

PICKETING FOR AREA STANDARDS: AN EXCEPTION TO SECTION 8(b)(7)

A union's picketing for area standards, requesting a non-union employer to provide the prevailing employment benefits offered by unionized operations in the locale, has been held by the National Labor Relations Board to be non-recognitional and hence beyond the purview of section 8(b)(7) of the LMRDA. In addition to evaluating the Board's distinction between bona fide area standards picketing and disguised recognitional picketing, this comment seeks to anticipate difficulties which the Board will encounter in attempting to specify the components of the economic package to which non-union employers may be requested to conform.

THE TACTIC of picketing is normally utilized by labor organizations as a means for compelling settlement of disputes which arise between employers and their employees. Even in the absence of a dispute, however, an employer may find a union picketing his premises for area standards; that is, for the immediate purpose of urging the non-union employer¹ to adopt a compensation program substantially equivalent to that provided by unionized employers in similar operations in the same area. Such picketing is currently sanctioned by the National Labor Relations Board's interpretation of one of the 1959 Landrum-Griffin Act² amendments to the

¹ Although the picketed employer is usually non-unionized, the Board's first validation of area standards picketing was in a case in which the employer had recognized a union other than the one directing the picketing. *See* Hod Carriers Local 41, 133 N.L.R.B. 512 (1961); notes 8-15 *infra* and accompanying text. While a more pervasive prohibition of recognitional and organizational picketing, applicable "where the employer has lawfully recognized . . . any other labor organization," Labor-Management Reporting and Disclosure Act § 8(b)(7)(A), 29 U.S.C. § 158(b)(7)(A) (1964), was enacted subsequent to that decision, *see* notes 4 & 16-29 *infra* and accompanying text, area standards picketing has since been deemed totally without the purview of the new provision. *See* Houston Bldg. & Constr. Trades Council, 136 N.L.R.B. 321 (1962). The picketers, therefore, apparently need not defer to another union's representative status. In the remainder of this comment, however, picketing in such a situation is given only tangential consideration. The significant policy objections to allowing a demand for area standards where the employer has already accepted another bargaining representative may be found in Meltzer, *Organizational Picketing and the NLRB: Five On a Seesaw*, 30 U. CHI. L. REV. 78, 93-95 (1962).

² Labor-Management Reporting and Disclosure Act, 29 U.S.C. §§ 401-531 (1964) [hereinafter cited as LMRDA]. For a discussion of the 1959 amendments to the NLRA *see* Cox, *The Landrum-Griffin Amendments to the National Labor Relations*

National Labor Relations Act.³ Codified as section 8(b)(7) of the NLRA,⁴ that amendment makes it an unfair labor practice for a union to picket for a recognitional or organizational purpose.⁵ However, by defining "recognitional" or "organizational" only with reference to situations in which the union's present and immediate purpose is the securing of a contract,⁶ the Board has permitted a union to demand conformity to area standards.⁷ In order to provide a guide for employers and unions in the area standards setting, this comment will identify factors indicative of such present recognitional purpose and will analyze the components of an appropriate area standards comparative package.

Act, 44 MINN. L. REV. 257 (1959). An excellent analysis of the entire Landrum-Griffin Act is found in Aaron, *The Labor-Management Reporting and Disclosure Act of 1959* (pts. I & II), 73 HARV. L. REV. 851, 1086 (1960).

³ National Labor Relations Act, 29 U.S.C. §§ 141-60 (1964).

⁴ Section 8(b)(7) provides: "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 subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) 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: *Provided*, that when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, that 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.

"Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b)." *Id.* § 158(b)(7).

⁵ Recognitional picketing is the attempt to pressure an employer into recognizing the picketing union; whereas organizational picketing is aimed at enlisting employees into the picketing union. However, the terms are now generally used interchangeably. See Meltzer, *supra* note 1, at 79 & n.10.

⁶ Houston Bldg. & Constr. Trades Council, 136 N.L.R.B. 321 (1962).

⁷ Besides the exception for area standards picketing, the Board has deemed three

DEVELOPMENT OF THE AREA STANDARDS EXCEPTION

Area standards picketing is of relatively recent origin, having its legal inception in *Hod Carriers Local 41 (Calumet I)*,⁸ a case which arose prior to the enactment of the Landrum-Griffin Act and, thus, was decided under section 8(b)(4)(C) which proscribes picketing intended to force recognition or bargaining privileges from an enterprise whose employees already have a certified bargaining representative.⁹ Subsequent to the Board's certification of another union, the Hod Carriers picketed the employer with the avowed purpose of compelling him to match the union's remuneration schedule. A three-member panel of the Board unanimously held that picketing for prevailing wage and working conditions, or area standards, resembled a demand for the employer's acquiescence to collective bargaining and was, thus, intended to compel the employer "to recognize or bargain" with the picketers in violation of section 8(b)(4)(C).¹⁰ Noting that a violation would occur if recognition were simply

other types of picketing as neither recognitional nor organizational, and hence without the purview of § 8(b)(7). Thus, in *Local 259, UAW*, 133 N.L.R.B. 1468 (1961), picketing solely to protest an employee's discharge and to obtain his reinstatement was held non-recognitional since the evidence exhibited that the union's picketing would have ceased if the employer had reinstated the employee. *See generally* Crowley, *The Regulation of Organizational and Recognitional Picketing Under Section 8(b)(7) of the National Labor Relations Act*, 47 MARQ. L. REV. 295, 303-05 (1963). Similarly, picketing to promote a consumer boycott of "unfair" stores and elicit consumer support for "fair" or organized stores is non-recognitional. *Alton-Wood River Bldg. & Constr. Trades Council*, 144 N.L.R.B. 526 (1963). Also, picketing to protest an unfair labor practice or refusal to bargain has been held not to be recognitional. *Hotel Employees Local 19*, 146 N.L.R.B. 1094, 1100 (1964) (trial examiner's finding adopted by the Board); *Building & Constr. Trades Council*, 146 N.L.R.B. 1086 (1964). *See generally* Dunau, *Some Aspects of the Current Interpretation of Section 8(b)(7)*, 52 GEO. L.J. 220, 221-26 (1964); Comment, *Appeals to the Consumer: The Remaining Area of Permissible Organizational Picketing Under Section 8(b)(7)*, 9 U.C.L.A.L. REV. 666, 678-91 (1962).

⁸ 130 N.L.R.B. 78, *rev'd on rehearing*, 133 N.L.R.B. 512 (1961). [Hereinafter the initial decision will be referred to as *Calumet I* and the decision on rehearing will be called *Calumet II*.]

⁹ Section 8(b)(4) provides: "It shall be an unfair labor practice for a labor organization or its agents . . . (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . . (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9." 29 U.S.C. § 158(b)(4) (1964).

