 NLRB 851 (1962); *Laborers Local 304 (Athejen Corp.)*, 260 NLRB 1311 (1982). Posting individuals at the approaches to a business, even without the use of signs, in order to accomplish the purposes of the union has been held to be picketing if it results in keeping employees or customers away from the plant. *Lumber Workers Local 2797 (Stoltze Land)*, 156 NLRB 388 (1965). Milling about on a road in front of the employee entrance to the plant in such a manner that employees are prevented or dissuaded from entering has been held to be picketing. *Mine Workers District 6 (Weirton Construction)*, 174 NLRB 344 (1969). However, leafletting of a parking lot with area standards leaflets and handing cards and leaflets with “do not patronize” messages to customers as they drove up to a parking lot of a retail establishment has been held not to be picketing, even though one isolated instance of non-delivery resulted from this effort. *Teamsters Local 688 (Levitz Furniture)*, 205 NLRB 1131 (1973).

In the instant case, the alleged pickets did none of the things at the Hatfield premises on January 10 that pickets normally do. They had no signs or handbills, they did not patrol, and most important, they did not position themselves at entrances to the premises where they could speak to or influence anyone, either employees, deliverymen, or customers, who might be approaching the premises from the outside. They parked their cars inside the plant and stayed near their cars during the brief period of time they were present. In short, they did not constitute themselves as either a physical or a moral barrier designed to isolate those inside the picket line from communication with, or commercial intercourse with, those outside the picket line. They did not prevent deliveries from occurring. Indeed, none took place and none were expected on the Saturday morning when this incident occurred. Whatever interruption took place in the maintenance activities which were scheduled on that day did not occur until after the pickets left. While the individuals who visited the Hatfield premises on January 10 committed a civil

trespass and some of them committed a violation of Section 8(b)(1)(A) by their statements and by the assault upon Johnston, these acts do not constitute picketing, as that term has normally been used or construed, and hence fall under a regulation of a section of the Act other than Section 8(b)(7)(C).

It should be noted that picketing alone, even where a recognitional or organizational object is evident, does not constitute a violation of Section 8(b)(7)(C) of the Act unless it has continued for a reasonable time not to exceed 30 days and no representation petition has been filed. Here the alleged pickets were at the Hatfield premises for barely 30 minutes. While, for good cause, the 30-day period of time for filing a petition with the Board may be shortened, the Board has yet to shorten the grace period allowed by statute to less than an hour. For this reason as well, I conclude that no violation of the picketing prohibition in Section 8(b)(7)(C) took place at the time and place alleged in the consolidated complaint.

In *Service Employees Local 73 (A-1 Security)*, 224 NLRB 434, a sharply divided Board held that a threat to picket for a recognitional or organizational object, even when unaccompanied by actual picketing, constitutes a violation of Section 8(b)(7)(C). Since the Act gives recognitional pickets 30 days, with some exceptions, to apply this kind of pressure before any obligation arises to employ administrative processes set forth in Section 9 of the Act, and since a threat to picket is, by its nature, a statement taking little or no time to utter, the question then arose as to whether a union which has threatened to picket falls within the requirement to file a representation petition and how the 30-day grace period allowed by statute for actual picketing should be applied. The Board majority held that a threat to picket should be held to the same proscription as a picket line itself and that it should be deemed to be continuing in nature until actually revoked. Hence, a union which threatens to picket must file a representation petition within 30 days of the threat unless the threat is formally withdrawn.

In this case, March made a threat to Johnston during their phone conversation in mid-September to picket Hatfield. There is no doubt about why he wanted to picket Hatfield. His statements on this occasion, as well as the one he made in person the previous week, made it abundantly clear that March was interested in having Hatfield sign a contract with the UMWA. There is no suggestion in the record that any representation petition seeking this end was ever filed, although purport of Johnston’s repeated replies made it clear to March that his employees, not the Company, would determine whether the UMWA would or should represent them. In uttering this threat, March, an organizer in the employ of the UMWA International, was acting on behalf of that organization. There is no evidence that he was acting on this occasion on behalf of the UMWA local or district who are respondents in this case, and there is no evidence at all that any agents of those respondents were present or had any knowledge of March’s utterance. Accordingly, the illegal threat made by March can be attributed to the International alone. In light of these considerations, I conclude that, by threatening Hatfield for the purpose of obtaining recognition, without filing a representation petition within a reasonable time not to exceed 30 days, the Respondent UMWA International violated Section 8(b)(7)(C) of the Act. In all other

respects the 8(b)(7)(C) portion of the consolidated complaint in this respect must be dismissed.

CONCLUSIONS OF LAW

1. Hatfield Dock & Transfer, Inc. is an employer engaged in commerce within the meaning of Section 2(2) of the Act.

2. Respondents International Union, United Mine Workers of America, District 17, United Mine Workers of America, and Local 2236, United Mine Workers of America, and each of them, is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening to picket Hatfield Dock & Transfer, Inc. with an object of forcing or requiring it to recognize and bargain with Respondent International Union, United Mine Workers of America, as the collective-bargaining representative of the employees of Hatfield Dock & Transfer, Inc., and allowing the threat to remain unrevoked for a period of time in excess of 30 days, when the respondent was not currently certified or recognized as such representative and when no petition had been filed under Section 9(c) of the Act, Respondent International Union, United Mine Workers of America, violated Section 8(b)(7)(C) of the Act. The unfair labor practice has a close, intimate, and substantial effect on the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has committed an unfair labor practice, I will recommend that it be required to cease

and desist therefrom and to take other affirmative actions designed to effectuate the purposes and policies of the Act. Based on violations of Section 8(b)(7)(C) and other sections of the Act committed by this Respondent in other cases, the General Counsel and the Charging Party have requested a broad cease-and-desist order forbidding the Respondent from threatening to picket or picketing not only Hatfield but any other employer for the purpose of recognition without complying with the provisions of Section 8(b)(7)(C). Such orders are rare and must be issued sparingly. *San Francisco Joint Executive Board of Culinary Workers v. NLRB*, 501 F.2d 794 (D.C. Cir. 1974). An 8(b)(7)(C) violation such as this one, involving a single incidental threat to picket unaccompanied by actual picketing, is not an appropriate vehicle for such an order. Accordingly, I will recommend a conventional cease-and-desist order tailored to the facts of this case and the violation found. The General Counsel has requested a visitatorial clause, permitting the Board to use the Federal Rules of Civil Procedure to obtain discovery in the event that this Order must be enforced by a contempt proceeding in a court of appeals. I will recommend such an order. I will also recommend that the Respondent International Union, United Mine Workers of America, be required to post the usual notice advising its employees of their rights and of the results in this case.

[Recommended Order omitted from publication.]