Florida Law Review

Volume 35 | Issue 4 Article 2

September 1983

Recognition Picketing Under the NLRA

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RECOGNITION PICKETING UNDER THE NLRA

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INTRODUCTION

Long ago, Justice Holmes articulated the broad socioeconomic considerations underlying national labor policy:

> [O]ne of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way.[1]

Peaceful picketing is a potent union weapon in this battle.[2] To protect labor's right to use this weapon for organization or recognition while checking potential abuses inherent in its unrestrained exercise,[3] Congress amended the National Labor Relations Act[4] in 1959. The amendment, section 8(b)(7),[5] provides "a comprehensive code governing organizational strikes and picketing . . . ."[6] Congress enacted this section to ensure employees freedom of choice in selecting a bargaining representative.[7]

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In 1959, the year section 8(b)(7) was enacted, the late Professor-Emeritus Nathan P. Feinsinger of Wisconsin Law School brilliantly led this author and his classmates through the undeveloped maze of the section. It is with respect and affection that this article is therefore dedicated in memory of Nate.

1. Vegalahn v. Guntner, 167 Mass. 92, 108, 44 N.E. 1077, 1081 (1896) (Holmes, J., dissenting).

2. "The ultimate source of bargaining power is the ability to inflict economic damage on the opponent. Thus the ground rules regulating the use of economic pressure have always been a hotly disputed area of labor law." L. REYNOLDS, LABOR ECONOMICS AND LABOR RELATIONS 583 (7th ed. 1978).

3. International Hod Carriers, Local 840 (C.A. Blinne Constr. Co.) 135 N.L.R.B. 1153, 1158 (1962).

4. 29 U.S.C. §§ 141-144, 151-168, 171-182, 185-187 (1976).

5. 29 U.S.C. § 158(b)(7) (1976).

6. NLRB v. Drivers, Local 639, 362 U.S. 274, 291 (1960). *See also* NLRB v. Local 103, Iron Workers (Higdon Constr. Co.), 434 U.S. 335 (1978). *See generally* Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257 (1959); Dunau, *Some Aspects of the Current Interpretation of Section 8(b)(7)*, 52 GEO. L.J. 220 (1964); Meltzer, *Organizational Picketing and the NLRB: Five on a Seesaw*, 30 U. CHI. L. REV. 78 (1962); Rosen, *Area Standards Picketing*, 23 LAB. L.J. 67 (1972); Shawe, *Federal Regulation of Recognition Picketing*, 52 GEO. L.J. 248 (1964); Note, *Picketing for Area Standards: An Exception to Section 8(b)(7)*, 1968 DUKE L.J. 767.

7. *See* NLRB v. Local 103, Iron Workers (Higdon Constr. Co.), 434 U.S. 335, 346 (1978).

> The use of picketing was of particular concern as a method of coercion in three specific contexts: where employees had already selected another union representative, where employees had recently voted against a labor union, and where employees had not

From its inception, section 8(b)(7) has raised difficult problems of interpretation and harmonization.[8] It continues to be one of the most intricate and opaque strands in the web of national labor policy. To unravel some of these intricacies, this article will trace the section's evolution, reviewing its construction and application by the courts and the National Labor Relations Board (the Board). Board procedures for resolving alleged violations of the section will also be examined. The current state of the law pertaining to organizational picketing will be analyzed, and problem areas in application of the section identified.

EXPLICATION OF THE STATUTE

Section 8(b)(7)[9] bars a union from picketing for recognition or organization

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been given a chance to vote on the question of representation. Picketing in these circumstances was thought impermissibly to interfere with the employees' freedom of choice.

Id. at 347. *See also* Connell Constr. Co. v. Plumbers & Steamfitters, Local 100, 421 U.S. 616 (1975), in which the court stated:

> One of the major aims of the 1959 Act was to limit "top-down" organizing campaigns, in which unions used economic weapons to force recognition from an employer regardless of the wishes of his employees. Congress accomplished this goal by enacting § 8(b)(7), which restricts primary recognitional picketing, and by further tightening § 8(b)(4)(B), which prohibits the use of most secondary tactics in organizational campaigns.

Id. at 632.

8. *See, e.g.,* International Hod Carriers, Local 840 (C.A. Blinne Constr. Co.), 135 N.L.R.B. 1153 (1962).

9. 29 U.S.C. § 158(b)(7) (1976). The statute provides:

> (b) It shall be an unfair labor practice for a labor organization or its agents— . . .
> (7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:
> (A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title,
> (B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or
> (C) where such picketing has been conducted without a petition under section 159(c) of this title 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 159(c)(1) of this title 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

in certain circumstances. Subsection (A) bans organizational or recognitional picketing when the employer has lawfully recognized another union and questions concerning representation cannot appropriately be raised.[10] Subsection (B) bars such picketing when a valid Board election has been held within the preceding twelve months.[11] Subsection (C) provides that when picketing for recognition or organization is not barred by subsections (A) or (B), such picketing may not exceed thirty days unless a representation petition is filed within that period.[12]

If no such petition is filed, picketing beyond thirty days is an unfair labor practice. Filing a timely petition stays the limitation and the picketing may continue pending the outcome of the petition. The first proviso to subsection (C) expedites the procedure. It requires a Board directed and certified election once a timely petition has been filed.[13] The second proviso to subsection (C) affords an immunity to certain kinds of informational picketing when subsections (A) and (B) do not apply. This immunity is withheld when the object of the informational picketing is to interfere with deliveries to the picketed employer.[14]

The "comprehensive code" contained in section 8(b)(7) is designed to further the orderly resolution of disputes over representation of employees by requiring settlement through Board procedures rather than coercive picketing.[15] The Board's Rules and Regulations and Statements of Procedure implement the section.[16] A case is given priority status and promptly investigated[17] upon the filing of a charge that a union has violated section 8(b)(7). If after investigation the charge appears to have merit, the Regional Director issues a complaint and simultaneously applies to the federal district court for an injunction against the picketing.[18] However, when a union that has filed a

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 subsection.

10. *Id.* § 158(b)(7)(A).
11. *Id.* § 158(b)(7)(B).
12. *Id.* § 158(b)(7)(C).
13. *Id.*
14. *Id.*
15. As one court remarked:

> The Landrum-Griffin Amendments indicate a further drift by Congress from the Norris-LaGuardia view that the law has no useful role to play in labor disputes, toward a view that there is a need for greater stability in the organizational recognitional areas of industrial relations . . . [Section 8(b)(7)] seeks to accomplish this objective.

Penello v. Retail Store Employees, Local 692, 188 F. Supp. 192 (D.C. Md. 1960), *aff'd*, 287 F.2d 509 (4th Cir. 1961).

16. NLRB Rules & Regs., 29 C.F.R. § 102 (1982); NLRB Statements of Procedure, 29 C.F.R. § 101 (1982).
17. 29 C.F.R. §§ 101.22, 102.73, .95(a)(19) (1982).
18. 29 C.F.R. §§ 101.22(b), 102.74 (1982). Section 10(l) provides for injunctive relief pending final Board decision regarding certain unfair labor practice conduct, including that arising under section 8(b)(7). 29 U.S.C. § 160(l) (1976). *See also* McLeod v. Chefs, Local 89, 280 F.2d 760 (2d Cir. 1960).

"timely" election petition is charged with violating subsection (C), the Regional Director suspends proceedings on the unfair labor practice charge and investigates the petition.[19] If the Regional Director decides an election is warranted and no issues require a prior hearing, he will direct an election to be held in an appropriate unit of employees.[20] Any party aggrieved by the Regional Director's direction of the election may seek review by filing with the Board a request for special permission to appeal the Regional Director's action. The Board may order a stay of the election if appropriate.[21] After the election, and after disposition of any challenges to election procedures, the Regional Director issues a certification of the election results.[22]

If the picketing union loses the election but nevertheless continues picketing for recognition or organization, it is subject to restraint under section 8(b)(7)(B) because an election was held within the past twelve months. Accordingly, the employer may file a new unfair labor practice charge alleging violation of section 8(b)(7)(B). Upon investigating the charge and finding it meritorious, the Regional Director may issue a complaint and concurrently seek to enjoin the picketing.[23] In the subsequent section 8(b)(7)(B) proceeding, the initial question is whether the post-election picketing has the proscribed object of recognition or organization. With an affirmative finding the inquiry becomes whether there was a "valid election." In the new proceeding, all questions relating to the validity of the election, including the Regional Director's propriety of directing it, are open to Board and judicial review.[24]

Proscribed Means: Picketing

Although section 8(b)(7) prohibits unions from picketing for recognition or organization, the Act fails to define picketing. Moreover, few decisions[25] since the section's enactment have interpreted the term. Essentially, picketing is a patrol that "establishes a *locus in quo* that has far more potential for inducing action or nonaction than the message the pickets convey. . . ."[26] Picketing generally involves the use of signs combined with the elements of

19. 29 C.F.R. §§ 101.22(a), 102.75(a) (1982).

