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Unfair Labor Practices: The Picketing Restrictions Imposed by the 1959 Taft-Hartley Amendments

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RECENT DECISIONS

Unfair Labor Practices: The Picketing Restrictions Imposed By The 1959 Taft-Hartley Amendments—In the first appellate court decision[1] interpreting the restrictions on recognitional and organizational picketing enacted by the *Labor-Management Reporting and Disclosure Act of 1959*,[2] the Court of Appeals for the Second Circuit furnished some guideposts for the NLRB and the courts in applying this complex statute to the host of cases that are already arising under it.

In 1957 a majority of the employees of the Stork Club in New York began picketing to protest the alleged discharge of certain employees for engaging in union activities and to compel the employer to recognize and bargain with the two uncertified unions that represented them. The picketing continued until January, 1960, when the employer filed an unfair labor practice charge under Section 8(b)(7)(C).[3] Upon notice of the charge, the unions on the advice of counsel immediately notified the employer and the NLRB that they were no longer picketing to compel the employer to recognize and bargain with them, but were picketing for "informational" purposes only, i.e., to advise the public that the Stork Club had no contract with the unions,

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[1] McLeod v. Chefs, Cooks, Pastry Cooks and Assistants, Local 89, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, 280 F. 2d 760 (2d Cir. 1960).

[2] Section 704(c), 73 Stat. 544 (1959). This section amends section 8(b) of the National Labor Relations Act, as amended 29 U.S.C. 158(b) 1960, and provides that 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 Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act, (B) where within the preceding twelve months a valid election under Section 9(c) of this Act has been conducted, or (C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services. Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b)."

[3] *Ibid.* Neither union had filed a representation petition under section 9(c).

and that its employees did not enjoy union wages, hours and working conditions. Such picketing is permitted under the second proviso of Section 8(b)(7)(C), and the picket signs were then changed so as to come within the language of that proviso. However, upon application by the Stork Club for a temporary injunction pending a decision by the NLRB, the Federal District Court[4] found reasonable cause to believe that one of the unions' objectives remained that of employer recognition. The court reasoned that, since the picket signs stated that the Stork Club did not have a union contract, it must follow that their ultimate objective was to force the Stork Club to sign one with them.

Upon appeal, the Second Circuit held that the finding of the lower court on this point was clearly erroneous. It rejected, in the absence of independent evidence, the presumption that the unions' initial objectives persisted after the picket signs were changed and the unions had notified the employer that they no longer were picketing for recognition. The court stated:

> To say that the carrying of signs stating that the employer has no contract with the union is proof of recognitional picketing is to ignore the letter and we think, the spirit of the statute.[5]

The court agreed, however, with the finding that there was reasonable cause to believe that the picketing did induce individuals employed by other employers to refuse to make their deliveries to the Stork Club. In view of this unlawful effect, therefore, the court held that an injunction was properly issued, but ordered the lower court to modify it so as to enjoin the picketing only during those hours of the day when deliveries were most likely to occur.

Of the multitude of questions that ultimately must be resolved by the NLRB and the courts as to the meaning and scope of Section 8(b)(7), the *Stork Club* decision gives some indication as to the direction that may be taken in answering at least two of them. First, by what standards will be "objectives" of the picketing by uncertified unions be determined? Secondly, if the picketing is found to be the legally permissible "informational" type, is it nevertheless proscribed if "an effect" is to induce any employee of another employer not to make a delivery or to perform other services, whether or not the union intends such an effect?

It seems clear that "dual purpose" picketing, i.e., for publicity as well as for recognitional or organizational objectives, will not be allowed, since the section speaks in terms of *an* object, and not necessarily the sole object, of the picketing.[6] There has been much discus-

[4] McLeod v. Chefs, Cooks, Pastry Cooks and Assistants, Local 89, Hotel and Restaurant Employees Union, AFL-CIO, 181 F. Supp. 742 (S.D.N.Y. 1960).
[5] *Supra* note 1, at 763-764.
[6] Phillips v. International Ladies Garment Workers Union, AFL-CIO, 45 LRRM 2363 (1959); Elliott v. Sapulpa Typographical Union, 45 LRRM 2400 (1959);

sion in the cases that have arisen thus far, however, as to whether the section refers only to present or immediate objectives, or whether it proscribes picketing even if the union's ultimate goal is recognition or organization.[7] A number of Federal District Courts have denied temporary injunctions because of this alleged distinction, holding that Congress could not have intended to ban purely informational picketing, albeit the hope of the picketing union is that such tactics will carry it closer to ultimate recognition, which presumably is the goal of all unions[8] As stated by the court in *Brown v. Department and Specialty Store Employees Union, Local 1265:*

