

but, on the contrary, was economic in character. The strike being economic, under established law it was permissible for the Respondent to make permanent replacements of its striking employees, and I find that such replacements were made in the cases of all the strikers who applied for reinstatement. Under these circumstances, the Respondent's refusal to reinstate the striking employees found herein to have made unconditional application for reinstatement, was not violative of the Act, and I must recommend dismissal of this allegation of the complaint.³

In conclusion: I have intentionally made my findings herein on a broader base than was required by my ultimate conclusions, to avoid the consumption of additional time and expense which would be incurred in a remand were the Board to disagree with my interpretation and application of its *Plaza Provision Company* decision.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with its business operations described in section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. Columbine Beverage Company is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union No. 435, is a labor organization within the meaning of Section 2(5) of the Act.

3. By interrogating its employees concerning their union activities, attitudes, and intentions with respect to union activities; by threatening them with reprisals if they engaged in a strike or other protected concerted activities; and by promising rewards to those who refrained from strike activities, the Respondent interfered with, restrained, and coerced its employees in the exercise of rights guaranteed by Section 7 of the Act, thereby engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent has not engaged in unfair labor practices violative of Section 8(a)(3) and (5) of the Act, as alleged in the complaint.

[Recommendations omitted from publication.]

³ I do not view the Respondent's letter to its striking employees, informing them that unless they returned to their jobs they would be replaced, as discharges, but as a correct statement of the law with respect to the status of economic strikers.

Bartenders and Hotel and Restaurant Employees Union, Local 58 of the Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO and Fowler Hotel, Inc. Case No. 25-CP-2. September 28, 1962

DECISION AND ORDER

On March 31, 1960, Trial Examiner George A. Downing issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent Union had engaged in the unfair labor practices alleged in the complaint and recommending that it cease and desist therefrom

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and take certain affirmative action, as set forth in the attached Intermediate Report. Thereafter, the Union filed exceptions to the Intermediate Report.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed.¹ The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions, and the entire record in the case, and finds merit in the Union's exceptions. Accordingly, the Board hereby adopts the Trial Examiner's findings of fact but not his conclusions or recommendations, for the reasons set forth below.

The Trial Examiner, although finding that the Union's picketing conformed with the terms of the publicity proviso to Section 8(b)(7)(C) of the Act, nevertheless concluded that the picketing violated that section. He reasoned that "*the* object" of the Union's picketing was to force the hotel to recognize and bargain with the Union, and the picketing was not solely "*for the purpose of* advising the public" that the hotel was nonunion. [Emphasis supplied by the Trial Examiner.]

As we held in *Crown Cafeteria*, 135 NLRB 1183, the mentioned publicity proviso carves out a significant exception to the general ban on recognitional and organizational picketing. The proviso was intended to permit picketing which truthfully advised the public that the employer did not have a contract with the union, unless the picketing was accompanied by a proviso "effect." Here, the picket language was substantially in the words of the proviso,² and the picket signs were displayed only at the public entrances to the hotel.³ Accordingly, conceding that the Union had bargaining or recognitional objectives, as our dissenting colleagues assert, we find that the picketing was clearly informational and within the proviso. As there is no evidence to indicate that the picketing had any "effect," we shall dismiss the complaint.

[The Board dismissed the complaint.]

MEMBER FANNING, concurring:

I concur in the finding by Chairman McCulloch and Member Brown that the Union did not violate Section 8(b)(7)(C) by its picketing. In my opinion, however, the picketing was lawful because the Union was "currently certified" as the representative of Fowler's employees.

¹ No exceptions were filed to the Trial Examiner's rejection of the General Counsel's offer of proof concerning an incident where an employee allegedly refused to cross the picket line to make a delivery. Moreover, the General Counsel admitted that the proffer was immaterial to his theory of the case.

² *Oakland G. R. Kinney Company*, 136 NLRB 335.

³ Cf. *Philadelphia Window Cleaners and Maintenance Workers' Union, Local 125 (Atlantic Maintenance Co)*, 136 NLRB 1104.