20. *Id.* §§ 101.23(b), 102.77(b). However, where the Regional Director determines that any of the issues involved raise questions which should be decided by the Board before election, he may order a hearing on such issues and then submit the matter to the Board for determination. *Id.*

21. *Id.* §§ 101.23(b), 102.80(c).

22. *Id.* §§ 101.23(b), 102.78, .69(b). The Regional Director dismisses the unfair labor practice charge when he determines an election should be held on the petition, the processing of which has been "suspended" pending investigation of the petition. *Id.* §§ 101.24(a), 102.81(a). *See* Department & Specialty Store Employees Union, Local 1265 v. Brown, 284 F.2d 619 (9th Cir. 1960), *cert. denied,* 366 U.S. 934 (1961).

23. 29 C.F.R. §§ 101.22(b), 102.74 (1982).

24. *See* Department & Specialty Store Employees Union, Local 1265 v. Brown, 284 F.2d 619 (9th Cir. 1960), *cert. denied,* 366 U.S. 934 (1961); Department of Specialty Store Employees Union, Local 1265 (Kinney Co.), 136 N.L.R.B. 335 (1962).

25. *See, e.g.,* NLRB v. United Furniture Workers, 337 F.2d 936 (2d Cir. 1964); NLRB v. Local 182, Teamsters (Woodward Motors), 314 F.2d 53 (2d Cir. 1963); Local 282, Teamsters, 262 N.L.R.B. 528 (1982); Teamsters, Local 688, 205 N.L.R.B. 1131 (1973).

26. Building Serv. Employees Int'l Union, Local 262 v. Gazzam, 339 U.S. 532, 537 (1950).

patrolling and confrontation. Yet courts have established union conduct as picketing despite the lack of signs[27] or of conventional patrolling.[28]

In *NLRB v. Local 182, Teamsters (Woodward Motors),*[29] union members placed signs in snowbanks and then waited in nearby cars until delivery trucks approached. The Board determined that these actions constituted picketing prohibited by section 8(b)(7).[30] In the action for enforcement of the Board's order, the Second Circuit consulted a dictionary for the labor meaning of "picket."[31] The court found picketing to be walking or standing in front of a place of employment; movement by pickets was not necessary.[32] Holding the union's conduct violated section 8(b)(7), the court stated: "The activity was none the less picketing because the union chose to bisect it, placing the material elements in snowbanks but protecting the human elements from the rigors of an upstate New York winter by giving them the comfort of heated cars until a delivery truck approached . . . ."[33]

The following year, the same court found it necessary to clarify its decision. In *NLRB v. United Furniture Workers,*[34] union representatives attached signs to poles and trees every morning in front of the employer's plant, then waited in a car across the street until the afternoon when they removed the signs. The Board found the activity constituted picketing.[35] The court returned the case to the Board for additional findings of fact, stating that the facts did not show whether confrontation, an essential element of picketing, had taken place.[36] The court's test was whether the union members' presence in the car was intended to and did have the same effect on people approaching the plant as if the members had stayed with the signs.[37] For example, if union representatives had stayed in a house across the street, that conduct is not "picketing."[38]

These two decisions show that picketing may occur with posted but unaccompanied signs. Later decisions[39] demonstrate that patrolling without signs may constitute picketing. In *Teamsters, Local 688,*[40] the union passed out leaflets to persons entering the employer's premises.[41] The Board distinguished picketing from handbilling in the following manner:

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27. *See, e.g.,* Local 282, Teamsters, 262 N.L.R.B. 528 (1982); District 30, U.M.W., 163 N.L.R.B. 562 (1967).

28. *See, e.g.,* NLRB v. United Furniture Workers, 337 F.2d 936 (2d Cir. 1964); NLRB v. Lawrence Typographical Union No. 570, 169 N.L.R.B. 279, *enforced.* 402 F.2d 452 (10th Cir. 1968).

29. 314 F.2d 53 (2d Cir. 1963).

30. 135 N.L.R.B. 851, 851 (1962).

31. 314 F.2d at 57-58. *See also* WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed.).

32. 314 F.2d at 58.

33. *Id.*

34. 337 F.2d 936 (2d Cir. 1964).

35. 146 N.L.R.B. 474, 474 (1964).

36. 337 F.2d at 940.

37. *Id.*

38. *Id.*

39. Local 282, Teamsters, 262 N.L.R.B. 528 (1982); Teamsters, Local 688, 205 N.L.R.B. 1131, 1133 (1973).

40. 205 N.L.R.B. 1131 (1973).

41. *Id.* at 1131-32. Although the union varied the form of the handbills, all leaflets

> We recognize, of course, that there may be situations where, even though union agents do not patrol with signs, their very presence is intended to and does operate as a signal to induce action by those to whom the signal is given. It is this "signalling" which provokes responses without inquiry into the ideas disseminated and distinguishes picketing from other forms of communication and makes it subject to restrictive regulation.[42]

The Board recently affirmed a similar decision by an administrative law judge in *Local 282, Teamsters*.[43] In that case union members stationed at the employer's delivery entrances neither carried signs nor handed out leaflets.[44] The administrative law judge held the activity to be picketing because the union members conveyed a signal to delivery truck drivers to halt deliveries.[45] The Board agreed with his findings.[46]

Proscribed Objects: Organization and Recognition

Section 8(b)(7) proscribes picketing when "an object" of the picketing is to force an employer "to recognize or bargain with a labor organization," or to force employees to select the union as their bargaining representative.[47] The section prohibits picketing only when one of the objects is organization or recognition. Because section 8(b)(7) uses the phrase "an object," so long as *one* of the union's objectives is illegal the existence of other legitimate objectives is immaterial.[48] Conversely, picketing conducted solely to protest an employee's discharge and secure his reinstatement is not illegal.[49] When an employer alleges an 8(b)(7) violation, the Board must first ascertain whether the union's conduct constitutes picketing. If so, the Board must then determine the object of the picketing.[50]

Picketing solely for the purpose of protesting substandard wages and

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suggested that representation by the union would benefit the employees. The handbills were initially directed toward employees, but later were aimed at the public. *Id.* at 1132.

42. *Id.* at 1133. However, the Board found that the union was not seeking to convey a signal by distributing its handbills. *Id.*

43. 262 N.L.R.B. 528 (1982).

44. *Id.* at 528-29.

45. *Id.* at 541. *See also* Lumber & Sawmill Workers Local 2797, 156 N.L.R.B. 388, 394 (1965):

> The important feature of picketing appears to be the posting by a labor organization or by strikers of individuals at the approach to a place of business to accomplish a purpose which advances the cause of the union, such as keeping employees away from work or keeping customers away from the employer's business.

46. 262 N.L.R.B. at 529.

47. 29 U.S.C. § 158(b)(7) (1976).

48. *See* NLRB v. Local 265 (RP & M Elec.), 604 F.2d 1091 (8th Cir. 1979). *See also* IBEW, Local 501 v. NLRB, 341 U.S. 694, 700 (1951); Denver Bldg. & Constr. Trades Council v. NLRB, 341 U.S. 675, 688-89 (1951).

49. *See* Local 259, UAW (Fanelli Ford Sales, Inc.), 133 N.L.R.B. 1468, 1475 (1961).

