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Labor Law - Picketing - Peaceful Picketing for Recognition by Minority Union

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LABOR LAW—PICKETING—PEACEFUL PICKETING FOR RECOGNITION BY MINORITY UNION—Petitioner union was certified as exclusive bargaining representative of an employees' unit in 1953. When contract negotiations faltered, the union called a strike and began picketing the employer's retail store. The picketing continued for two years during which time the employer permanently replaced the strikers with non-union employees. In 1955 the union lost a new representation election by a vote of 28 to 1 and was decertified.[1] When the picketing persisted, the employer petitioned the National Labor Relations Board, charging the union with an unfair labor practice. The Board, after finding that the union's objective was exclusive recognition,[2] held that the peaceful picketing violated section 8(b)(1)(A)[3] of the amended National Labor Relations Act.[4] On petition to review, *held,* order set aside, one judge dissenting. Peaceful picketing for recognition by members of a minority union does not constitute restraint or coercion of employees within the meaning of section 8(b)(1)(A). *Drivers Local 639 v. NLRB (Curtis Brothers, Inc.),* (D.C. Cir. 1958) 43 L.R.R.M. 2156, cert. granted 27 U.S. LAW WEEK 3291, 3293 (1959).

Since it is an unfair labor practice for an employer to recognize a minority union as exclusive bargaining representative of an employees' unit,[5] fairness would seem to require that the act be construed, if possible,

1 Since they had been permanently replaced, the economic strikers were ineligible to vote in the election. Labor-Management Relations Act, 1947, 61 Stat. 143, 29 U.S.C. (1952) §159(c)(3). See Pipe Machinery Co., 79 N.L.R.B. 1322 (1948).

2 Although there was no express demand for recognition following the election, the character of the picketing had not changed since its instigation prior to the election to compel the employer to bargain with the union.

3 Labor-Management Relations Act, 1947, 61 Stat. 140, 29 U.S.C. (1952) §158(b)(1)(A). See text at note 8 infra.

4 Curtis Brothers, Inc., 119 N.L.R.B. 232 (1957); comment, 33 N.Y. UNIV. L. REV. 410 (1958), notes, 71 HARV. L. REV. 1362 (1958), 42 MINN. L. REV. 459 (1958), 44 VA. L. REV. 741 (1958). Prior to the principal decision the Board had applied the Curtis rule in eleven cases: Alloy Mfg. Co., 119 N.L.R.B. 307 (1957), enforcement granted in part on other grounds and denied in part on other grounds, NLRB v. IAM Lodge 942 (Alloy Mfg. Co.), (9th Cir. 1959) 43 L.R.R.M. 2548; Andrew Brown Co., 120 N.L.R.B. No. 89, 42 L.R.R.M. 1195 (1958); Biltmore Furniture Mfg. Corp., 120 N.L.R.B. No. 219, 42 L.R.R.M. 1261 (1958); Fisk & Mason, 120 N.L.R.B. No. 19, 41 L.R.R.M. 1449 (1958); Harou, Inc. and En Tour, 120 N.L.R.B. No. 90, 42 L.R.R.M. 1034 (1958); Lane Bryant San Francisco, Inc., 121 N.L.R.B. No. 86, 42 L.R.R.M. 1415 (1958); Machinery Overhaul Co., 121 N.L.R.B. No. 153, 42 L.R.R.M. 1527 (1958); O'Sullivan Rubber Corp., 121 N.L.R.B. No. 185, 42 L.R.R.M. 1567 (1958); J.C. Penney Co., 120 N.L.R.B. No. 189, 42 L.R.R.M. 1198 (1958); H.A. Rider & Sons, 120 N.L.R.B. No. 199, 42 L.R.R.M. 1238 (1958); Shepherd Machinery Co., 119 N.L.R.B. 320 (1957). Since the principal decision the Board has applied the Curtis rule in three cases: Mid-Island Electrical Sales Corp., 122 N.L.R.B. No. 105, 43 L.R.R.M. 1205 (1959); Cosper Mfg. Co., 123 N.L.R.B. No. 27, 43 L.R.R.M. 1413 (1959); United Transports, Inc., 123 N.L.R.B. No. 60, 43 L.R.R.M. 1503 (1959).