Section 8(b) (7) removes picketing for recognition or organization from its proscriptive ambit where the picketing union holds a certificate as the exclusive bargaining agent of the employees involved. In 1956 the Union and Holt, Fowler's predecessor, submitted the question concerning representation of Holt's employees to the Indiana State Division of Labor. An election was held, the Union won by a vote of almost 2 to 1, and was certified. There is nothing in this record to indicate that the election, which was conducted by a responsible State agency, was affected by any irregularities or did not meet the standards imposed by the Board for the conduct of its own elections. This Board has consistently ruled that it would accord the same effect to the results of State board elections, regularly held, as it would to its own.⁴ Neither Section 8(b) (7) nor its legislative history reveal any congressional intent to impinge upon this Board policy.

I am in complete accord with Judge Swygert's conclusion in the Section 10(1) proceeding⁵ that the Union's picketing was lawful because it possessed a certificate by virtue of the Division of Labor election. And, like Judge Swygert, I attach no significance to the fact that there was a change of ownership of the hotel after that certificate was issued.⁶

Accordingly, I join in the Order dismissing the complaint.

MEMBERS RODGERS and LEEDOM, dissenting:

We dissent from the reversal of the Trial Examiner and the dismissal of the complaint.

The opinion of Chairman McCulloch and Member Brown is, in our view, an unwarranted extension of majority decision in *Crown Cafeteria*, 135 NLRB 1183. The picket sign here stated: "ON STRIKE For Renewal of Our Union Contract. EMPLOYEES OF FOWLER HOTEL, Members of Hotel Employees Union AFL-CIO, Local 58." Unlike Chairman McCulloch and Member Brown, we do not see how a picket sign, which on its face states that the purpose of the picketing is to secure renewal of a union contract, can be deemed limited to the purpose of advising the public that the employer does not have a union contract. The sign clearly and necessarily encompasses recognition and bargaining; language such as this, which affirms the positive purpose to secure renewal of a contract, can hardly be deemed "substantially" in the language of the Act, which permits informational picketing only in the absence of such a purpose. Accordingly, apart from any other considerations,⁷ we would find that the language

⁴ See *T-H Products Company*, 113 NLRB 1246 (involving an Indiana State Labor Division election and certificate); *Olin Mathieson Chemical Corporation*, 115 NLRB 1501; *Bluefield Produce and Provision Company*, 117 NLRB 1660.

⁵ *Getreu v. Bartenders and Hotel and Restaurant Employees Union*, 181 F. Supp. 738 (D.C.N.D. Ind.).

⁶ See *Colony Materials, Inc.*, 130 NLRB 105, and cases cited in footnotes 2 and 3 therein.

⁷ See the dissenting opinion in *Crown Cafeteria*, *supra*.

of the picket sign precludes a finding that the picketing was protected by the publicity proviso. Nor, for the reasons set forth by the Trial Examiner in his Intermediate Report, can we agree with Member Fanning that the Respondent can be deemed to have been "currently certified" within the meaning of Section 8(b)(7). We would therefore find that by picketing for more than 30 days after the effective date of Section 8(b)(7)(C), without a petition having been filed, the Respondent violated that section of the Act.

INTERMEDIATE REPORT

STATEMENT OF THE CASE

This proceeding, brought under Section 10(b) of the National Labor Relations Act as amended (61 Stat. 136), was heard before Trial Examiner George A. Downing in Lafayette, Indiana, on March 2 and 3, 1960, with all parties represented. The amended complaint, issued on January 7, 1960, by the General Counsel of the National Labor Relations Board, and based on charges duly filed and served, alleged that Respondent had engaged in unfair labor practices proscribed by Section 8(b)(7)(C) of the Act by picketing the Fowler Hotel on and after September 4, 1959, with an object of forcing and requiring Van Orman-Fort Wayne Corporation (herein called Van Orman), the manager of the Fowler Hotel, to recognize and bargain with Respondent as the collective-bargaining representative of the employees of the Fowler Hotel although Respondent was not currently certified as the representative of said employees and although such picketing had continued for more than a reasonable period of time without a valid petition having been filed under Section 9(c) of the Act.

Respondent answered, denying the unfair labor practices and pleading various affirmative defenses based on an alleged certification by the State Division of Labor, a collective-bargaining relationship with the prior owner of the hotel, and a refusal to bargain by the subsequent owner of the hotel. Respondent averred that its strike and its picketing in protest of that illegal action was protected concerted activity, and that the Board was estopped to deny that the certification was not a certification within the meaning of Section 8(b)(7) of the Act, because of the Board's arbitrary and unlawful failure to assert jurisdiction over hotels. Respondent also asserted various constitutional defenses under the first and fifth amendments, e.g., denial of due process and deprivation of freedom of speech and assembly.