50. As the Supreme Court remarked, "[d]etermining the object, or objects, of labor union picketing is a recurring and necessary function of the Board. Its resolution of these mixed factual and legal questions normally survives judicial review." NLRB v. Local 103, Iron Workers, 434 U.S. 335, 342 n.7 (1978).

achieving area wage standards does not violate section 8(b)(7)[51] because the picketing's object is not for recognition or organization. Determining whether picketing is directed only to area standards is often problematic.[52] The Board considers various factors to determine whether a union is engaged in permissible area standards picketing or is using area standards as a pretext for recognition. For example, the Board examines whether the union actually investigated the employer's wages and benefits,[53] or whether there were "adequate, reasonably reliable, external sources to substantiate the union's conclusion" that the employer's economic package was substandard.[54] The Board also considers whether the union requested the employer to furnish information irrelevant to area standards.[55] Another factor in the Board's determination is whether the union's demands of the employer were broader than necessary for compliance with area standards.[56]

The Board has recognized that a union may alter its picketing objectives. Thus, a union's original recognitional object does not preclude a finding that later picketing was for the permissible purpose of maintaining area standards.[57] "[W]hen a union follows a disclaimer with the cessation of picketing for a significant period of time and engages in no other conduct inconsistent with its disavowal of representative interest, the Board has been more inclined to conclude that the union has abandoned its present recognitional objective."[58]

51. *See* Houston Bldg. & Constr. Trades Council (Claude Everett Constr. Co.), 136 N.L.R.B. 321 (1962).

52. *See* IBEW, Local 265 (RP & M Elec.), 236 N.L.R.B. 1333 (1978), *enforced,* 604 F.2d 1091 (8th Cir. 1979). Member Jenkins at the Board level and Judge Heaney in the enforcement proceeding strongly dissented, finding that the facts were consonant with permissible area standards picketing. 236 N.L.R.B. 1333, 1335 (1978) (dissenting opinion); 604 F.2d 1091, 1100-01 (8th Cir. 1979) (Heaney, J., dissenting). As one administrative law judge stated:

> We must continually bear in mind that recognition and area standards represent different goals. Unions exist for organizational and recognitional purposes, and always have an ultimate goal of representing all employees functioning in a particular industry. They do not lightly forego it, and pursuit of an ostensible area standards object must not be viewed as an easy way to circumvent the statutory proscriptions against recognitional picketing. Thus, we must always carefully scrutinize the circumstances surrounding alleged area standards picketing to determine if the union in pursuing this course of action has accepted the required limitations, and may reasonably be said to be seeking no more than an equalization of competitive advantage rather than the attainment of a bargaining relationship.

Sales Delivery Drivers, Local 296, 205 N.L.R.B. 462, 469 (1973). *See also* IBEW, Local 265 (RP & M Elec.), 236 N.L.R.B. 1333, 1335 n.6 (1978) (purported area standards often used to disguise prohibited recognitional or organizational aims).

53. *See* Carpenters, Local 1622, 250 N.L.R.B. 416, 418 (1980); Building Serv. Employees, Local 87 (Liberty House/Rhodes), 223 N.L.R.B. 30, 34 (1976).

54. General Serv. Employees, Local 73 (A-1 Security Serv. Co.), 224 N.L.R.B. 434, 435 (1976), *enforced,* 578 F.2d 361 (D.C. Cir. 1978).

55. *See* Automotive Employees, Local 88, 208 N.L.R.B. 679, 680 (1974).

56. *See* IBEW, Local 265 (RP & M Elec.), 236 N.L.R.B. 1333 (1978), *enforced,* 604 F.2d 1091 (8th Cir. 1979).

57. *See* Ventura County Dist. Council of Carpenters, 242 N.L.R.B. 1109 (1979).

58. McClintock Market, Inc. 244 N.L.R.B. 555 (1979). *See also* Ogden Ent., 248 N.L.R.B. 290 (1980); John's Valley Foods, 237 N.L.R.B. 425 (1978).

Although picketing for area standards is not a proscribed object, picketing to enforce a prehire contract may encompass a recognitional object and thus violate section 8(b)(7). In *NLRB v. Local 103, Iron Workers (Higdon Contracting Co.),*[59] the Supreme Court upheld the Board's finding that an uncertified, minority union violated section 8(b)(7)(C) by picketing to enforce a prehire contract lawful under section 8(f).[60] In *Iron Workers,* Higdon Construction Company and Local 103 had been parties to a collective bargaining relationship since 1968. In 1973, Higdon and Local 103 entered into a prehire contract which obligated Higdon to follow the terms of a tri-state, multiemployer association agreement. The prehire contract contained a union-security agreement. Higdon Contracting Company was then formed for the express purpose of performing nonunion construction work. Thereafter, Local 103 picketed two Higdon Contracting projects with signs that read "Higdon Construction Company is in violation of the agreement of the Iron Workers Local Number 103."[61] Local 103 did not represent a majority of employees at either project and its members picketed one project for more than thirty days without filing a representation petition.

The Board found the prehire contract not binding upon the employer because Local 103 never achieved majority status.[62] In the Board's view, a prehire contract does not give a minority union the rights of a majority union until it attains majority status in the relevant unit. Until then the prehire contract is voidable and lacks the binding effect of a majority union contract. The Board found the picketing was not to enforce an existing agreement, but rather to force Higdon Contracting to bargain with Local 103. Because the picketing had a proscribed object and because Local 103 was uncertified and had failed to file a representation petition within a reasonable time, the Board found the picketing violative of section 8(b)(7)(C).

The D.C. Circuit denied enforcement of the Board's order,[63] holding that Local 103 had the right to picket to enforce the lawful prehire contract. The court found that granting a nonmajority union the contract enforcement rights of a majority union was permissible because section 8(f) denied contract bar protections to prehire agreements.

The Supreme Court reversed and upheld the Board's decision as being validly predicated upon the statutory policy favoring majoritarian exclusivity. The Court stated that section 8(f) is a limited exception to the general statutory prohibition against minority union recognition and minority agreements.[64]

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59. 434 U.S. 335 (1978). *See also* Modjeska, *The Supreme Court and the Diversification of National Labor Policy,* 12 U.C.D. L. REV. 37 (1979).

60. 29 U.S.C. § 158(f) (1976). *See generally NLRB Guidelines on Construction Pre-Hire Agreements,* 1979 LAB. REL. YEARBOOK 349.

61. 434 U.S. at 340.

62. Local 103, Iron Workers (Higdon Constr. Co.), 216 N.L.R.B. 45 (1975).

63. Local 103, Iron Workers v. NLRB, 535 F.2d 87 (D.C. Cir. 1976).

64. 434 U.S. at 345. The Court noted its decision in ILGWU v. NLRB (Bernhard-Altmann Texas Corp.), 366 U.S. 731 (1961), in which the Court held an employer violated § 8(a)(1) and (2). The Court also found the union violated § 8(b)(1)(A) by entering into an exclusive collective bargaining agreement with a minority union. The *Bernhard-Altmann*

Section 8(f) legalizes minority agreements in the construction industry but does not protect the union against inquiry into majority status during the life of the agreement.[65] The Court endorsed the correlative Board principle that absent proof of a union's majority status, an employer's refusal to honor a pre-hire contract is not violative of section 8(a)(5).[66]

The Court agreed with the Board that section 8(b)(7)(C) should not be interpreted literally so as to forbid any picketing with a bargaining object. While section 8(b)(7)(C) does not ban picketing by a majority union to enforce a contract, it does ban picketing to force initial recognition and bargaining. By dovetailing these interpretations of sections 8(f) and 8(b)(7)(C), and by recognizing Local 103's minority status at the picketed projects, the Court concluded the picketing violated section 8(b)(7)(C).

Rival Union Picketing

Section 8(b)(7)(A) bans picketing for recognition or organization when the employer has lawfully recognized another union unless the picketing union can appropriately challenge that representation.[67] The subsection embodies the congressional judgment that in such situations "both the employer and the employees are entitled to immunity from recognition or organization picketing for a proscribed period."[68]

Section 8(b)(4)(C)[69] of the Taft-Hartley Act protects an employer from rival union picketing when the employees are represented by a certified union. Section 8(b)(7)(A)[70] extends the protection to situations involving contracts with uncertified but lawfully recognized unions when no question concerning representation may appropriately be raised. The subsection thus essentially reaches the situation where the Board's contract bar (or other bar) rules preclude an election.[71]

A rival picketing union may challenge the legality of the incumbent

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Court stated there could be "no clearer abridgment" of the § 7 rights of employees to select their own bargaining representative than to grant exclusive bargaining status to an agency selected by a minority of its employees. 366 U.S. at 737.