¹⁰ 130 N.L.R.B. at 81-82.

one, and not the sole or primary, object of the picketing,¹¹ the Board reasoned:

While, clearly, no express demand for recognition or bargaining was made, it is equally clear that one of the objects of . . . picketing was to force [the employer] to meet the "prevailing rate of pay and conditions" for the area. It is well established that a union's picketing for prevailing rates of pay and conditions of employment constitutes an attempt to obtain conditions and concessions normally resulting from collective bargaining, and constitutes an attempt by the union to force itself on employees as their bargaining agent.¹²

The union's disclaimer of any recognitional objective was held to be an inadequate defense, since, in the Board's view, the picketing union's ultimate end was to become the certified bargaining agent of the employees. Pursuant to the union's request for consideration of its contentions by the entire Board, a differently-constituted Board¹³ reversed *Calumet I* in a 3-2 decision (*Calumet II*).¹⁴ While implicitly agreeing that the presence of any recognitional purpose would subject the picketing to section 8(b)(4)(C) proscriptions, the Board held that picketing solely for area standards was not recognitional in character, provided its present purpose was not to secure a contract:

A union may legitimately be concerned that a particular employer is undermining area standards of employment by maintaining lower standards. It may be willing to forgo recognition and bargaining provided subnormal working conditions are eliminated from area considerations. We are of the opinion that Section 8(b)(4)(C) does not forbid such an objective.¹⁵

The advent of section 8(b)(7)(C). While the *Calumet* cases were developing, Congress added section 8 (b) (7)¹⁶ to the NLRA in response to disclosures by an investigating committee that the picket line had occasionally been used to coerce employees in the selection or acceptance of

¹¹ *Id.* at 82. For an identical Supreme Court interpretation see *NLRB v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 688-89 (1951), a case arising under subsection (A) of § 8(b)(4) of the NLRA.

¹² 130 N.L.R.B. at 81-82.

¹³ In 1962 President Kennedy appointed members McCulloch and Brown to fill two vacancies on the Board. With this change, members Leedom and Rodgers, who were part of the majority under the Eisenhower Board, became the minority. It should be noted that most of the subsequent decisions in this area have been by a 3-2 majority of the Board. *See, e.g.*, *Hod Carriers Local 107*, 138 N.L.R.B. 102 (1962); *Local 741, Plumbing Journeymen*, 137 N.L.R.B. 1125 (1962); *Houston Bldg. & Constr. Trades Council*, 136 N.L.R.B. 321 (1962).

¹⁴ *Hod Carriers Local 41*, 133 N.L.R.B. 512 (1961).

¹⁵ *Id.*

¹⁶ 29 U.S.C. § 401 (1964). See note 2 *supra*.

their collective bargaining representative.¹⁷ The newly-added provision made picketing, an object of which is recognition or organization, an unfair labor practice if one of three factual conditions were present.¹⁸ Thus, in an enterprise in which an employee representative has been lawfully recognized, subsection (A) precludes another union from picketing, apparently to provide the employer and incumbent union an unrestrained atmosphere in which to establish a structure for expression of employee desires. Further, if the employer's present union contract falls within the NLRB's contract bar rules,¹⁹ subsection (A) will prohibit picketing. That subsection thus fills the void left by section 8(b)(4)(C), which did not deal with the problem of organizational picketing²⁰ but prohibited recognitional picketing only when another union had been certified.²¹ Subsection (B) prohibits organizational or recognitional picketing for a twelve-month period subsequent to an expression of the employees' views in a valid representational election, regardless of its outcome.²² The purpose of that subsection is to secure a limited period of industrial peace and stability and to protect the integrity of the Board's election machinery.²³ Finally, subsection (C) augments the above prohibitions by restricting recognitional or organizational picketing in situations other than those described in subsection (A) and (B) to a "reasonable period" not to exceed thirty days, unless an election petition has been filed within that period.²⁴ In addition to excepting recognitional-organizational picketing from the statute's prohibition if an election petition is on file, Congress added a second proviso to subsection(C)²⁵ in the House-Senate Conference Committee.²⁶

¹⁷See 1 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 470-74 (1959) (minority report).

¹⁸See note 4 *supra*.

¹⁹For a discussion of the definition and purpose of the contract bar rules see Aaron, *supra* note 2, at 1101, and Meltzer, *supra* note 1, at 82.

²⁰See note 5 *supra* for an explanation of the recognitional-organizational distinction.

²¹See Hod Carriers Local 840, 135 N.L.R.B. 1153, 1156 & n.5 (1962) (dictum); note 19 *supra*.

²²Local 130, Painters, 135 N.L.R.B. 876 (1962).

²³See Aaron, *supra* note 2, at 1103-06; Meltzer, *supra* note 1, at 82.

²⁴Section 9(c) of the NLRA provides that the petition for an election may be filed by the employees, employer, or union. Once the petition is filed within the 30 day period, the proscription of § 8(b)(7)(C) becomes inoperative.

²⁵29 U.S.C. § 158(b)(7)(C) (reproduced in note 4 *supra*).

²⁶See 2 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1431-32 (1959).

This exception, applicable only to subsection (C),²⁷ legitimizes picketing or other publicity for the purpose of truthfully advising the public that an employer is employing non-union laborers.²⁸ If, however, such picketing induces secondary interferences with the picketed employer's operation, such as causing third parties to refuse to deliver goods to or perform services for the picketed employer, the second proviso's legal protection is withdrawn.²⁹

Area standards picketing under section 8(b)(7)(C). Passage of section 8(b)(7)(C) presented to the Board the issue of whether area standards picketing was "recognitional" within the meaning of the new enactment.³⁰ Under the Board's prior *Calumet* decisions, two conflicting definitions of recognition were available. On the one hand, by following the definition of "recognition" of *Calumet II*, the Board could have incorporated into section 8(b)(7)(C) the distinction between the ultimate purpose of organizing all employees, which is non-recognitional, and the present purpose of securing a contract, which is prohibited. True area

²⁷ In several early cases under § 8(b)(7), when it was apparent that the union had violated either subsection (A) or (B), the union would attempt to avoid a finding against it by contending that the picketing was informational and therefore protected under the second proviso of subsection (C). However, the Board and courts have refused this defense, since the proviso explicitly states that it applies only to subsection (C). *Keenedy v. Joint Exec. Bd. of Hotel Employees*, 192 F. Supp. 339 (S.D. Cal. 1961) (section 8(b)(7)(B)); *Local 1199, Drug Employees*, 136 N.L.R.B. 1564 (1962) (section 8(b)(7)(A)).

²⁸ See *Hod Carriers Local 840*, 135 N.L.R.B. 1153, 1158-59 & n.11 (1962).

²⁹ The Board has held that minor interference with the employer's deliveries caused by informational picketing under the second proviso to § 8(b)(7)(C) is not sufficient to destroy that exemption. *E.g.*, *Retail Clerks Local 1404*, 140 N.L.R.B. 1344 (1963) (three insignificant delivery delays); *Retail Clerks Local 57*, 138 N.L.R.B. 498 (1962) (two minor service stoppages); *Retail Clerks Local 324*, 138 N.L.R.B. 478 (1962), *aff'd sub nom. Barker Bros. v. NLRB*, 328 F.2d 431 (9th Cir. 1964) (delay of several deliveries and refusal of three truck drivers to cross the picket line). However, in *Waiters Local 500*, 138 N.L.R.B. 470 (1962), where all liquor supplies to the employer's restaurant were halted for two and one half months by a refusal of truck drivers to cross an informational picket line, the Board held that a sufficient impact was exhibited to result in a violation of the secondary effects clause of the second proviso of § 8(b)(7)(C). *Accord*, *Local 429, IBEW*, 138 N.L.R.B. 460 (1962) (two subcontractors refused to cross a picket line for three weeks). The Board's decisions under the secondary effects clause seem to accept that some interruptions will always occur whenever a picket line is erected and that such minor secondary effects are the cost inherent in permitting picketing. However, if these costs increase so as to outweigh the true purpose of picketing, the Board will apply the secondary effects clause against the union.