Upon the entire record in the case and from my observation of the witnesses I make the following:

FINDINGS OF FACT

I. THE EMPLOYER'S BUSINESS

Van Orman, an Indiana corporation, with its principal office and place of business in Fort Wayne, leases and operates the Van Orman Hotel and Embers Club in Fort Wayne, Indiana; it owns and operates the Van Orman Hotel and Van Orman Suburban Hotel, Bloomington, Indiana; and it operates and manages the Van Orman Northcrest Hotel in Fort Wayne. Since on or about September 9, 1959, Van Orman has managed the Fowler Hotel in Lafayette pursuant to a contract with Fowler Hotel, Inc., the owner thereof. All of said hotels are over 75 percent transient. During 1959 Van Orman has received in excess of \$2,250,000 in gross receipts from said hotels, and it purchased goods and supplies valued in excess of \$25,000 which were shipped to it from points outside the State.

During the calendar year 1958 the gross receipts of the Fowler Hotel were \$367,870.58, and during 1959 they were \$445,416.57. During the latter year total purchases for Fowler Hotel from extrastate sources exceeded \$68,000.

As Respondent's brief questions the Board's jurisdiction, contending that only the operations of the Fowler Hotel are to be considered because the transaction between Van Orman and Fowler Hotel, Inc., was not at "arm's length," we review briefly the history of the hotel's ownership and management.

Around July 1, 1958, Fowler Hotel, Inc., a newly formed corporation of six stockholders, purchased the hotel from Holt Hotel Company, the former owner, but assumed none of Holt's liabilities or contracts. On September 9, 1959, Van Orman took over the management and operation of the hotel under a contract dated September 4, with Fowler Hotel, Inc., which provided in part that all manage-

ment prerogatives were to be vested in Van Orman, including sole and exclusive power to hire, discharge, supervise, fix compensation of, and otherwise direct the employees of the hotel. Contemporaneously, Harold Van Orman, Jr., president of Van Orman and owner of 99 percent of its stock, purchased from each of Fowler's individual stockholders 50 percent of his stock holdings. At the same time Mr. Van Orman was elected president of Fowler Hotel, Inc., whose board of directors also placed in his hands all matters concerning labor relations policy, though he testified that it was in his capacity as president of the Van Orman corporation that he had, under the management contract, complete control of the operations of the hotel.

There is no support in the record for the claim that either the management contract or the stock transaction was not at "arm's length," and there is no hint that either or both transactions were made simply to qualify for NLRB jurisdiction. Nor does the evidence that the employees and supervisors remained, with little change, and that they were paid from Fowler Hotel funds by checks signed by officers of Fowler Hotel, Inc., reflect upon the nature of the transaction.

I therefore conclude and find that Van Orman is engaged in commerce within the meaning of the Act. *The Bellingham Hotel Company*, 125 NLRB 562; cf. *Southwest Hotels, Inc.*, 126 NLRB 1151. Of course, it is plain that if only the operations of the Fowler Hotel were considered, the Board's jurisdictional standards were not met either in 1958 or 1959.

II. RESPONDENT AS A LABOR ORGANIZATION

Respondent is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The issues*

The issues in this case are mainly legal issues, there being no disputes as to any material fact. The main issue which the General Counsel raises is whether there is any basis, under the circumstances in this case, for application of the second proviso to subparagraph (C) of Section 8(b)(7), *i.e.*, picketing "for the purpose of" truthfully advising the public, etc. (See section C, *infra*, where all material portions of the statute are quoted.)

The issues which Respondent raises in its brief vary somewhat from those stated in its answer. Thus it questioned for the first time the Board's jurisdiction (an issue disposed of under section I, *supra*), thereby departing from, if not abandoning, the defense made in the answer that the Board had arbitrarily and unlawfully failed to assert jurisdiction. Assertion of the jurisdictional issue also weakened Respondent's defense (which it still continues to urge) that it was conducting an unfair labor practice strike in protest of Van Orman's refusal to bargain with it. The main issue which Respondent raises is whether an alleged certification by the Indiana Division of Labor in 1956 will qualify it as being "currently certified" as the representative of the Fowler Hotel employees within the meaning of Section 8(b)(7).