65. 434 U.S. at 345. The Court examined the presumption of continued majority status accorded to majority union contracts, citing Dayton Motels, Inc., 192 N.L.R.B. 674, 678 (1971), *remanded*, 474 F.2d 328 (6th Cir. 1973), *enforced*, 525 F.2d 476 (6th Cir. 1976). 434 U.S. at 343. The Court said that the question of a union's majority status is also subject to litigation in a suit under § 301 of the Act to enforce a § 8(f) contract. "[A]bsent a showing that the union is the majority's chosen instrument, the contract is unenforceable." *Id.* The Court found that this construction of the statute did not render § 8(f) meaningless. *Id.* at 352.

66. 434 U.S. at 345. "The employer's duty to bargain and honor the contract is contingent on the union's attaining majority support at the various construction sites." *Id.*

67. 29 U.S.C. § 158(b)(7)(A) (1976).

68. International Hod Carriers, Local 840 (C.A. Blinne Constr. Co.), 135 N.L.R.B. 1153, 1156-57 (1962).

69. 29 U.S.C. § 158(b)(4)(C) (1976).

70. 29 U.S.C. § 158(b)(7)(A), (1976).

71. *See* Local 378, Meat Cutters (Waldbaum, Inc.), 153 N.L.R.B. 1482 (1965); Local 1199, Drug & Hosp. Employees Union (Janel Sales Corp.), 136 N.L.R.B. 1564 (1962); Local 182, Teamsters (Sitrue, Inc.), 129 N.L.R.B. 1459, 1463 (1961).

union's representative status only when permitted under sections 8 or 9 of the Act,[72] not as a defense to section 8(b)(7)(A) charges.[73] The Board has explained:

> Section 8(b)(7)(A), . . . was intended in part to promote stability in established bargaining relationships, an interest also served both by the contract bar rules and by Section 10(b). To hold . . . that an incumbent union's representative status may be placed in issue as a defense to 8(b)(7)(A) charges would permit a rival union to accomplish by means of picketing what it could not achieve under established Board procedures. Such an application of 8(b)(7)(A) would offend the very policy which that Section was designed to further. Consistent with the congressional scheme, it is our opinion that the term 'lawfully recognized' was meant to include all bargaining relationships immune from attack under Sections 8 and 9 of the Act.[74]

The informational (or second) proviso of section 8(b)(7)(C) is not available as a defense to an alleged violation of section 8(b)(7)(A). That proviso applies only to situations defined in the principal clause of section 8(b)(7)(C).[75] However, a union picketing in the face of a lawful collective bargaining relationship may assert an area standards defense.[76] Picketing for area wage standards does not violate 8(b)(7)(A) even though adoption of area standards by the employer would greatly infringe on the incumbent union's collective bargaining agreement with the employer.[77]

Post-Election Picketing

Section 8(b)(7)(B) bars a rival union from picketing for recognitional or organizational objects where a valid Board election has been held within the preceding twelve months.[78] With this section, Congress intended that "where the employees within the preceding twelve months have made known their views concerning representation, both the employer and the employees are entitled to immunity from recognition or organization picketing for prescribed periods."[79] Accordingly, the initial question in a section 8(b)(7)(B) proceeding is whether the post-election picketing is conducted for the proscribed purpose of recognition or organization.[80] If it is, the inquiry becomes whether

72. 29 U.S.C. §§ 158, 159 (1976). For example, the union might challenge the incumbent union's status under § 8(a)(2), alleging employer domination or interference with the formation of the incumbent union. *See* 29 U.S.C. § 158(a)(2) (1976).

73. *See* International Hod Carriers, Local 1298 (Roman Stone Constr. Co.), 153 N.L.R.B. 659 (1965).

74. *Id.* at 659, n.3. *See also* Sheet Metal Workers, Local 284 (Quality Roofing Co.), 169 N.L.R.B. 1014 (1968); District 9, U.M.W. (Seagraves Coal Co.), 160 N.L.R.B. 1582 (1966).

75. *See* Local 1199, Drug & Hosp. Employees Union (Janel Sales Corp.), 136 N.L.R.B. 1564 (1962).

76. Sales Delivery Drivers, Local 296, 205 N.L.R.B. 462 (1973).

77. *Id.* at 469-71.

78. 29 U.S.C. § 158(b)(7)(B) (1976).

79. International Hod Carriers, Local 840 (C.A. Blinne Constr. Co.), 135 N.L.R.B. 1153, 1156-57 (1962). The certification date rather than the ballot date is determinative under § 8(b)(7)(B). *See* Retail Store Employees' Union, Local 692 (Irvins, Inc.), 134 N.L.R.B. 686 (1961).

80. *See supra* notes 47-50 and accompanying text.

a "valid election" was in fact held. All questions regarding the validity of the election are open to Board and judicial review in the subsequent section 8(b)(7)(B) proceeding.[81]

Unreasonable Duration and Expedited Election

Section 8(b)(7)(C) provides that when subsections (A) and (B) do not bar picketing for recognition or organization, such picketing is limited to a reasonable period. This reasonable period may not exceed thirty days unless a representation petition is filed within that period.[82] If no petition is filed, picketing beyond the reasonable period is an unfair labor practice.[83] To avoid prolonged picketing, the first proviso to subsection (C) expedites the election procedure specifying that when a timely 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."[84]

The purpose of section 8(b)(7)(C) is to afford a union a reasonable opportunity to use picketing as an organizational device. Thereafter, the Board may hold an election to determine whether a majority of the employees want the union as its representative. Although the section sets thirty days as the maximum picketing period without filing a representation petition the Board may fix shorter periods as "reasonable." In assessing whether a shorter period is reasonable, the Board may consider the particular circumstances,[85] such as pre-Act picketing, violence or perishable goods.[86] In some instances, the Board

81. NLRB v. Local 182, Teamsters, 314 F.2d 53 (2d Cir. 1963); Department & Specialty Store Employees Union, Local 1265 v. Brown, 284 F.2d 619 (9th Cir.), *cert. denied,* 366 U.S. 934 (1961); Department & Specialty Store Employees Union, Local 1265 (Kinney Co.), 136 N.L.R.B. 335 (1962).

82. 29 U.S.C. § 158(b)(7)(C) (1976). *See also* NLRB v. Local 103, Iron Workers, 434 U.S. 335 (1978).

83. The timely petition requirement is satisfied not only by a petition filed by the picketing union, but also by a petition filed by a competing union. United Bhd. of Carpenters (B.H. Brown Constr. Co.), 202 N.L.R.B. 740 (1973).

84. 29 U.S.C. § 158(b)(7)(C) (1976).

85. *See* NLRB v. Local 239, Teamsters, 289 F.2d 41 (2d Cir.), *cert. denied,* 368 U.S. 833 (1961). Thus, Senator Goldwater declared:

> [Section 8(b)(7)(C)] simply means this: A union may not picket for recognition or for organizational purposes for more than a reasonable period *which may be less than 30 days if the Board so determines,* but may not be longer, without a petition for a representation election being filed with the Board. If no such petition is filed in such period then at the end thereof, but not later than the 31st day from its commencement, such picketing, if continued or resumed, becomes an unfair labor practice.

105 CONG. REC. 1972 (1959) (emphasis added).

Similarly, Representative Griffin, cosponsor of the provision and member of the Conference Committee, stated: "Of course, the picketing may be enjoined in less than 30 days if the Board finds the circumstances are such as to make it unreasonable to permit it to continue and it must be stopped at the end of 30 days." 105 CONG. REC. 18153 (1959).