³⁰ See generally Meltzer, *supra* note 1, at 92; Comment, *Appeals to the Consumer: The Remaining Area of Permissible Organizational Picketing Under Section 8(b)(7)*, 9 U.C.L.A.L. REV. 666 (1962).

standards picketing would fall outside the purview of the statute since the Board found in *Calumet II* that such activity had no present purpose of securing a contract.³¹ On the other hand, the rationale of *Calumet I* and the emphatic dissent of *Calumet II* that all picketing has some recognitional objective could have been revived. Even if the Board had declared area standards picketing to be recognitional per se under such a definition, however, such activity might still have been found to comport with the spirit of the second proviso to section 8(b)(7)(C) as picketing designed to inform the public of the non-union nature of the enterprise.³²

The issue of the meaning of "recognition" was presented to the Board in *Houston Building & Construction Trades Council* [hereinafter referred to as *Claude Everett*].³³ After first learning that the non-union employer's wages were lower than the union rate, the union in that case picketed in excess of thirty days, utilizing picket signs disclaiming any recognitional objective but publicizing the fact of substandard wages.³⁴ A majority of the Board chose to rely upon *Calumet II*,³⁵ holding that picketing solely for area standards where the *present* purpose of the union was not to secure a contract had neither an organizational nor a recognitional objective.³⁶ Although *Calumet II* was decided under section 8(b)(4)(C), which proscribes only recognitional picketing, *Claude Everett* arose under the section 8(b)(7)(C) prohibition of organizational as well as recognitional

³¹ The adoption of the view that area standards picketing is non-recognitional seems to leave unanswered the relevance of § 8(b)(7)(C)'s second proviso, which was apparently intended to exclude informational picketing from the statute's general proscription. Furthermore, if the second proviso has no substantive effect, the "secondary effects" exception to this proviso cannot be applied to invalidate a demand for area conformity. The result is that once the Board has denominated area standards picketing as non-recognitional, and therefore outside the prohibition of § 8(b)(7)(C), the seemingly intended limitation imposed on such picket lines by the "secondary effects" clause is lost. See *Hod Carriers Local 107*, 138 N.L.R.B. 102, 103 (1962) (picketing found to be bona fide area standards; the Board noted that the employer's deliveries and services were interrupted but found this fact immaterial); *Houston Bldg. & Constr. Trades Council*, 136 N.L.R.B. 321, 324 (1962) (same). See generally *Crowley*, *supra* note 7, at 308-19.

³² Of course, area standards picketing which induced stoppages in delivery would violate the "secondary effects" exception to the second proviso, and would therefore lose its protection. *But see* note 31 *supra*.

³³ 136 N.L.R.B. 321 (1962).

³⁴ The language used on the sign was as follows: "Houston Building and Construction Trades Council, AFL-CIO protests substandard wages and conditions being paid on this job by Claude Everett Company. Houston Building and Construction Trades Council does not intend by this picket line to induce or encourage the employees of any other employer to engage in a strike or a concerted refusal to work." *Id.* at 322.

³⁵ *Hod Carriers Local 41*, 133 N.L.R.B. 512 (1961).

³⁶ 136 N.L.R.B. at 323.

picketing. Nevertheless, the majority maintained that the "recognitional" language of both sections was similar and that the rationale for permitting area standards picketing under section 8(b)(4)(C) was equally appropriate to such activity under section 8(b)(7)(C).³⁷ However, Members Leedom and Rodgers vigorously rejected the majority's present purpose/ultimate purpose distinction, contending that any picketing to raise wages or to protest present working conditions was recognitional per se and, therefore, an unfair labor practice under the statute.³⁸

Apparently because of the equivocation in the Board's evaluation³⁹ and the absence of definitive judicial review of the issues raised by the Board's current position, the acceptability of area standards picketing is not yet finalized. Those who desire continuation of the present administrative interpretation contend that a union may justifiably seek area conformity in order to preserve gains it has achieved in other operations. Since the unionization of an enterprise may result in higher production costs through increased wages, added fringe benefits, or shorter working hours, the unionized employer often finds himself at a disadvantage in competing with unorganized producers.⁴⁰ Should such detriment be substantial, the unionized employer may demand that his employees' representative either relinquish previous gains or face a severe or total contraction of the operation.⁴¹ To prevent the consequent threat to the job security of union members, the union could, of course, attempt to organize the remainder of

³⁷ *Id.*

³⁸ *Id.* at 324-26.

³⁹ See note 13 *supra*.

⁴⁰ See Retail Clerks Local 899, B.N.A. DAILY LABOR REPORT No. 142 (166 N.L.R.B. No. 92), at D-2 (July 24, 1967); Cox, *supra* note 2, at 265-67.

⁴¹ The potential impact of compensation disparity among competitors in a context analogous to picketing for area standards was adequately illustrated by Mr. Justice Brandeis' dissent in Duplex Printing Press Co. v. Deering, 254 U.S. 443, 479-80 (1921): "The defendants admit interference with plaintiff's business but justify on the following ground: There are in the United States only four manufacturers of such presses; and they are in active competition. Between 1909 and 1913 the machinists' union induced three of them to recognize and deal with the union, to grant the eight-hour day, to establish a minimum wage scale and to comply with other union requirements. The fourth, the Duplex Company, refused to recognize the union; insisted upon conducting its factory on the open shop principle; refused to introduce the eight-hour day and operated for the most part, ten hours a day; refused to establish a minimum wage scale; and disregarded other union standards. Thereupon two of the three manufacturers who had assented to union conditions, notified the union that they should be obliged to terminate their agreements with it unless their competitor, the Duplex Company, also entered into the agreement with the union, which, in giving more favorable terms to labor, imposed correspondingly greater burdens upon the employer."

the industry. Yet, such an undertaking requires an enormous commitment of both personnel and finances and may, in fact, be met by strong employee resistance in some unorganized enterprises. Further, because the competitive injury to unionized employers would probably become critical before industry-wide organization was achieved, a provisional measure is needed in order to insure the effective functioning of existing unionization. Area standards picketing for equalization of labor costs throughout the industry offers such an immediate preventive remedy.⁴² The potential disregard of the desires of employees in picketed shops is apparently felt to be justified by the protection afforded the interests of other employees who are members of the picketing union.

Those resisting use of the picket line to coerce area conformity assert that allowance of the exception undermines several statutory policies. With continuing insistence that all picketing for improved wages or working conditions is recognitional in nature,⁴³ the opponents view the Board's present/ultimate purpose distinction as a mere conclusory gloss which disregards the legislative intent underlying section 8(b)(7).⁴⁴ That section seems to reflect explicit congressional recognition of the undesirability of industrial disruption caused by public solicitation of an employer's acquiescence to a union's demands. Further, as implied by the *Claude Everett* dissenters, area standards picketing, in effect, seeks the benefits of collective bargaining without compliance with statutory directives.⁴⁵ Not only does the coerciveness of the picket line bypass the NLRA's establishment of initial uninhibited negotiation meetings between an employer and the union,⁴⁶ but also the employer is pressured to make concessions to a labor organization which usually has not conformed to the prescribed modes for gaining recognition.⁴⁷ In essence, the "take it or leave it" nature of a request for area conformity seems to negate statutory attempts to encourage settlements of disputes over compensation and the conditions of employment in an atmosphere of unthreatening interchange.⁴⁸

The validity of the area standards exception has been further disputed because the subjective nature of a proscribed recognitional purpose allows it

⁴² See *Local 741, Plumbing Journeymen*, 137 N.L.R.B. 1125, 1127 (1962).