B. *The evidence*

The nature of Respondent's defenses requires consideration of the history of the collective-bargaining relationship which existed between Respondent and Holt Hotel Company, the former owner of the Fowler Hotel. In April 1956 a consent representation election was conducted by the Indiana State Division of Labor of all the employees named on a list of 54 eligible voters as agreed to by the Holt Company and Respondent, with the Company agreeing further to recognize the Union as the exclusive bargaining agent if over 50 percent of those voting should select the union.¹ Those who were listed included all the hotel employees except the supervisors, the auditors, the bartenders (who were represented by a separate union at the time), and the restaurant employees, who were employed by a lease concessionaire. The Union won the election 34 votes to 18, and the Commissioner certified the results.

Thereafter Holt and Respondent entered into a contract effective from June 1, 1956, to May 31, 1958, with a provision that it should continue after May 31, 1958,

¹ The State act is not a labor relations statute as such, but under it the Commissioner of Labor is given authority to mediate and arbitrate labor disputes and to conduct elections where the parties voluntarily agree to submit. No provision is made for finding an appropriate unit and none for any formal certification (though the Commissioner certifies the results of the election), nor are sanctions provided for failure to recognize or bargain.

from year to year, unless either party gave at least 30 days' notice prior to any yearly period of an intention to modify or terminate the agreement.

Beginning in July 1958 Fowler Hotel, Inc., took over the operation of the hotel and also began then to operate the restaurant as the employer of its employees. The new owner refused to recognize the union, despite formal demands made in September and October 1958, though it informed Respondent's business agent it would negotiate if a majority of the employees desired representation.

A strike of union members was called on October 17, 1958, in protest of Fowler's refusal to renew the old contract, with some 24 union members going out and approximately 15 union members remaining at work. However, the total number of hotel employees, on October 16, excluding supervisors, but including restaurant employees, 3 bartenders, and 2 parking lot employees² aggregated approximately 80, of whom approximately 50 reported to work on the 17th and 58 on the 18th.

The picketing has continued without interruption to date, with a banner bearing the following legend:

ON STRIKE
For Renewal of Our
Union Contract
EMPLOYEES OF FOWLER HOTEL
Members of Hotel Employees'
Union AFL-CIO, Local 58

Respondent's counsel conceded in his opening statement that, "We have continued uninterruptedly to picket the employer for renewal of the contract, *which we agree is the object.*" [Emphasis supplied.] All the evidence is in accord with that statement, including Van Orman's testimony concerning two conferences with Ardith Howard, Respondent's business agent, in September and November 1959. Van Orman also testified that in the latter conversation he offered to negotiate if Howard could prove a majority, but Howard replied he did not think the Union could win an election because the restaurant employees had been brought in, as well as other new employees.

Respondent has at no time filed a petition under Section 9(c) of the Act, though on February 2, 1960, either the Van Orman Corporation or Fowler Hotel, Inc., filed a petition in Case No. 25-RM-112, on which a hearing was scheduled for March 7, 1960. On February 24, 1960, Respondent filed a charge against Fowler Hotel, Inc., in Case No. 25-CA-1232, alleging violations of Section 8(a)(1) and (5).³

C. Concluding findings

The issues herein require close attention to the statutory language. Section 8(b)(7)(C) provides, to the extent here relevant, that it shall be an unfair labor practice for a labor organization or its agents—

(7) to picket or cause to be picketed . . . any employer where an object thereof is forcing or requiring an employer to recognize or bargain with the labor organization as the representative of his employees . . . unless such labor organization is currently certified as the representative of such employees:

* * * * *

(C) where such picketing had 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.

² At the time of the 1956 election, the parking lot attendants were employees of a separate corporation and plainly not on the agreed list of eligible voters.

³ On March 10, after the close of the hearing herein, the Regional Director wrote the Trial Examiner, with copies to counsel for Respondent and the Charging Party, that he had investigated that charge and dismissed it on March 3.

It should also be noted that under the provisions of subparagraphs (A) and (B) picketing for the proscribed object is banned respectively, where the employer has lawfully recognized another union and a question concerning representation may not be appropriately raised under Section 9(c) of the Act, and where a valid election under Section 9(c) has been conducted within the preceding 12 months.