5 By entering into a contract recognizing a minority union as exclusive bargaining representative, an employer violates §8(a)(1) and (2). Labor-Management Relations Act, 1947, 61 Stat. 140, 29 U.S.C. (1952) §158(a)(1) and (2). Moreover, by accepting recognition the minority union violates §8(b)(1)(A). Bernhard-Altmann Texas Corp., 122 N.L.R.B.

to ban picketing to compel an employer to grant such recognition. The specific reasons given by the court for its refusal so to construe the act[6] do not conceal its concern that such an interpretation would in effect proscribe organizational as well as recognition picketing.[7] Section 8(b)(1)(A) makes it an unfair labor practice for a union to "restrain or coerce" employees in the exercise of their right to join or refrain from joining any labor organization.[8] Picketing by a minority union for either recognition or organizational purposes economically coerces employees to join the union by stopping or interrupting their employment and by tending to force the employer, whose business is falling off, to put pressure on them to join so that the picketing will cease. The dissenting opinion of Board member Murdock in the NLRB decision of the principal case was expressly adopted by the court of appeals. He contended that since the economic pressure exerted upon the employees is the same regardless of the objective sought by the union, no distinction between recognition and organizational picketing can be made in the application of section 8(b)(1)(A).[9]

This contention provokes two questions. Was the act intended to outlaw organizational picketing? If not, can it be interpreted so as to prohibit only recognition picketing? Section 8(a)(1),[10] making it an unfair labor practice for an employer to "interfere with, restrain, or coerce" employees in the exercise of their right to join or refrain from joining any labor organization, had been construed by the courts prior to the adoption of section 8(b)(1)(A) to proscribe economic as well as other kinds of coercion.[11] Since the basic idea behind section 8(b)(1)(A) was to subject

No. 142, 43 L.R.R.M. 1283 (1959); United Transports, Inc., 123 N.L.R.B. No. 60, 43 L.R.R.M. 1503 (1959).

[6] Emphasis was placed on §13: "Nothing in this subchapter, except as *specifically* provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." (Italics supplied.) Labor-Management Relations Act, 1947, 61 Stat. 151, 29 U.S.C. (1952) §163. The court felt that §8(b)(1)(A) was inapplicable to picketing because it is not specifically mentioned therein; however, §8(b)(2) Labor-Management Relations Act, 1947, 61 Stat. 140, 29 U.S.C. (1952) §158(b)(2) has been used to outlaw picketing despite the fact that it contains no explicit reference thereto. Alloy Mfg. Co., note 4 supra. The court also felt that §8(b)(4)(C), which outlaws recognition picketing by any union when another union has been certified, was made entirely redundant by the Board's decision in Curtis; however, §8(b)(4)(C) applies to picketing by either a minority or a majority union, whereas the Curtis rule is limited to minority union picketing. See Andrew Brown Co., note 4 supra, at 1196, n. 5.

[7] The court states, "The Board interpretation of §8(b)(1)(A), and of the meaning of 'coerce and restrain,' presents implications of serious and far-reaching consequences." Principal case at 2157.

[8] See note 3 supra.

[9] Member Murdock asserted that the Board's theory of coercion was so broad as to proscribe all picketing. Curtis Brothers, Inc., note 4 supra, at 257.

[10] See note 5 supra.