⁴³ See, e.g., *Cox*, *supra* note 2, at 267.

⁴⁴ See, e.g., *Meltzer*, *supra* note 1, at 90-91.

⁴⁵ *Houston Bldg. & Constr. Trades Council*, 136 N.L.R.B. 321, 324 (1962) (members *Rodgers* and *Leedom* dissenting).

⁴⁶ See *National Labor Relations Act* § 8(d), 29 U.S.C. § 158(d) (1964).

⁴⁷ See *id.* § 159.

⁴⁸ See, e.g., *Local 741, Plumbing Journeymen*, 137 N.L.R.B. 1125, 1131 (1962) (members *Rodgers* and *Leedom* dissenting in part); *Meltzer*, *supra* note 1, at 94.

to be easily disguised in verbalizations of an area conformity objective.⁴⁹ Thus, picketing with a motivation which has been clearly prohibited by section 8(b)(7) could readily be clothed with slogans and actions so as to secure a favorable judgment under the present/ultimate purpose criterion. In addition, commentators have noted that the NLRB's already heavily-burdened investigative and hearing staffs must undertake an additional, prodigious administrative task to verify that an asserted area standards package is properly composed.⁵⁰ Besides being required to synthesize the various wage and fringe structures prevailing in unionized operations in a locale, the staffs may find it necessary to compare such protean attributes as skill and efficiency to insure that any wage disparity is not otherwise justifiable as a reflection of the quality of the performance of non-union workmen.⁵¹

FACTORS DETERMINATIVE OF RECOGNITIONAL INTENT

Subsequent to its endorsement of the area standards exception, the Board has offered several distinctions which clarify the threshold question of the indicia of a prohibited recognitional or organizational purpose. While proof that the picketing has some recognitional objective will bring it within the proscription of section 8(b)(7)(C), it is apparent that no one specific act is controlling. Rather the Board looks to the totality of the circumstances, with particular emphasis upon activities typically accompanying a union's desire to secure a contract. Once the determination is made that the picketing is a bona fide request for area conformity, the Board's practice has been to discontinue its investigation and not to pursue the more subtle issue of whether in fact area standards picketing is justified.

The factual situations of decisions upholding area standards picketing generally follow a similar pattern.⁵² The union's inquiries about an employer's wage scale disclose that it is below the union standard. By letter or personal contact, the employer is informed that unless he conforms to the wage scale for the locale, a picket line will be erected. When the employer ignores this ultimatum, a picket line is formed with signs proclaiming the union's desire for parity of area standards, but not for recognition. If nothing more is done, the union will probably not be deemed to have committed any unfair labor practice under the NLRA.

⁴⁹ See Cox, *supra* note 2, at 267; Meltzer, *supra* note 1, at 91.

⁵⁰ See, e.g., Meltzer, *supra* note 1, at 92.

⁵¹ See notes 95-98 *infra* and accompanying text.

⁵² See, e.g., Hod Carriers Local 107, 138 N.L.R.B. 102 (1962); Local 741, Plumbing Journeymen, 137 N.L.R.B. 1125 (1962); Houston Bldg. & Constr. Trades Council, 136 N.L.R.B. 321 (1962); Note, 38 TEMP. L.Q. 433, 435 (1965).

Slight deviations from such acceptable conduct will frequently be deemed to indicate a present recognitional or organizational objective and, thus, result in a union violation of section 8(b)(7)(C). The determination of the presence of a prohibited purpose is significantly affected by the extent to which the picketing accompanies solicitations of employees of the picketed business. In *Local 741, Plumbing Journeymen*⁵³ an employee testified that several weeks prior to the erection of an area standards picket line, an attempt was made to persuade him to join the union. These allegations were denied by the union, but due to the stipulation of facts, the trial examiner did not pass on the parties' credibility. The Board, however, did state that even if the employee's testimony was correct, a proscribed purpose on the part of the union would not have been established since an isolated solicitation did not indicate the requisite concerted organizational effort. Furthermore, the fact that several employees joined the union after the initiation of the picketing was dismissed as merely coincidental. In *Window Cleaners Local 125*⁵⁴ the Board rejected the union's contention that it was engaged in informational picketing excepted under the second proviso to section 8(b)(7)(C), finding instead that the picketing was organizational and, thus, within the general prohibitions of section 8(b)(7)(C). The granting of the employer's plea rested mainly on evidence that the union's picket signs and handbills were aimed primarily at the employees and that the union moved its picket line to correspond with a relocation of the employees' entrance.

The most detrimental conduct for a union to pursue is to request a contract after area standards picketing has begun, for such a demand has been viewed as an affirmative indication that the true character of the picketing was recognitional. In *Plasterers' Local 44*,⁵⁵ the employer, a subcontractor on a building project, utilized non-union laborers. After local unions erected an area standards picket line,⁵⁶ a union official stated in a telephone conversation with the employer that the union sought to represent the unorganized employees and, moreover, that the union wanted a contract.⁵⁷ In this factual situation, the Board had little trouble concluding

⁵³ 137 N.L.R.B. 1125 (1962).

⁵⁴ 136 N.L.R.B. 1104 (1962); *accord*, *Local 1205, Teamsters*, 62 L.R.R.M. 1443 (NLRB 1966), *enforced sub nom. NLRB v. District Council of Carpenters*, 387 F.2d 170 (2d Cir. 1967).

⁵⁵ 144 N.L.R.B. 1298 (1963).

⁵⁶ The picket signs stated: "Penny Construction Company, Inc., is breaking down wage scales and working conditions established by O.P. & C.M.I.A. Local Union No. 44, AFL-CIO." *Id.* at 1299.

⁵⁷ *Id.* at 1300.

that an object of the picketing, regardless of disclaimers to the contrary, was recognitional and therefore prohibited under section 8(b)(7)(C).⁵⁸ In contrast to the solicitation of a contract after the picketing began, the mere request for an agreement prior to the erection of an area standards picket line is generally not considered fatal.⁵⁹ If the union's request is refused, however, and the employer is then threatened with a picket line, this attempted coercion is sufficient to establish recognitional intent. Thus, in *Butchers' Local 120*⁶⁰ an employer's refusal to sign a union contract was met by the threat of a union representative that he "could make things unpleasant for the employer."⁶¹ An alleged area standards picket line subsequently appeared.⁶² On these facts the Board held the picketing to be recognitional.⁶³ Furthermore, the erection of a picket line without a prior determination of the economic remuneration being paid by the picketed employer has usually been found to indicate a present organizational purpose.⁶⁴ Although this inconsistent course of action is not determinative, it does make any area standards picketing argument appear absurd, since without knowledge of what the picketed employer is paying, the essential comparison of his rates with those prevailing in the locale cannot be made.

In several situations, the Board has considered the content of picket signs and the actions of the picketers as factors indicative of the purpose of the picketing. In *Building & Construction Trades Council*⁶⁵ the employer began construction on a motel, intending to utilize union and non-union subcontractors. After he refused to acquiesce in the union's request that only union subcontractors be employed, a picket line protesting substandard working conditions appeared. The union engaged in mass picketing, the picketers used abusive language, accosted non-union subcontractors, and assaulted the picketed employer's men.⁶⁶ In view of these actions, the Board affirmed the trial examiner's finding that the picketing violated section 8(b)(7)(C). In addition to overt behavior, the Board may also consider

⁵⁸ *Accord*, IBEW Local 113, 142 N.L.R.B. 1418 (1963); *cf* Lodge 1492, IAM, 139 N.L.R.B. 1477 (1962) (section 8(b)(7)(B) case).