Consideration of the case properly begins with the General Counsel's contention that there is no basis under the circumstances of this case for application of the second proviso, *supra*, (i.e., picketing for "the purpose" of truthfully advising the public, etc.) because the evidence established that *the* object of the picketing was to force Van Orman to bargain. That contention raises a question as to the puzzling use by Congress of offsetting synonyms,⁴ though with different modifiers, i.e., *an* object versus *the* purpose. And since we start, of course, with the assumption that Congress' choice of language was intentional, not aberrant, the problem is to determine what it meant.

The legislative history of the earlier Taft-Hartley amendments (1947) showed that Congress then, too, dealt with the present terms. Thus, Senator Taft pointed out, in his supplementary analysis of that Act as passed that (93 Congressional Record 6859):

Section 8(b)(4), relating to illegal strikes and boycotts, was amended in conference by striking out the words "for the purpose of" and inserting the clause "where an object thereof is."

It was that very statement which the Supreme Court found persuasive, in reaching the conclusion in *N.L.R.B. v. Denver Building and Construction Trades Council, Gould & Preisner*, 341 U.S. 675, 689, that as the term "an object" was used in Section 8(b)(4), "It is not necessary to find that the *sole* object of the strike was [the proscribed one]."⁵

Coming now to the 1959 amendments, we find that Congress used the identical terms again in amending Section 8(b)(4) and in enacting a new subsection (7), both being parts of a comprehensive scheme to regulate picketing. In so doing, Congress gave not the slightest hint of disagreement with the Court's interpretation, thereby indicating its acceptance of that construction. Thus as the Court observed of a similar situation surrounding the Taft-Hartley amendments (*Gullett Gin Company, Inc. v. N.L.R.B.*, 340 U.S. 361, 366:

In the course of adopting the 1947 amendments Congress considered in great detail the provisions of the earlier legislation as they had been applied by the Board. Under these circumstances it is a fair assumption that by reenacting without pertinent modification the provisions with which we here deal, Congress accepted the construction placed thereon by the Board and approved by the courts.

Cf. *Apex Hosiery Company v. Leader*, 310 U.S. 469, 488.

Furthermore, such little legislative history as bears directly on the subject indicates affirmatively that in using "the purpose," Congress meant the *only* purpose. Most of the references to Section 8(b)(7)(C) occurred at and after the conference stage, when the Senate conferees were endeavoring to salvage some sort of their position in effecting a compromise under the House (Landrum-Griffin) bill. Speaking to a compromise proposal which later became the present section, Senator Kennedy stated, on August 28, 1959, (105 Daily Congressional Record 15900):

Under our substitute proposal organizational picketing can take place *only* under limited conditions. All are in our opinion most fair and equitable.

* * * * *

⁴Though both words have a variety of meanings, in different senses, they appear to be synonymous in the sense used in Section 8(b)(7) (and in 8(b)(4) as amended). Thus, Webster's New International Dictionary not only uses each term in defining the other, but uses some of the same terms and synonyms in defining each.

Purpose: 1. That which one sets before himself as an *object* to be attained; the *end* or *aim* to be kept in view . . . *design; intention*

2. The *object*, effect, or result *aimed at, intended, or attained*

Object: That by which the mind, or any of its activities, is directed; that on which the *purposes* are fixed as the *end* of action or effort; that which is sought for; *end; aim; motive; final cause*. [Emphasis supplied]

⁵If Congress had reversed its choice, using "the purpose" in place of "an object," the conclusion would plainly follow that it would have intended *the* purpose to mean the *sole* purpose.

Second. Picketing, in the absence of a contract or an election, which has *only the effect* of notifying the public of non-union conditions, and asking the employees to join the union would not be banned. [Emphasis supplied]⁶

That statement was repeated in the analysis which accompanied Senate Resolution 181. 105 Daily Congressional Record 15906-15907, August 28, 1959.

On September 3, 1959, Senator Kennedy, speaking to the conference report, commented further on the subject of organization picketing (105 Daily Congressional Record 16413):

When the picketing results in economic pressure through the refusal of other employees to cross the picket line, the bill would require a prompt election. *Purely* informational picketing cannot be curtailed under the conference report, although even this privilege would have been denied by the Landrum-Griffin measure. [Emphasis supplied.]