86. *See, e.g.,* District 65, Retail, Wholesale & Dept. Store Union, 141 N.L.R.B. 991, 999 (1963) (30 days is outside limitation; in view of threats of physical violence, use of abusive language, and blocking of struck premises, picketing was unlawful after 26 days).

has found picketing to be unreasonable *ab initio*: when the picketing union is statutorily[87] disabled from representing the unit.[88]

Cases concerning plant guards have clarified the operation of section 8(b)(7)(C) when the picketing union is ineligible for certification as the representative of the picketed employer's employees. Section 9(b)(3) of the Act prohibits the Board from certifying a union as the representative of a unit of guards if the union admits nonguards to membership.[89] In *Teamsters, Local 71 (Wells Fargo Armored Service Corp.),*[90] the union resumed recognitional picketing after dismissal of its representation petition on the basis of section 9(b)(3) violations. The Board stated that filing a representation petition is a defense to an unfair labor practice charge only when the petition raises a valid question concerning representation. Because section 9(b)(3) prohibited the union's certification, no valid question concerning representation could have been raised by the union's petition.[91] The Board thus held the union's picketing unreasonable and a violation of section 8(b)(7).[92]

General Service Employees Local 73 (A-1 Security Service)[93] presented similar facts, but the union had never filed a representation petition. Because nonguards were admitted to membership in violation of section 9(b)(3),[94] the union was ineligible for certification. Thus, any representation petition filed would have been dismissed. Citing *Wells Fargo,* the Board held that any picketing by the union, regardless of the duration, would violate section 8(b)(7).[95] Enforcing the Board order, the D.C. Circuit elaborated, "[t]he necessary consequence of our decision is that only groups eligible to be recognized can

87. The Board has reached opposite results in two situations where a union could never be certified as bargaining representative. When the picketing union is ineligible for certification because it seeks to represent a one-employee unit, the Board's position has been that the picketing is not prohibited by § 8(b)(7)(C) and may therefore continue even though a filed petition would be immediately dismissed. *See* American Radio Ass'n. (Watters Marine, Inc.), 258 N.L.R.B. 1251 (1981); Teamsters, Local 115 (Vila-Barr Co.), 157 N.L.R.B. 588 (1966). On the other hand, the Board has held that any picketing would violate § 8(b)(7)(C) when a union cannot be certified because it seeks to represent a unit of guards but admits nonguards as union members. *See infra* notes 89-96 and accompanying text.

88. *See* Local 282, Teamsters, 262 N.L.R.B. 528 (1982); General Serv. Employees, Local 73 (A-1 Sec. Serv.), 224 N.L.R.B. 434 (1976), *enforced,* 578 F.2d 361 (D.C. Cir. 1978); Teamsters, Local 71 (Wells Fargo Armored Serv. Corp), 221 N.L.R.B. 1240 (1975), *enforced,* 553 F.2d 1368 (D.C. Cir. 1977); Drivers, Local 639 (Dunbar Armored Express, Inc.), 211 N.L.R.B. 687 (1974).

89. 28 U.S.C. § 159(b)(3) (1976).

90. 221 N.L.R.B. 1240 (1975), *enforced,* 553 F.2d 1368 (D.C. Cir. 1977).

91. *Id.* at 1242. Member Fanning strongly dissented. In his view, "[t]he election required by Section 8(b)(7)(C) needs no certifiable petitioner to raise a question concerning representation." *Id.* at 1240 (dissenting opinion). Rather, the Board should conduct the expedited election envisioned by the section and certify the arithmetical results since it cannot certify the union. The union's picketing would be barred for one year if it lacked majority support. *Id.* at 1240-41 (dissenting opinion).

92. *Id.* at 1240.

93. 224 N.L.R.B. 434 (1976), *enforced,* 578 F.2d 361 (D.C. Cir. 1978).

94. *See* 28 U.S.C. § 159(b)(3) (1976).

95. 224 N.L.R.B. at 436.

picket for recognition or take advantage of the up to thirty day 'grace period' provided in 8(b)(7)(C) for recognitional picketing."[96]

Employer unfair labor practices are not an automatic defense to a charge of a section 8(b)(7) violation.[97] Nonetheless, employer unfair labor practices which prompt a union's picketing for recognition or organizational purposes are not completely irrelevant under section 8(b)(7). Section 8(b)(7)(A) bans picketing where the employer "has lawfully recognized in accordance with this Act any other labor organization."[98] Under section 8(b)(7)(A), the picketing union can defeat an unfair labor practice charge by proving that the incumbent union had been supported by the employer in violation of section 8(a)(2).[99]

Furthermore, section 8(b)(7)(C) makes the right to continue picketing beyond a reasonable period of time contingent upon a prompt determination of the representation question in a Board election. The election must be valid under Board standards for the election results to have meaning.[100] A valid election cannot be conducted when current, unremedied employer unfair labor practices might affect employee free choice. Curtailing the union's right to continue picketing based on the results of such an election could encourage the employer to commit unfair labor practices to assure the union's defeat.

In *International Hod Carriers, Local 840 (C.A. Blinne Construction Co.),*[101] the Board analyzed the effect of employer unfair labor practices on a union's section 8(b)(7)(C) obligation to file a representation petition as a prelude to an expedited election when picketing for longer than thirty days. The union argued that when an employer commits unfair labor practices the Board should waive the filing requirement because the resulting expedited election would be tainted by unfair labor practices. Holding that unfair labor practice charges did not relieve the union of its obligation to file a representation petition,[102] the Board found the union's fears groundless.[103] If the unfair

96. General Serv. Employees, Local 73 v. NLRB, 578 F.2d 361, 371 (D.C. Cir. 1978).

97. *See* International Hod Carriers, Local 840 (C.A. Blinne Constr. Co.), 135 N.L.R.B. 1153, 1165-67 (1962). In fact, Congress specifically rejected a proposal which would have had that effect. *Id.* at 1163.

98. 29 U.S.C. § 158(b)(7)(A) (1976).

99. The proviso to § 10(l) emphasizes this by providing that a temporary injunction shall not be sought where an investigated and meritorious 8(b)(2) charge has been filed. 29 U.S.C. § 160 (1976).

100. Section 8(b)(7)(B) emphasizes this by barring picketing within twelve months of "a valid election under section [9(C)]." 29 U.S.C. § 158(b)(7)(B) (1976).

101. 135 N.L.R.B. 1153 (1962).

102. *Id.* at 1165.

103. *Id.* at 1166. The Board stated:

> In our view, Congress intended that, except to the limited extent set forth in the limited proviso, the Board in section 8(b)(7)(C) cases follow the tried and familiar procedures it typically follows in representation cases where unfair labor practice charges are filed. That procedure . . . is to hold the representation case in abeyance and refrain from holding an election pending the resolution of the unfair labor practice charges.

Id. at 1165.

practice charges were meritorious, the expedited election would be delayed until an uncoerced election could be held. On the other hand, if the charge of employer unfair labor practices were found baseless, an expedited election would quickly follow in accordance with Congress' direction.[104]

The Board concluded that unless a representation petition is filed within a reasonable period of time, the picketing will violate subsection (C) notwithstanding the employer's unfair labor practices. Even if a timely petition is filed, it nonetheless may be "blocked" by the employer's unfair labor practices. If the union files charges concerning the employer's conduct and the Board determines the charges have merit, no election would be held on the petition until the unfair labor practices were remedied. The union could continue picketing in the interim, but steps to check the picketing could not be taken under 8(b)(7)(B) until the union lost in a valid election.

Informational Picketing Exception

Subsection 8(b)(7)(C) proscribes picketing for recognition or organization when a petition for an election has not been filed within a reasonable time from the commencement of picketing.[105] The second proviso to section 8(b)(7)(C) carves out a significant exception to this general ban on recognition and organizational picketing. The proviso allows picketing for recognition or organization under two specified conditions. First, the picketing must be for the purpose of truthfully advising the public that the picketed employer "does not employ members of, or have a contract with a labor organization."[106] Under the second condition, the picketing cannot interfere with deliveries to or the performance of other services at the picketed premises by employees of other employers.