⁵⁹ Hod Carriers Local 107, 138 N.L.R.B. 102 (1962). *But see* Local 113, IBEW, 142 N.L.R.B. 1418 (1963).

⁶⁰ 63 L.R.R.M. 1156 (NLRB 1966).

⁶¹ *Id.*

⁶² The legend on the picket sign stated: "[The employer provides] wages and working conditions for employees below prevailing standards established . . ." *Id.*

⁶³ *Id.* at 1157; *cf.* Asbestos Workers Local 16, 64 L.R.R.M. 1399 (NLRB 1967).

⁶⁴ Carpenters Local 2133, 151 N.L.R.B. 1378, 1382 (1965); Construction Laborers Local 1207, 141 N.L.R.B. 283, 284 (1963).

⁶⁵ 149 N.L.R.B. 1629 (1964), *aff'd*, 359 F.2d 62 (3d Cir. 1966) (*per curiam*).

⁶⁶ *Id.* at 1638-41 (trial examiner's report).

the content of picket line literature⁶⁷ and statements made by individual picketers concerning the purpose of their activity.⁶⁸ While either form of assertion is not conclusive, they may constitute additional evidence suggesting a present recognitional purpose. However, inconsistency between representations on picket signs and acceptable picketing objectives has, in certain situations, played a significant role in resolution of the issue of the union's purpose.⁶⁹ Thus in one Board decision, unlawful activity was found when the picketer's placards failed to mention area standards but simply stated that the employer did not have a contract with the particular picketing union.⁷⁰

Apparently on the assumption that a labor organization either would or could not garner support for a well-manned, twenty-four hour picket line if the union anticipated no significant increase in dues and membership as a result of its efforts, the Board's General Counsel has argued that constant and determined picketing should support an inference that an objective

⁶⁷ The language of the picket signs in the following cases was found not to indicate a recognitional objective, in the absence of threats or coercion by the union: Knapp v. IBEW Local 953, 50 CCH Lab. Cas. 32,827 (W.D. Wis. 1964) ("Our only dispute is with the substandard benefits paid by Erickson. Employees of Erickson Electric receive substandard benefits"); Cosentino v. Carpenters Dist. Council, 200 F. Supp. 112 (E.D. Mo. 1961) ("Notice to the public! Vestaglas, Inc. employees do not belong to AFL-CIO and have sub-standard wages and working conditions . . ."); Hod Carriers Local 107, 138 N.L.R.B. 102 (1962) ("Texarkana Construction Co. not paying prevailing wage rate"); Local 741, Plumbing Journeymen, 137 N.L.R.B. 1125 (1962) ("Keith Riggs Plb. unfair to Plumbers Local 741 sub-standard wages & working conditions").

⁶⁸ Cf. Local 130, Painters, 135 N.L.R.B. 876 (1962) (arising under section 8(b)(7)(B)). In that case the picketer stated: "We want him [employer] to sign a contract and pay the scale and work some of our men." Later he remarked, "Well, we just can't get him to sign up with the Union." *Id.* at 877.

⁶⁹ See Construction Laborers Local 1207, 141 N.L.R.B. 283, 285 n.7 (1963) (picket sign stated that the employer "does not recognize or have a contract with Laborer's Local 1207"); cf. Local 130, Painters, 135 N.L.R.B. 876, 877 (1962) (section 8(b)(7)(B) case; sign stated: "C.P. Joiner, Inc. . . . does not . . . have a contract with Painters Local 130").

⁷⁰ In Construction Laborers Local 1207, 141 N.L.R.B. 283 (1963), the picket sign originally stated: "[Employer] does not recognize or have a contract with Laborer's Local 1207." This legend was later changed to read: "Austin Construction Company lowering wages & working conditions negotiated by Laborers Local 1207." *Id.* at 285 n.7. The Board in commenting on these signs stated that the initial sign "clearly disclosed a recognition purpose in its text." *Id.* at 284-85. The Board did not mention the second proviso to § 8(b)(7)(C), the literal language of which would seem to exempt the original sign from the statute's proscription. See notes 4, 27 & 31 *supra* and accompanying text.

broader than mere enforcement of area standards is sought.⁷¹ Such an assertion may appear tenable, for in many situations a union's demand for conformity to area standards would undermine its attempts to organize in a particular locality. If, in response to an area standards picket line, an employer did extend to his employees economic benefits equivalent to those received in similar unionized operations, the union could no longer use wage disparity as an indication to the non-unionized employees of their need for a bargaining representative. Those supporting the General Counsel's view might argue that because of the potential dissipation of its organizational tools, a union may not commit its finances and manpower as willingly to an area standards picket line as to a recognitional effort. The defect in this rationale is probably its imparting of unrealistic subtleties to union leadership. It is more reasonably concluded that the directors of the labor organization may recognize that, in addition to preserving gains achieved in unionized operations,⁷² their ability to force wage equalization will impress upon the non-unionized employees the value of collectivization, thereby rendering them more receptive to a subsequent organizational campaign. However, in rejecting the General Counsel's contentions, the Board has adopted a perceptive analysis: If the objective of the picketing is lawful, "a vigorous pursuit" of that goal should not negate its validity, absent significant disruption of the local peace.⁷³ Thus once it determines the "lawfulness" of a picket line, the Board will not attempt to deduce the picketers' motivation from the intensity of their undertaking or from the effectiveness of their obstruction. Since under the Board's current interpretation section 8(b)(7) prohibits only *present* recognitional picketing,⁷⁴ and since a union's desire for enhanced future status with unorganized employees could readily be classified as an ultimate recognitional purpose, precedential support can be found for the Board's position.

THE COMPONENTS OF THE AREA STANDARDS PACKAGE

Early in the development of the area standards exception to the picketing proscription of section 8(b)(7), commentators concluded that a

⁷¹ See Retail Clerks Local 899, B.N.A. DAILY LABOR REPORT NO. 142 (166 N.L.R.B. No. 92), at D-2 (July 24, 1967).

⁷² See notes 40-42 *supra* and accompanying text.

⁷³ The Board summarily affirmed the trial examiner's decision in Retail Clerks Local 899, B.N.A. DAILY LABOR REPORT NO. 142 (166 N.L.R.B. No. 92), at D-2 (July 24, 1967).

⁷⁴ See note 36 *supra* and accompanying text.

recognitional purpose could easily be effectuated under the guise of a demand for adherence to prevailing wage rates.⁷⁵ Rather than retarding the growth of the exception and thereby limiting the necessity for dissecting such difficult questions as credibility and subjective motivation, the Board, in its continued protection of a union's right to demand area conformity, has presented some criteria for separating recognitional from area standards pickets. Perhaps because of its preoccupation with the recurrence of prohibited activity masked as area standards picketing, the Board has not yet offered definitive analysis of the elements with which protected picketing must comply. A preliminary step to such definition came in the Board's summary acceptance of the trial examiner's conclusions in *Retail Clerks Local 889*.⁷⁶ In that case, the union, while apparently neither making express demands for recognition nor phrasing picket line literature to indicate such an objective, presented to the non-unionized employer copies of contracts obtained in other similar operations,⁷⁷ assertedly for the purpose of illustrating prevailing wage packages. The trial examiner found, however, that the union's failure to delete from the contracts such items as seniority and grievance procedures was indicative of a purpose broader than mere attainment of area conformity, when placed against the background of the union's generally-stated demand for benefit equivalency.⁷⁸ Noting that the

⁷⁵ See Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 267 (1959); Meltzer, *Organizational Picketing and the NLRB: Five On a Seesaw*, 30 U. CHI. L. REV. 78, 91 (1960).