See also the following post-legislative comment by Senator Goldwater, concerning the second proviso, on October 2, 1959 (Congressional Record Appendix A8525):

The second proviso to the third prohibited provision grants the following exemption from said third prohibition only—and not from the first two:

Where the union engages in picketing or other publicity *for the sole purpose* of truthfully advising the public that an employer does not employ members of or have a contract with a labor union. In those circumstances, such picketing may be carried on indefinitely [unless the effect is to induce employees, etc.] [Emphasis supplied.]

The foregoing interpretation of the statutory language, brings us face to face with the argument that it makes the second proviso of subparagraph (C) meaningless, a view which is most forcefully stated in the cogent opinion of District Judge Swygert, who denied the Regional Director's petition for a Section 10(l) injunction against Respondent. Thus, as Judge Swygert pointed out (45 LRRM 2496, 3498):

It is difficult, if not impossible, to imagine any kind of informational picketing pertaining to an employer's failure or refusal to employ union members or to have a collective bargaining agreement where another object of such picketing would not be ultimate union recognition or bargaining. In most instances certainly the aim of such informational picketing could only be to bring economic pressure upon the employer to recognize and bargain with the labor organization. To adopt petitioner's interpretation of subparagraph (C) would make the second proviso entirely meaningless.

Though certainly the situations are limited in which the second proviso can have practical meaning,⁷ they are by no means nonexistent. That there remains some area within which the proviso can operate is plainly shown by the findings in *Radio Broadcast Technicians, Local Union No. 1264 of the International Brotherhood of Electrical Workers, AFL-CIO (WKRK-TV)*, 123 NLRB 507. There the Board adopted the Trial Examiner's holding that where a union picketed an employer after losing an election and where it conducted a campaign to induce a boycott of the employer by the public and by the employer's advertisers, *the object* of the union's conduct *was not to force the employer to recognize or bargain with the union*, but to protect its bargaining position with competing union stations and thereby enable it to maintain the level of wages and working conditions for employers whom it represented.

Under the circumstances in this case it is unnecessary to map out the exact boundaries of the *lebensraum* in which the second proviso can operate. I conclude and find on all the evidence in the case, including the concession of Respondent's counsel, that *the object* of Respondent's picketing on and after November 13, 1959, was to force and require Van Orman to recognize or bargain with Respondent as the representative of its employees, and that, though said picketing and other publicity was incidentally truthful, it was not *for the purpose* of advising the public that Van Orman did not employ members of or have a contract with it.

⁶The Senator's capsule summary of the language of the second proviso is not precise; he apparently equated publicity that *an employer does not employ union members with solicitation of employees to join the union*. Moreover, in his statement next quoted below, he recognized the possibility of picketing *only* for information.

⁷There is, of course, a further limitation on the proviso which robs it of practical effect, and that is the exemption is lost if *any* employee of another employer is induced by the picketing not to pick up or deliver goods or not to perform services.

I therefore conclude and find that under the evidence Respondent's picketing did not fall within the protection of the second proviso.⁸

We now reach the question whether Respondent's alleged certification by the State Division of Labor in 1956 will qualify it as being *certified* within the meaning of Section 8(b)(7). The answer is plainly in the negative. The statutory scheme shows that the certification which Congress had in mind was one made by NLRB under Section 9 of the Act. Thus, throughout Section 8(b)(7) Congress referred specifically to questions concerning representation, to elections and the conducting of elections by the Board, and to the filing of (representation) petitions, *all under Section 9(c) of the Act*. The conclusion is inescapable that in excepting a "certified" union from the reach of the picketing ban, Congress meant one which is certified by the Board under that section. There is no suggestion in the legislative history that Congress intended or assumed that the term would or should include a certification by a State board. To the contrary, such comments as bear directly on the point indicate that a certification by NLRB was contemplated. See *e.g.*, Extension of Remarks of Senator Dirksen, 105 Daily Congressional Record Appendix A8274-8275, September 18, 1959.

