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Legislation and Administration: Labor Law -- Union Unfair Labor Practice -- Picketing After Losing Representation Election

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LEGISLATION AND ADMINISTRATION

LABOR LAW—UNION UNFAIR LABOR PRACTICE—PICKETING AFTER LOSING REPRESENTATION ELECTION.—The National Labor Relations Board has recently been presented with conflicting recommendations by its trial examiners regarding the validity of union picketing after the union has lost a representation election. In *Shepherd Machinery Co.*, Case No. 21-CB-805, the trial examiner concluded that such picketing was an unfair labor practice because its purpose was to coerce and restrain the employees of the company. However, an opposite conclusion was reached in *Curtis Brothers, Inc.*, Case No. 5-CB-190, where the trial examiner recommended that the complaint against the union be dismissed. Apparently, this is the first instance in which the Board has been called upon to answer the narrow question whether picketing after the loss of an election is violative of section 8 (b) (1) (A) of the Labor Management Relations Act (Taft-Hartley Act), 61 STAT. 141 (1947), 29 U.S.C. § 158 (b) (1) (A) (1952).

It was reasoned in *Shepherd* that since the employees involved had repudiated the union at the polls, the purpose of the picketing was not to inform the public of a labor dispute but to force the employer, by economic pressure, to accede to union demands. The trial examiner found that by these tactics the union had in effect coerced the employees and thereby violated section 8 (b) (1) (A) of the Taft-Hartley Act. This section makes it an unfair labor practice for a labor organization or its agents "to restrain or coerce employees in the exercise of their rights guaranteed in Section 7 [Taft-Hartley Act] . . . ." Section 7 not only provides for the right of self-organization, but also protects "the right to refrain from any or all such activities" except where there is a lawful union shop contract. See 61 STAT. 140 (1947), 29 U.S.C. § 157 (1952). The examiner pointed out further that there would be no interference with free speech if this picketing were restrained. This observation was based on a series of Supreme Court cases holding picketing to be something more than free speech and capable of being enjoined when conducted for unlawful purposes. *Building Service Union v. Gazzam*, 339 U.S. 532 (1950); *International Brotherhood of Teamsters v. Hanke*, 339 U.S. 470 (1950); *Hughes v. Superior Court of California*, 339 U.S. 460 (1950); *Gibboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949).

The opposite recommendation in *Curtis* was based primarily on the legislative history of section 8 (b) (1) (A) as set forth in *National Maritime Union*, 78 N.L.R.B. 971 (1948), but emphasis

was also placed on *Perry Norvel Co.*, 80 N.L.R.B. 225 (1948), which held that a minority strike did not "restrain or coerce" the employees in violation of this section. Here the trial examiner considered the Supreme Court decisions, *supra*, "inapposite."

It makes little difference in this problem area whether the picketing is labeled as organizational or recognitional, for the significant determinant is whether the picketing "restrains and coerces," and is thereby unlawful. Nevertheless, the courts and the Board continue to make this meaningless distinction. The picketing in the instant cases is best classified as recognitional since that is the more inclusive term. The only purpose of continued picketing after failure to organize the employees is to gain recognition of the union by putting economic pressure on the employers and, indirectly, the employees.

In one of the earliest cases involving section 8(b) (1) (A) the Board indicated that it applied only to violence or threats of violence. *National Maritime Union, supra.* The Board relied on the section's legislative history as it quoted extensively from congressional reports. A later case actually involving recognitional picketing followed this historical analysis and found there was no violation of section (8) (b) (1) (A). *In the Matter of Local 74*, 80 N.L.R.B. 533 (1948). See also *Perry Norvell Co., supra.* The Board felt that Congress intended to outlaw the coercive conduct which accompanies a strike, but not the strike itself, thus implying that coercive picketing could violate section 8(b) (1) (A) even during a lawful strike.

However, the Board has turned away from the doctrine of *National Maritime Union, supra,* and has found violations of section 8(b) (1) (A) where the union attempted to force an employer, through picketing, to discharge employees in violation of section (8) (a) (3). ". . . The reason for it [the discharge] would inevitably become known to the other employees, and would coerce and restrain them. . . ." *Clara-Val Packing Co.*, 87 N.L.R.B. 703, 705 (1949). See *Pinkerton's National Detective Agency*, 90 N.L.R.B. 205 (1950).

The Taft-Hartley Act specifically provides in section 9(c) that the results of a Board-conducted election shall be valid and binding for a period of one year. 61 STAT. 141 (1947), 29 U.S.C. § 159 (c) (1952). Although the Second Circuit has said, "We are not prepared to hold that all post-certification picketing is forbidden," *Douds v. Local 150, Bakery & Confectionery Workers Union*, 224 F.2d 49, 51 (2d Cir. 1955), it seems that this activity would be protected only in rare circumstances where it was conducted for the *sole* purpose of informing the public of a labor dispute. In this situation, the picketing can be analogized to "free

speech" which is protected by section 8 (c) of the Act. 61 STAT. 141 (1947), 29 U.S.C. § 158 (c) (1952).

Since mere persuasion without violence by union agents has been held to violate section 8 (b) (1) (A), *NLRB v. Newspaper & Mail Delivers' Union,* 192 F.2d 654 (2d Cir. 1951), the Board should have little difficulty in finding recognitional picketing, which is one of labor's most forceful weapons, a violation of this section when its purpose and effect is to coerce and restrain employees in the exercise of their rights under section 7. Clearly, the economic incidents of such picketing may force the employer to pressure his employees into joining the union when in fact the employees may desire to join another union or refrain from joining any union whatsoever.

Since the Board has received conflicting recommendations from its trial examiners, it now has the opportunity to restate the law concerning post-election picketing. The semantic distinction adhered to in the past should be disregarded. This type of picketing should be recognized for what it is—an unlawful activity. To permit unions to harass employer and employees after the latter have indicated a desire not to be represented by a particular union is to dissipate the effect of the Board's representation elections.

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