⁷⁶ 65 L.R.R.M. 1666 (NLRB 1967). A synopsis of the trial examiner's conclusions is presented in 1967 CCH NLRB Dec. 28,311.

⁷⁷ A union's presentation to a picketed employer of copies of contracts secured in other plants may no longer be an advisable method of establishing the prevailing wage-fringe package, since the inference might be drawn from this action that the union was in effect demanding conformity to specific items, a request proscribed by the trial examiner in *Retail Clerks* as unduly restricting a non-unionized employer's discretion to dictate the form of compensation of his employees. See notes 88-89 *infra* and accompanying text. Future applications of this rationale might find objectionable a demand for industry-wide wage rates for particular job classifications. If the justification of an area standards picket line is a unionized employer's inability to compete in the common product market with a non-unionized enterprise, it would appear that a labor organization could object only to a difference in the two employers' total labor costs per unit of production, as this factor is most directly related to the market price assigned the respective products. Higher compensation of some union employees performing functions identical to those undertaken by lower-paid non-union workmen might be offset by more favorable pay to other non-union job classifications. Consequently, the non-unionized employer's discretion to determine the method of compensation within his enterprise would seem to permit a refusal to follow industry wage patterns for particular work assignments.

⁷⁸ B.N.A. DAILY LABOR REPORT No. 142 (166 N.L.R.B. No. 92), at D-3 (July 24, 1967).

justification for area standards picketing is the prevention of competitive disadvantage to the union employer attributable to benefits received by the labor representative, the examiner found the appropriate comparative unit to be total economic cost packages offered by the unionized and non-unionized employers. This standard encompasses wages as well as economic fringe benefits such as pension and health plans.⁷⁹

By excluding seniority and grievance procedures from the comparative unit, the *Retail Clerks* decision solidifies a significant, though predictable, limitation upon the permissible scope of a union's claim that concessions made to it by a unionized employer are injurious to the latter's competitive position. Although the organized employer's establishment of an employee grievance procedure may increase that employer's cost by necessitating that its representative be compensated for time spent in grievance meetings, or that it bear a portion of an arbitrator's fees, the criteria presented by *Retail Clerks* to determine disadvantage permits consideration of only those items substantially related to the immediate economic benefit of employees. The trial examiner's grouping of "provisions concerning seniority, grievances, and other non-cost items ordinarily associated with an established collective bargaining relationship"⁸⁰ is apparently based on a widely accepted distinction between provisions governing compensation and those dealing with working conditions or job security. The Board's adoption of the examiner's decision perpetuates the loose and unwritten categorization found in collective bargaining practice,⁸¹ thereby utilizing customary contract items as guides for a union attempting to ascertain an unorganized employer's conformity to area standards.⁸²

⁷⁹ *Id.* at D-3 to -4.

⁸⁰ *Id.* at D-3.

⁸¹ "Those collective bargaining matters which have direct and measurable cost consequences, e.g., wage rates, paid vacations, pensions, etc., are commonly referred to as economic issues; those whose costs cannot be directly computed, e.g., seniority provisions, no-strike and no-lockout clauses, management rights clauses, etc., are referred to as non-economic issues. It must be kept in mind that this division is one of expediency and convenience rather than of accuracy." S. TORFF, *COLLECTIVE BARGAINING* 45 n.11 (1953).

⁸² While the components of an economic package have been traditionally isolated on the basis of their direct enhancement of an employee's financial position, it might be argued that some economic benefits also relate directly to improvement of working conditions. For example, while pay for holidays not worked is of a compensatory nature, bargaining representatives seeking this benefit argue chiefly that social tradition justifies such a reprieve and that it should be provided without the employee's having to disrupt his financial planning. The granting of holiday pay might thus be viewed as an improvement of the totality of conditions affecting the employee's work. Most

Yet, Board litigation has not definitively discussed the consequence to an otherwise properly motivated labor organization which inadvertently or negligently includes improper items in the economic package to which conformity is demanded. Commentators indicate, however, that the exception from statutory proscriptions for area standards picketing should be strictly limited.⁸³ Thus, an over-inclusion of items in the comparative package at least tends to show a recognitional purpose.⁸⁴ Indeed, the need for restricting use of the picket line to situations clearly evidencing the absence of prohibited purpose may suggest that any improperly composed package should be *presumed* to show a broader motivation than mere achievement of area conformity. The decision in *Retail Clerks* lends implied support to this conclusion, for the trial examiner noted the absence of overt expression of recognitional intent and specifically premised his finding of the proscribed motivation on the union's failure to delete improper items from its delineation of prevailing standards. While the *Retail Clerks* decision cannot be said to hold that the mistaken inclusion of one or two non-economic items in a comparative package would give rise to a presumption of recognitional purpose,⁸⁵ the clear import of the opinion is, however, that administrative review will result in close scrutiny of the preciseness with which a union attempts to limit its demands to items having a *direct* effect upon an employer's labor costs.

Under the *Retail Clerks* analysis, a union seeking to force economic uniformity upon unorganized employers may also indicate a prohibited recognitional objective by the specificity of its comparative *economic* demands. One of the most consistent objections raised to the area standards exception is that through its application a labor organization may force conformity to union compensation patterns without having afforded picketed employers an opportunity to subject the proposals to negotiations.⁸⁶ In

authorities, however, classify holiday pay as part of the economic package. *See, e.g., S. TORFF, supra* note 81, at 45-46.

⁸³ *See, e.g., Cox, supra* note 75, at 267; Aaron, *The Labor-Management Reporting and Disclosure Act of 1959* (pt. II), 73 HARV. L. REV. 1086, 1105-06 (1960).

⁸⁴ *See, e.g., Retail Clerks Local 899, B.N.A. DAILY LABOR REPORT* No. 142 (166 N.L.R.B. No. 92) (July 24, 1967).

⁸⁵ *Retail Clerks* would not fully support a presumption of recognitional purpose when only a few non-economic benefits are included in a comparative package, for the union in that case demanded conformity to *all* non-economic items encompassed by its contracts with other employers. The blatancy of the over-inclusion apparently precluded a determination that it had been inadvertent. *See B.N.A. DAILY LABOR REPORT* No. 142 (166 N.L.R.B. No. 92), at D-3 (July 24, 1967).