Two Board decisions which Respondent relies on afford no support, for both preceded the present amendment and both were concerned with wholly unrelated subjects of statutory regulation, not even remotely akin to the present restriction on picketing. Thus, *Olin Mathieson Chemical Company*, 115 NLRB 1501, involved application of the Board's 1-year rule against the conducting of a representation election in a case where a State board had conducted a valid election within the year. In *Bluefield Produce & Provision Company*, 117 NLRB 1660, the Board chose to apply (also in a case where a State agency had conducted an election within a year) its rule that a certification based on a Board election must be honored for a reasonable period—ordinarily 1 year—absent unusual circumstances.

Even were it assumed that the above holdings might be entitled to some persuasive weight during the first year of a State certification, it is plain that they are inapposite here in view of the lapse of time and the intervening circumstances, including the changes in ownership and management, the enlargement of the unit, and the loss of Respondent's majority. Respondent could in no case, therefore, be regarded as *currently* certified within the meaning of Section 8(b)(7).

Respondent also contends that it was at all times conducting an unfair labor practice strike because of an alleged refusal to bargain by Van Orman and the previous owner of the hotel. Laying aside the bare legal question whether picketing to protest an employer's unfair labor practice is privileged under Section 8(a)(7)(C), Respondent's defense is wholly without merit under the circumstances here. Preliminarily, it should be observed that Respondent filed no charge with the Board until the eve of the hearing.

There are numerous reasons which preclude a finding that Respondent was conducting an unfair labor practice strike. Starting with the State law, there is no labor relations statute as such in Indiana, no statute which requires bargaining, no statute which defines or proscribes unfair labor practices, and no board or agency which is empowered to fix an appropriate unit for bargaining or to issue a formal certification therein. There is neither statute nor decision which fixes the obligations of *successor concerns* to continue recognition of a union which was recognized by a predecessor nor, indeed, any which fixes the time during which the predecessor itself is required to extend recognition. Furthermore, whatever the union's majority status was in the alleged unit as it existed up to July 1, 1958, the evidence showed plainly sufficient enlargement thereafter that Respondent was without a majority at the time the strike began on October 17, 1958, and at all times thereafter. For all of the foregoing reasons there could have been no unfair labor practice under the State law and no finding that the strike was an unfair labor practice strike prior to September 9, 1959.

There can also be no finding under the Federal act that the strike was an unfair labor practice strike on and after September 9, 1959. In the first place, because Respondent failed to file a timely charge, Section 10(b) precludes a finding that unfair labor practices were in fact committed during the earlier period—a necessary prerequisite to the finding that the strike began as, or was converted into, an unfair labor practice strike. *Greenville Cotton Oil Company*, 92 NLRB 1033, *enfd.*

⁸ Because the General Counsel contended that the final clause of the second proviso was without application under his theory of the case, the Trial Examiner rejected his offer of proof (on his admission that the evidence was immaterial and his refusal to amend the complaint in such a manner that the evidence would be material) concerning an actual incident of an employee's refusal to cross the picket line to make deliveries.

197 F. 2d 326 (C.A. 5), review denied, *American Federation of Grain Millers v. N.L.R.B.*, 197 F. 2d 451. But see, *contra*, *N.L.R.B. v. Brown and Root, Inc.*, 203 F. 2d 139, 145-146 (C.A. 8). The strike must, therefore, be found to be an economic strike *Ibid*.

The merits of the belated charge filed in Case No. 25-CA-1232 on February 24, 1960, cannot be determined by the Trial Examiner for two reasons: his assignment does not cover that case, and the charge was dismissed by the Regional Director on March 3, 1960. However, as above found, the evidence showed that Respondent did not in fact represent a majority of the Fowler Hotel employees in an appropriate unit at any time after the strike began on October 17, 1958.

Respondent's attempt to raise constitutional issues of freedom of speech and assembly and of violation of the first and fifth amendments is wide of the mark. Respondent's picketing, though peaceful and truthful, was plainly for an object which the Act proscribes. Therefore, neither Section 8(c) nor the constitutional guarantees can serve to protect or immunize it. *International Brotherhood of Electrical Workers, Local 501 (Samuel Langer) v. N.L.R.B.*, 341 U.S. 694, 705; *N.L.R.B. v. Denver Building & Construction Trades Council*, 341 U.S. 675, 690-691 and cases there cited in footnote 22. Furthermore, the constitutionality of the statutory provisions will be assumed at the Trial Examiner and Board level pending contrary adjudication by the courts. *Bluefield Produce & Provision Co., supra*, at p. 1663.