The Board's focus in determining whether the picketing causes delivery interruptions or work stoppages at the picketed premises is on the actual impact upon the employer's business.[107] The question, in the Board's view, is "whether the picketing has disrupted, interfered with, or curtailed the employer's business."[108] The proviso's protection is lost only if the picketing results in numerous delivery stoppages[109] or compels the employer to modify his normal dealings with suppliers.[110] Picketing for other purposes is not within the ambit of section 8(b)(7) and thus is not proscribed by the second proviso even when it causes delivery stoppage. Furthermore, the proviso does not exempt picketing that is otherwise banned by subsections (A) and (B).

The second proviso essentially reflects a congressional compromise sanctioning "publicity picketing" and prohibiting "signal picketing."[111] Publicity picket-

104. *Id.* at 1166.

105. 29 U.S.C. § 158(b)(7)(C) (1976).

106. *Id.*

107. Retail Clerks, Locals 324 & 770 (Barker Bros. Corp. & Gold's, Inc.), 138 N.L.R.B. 478 (1962), *rev. denied,* 328 F.2d 431 (9th Cir. 1964).

108. *Id.* at 491.

109. *Id.* at 478.

110. Local Joint Executive Bd. of Culinary Workers, 203 N.L.R.B. 744 (1973).

111. This difference between "publicity picketing" and "signal picketing" was aptly described by Professor Archibald Cox:

ing seeks to enlist the consuming public's support for the picket's cause.[112] Signal picketing, on the other hand, is primarily intended to inform union members that their unions are invoking organized economic action against the picketed employer.[113] As noted by the Second Circuit, "[t]his proviso gives the union freedom to appeal to the unorganized public for spontaneous popular pressure upon an employer; it is intended, however, to exclude the invocation of pressure by organized labor groups or members of unions, as such."[114]

APPRAISAL OF THE STATUTE: CONSTITUTIONAL CONSIDERATIONS

Recognitional or organizational picketing has been virtually prohibited by section 8(b)(7) as the preceding discussion indicates. Picketing which is not subject to prohibition is severely limited in duration. Only an innocuous form of informational picketing is seemingly preserved, and even that protection is forfeited where adverse effects occur. Section 8(b)(7) thus goes "beyond the Taft-Hartley Act to legislate a comprehensive code governing" recognitional and organizational picketing.[115]

Such a sweeping governmental prohibition of peaceful picketing raises questions[116] of unconstitutional abridgement of first amendment rights of freedom of speech and assembly.[117] It may be too late in the decisional day, however, for such questions to be considered seriously. At one time the Supreme Court broadly assimilated peaceful picketing into the freedom of speech and assembly protected under the fourteenth amendment.[118]

> This distinction between picketing backed by the threat of economic punishment and picketing which appeals only to reason, loyalty and other emotions is paralleled by a difference in the audience which the pickets seek to reach. The Teamsters' picket line is rarely addressed to individual members of the public. Its primary, and often its exclusive purpose is to notify union members and members of affiliated unions that they must not work in the picketed establishment, or pick up or deliver goods, because their unions are engaged in bringing economic weapons to bear on the employer. Despite its element of publicity and propaganda, therefore, such picketing may be fairly described as the signal by which the union invokes its economic power. The pickets patrolling in front of a retail establishment are also bringing economic pressure against the business — and in this respect the case is the same — but their appeal is addressed to the public and the members of the public decide chiefly as individuals whether to patronize the establishment or to support the pickets' cause. Thus the publicizing is the primary element and the disciplined economic power of the union is an insignificant factor.

COX, *Strikes, Picketing and the Constitution,* 4 VAND. L. REV. 574, 594-95 (1951).

112. COX, *supra* note 111, at 595-97.

113. *Id.* at 595-96. *See also* COX, *The Landrum-Griffin Amendments to the National Labor Relations Act,* 44 MINN. L. REV. 257, 262-70 (1959).

114. NLRB v. Local 3, IBEW, 317 F.2d 193, 198 (2d Cir. 1963).

115. NLRB v. Drivers, Local 639, 362 U.S. 274, 291 (1960). *See also* NLRB v. Local 103, Iron Workers, 434 U.S. 335 (1978).

116. *See, e.g.,* NLRB v. Local 265, IBEW (RP & M Elec.), 604 F.2d 1091 (8th Cir. 1979); NLRB v. Local 3, IBEW, 339 F.2d 600 (2d Cir. 1964) (per curiam); Local Joint Bd. v. Sperry, 323 F.2d 75 (8th Cir. 1963); Dayton Typographical Union v. NLRB, 326 F.2d 634 (D.C. Cir. 1963).

117. U.S. CONST. amend. I.

118. Thornhill v. Alabama, 310 U.S. 88 (1940). The Court struck down a blanket ban against all peaceful picketing and stated:

In later years the Court retreated from this broad equation with the development of the unlawful purpose doctrine. The Court found that picketing encompassed more than the communication of ideas.[119] While picketing had publicity aspects, it was also a signal to organized labor for economic action. The act of picketing was more likely to induce action than the message conveyed.[120] The signal aspects therefore justified curtailment of picketing which contravened legitimate governmental purposes.

The Court thus upheld state injunctions against picketing when the manner or object of the picketing was contrary to a valid state policy.[121] Moreover, the Court held that Congress similarly had the power to regulate and curtail peaceful picketing.[122] Given this federal and state power to curtail picketing that contravenes legitimate governmental purposes, first amend-

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> In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the constitution . . . . Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.

Id. at 102-03. *See also* Carlson v. California, 310 U.S. 106 (1940); Schneider v. State, 308 U.S. 147 (1939); Hague v. CIO, 307 U.S. 496 (1939). In Thomas v. Collins, 323 U.S. 516 (1945) the Court stated: "The right thus to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly." *Id.* at 532.

Cases such as Thornhill v. Alabama, 310 U.S. 88 (1940), and Chauffeurs, Local 795 v. Newell, 356 U.S. 341 (1958), involved legislative or injunctive bans drawn in "sweeping and inexact terms." Carlson v. California, 310 U.S. 106, 112 (1940). These bans prohibited all peaceful picketing irrespective of the legitimacy of the object.

119. Hughes v. Superior Court, 339 U.S. 460 (1950). "[W]hile picketing is a mode of communication, it is inseparably something more and different." *Id.* at 464. *See also* Bakery Drivers, Local 802 v. Wohl, 315 U.S. 769 (1942) (Douglas. J., concurring). "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated." *Id.* at 776.

120. Building Serv. Employees, Local 262 v. Gazzam, 339 U.S. 532, 537 (1950). *See also* United States v. O'Brien, 391 U.S. 367, 376 (1968): "This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."

121. *See* Teamsters v. Vogt, Inc., 354 U.S. 284 (1957) (picketing to compel the employer to force his employees to join the union); Local 10, United Ass'n of Journeymen Plumbers & Steamfitters v. Graham, 345 U.S. 192 (1953) (picketing to compel an "all union" job); Teamsters v. Hanke, 339 U.S. 470 (1950) (picketing to compel self-employed persons to adhere to a union limitation on business hours); Hughes v. Superior Court, 339 U.S. 460 (1950) (picketing to compel retail stores to hire a certain proportion of Negroes); Building Serv. Employees, Local 262 v. Gazzam, 339 U.S. 532 (1950) (picketing to compel the employer to force his employees to accept the union as their representative); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949) (picketing to compel a violation of the state antitrust law).

122. Local 501, Electrical Workers v. NLRB, 341 U.S. 694, 705 (1951) (secondary boycott picketing). *See also* ILA v. Allied Int'l, Inc., 102 S. Ct. 1656 (1982) (secondary boycott picketing); NLRB v. Retail Store Employees Union, Local 1001, 447 U.S. 607 (1980) (secondary boycott picketing).

ment challenges to section 8(b)(7) have been uniformly unsuccessful.[123] In upholding the constitutionality of the section, courts have relied upon the unlawful purpose doctrine,[124] the Act's safeguards protecting "pure" free speech,[125] and the section's lack of oppression in its practical impact.[126]

One legitimate governmental purpose which, if contravened, justifies curtailing picketing is ensuring employee freedom of choice in selecting a bargaining representative. Section 8(b)(7) implements this policy by channeling representation questions into the NLRB election processes and away from the recognitional and organizational pressures of the picket line.[127] While the representational question is pending, the right to continue recognition or organization picketing may be preserved despite any signal effects of the picketing. The right to engage in publicity (informational) non-effects picketing is also clearly preserved in this period, as well as in other non-(A) or (B) situations. In this regard, then, a balance between a legitimate governmental purpose and free speech is made.