[11] See, e.g., NLRB v. Winona Textile Mills, (8th Cir. 1947) 160 F. (2d) 201.

unions to the same regulations as employers,[12] it can be argued that this section should also be construed to outlaw all forms of economic coercion, including organizational picketing.[13] The primary objection to this interpretation stems from the improbability that Congress intended such a radical innovation as proscription of organizational picketing without mentioning it expressly.[14] Despite the fact that the principles of statutory construction would support interpreting the act so as to outlaw organizational picketing[15] and despite the strong policy considerations favoring abolition of most organizational picketing,[16] it would seem proper for the courts to require a clearer mandate from Congress before taking this step. It does not follow, however, that recognition picketing by a minority union need be immune from section 8(b)(1)(A). The Board emphasized that while the economic coercion exerted by the two kinds of picketing may be the same, recognition picketing is especially objectionable because it is ". . . tainted, on its face, with the unlawful direct purpose of forcing the commission of an unfair labor practice by the employer and the summary imposition of an unwanted union upon its employees."[17] If the illegal objective of the picketing is made the basis of proscription and if section 8(b)(1)(A) is utilized as a general enforcement provision to effectuate the policies of the act,[18] the Board's decision seems

12 Senator Taft stated, "The act for years has contained the provision: 'It shall be an unfair labor practice on the part of an employer to interfere with, restrain, or coerce employees in the exercise of the rights to work and organize.' All that is attempted is to apply the same provision with exact equality to labor unions." 93 CONG. REC. 4436 (1947). On the legislative history of §8(b)(1)(A) generally, see 26 GEO. WASH. L. REV. 691 at 693-700 (1958).

13 The Court of Appeals for the Ninth Circuit used this reasoning in holding that a union seeking to organize the employees of a wholesale baking company coerced them in violation of §8(b)(1)(A) by picketing the retail stores selling the wholesaler's products. Capital Service, Inc. v. NLRB, (9th Cir. 1953) 204 F. (2d) 848, affd. on other grounds 347 U.S. 501 (1954). There is no indication that the result would have been different if the union had picketed the wholesaler itself.

14 See Cox, "Some Aspects of the Labor-Management Relations Act, 1947," 61 HARV. L. REV. 1 at 28 (1947).

15 See comment, 33 N.Y. UNIV. L. REV. 410 at 415-416 (1958).

16 See Cox, "Some Current Problems in Labor Law: An Appraisal," 35 L.R.R.M. 48 at 56-57 (1955).

17 Curtis Brothers, Inc., note 4 supra, at 239. The Board adopted an "unlawful purpose" doctrine, similar to that much used by state courts to enjoin peaceful picketing by minority unions since the decisions in Building Service Union v. Gazzam, 339 U.S. 532 (1950); Hughes v. Superior Court, 339 U.S. 460 (1950); and Teamsters Union v. Hanke, 339 U.S. 470 (1950). Only the Gazzam case involved recognition picketing. For a review of the development of the unlawful purpose doctrine, see Justice Frankfurter's opinion in Teamsters Union v. Vogt, Inc., 354 U.S. 284 (1957).

18 The Board stated that ". . . the problem in the instant case is not 'which section?' is involved but 'has the Act been violated at all?' . . . the policy of the statute . . . impels a finding of a violation here. . . ." Curtis Brothers, Inc., note 4 supra, at 246. This interpretation of §8(b)(1)(A) is not surprising; a similar construction has been given to §8(a)(1), which prohibits restraint or coercion by employers. See note 5 supra. Violations

justifiable, though its application should be limited to recognition picketing. It must be admitted that the distinction between recognition and organizational picketing, though theoretically sound, is open to criticism.[19] The union's subjective motives are not always apparent, and in any event courts have generally been concerned with the effects of minority picketing rather than its purpose. Nevertheless, the distinction which has been drawn can be useful in preventing unjust injury to employer and employees in situations like the principal case, where the union's objective is fairly evident. If the approach suggested receives approval in subsequent cases of this type, then it is to be hoped that before unions become adept at making all minority picketing appear to be for organizational purposes, Congress will act by providing some needed amendments to the LMRA.

Roger W. Findley, S.Ed.

of §8(a)(2), (3), (4), and (5) are also violations of §8(a)(1). See Harcourt and Co., 98 N.L.R.B. 892 at 900 (1952). See also note, 42 MINN. L. REV. 459 at 477 (1958); note, 44 VA. L. REV. 741 at 745 (1958).

[19] See Cox, "Some Current Problems in Labor Law: An Appraisal," 35 L.R.R.M. 48 at 55-56 (1955).