⁸⁶ *See, e.g., Meltzer, supra* note 75, at 94. In fact, a union which did undertake

several decisions the Board had apparently assumed that this attempted imposition of a ready-made wage and fringe schedule was an acceptable means for rectifying substandard compensation programs in non-unionized operations.⁸⁷ Nonetheless, the Board's adoption of the trial examiner's findings in *Retail Clerks* may presage a reversal of its previous position, for the examiner concluded that a recognitional purpose can be presumed when a labor representative seeks to compel a non-union employer to provide his employees benefits equivalent in form to those secured by the union from other employers.⁸⁸ In the examiner's view, division of the cost package should be within the province of the picketed employer since the area standards exception should not license a union without majority status to specify the form of employee compensation. Such a limitation is consistent with the justification that area standards picketing insures only the competitiveness of unionized enterprises as against picketed employees. Because equivalency of specific benefits is unnecessary to preserve the unionized employer's market position, a demand for equation of specific benefits may reasonably be said to reflect a motivation other than preservation of gains achieved in other operations. Furthermore, without such a limitation on the form of the request for conformity, the NLRA provisions governing collective bargaining procedures would be easily

to negotiate with an employer while assertedly picketing for area standards is more readily deemed to have a recognitional objective, for restoration of the competitive positions of unionized employers—the only acceptable motivation for a demand for area conformity—could be achieved without resort to negotiation. Further, seeking bilateral review of the compensation structure in a non-union enterprise closely resembles a request that the employer accept a contract with the picketing union, a demand consistently found to be beyond the permissible scope of the area standards exception. *See, e.g., Plasterers' Local 44*, 144 N.L.R.B. 1298 (1963).

⁸⁷ The Board's view, prior to *Retail Clerks*, of the appropriate form of a request for area conformity may be inferred from its assertion, in *Local 741, Plumbing Journeymen*, 137 N.L.R.B. 1125, 1125-26 (1962) (emphasis added): "A labor union normally seeks to organize the unorganized and to negotiate collective-bargaining contracts with employers; but it also has a legitimate interest apart from organization or recognition that employers meet *prevailing pay scales and employee benefits*, for otherwise employers paying less than the prevailing wage scale would ultimately undermine the area standards. . . ."

"Hence, if a union pickets and says to an employer, 'We only want you to pay the *prevailing wage scale*, but don't want to bargain with you or organize your employees', and there is no independent evidence to controvert this statement of objective the Board cannot find that the picketing has organization, recognition, or bargaining objectives."

⁸⁸ *See B.N.A. DAILY LABOR REPORT* No. 142 (166 N.L.R.B. No. 92), at D-3 (July 24, 1967).

subverted: Not only would an unauthorized representative be allowed to submit demands but also the coercion of the picket line would destroy the atmosphere for uninhibited interchange of proposals to which an employer is initially entitled under the Act.⁸⁹ Conversely, permitting the area standards picket line to request conformity only to the prevailing undivided economic package presents a reasonable avenue through which a unionized employer's disadvantageous competitive status can be ameliorated without undermining the discretion of a non-unionized employer to dictate the system for his employees' compensation.

Although the *Retail Clerks* limitation that only contract items directly related to labor costs be considered provides a convenient and understandable guide, a satisfactory explanation of the policy which compels inclusion of *only* such economic factors in the comparative basis is lacking. Since the Board deems it proper for a union to seek preservation of its collective bargaining gains through picketing to eliminate competitive disadvantage caused by increased labor costs due to unionization, it might seem that the labor representative could reasonably raise an objection to any cost factor which contributed to the unionized employer's unfavorable position.⁹⁰ The cost of maintaining a grievance procedure would appear as debilitating to an employer's market success as an equivalent amount expended for wages or other employee economic benefits. *Retail Clerks* implies that inclusion of such non-economic items is objectionable because they normally are conceded only as a result of an established collective bargaining relationship and, thus, are somehow inappropriately imposed upon a non-unionized employer.⁹¹ However, if the purpose of Board-sanctioned area standards picketing is to eradicate the competitive disadvantage of the unionized employer, it is reasonable that the union could demand not that an unorganized employer supply specific non-economic benefits such as seniority provisions, but only that he bear the same cost incurred by a unionized employer in establishing and maintaining such procedure. By including such cost in the comparative package, the union would not infringe upon the non-union employer's discretion in allocating benefits to its employees. Nevertheless, the utility of the area standards exception and the ease of its supervision may be enhanced by a

⁸⁹ See notes 46-47 *supra* and accompanying text.

⁹⁰ "Virtually every collective bargaining issue contains cost implication; and the cost consequences of a non-economic item may, in the long run, prove far more drastic than the cost of agreement upon a direct economic collective bargaining item." S. TORFF, *supra* note 81, at 45 n.11.

⁹¹ See B.N.A. DAILY LABOR REPORT No. 142 (166 N.L.R.B. No. 92), at D-3 (July 24, 1967).

definition which excludes some non-economic benefits. For example, while a seniority system may increase an employer's comparative production cost if he is required to promote or reassign employees on the basis of their longevity and not solely on their ability to perform production tasks, calculating the precise extent such a system increases total labor costs is not only difficult but also probably not comprehended by currently accepted cost accounting procedures. Deeming area standards to encompass only economic items, while not logically compelled as intimated by the examiner in *Retail Clerks*, precludes the necessity for conducting this complex investigation. Thus, not only is the Board's review of an asserted area standards picket line simplified, but the exception from statutory picketing proscriptions may be relied upon with more certainty by a union seeking to preserve concessions received in other enterprises.

Because of differences in skills, methods of production, and myriad other factors, significant potential problems have been forecast for any attempt to compare the labor costs of two employers. One commentator, for example, has hypothesized that a non-unionized employer's total wage-fringe package may be lower than a unionized employer's, but due to the greater skill or efficiency of the latter's employees, the total cost per unit production of both employers could be equal.⁹² The complexity anticipated in this situation may be unfounded, since labor costs are not isolatable as a source of competitive disadvantage for the organized enterprise; and, thus, the union arguably cannot complain that gains it has achieved may be jeopardized absent area conformity.⁹³ It may also be difficult to make an accurate comparison if a non-union cost package for new employees is lower than that prevailing in union shops, although long-term parity is achieved through profit-sharing plans.⁹⁴ Assuming the present cost of a deferred compensation program equalizes total labor costs in the two questions, however, a union could not reasonably assert the existence of present competitive disadvantage. Further, a union which can only claim future market detriment for the enterprises it has organized should not be permitted to picket for area standards, since, prior to the occurrence of the

⁹² See Meltzer, *supra* note 75, at 92. Even if total labor costs for a picketed employer were less than those of the employer establishing the area standards, a demand for the former's conformity to prevailing packages might be improper. See notes 95-98 *infra* and accompanying text.

⁹³ Because the justification for area standards picketing allows the union to consider only that market disadvantage resulting from collective bargaining concessions, see notes 40-42 *supra* and accompanying text, the hypothetical union employer's possible higher non-labor costs would seem irrelevant.

⁹⁴ See Meltzer, *supra* note 75, at 92.

disadvantageous market, wage or other production cost adjustments by either employer might equalize comparative total costs.

Less easily resolved are the administrative difficulties presented by a non-unionized employer's contention that his employees, while paid less than the area standard, possess less skill or do not perform identical functions. Assuming that skill is provable and subject to gradation,⁹⁵ it would appear reasonable that demands for wage-fringe package conformity should be allowed only for employee groups whose expertise is substantially equivalent.⁹⁶ However, the burden of establishing comparative skill gradation, whether placed on the picketers or the non-union employer,

⁹⁵ Several criteria could be employed to determine the relative skill or efficiency of employees. For example, the duration and type of training and years of experience of employees presumably bear upon their adeptness with particular assignments. Assuming that skilled workmen perform tasks more efficiently than less qualified employees, the relative skills of two groups of employees might be judged by a comparison of the units produced in operations which are product, rather than service, oriented. Thus, while the performance of a workman in manufacturing operations could be judged according to this criteria, an employee's production unit output might not be ascertainable in some phases of the construction industry. Since more highly trained or experienced workmen can command higher wages in contemporary job markets irrespective of their affiliation with a union, it would seem inequitable to allow a request that non-unionized employers utilizing less experienced employees meet a wage scale paid in unionized operations with more skilled workmen. See notes 96-97 *infra* and accompanying text.