Section 8(b)(7) further implements the governmental policy of securing employee free choice by insulating that choice from picketing pressures once the selection is made. Thus, sections 8(b)(7)(A) and (B) provide for periods of absolute repose following election or contract execution. During these periods both signal recognition or organization picketing and publicity recognition or organization picketing is banned. In these situations the constitutional balance is less even.

Even during the (A) and (B) periods of repose, however, the union remains free to engage in nonrecognition or organization publicity picketing. For example, the union may engage in area standards picketing. Free speech rights are somewhat preserved when the union's interest is in publicizing an employer's noncompliance with union economic *standards*. Free speech rights are limited, however, when the union's interest is in publicizing the employer's non-union or other union *status*.

Because the union may disseminate information in (A) and (B) periods through means other than picketing suggests that its first amendment rights are preserved to some extent. The right to engage in publicity other than picketing, however, may be so meaningless a form of communication as to be

123. NLRB v. IBEW, Local 265 (PR & M Elec.), 604 F.2d 1091 (8th Cir. 1979); NLRB v. Local 3, IBEW, 339 F.2d 600 (2d Cir. 1964) (per curiam); Dayton Typographical Union v. NLRB, 326 F.2d 634 (D.C. Cir. 1963); Local Joint Bd. v. Sperry, 323 F.2d 75 (8th Cir. 1963). *See also* Service Employees, Local 399, 263 N.L.R.B. 153 (1982) (Board declined to address first amendment issue in unfair labor practice proceeding under § 8(b)(4)).

124. NLRB v. IBEW, Local 265 (RP & M Elec.), 604 F.2d 1091 (8th Cir. 1979); Dayton Typographical Union v. NLRB, 326 F.2d 634 (D.C. Cir. 1963); Local Joint Bd. v. Sperry, 323 F.2d 75, 79 (8th Cir. 1963).

125. Local Joint Bd. v. Sperry, 323 F.2d 75, 79 (8th Cir. 1963).

126. Dayton Typographical Union v. NLRB, 326 F.2d 634 (D.C. Cir. 1963). In the court's view the statutory expedited election petition procedure provides the union a course of action by which it legally could picket. *Id.* at 649.

127. The section represents a comprehensive code designed by Congress to further the orderly resolution of disputes by requiring such questions to be settled through Board processes rather than as a result of coercive picketing. NLRB v. Drivers, Local 639, 362 U.S. 274, 291 (1960).

no right at all. This is especially so where such conduct as handbilling and stationary signs is deemed picketing under 8(b)(7).

Arguably, the constitutional balance in (A) and (B) situations is restored when the employer's interests are added to the governmental side of the scale. The dispositive question is whether Congress has a legitimate governmental purpose in insulating employers not only from all signal and effects-publicity (informational) recognition in (A) and (B) situations, but also from all such non-effects publicity picketing.

From the standpoint of both private and public interests, Congress clearly has a legitimate purpose in protecting the employer against certain coercive picketing. Property and industrial peace considerations are particularly significant. Such purpose certainly justifies the employer protections accorded in (C) situations when signal picketing is limited to a reasonable period not to exceed thirty days, or to a confined, expedited election period. Beyond that, effects-recognition or organization publicity picketing is proscribed. Non-effects publicity picketing may continue indefinitely, however, until it is subsumed in (A) or (B) situations. The governmental purpose of protecting employers against certain picketing also justifies a ban on signal or effects-publicity picketing in (A) and (B) situations.

Absent coercive pressures there is no legitimately vindicatable employer interest that justifies the ban on non-effects publicity picketing. Employer reassertion of the employee free choice rights previously discussed does not magnify the weight already accorded those separate rights. Consideration of employer interests on the government's side thus fails to repair the constitutional imbalance suggested in (A) and (B) situations.

In short, it is doubtful that legitimate governmental purposes warrant the prohibitions of (A) and (B) against non-effects publicity picketing. Absent signal harm, the mere existence of a recognitional or organizational object would not seem to predominate over the speech elements. A distinction should be made between information, non-effects recognition or organization picketing, and signal or informational effects recognition or organization picketing. Implicit in this distinction is the proposition that informational, non-effects picketing is not intended to force immediate recognition during a period when such object cannot lawfully be granted.

This distinction surfaced some years ago in *Hughes v. Superior Court.*[128] In that case a group of pickets peacefully patrolled a store to compel the employer (Lucky) to hire Negro clerks on a proportional basis in relation to the number of Negro customers. The picket signs read: "Lucky Won't Hire Negro Clerks in Proportion to Negro Trade — Don't Patronize." The pickets did not prevent customers or employees of Lucky from going to and from the store. The picketing was unaccompanied by threats, misrepresentation, or intimidation. In addition, there was no finding that the picketing in any way affected Lucky's business. The California Supreme Court nonetheless found the picketing's objective contrary to declared state policy against discrimination in hiring and upheld an injunction against the picketing.[129] Dissenting Justice

128. 339 U.S. 460 (1950).

129. Hughes v. Superior Court. 32 Cal. 2d 850, 198 P.2d 885 (1948).

Traynor believed the injunction was unconstitutional since the picketing did not possess "signal" aspects.[130] The United States Supreme Court held that the picketing was validly enjoined, stating "[t]he Constitution does not demand that the element of communication in picketing prevail over the mischief furthered by its use in these situations [to compel employment on the basis of racial grounds]."[131]

Hughes thus indicates that peaceful picketing in furtherance of an illegal objective may be constitutionally interdicted even though it is not a "signal" to employee action, but is merely an appeal to consumers not to patronize.[132] *Hughes* also suggests that the legislature may prohibit even picketing which is "pure speech" if "the gravity of the evil the legislature seeks to prevent, discounted by its improbability, justifies the infringement."[133] This test was met in *Hughes* by the state's nondiscrimination policy. *Hughes* does not clearly reject the suggestion that informational, non-effects picketing intended solely to inform or protest, rather than to further an unlawful objective, may not constitutionally be proscribed.[134]

Thus, in *Hughes*, the California Supreme Court noted a distinction between

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130. *Id.* at 871, 198 P.2d 897.

131. 339 U.S. at 464. The Court stated:

> But while picketing is a mode of communication, it is inseparably something more and different. Industrial picketing "is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated" . . . . Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word.

Id. at 464-65. Accordingly, the Court concluded that, "picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent. Picketing is not beyond the control of a State if the manner in which picketing is conducted or the purpose which it seeks to effectuate gives ground for its disallowance." *Id.* at 465-66.

132. Professor Gregory once observed:

> What difference is there between the sympathetic cooperation of the public, on the one hand, and of workers, on the other? . . . All picketing is obviously conducted to coerce. The desired coercion is achieved through convincing customers not to enter, by persuading loyal employees to withdraw, by influencing job hunters to remain away, and by enlisting the aid of all other union folk with a prejudice against crossing picket lines. I do not suggest that peaceful picketing coerces those whose aid is requested. But I doubt if much support is won on intellectual conviction as to the merits of the cause. Most of it is probably induced by a combination of fear, prudence and social embarrassment—a sort of psychological coercion which compounds itself ultimately into economic coercion on the picketing business.

Gregory, *Constitutional Limitations on the Regulation of Union and Employer Conduct*, 49 MICH. L. REV. 191, 207 (1950).

133. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits) v. NLRB, 308 F.2d 311, 317 (D.C. Cir. 1962).

134. Indeed, absent the element of affirmative furtherance of an independent, unlawful objective, it would seem that even consumer picketing is permissible.

picketing to promote and picketing against discrimination. The court observed that "[i]t may be assumed for the purposes of this decision, without deciding, that if such discrimination exists, picketing to protest it would not be for an unlawful objective."[135] The Supreme Court simply commented that "we cannot construe the Due Process Clause as precluding California from securing respect for its policy against involuntary employment on racial lines by prohibiting systematic picketing that would subvert such policy."[136]

Further support for the proposition that nonsignal, non-effects picketing constitutionally may not be proscribed is found in *Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits) v. NLRB.*[137] The D.C. Circuit avoided a perceived serious constitutional question by construing the secondary boycott prohibitions of section 8(b)(4) to bar consumer picketing only where such picketing in fact had a coercive effect upon the neutral employer.