Respondent's answer also raised various equitable defenses based on what it terms the Board's arbitrary and unlawful action in refusing to assert jurisdiction over hotels. Though its brief seems to abandon those defenses by asserting that Fowler Hotel did not meet the Board's jurisdictional standards (see section I, *supra*), the defenses will be briefly considered. They are plainly without merit.

The Board announced as early as January 11, 1959, its determination to assert jurisdiction in hotel cases (press release R-586), and on May 14, 1959, it announced the standards which it would apply (press release R-610). Respondent was free to test the jurisdictional question by filing either a representation petition under Section 9(c) or an unfair labor practice (refusal to bargain) charge under Section 10(b). It did not do so either before or after the change of management on September 9 or after the enactment of Section 8(b)(7) on November 13. Aside from the principle (which Respondent recognizes) that estoppel does not run against the Government, its own laches prevents reliance on the alleged failure by the Board to assert jurisdiction. Furthermore, it was plain that prior to September 9, 1959, Fowler Hotel did not meet the Board's jurisdictional standards. Respondent's contention that the management contract with Van Orman was not an "arm's length" transaction has been rejected. Even were its contention sound, it could have tested the jurisdictional question by filing a representation petition with the Board, thereby protecting itself against an unfair labor practice charge.

It is therefore concluded and found that by picketing the Fowler Hotel for more than a reasonable time after November 13, 1959, with the object found herein, and without a petition being filed under Section 9(c), Respondent has engaged in and is engaging in unfair labor practices as defined in Section 8(b)(7)(C) of the Act.

IV. THE REMEDY

Having found that Respondent has engaged in activities which violate Section 8(b)(7)(C) of the Act, I shall recommend that it cease and desist therefrom and that it take certain affirmative action of the type conventionally ordered in such cases, which I find necessary to remedy and to remove the effects of the unfair labor practices and to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the Trial Examiner makes the following:

CONCLUSIONS OF LAW

1. Van Orman-Fort Wayne Corporation is an employer within the meaning of Section 2(2) and 8(b)(7) of the Act.
2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.
3. By picketing the Fowler Hotel for more than a reasonable time after November 13, 1959, with an object of forcing or requiring Van Orman to recognize and bargain with Respondent as the collective-bargaining representative of the employees of the Fowler Hotel, without a petition being filed under Section 9(c) of the Act, Respondent has engaged in and is engaging in unfair labor practices as proscribed by Section 8(b)(7)(C) of the Act.

4. The aforesaid unfair labor practices having occurred in connection with the operations of Van Orman-Fort Wayne Corporation as set forth under section I, *supra*, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and substantially affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommendations omitted from publication.]

New York Central Transport Company and Sidney Schwartz.
Case No. 7-CA-3344. September 28, 1962

DECISION AND ORDER REMANDING CASE TO THE
TRIAL EXAMINER

On June 29, 1962, Trial Examiner Eugene E. Dixon issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent is not an employer within the meaning of Section 2(2) of the Act and recommending that the complaint herein be dismissed as set forth in the attached Intermediate Report. Thereafter, the General Counsel filed exceptions to the Intermediate Report and a supporting brief. A brief was filed by the Respondent.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Members Rodgers, Fanning, and Brown].

The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and finds merit in the General Counsel's exceptions.

The Respondent, New York Central Transport Company, a wholly owned subsidiary of the New York Central Railroad Company, does business in seven States, including Michigan. During the first 9 months of 1961, Respondent received a total revenue of about \$9,250,000. Of this amount, \$250,000 was due to pickup and delivery via truck from shipper to receiver; an equivalent amount was received from leasing flexivans to the New York Central Railroad; and \$37,000 was received in the form of commissions for the shipment by truck of privately owned household furniture. The largest amount, \$4,750,000 was directly earned from interstate piggyback operations performed for the New York Central Railroad Company. Deliveries of packaged material for shipment by railroad boxcar and interstate truck deliveries from terminals produced \$1,312,000 in revenue. The Respondent collected \$2,860,000 from trucking service for delivery of goods from a rail terminal to points of destination.

Testimony taken at the hearing revealed that about 10 percent of the Detroit area operation is devoted to intercity mail service pursuant to Government contract. This service includes both the highway hauling of preloaded trailers and piggyback transportation. It