⁹⁶ Low-skilled employees presumably work less efficiently, and thus are less valuable to their employers, than better trained or more experienced workmen. Since, irrespective of unionization, relatively unskilled employees command a lower wage in a stable labor market, this natural differential should be observed when a comparison is made to ascertain area conformity. Thus, if the general level of competence of the employees in the picketed plant is lower than that possessed by workmen in the operations from which area standards are ascertained, a wage disparity might not be solely the result of unionization. To insure that the area standard evaluation is made only of comparable units, consideration should be given to the wage scale of only those organized employees who function on the same qualitative level as that prevailing in the picketed enterprise.

If the competence of non-union workmen is significantly less than that of unionized employees in the locale, the non-unionized employer might argue that his acquiescence to area standards not only removes the unionized employer's competitive disadvantage but also puts that operator in a favorable and inequitable market position. The low-skilled workmen may produce a product qualitatively inferior to that manufactured in the more competent union operation. If the prices of the inferior and the higher quality products were substantially similar, as the union picketing for area standards attempts to make them, consumers who previously purchased the former because of its low price would choose the higher quality product in the absence of a price differential. Thus, the demand for area conformity overcompensates the unionized employer, for he is given *control* of an entire market which formerly was competitive on both price and quality bases.

would often be onerous and, thus, may necessitate the formulation of a more easily-applied standard. For example, *skill* could be viewed as the general level of expertise of an entire production unit, and it could be presumed to be equal in any two operations within the same industry unless the picketed employer could show a substantial disparity in the average training, aptitude, or experience of his employees.⁹⁷ A similar generalized approach could be suggested to meet the objection that economic package comparisons are valid only if the job assignments of the recipients are identical. Rather than attempting to match individual job classifications in union and non-union shops, a more convenient approach would be to probe whether whole departments in similar industries fulfill similar operational functions. This more generalized comparison is sustainable because the appropriate inquiry of area standards picketers is whether *total* labor costs of a non-union employer conform to area standards and not whether workers performing comparable functions are compensated identically.⁹⁸ Variations in individual job assignments therefore become irrelevant.

While problems resulting from differences in skill, job assignments, or forms of compensation can be given satisfactory theoretical resolutions, assessment must be made of the difficult practical burden imposed when precise comparisons are demanded. For example, in a complex industry, comparison of the skills possessed by employees in a picketed operation and the level of expertise presumed by a prevailing standard would seemingly require such a lengthy and detailed investigation as to render the proof either impractical or unreasonably disruptive of smooth industrial functioning. Though the difficulties of establishing similarity might be partially alleviated by broadly drawn standards for comparison, it can be anticipated that few operations are structured so as to be susceptible to summary evaluation.

Once the magnitude of the burden of proving, or refuting, the acceptability of an area standards picket line is appreciated, it becomes

⁹⁷ Professor Cox would require the picketers to overcome a presumption of improper purpose and thus bear the burden of showing the validity of their actions. See Cox, *supra* note 75, at 267. Under a proposed modification of this presumption, see text accompanying note 101 *infra*, the union need only show that, on the basis of knowledge available to it, wage packages could properly be compared and that a disparity in fact existed. Presumably a general similarity of skill would aid the labor representative in meeting this initial burden. In addition, requiring the employer to establish dissimilarity is defensible as an attempt to place the ultimate burden of persuasion on the party with best access to the data necessary to evaluate relative skill. See text following note 100 *infra*.

⁹⁸ See note 88 *supra* and accompanying text.

crucial to determine which party to the controversy must sustain that obligation. Indeed, if the burden were placed on the union, the significant expenditure of manpower and finances necessary to conduct the requisite investigation in particular cases may dictate a decision not to demand area conformity. Considering the strong legislative intent to curtail disruptions caused by a union's picketing for recognition, and the ease of disguising a recognitional motive in the garb of an area standards picket, Professor Cox has concluded that all picketing should be presumed to be recognitional and thus prohibited unless the union could prove that the picketed employer's standards presented a substantial threat to the preservation of gains achieved from employers which the union had organized.⁹⁹ Professor Cox's formulation appears to necessitate that the labor organization show that it used an accurate comparative base in ascertaining the picketed employer's non-conformity to prevailing wage-fringe structures. While the Cox presumption would probably achieve its purpose of uncovering disguised recognitional picketing,¹⁰⁰ it seems in many situations effectively to preclude a union's good faith request for adherence to area standards. Since the union has no access to the detailed information needed to show such things as skill and assignment similarity, its attempt to sustain the burden could be frustrated by the picketed employer's refusal to cooperate, a reaction which is predictable in nearly every instance.

Professor Cox's suggestion, however, is made more acceptable by slight modification. The basic presumption that all picketing is recognitional could be retained; but rather than having to show *conclusively* that previously achieved gains were jeopardized, the union should be required to establish only that such appeared to be the case on the basis of information revealed by its diligent investigation. Once it is shown that (1) all available sources of information had been exhausted and (2) the facts discovered confirmed that unionized employers might experience competitive detriment, the Board should allow the picket line, absent proof by the picketed employer that its

⁹⁹ Cox, *supra* note 75, at 267.

¹⁰⁰ Professor Cox's view has apparently never been passed upon by the Board. In fact, the implication of relevant decisions is that the Board endorses a presumption which is the opposite of that proposed by Professor Cox, for the NLRB has stated that where picketing in violation of § 8(b)(7) is alleged, the General Counsel must prove "an objective proscribed by the statute, i.e., it was for organization, recognition, or bargaining." Local 741, Plumbing Journeymen, 137 N.L.R.B. 1125 (1962). Thus, in order for the picket line to be deemed unlawful, the employer would have to assist the General Counsel's office in garnering facts which prove either improper purpose or insufficient investigation on the part of the union.

labor costs were in fact comparable, or could not be compared, to those incurred in operations from which the area standard was derived.¹⁰¹

However, the cases which have thus far come before the Board have not presented the difficulties anticipated above. Rather, most of the decisions have been directed toward uncovering crudely disguised recognitional motivations, confirming the reservations of commentators that the area standards exception may seldom be utilized for the limited purposes for which it was intended.¹⁰² Until the Board is convinced that most area standards picket lines are directed toward equalization of the competitive position of unionized enterprises, a reevaluation of the utility of the exception itself should be undertaken before administrative efforts are expended to delineate comparative bases and to allocate burdens of proof. If the area standards exception is to be preserved, however, it must be recognized that existing precedents offer little guidance to the union attempting to avoid an inference that its picket line is for recognitional purposes. The administrative pronouncements which are needed would seem preferably to come not through a continuation of piecemeal decisional development but rather through a precise suggestion as to both the type of investigation a union must undertake and the finding it must make before an area standards picket line will be legitimized.

¹⁰¹ The Board's current practice is to require a union, prior to its erection of a picket line, to inquire into the employer's compensation structure. *See* Carpenters Local 2133, 151 N.L.R.B. 1378, 1382 (1965); Construction Laborers Local 1207, 141 N.L.R.B. 283, 284 (1963).

¹⁰² *See, e.g.,* Aaron, *supra* note 83, at 1105-06.