The court distinguished picketing addressed to union member employees[138] from picketing merely addressed to members of the public. Congress may constitutionally regulate the former because it is a signal to action. Such picketing makes an appeal to individuals who are "subject to group discipline based on common interests and loyalties, habit, fear of social ostracism, or the application of severe economic sanction."[139] Picketing which appeals to the public, however, has no such signal effect and is "closer to the core notion of constitutionally protected free speech."[140] Without a specific showing that such picketing has imposed economic injury, banning it may violate the first amendment. As Judge Bazelon stated:

> It is true that even if picketing is in a given case "pure speech," this does not bar Congress or the states from prohibiting such appeals in all circumstances . . . . But in the absence of a showing that a substantial economic impact on the secondary employer has occurred or is likely to occur, we would be hard-put to find a constitutional justification for prohibiting a union from using picketing as the form of making "do not patronize" appeals, so long as the picketing is conducted in an entirely peaceful and non-coercive manner, is addressed solely to consumers, and has no side effects which might be a basis for distinguishing it from any other form of publicity.[141]

Applying a different statutory analysis from the D.C. Circuit, the Supreme Court held the statute does not prohibit limited product picketing which is confined to persuading customers to cease buying the primary employer's product.[142] The Court noted that Congress has consistently refused to prohibit peaceful picketing except where it is used as a means to achieve specific ends

135. 32 Cal. 2d at 855, 198 P.2d at 888.

136. 339 U.S. at 466.

137. 308 F.2d 311 (D.C. Cir. 1962), *rev'd on nonconstitutional grounds sub nom,* NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760, 377 U.S. 58 (1964).

138. *E.g.,* Electrical Workers, Local 501 v. NLRB, 341 U.S. 694 (1951).

139. 308 F.2d at 316.

140. *Id.*

141. *Id.* at 317.

142. NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760 (Tree Fruits), 377 U.S. 58 (1964).

which experience has shown are "undesirable".[143] The Court concluded that the statute's legislative history does not clearly reflect a congressional intent to ban all peaceful consumer picketing at secondary sites.[144]

Policy Considerations

Aside from questions of constitutionally protected speech, the emergent sweeping regulatory scheme of section 8(b)(7) necessarily raises additional questions of fundamental policy. By enacting the statute, Congress was obviously concerned with limiting industrial unrest and avoiding obstructions to interstate commerce. Congress was also concerned with the legitimate interests of the public, employees, employers and unions. Viewed against these divergent and often conflicting interests, the congressional balance appears expedient. The essential fairness of the balance is somewhat debatable.

National labor policy, as embodied in the Act, recognizes employees' rights of self-organization and representation, including the concomitant right to receive all information relevant to an informed choice. That policy also recognizes a union's organizational and recognitional rights, including the right to disseminate information to employees. Section 8(b)(7) does not intrude where the foregoing rights are exercised by means other than picketing. Where such rights are exercised by picketing, however, severe limitations are imposed. Thus, proscribed object picketing, informational or otherwise, is completely forbidden in (A) contract situations which may include periods of several years, and in (B) election situations which include at least one year. Proscribed object picketing, other than non-effects informational picketing, is severely limited in (C) situations, generally to either thirty days or the slightly longer expedited election period. The circle is completed by (A) or (B) situations arising to defeat even the limited informational picketing otherwise permitted by (C).

As discussed earlier, compelling employer, public and sometimes employee

143. *Id.* at 62.

144. *Id.* at 63. "All that the legislative history shows in the way of an 'isolated evil' believed to require proscription of peaceful consumer picketing at secondary sites was its use to persuade the customers of the secondary employer to cease trading with him in order to force him to cease trading with, or to put pressure upon, the primary employer." *Id.* In the Court's view, there was considerable difference between such conduct and peaceful picketing at the secondary site directed only at the struck product. *Id.*

Thereafter, in NLRB v. Retail Store Employees, Local 1001 (Safeco), 447 U.S. 607 (1980), the Court held that § 8(b)(4)(ii)(B) of the Act proscribed secondary picketing against a struck product where the picketing predictably encourages consumers to boycott the neutral party's business altogether. *Id.* at 614-15. The Court further held such a proscription consistent with the free speech guarantees of the first amendment. *Id.* at 616. Justices Blackmun and Stevens, in separate concurrences, complained that Justice Powell's majority opinion was too cursory in its discussion of the first amendment issue. *Id.* at 616-18. Each, however, found the restriction on picketing here to be constitutional; Justice Blackmun on the ground that the government's interest in protecting neutrals from coerced participation in the strike was sufficiently strong, *id.* at 617-18, and Justice Stevens on the ground that picketing has strong elements of conduct and is therefore not entitled to the same protections as pure speech. *Id.* at 618-19. Justice Brennan's dissent did not address the first amendment issue.

interests justify prohibiting coercive or signal picketing for prolonged periods. Justifying the preclusion of noncoercive picketing is more problematic, particularly if picketing is viewed as the only viable method of labor communication. Absent disruption, ongoing organizational efforts by means of picketing seem tolerable.

The fact that the employees have elected either to forego representation or have selected another union, does not require maintaining a sterile environment. The union may have a legitimate interest in disseminating information regarding the nonunion or other union status and the employees may have interests in receiving that information. The Supreme Court has clearly recognized, for example, the significant and protected interests of employees desiring to supplant the incumbent union with another representative.[145]

Even the limited open season situations under (C) raise questions of policy and fairness because they are severely curtailed by the thirty day and expedited election limitations. The thirty day limitation represents an empiric judgment which may be valid despite its arbitrariness. It may be a fair assumption that thirty days of signal picketing will determine the outcome of the union's organizational effort. Assuming, therefore, the fairness of the trial period, the fairness of the expedited election arguably follows.

In effect, the predicate for a valid expedited election process is the assumption that the Act works fairly. Thus the union will not be propelled into an election in the face of unremedied charges of unfair labor practices. Similarly, a picketing union lawfully entitled to recognition will be permitted to continue picketing, theoretically even after a bargaining order issues from an unfair labor practice proceeding.[146] These assurances, however, rest essentially upon the presumption of administrative regularity. The General Counsel has plenary authority respecting the issuance of unfair labor practice complaints.[147] Remedial avoidance of an expedited election, or pursuit of the union's charges, depends upon the General Counsel's informal discretion. This process allows neither hearing nor review. If one regards such discretionary justice as fair, the union is not prejudiced. To the extent the picketing union relies upon and is bound by the General Counsel's determination, the union is no different from any other charging party under the Act.[148]

CONCLUSION

The Board and courts have defined and clarified the contours of section 8(b)(7) since its enactment twenty-five years ago. The essential interpretive questions concerning the section's meaning and application have been resolved.

145. NLRB v. Magnavox Co., 415 U.S. 322 (1974).

146. *See* NLRB v. Gissel Packing Co., 395 U.S. 575 (1969); Dayton Typographical Union, Local No. 57 v. NLRB, 326 F.2d 634 (D.C. Cir. 1963).

147. *See* NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975); Saez v. Goslee, 463 F.2d 214 (1st Cir. 1972), *cert. denied*, 409 U.S. 1024 (1972), and cases cited therein.

148. In the (B) situation the union could at least in theory challenge the invalidity of the election by way of objections despite the employer's unremedied unfair labor practices. *See* Dayton Typographical Union, Local 57 v. NLRB, 326 F.2d 634 (D.C. Cir. 1963); NLRB v. Local 182, IBT, 314 F.2d 53 (2d Cir. 1963); General Shoe Corp., 77 N.L.R.B. 124 (1948).

The section appears today in equipoise. Having said that, however, it may be appropriate to recall the words of Justice Cardozo: "We like to picture to ourselves the field of law as accurately mapped and plotted. We draw out little lines and they are hardly drawn before we blur them."[149]

149. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 161 (1921).