> . . . the court should not allow the ultimate purpose of any union to organize all unorganized employees in a particular industry where it functions to be confused with immediate objects specifically proscribed by Congress.[9]

However, one eminent labor law authority suggests that the picketing union's objective be treated as a question of fact, with the union having the burden of rebutting the presumption that its immediate goal is recognition. He suggests that this burden can be met by showing that the labor conditions of which the union is complaining are:

> . . . such a substantial threat to existing union standards in other shops as to support a finding that the union has a genuine interest in compelling the improvement of the labor conditions or eliminating the competition, even though the union does not become the bargaining representative.[10]

In most cases, it will be extremely difficult to establish what the union's objectives actually are. A carefully worded picket sign in the language

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Penello v. Retail Store Employees Union, Local 400, 45 LRRM 2726 (1960); Compton v. Local 346, International Leather Goods Union, AFL-CIO, 184 F. Supp. 210 (Puerto Rico, 1960).

[7] E.g., one trial examiner held that a union which initially sought recognition but changed its picket signs so as to meet the test of immunity under the second proviso of Section 8(b)(7)(C) must be given the benefit of a presumption that it is sincere in its resort to informational picketing, and that such presumption is not overcome by contentions that the union may have "vague and speculative hopes" of achieving recognition at some future date. International Ladies Garment Workers Union and Saturn Sedran, Inc., Cases Nos. 10-CB-1124, 10-CP-2 (1960).

[8] Getreu v. Bartenders and Hotel and Restaurant Employees Union, Local 58, 181 F. Supp. 738 (N.D. Ind. 1960); Brown v. Department & Specialty Store Employees Union, Local 1265, 46 LRRM 2439 (1960). In Greene v. International Typographical Union and Local 285, 186 F. Supp. 630 (D. Conn. 1960), the court dismissed contempt proceedings against a union which had continued to picket after an injunction had been issued, but had changed its picket signs to state only that the employer did not have a contract with the union, and that the picket line should not cause anyone to refuse to cross it. The court stated that the NLRB's claim that the union was in contempt of the injunction ". . . confuses an immediate purpose with an ultimate objective and fails properly to interpret congressional intention in dealing with these two things."

[9] 46 LRRM 2439, 2442 (1960).

[10] Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act,* 44 Minn. L. Rev. 257, 267 (1959).

of the second proviso will not save the union from the operation of Section 8(b)(7), however, where the union's conduct and circumstances surrounding the picketing clearly indicate that its purpose is more than mere "advising the public." In the first decision by the Board applying Section 8(b)(7)(C), *Local 239, Teamsters and Stan-Jay Auto Parts and Accessories Corp.*,[11] the uncertified union picketed with signs demanding recognition for two months prior to the effective date of the section, and for some time thereafter. This fact, coupled with the union's attempts to persuade the non-union employees to join its ranks, and its proposal to the employer to sign a contract in return for a cessation of picketing, lead the Board to conclude that the union's later switch to "information only" picketing was not protected by the second proviso.

Another question raised in the *Stork Club* case, which is discussed by Judge Waterman in his concurring opinion, is what Congress meant by the words "an effect," in prohibiting informational picketing in the second proviso if "an effect of such picketing is to induce employees of other employers not to make pickups or deliveries or to perform other services." As he interprets the majority opinion, the word "effect" is emphasized and not the word "induce," so that if any one delivery is deterred because of the picketing, regardless of the intent or objective of the union, the picketing becomes unlawful. He states that Congress may have intended more than a mere "cause and effect" relationship, and that the union must be found to have intended to disrupt deliveries or other services before is picketing is banned. At any rate, he would not now construe the meaning of the language until after the Board itself has had an opportunity to do so in this case.[12]

It is interesting to note, however, that the court here found reasonable cause to believe that the Act was violated because of the testimony of three truck drivers who stated that they saw the pickets, spoke to no one, and decided not to make deliveries upon seeing the pickets at the entrance of the Stork Club. As one writer has pointed out, if "an effect" means "any effect," then one refusal to deliver may suffice to invalidate the picketing, ". . . but so aseptic a reading of the statute would significantly reduce the utility of the proviso permitting informational picketing."[13] Professor Cox is also of the view that the statute should be liberally construed, and should not be invoked to prohibit picketing on the basis of a few isolated instances of refusals by outside workingmen to pickup and deliver.[14]

As to the intent factor, the Board seems to have adopted an objective

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[11] 127 NLRB No. 132, 46 LRRM 1123 (1960).
[12] *Supra* note 1, at 765-766.
[13] Dunau, *A Preliminary Look at Section 8(b)(7)*, 48 Geo. L. J. 371, 378 (1959).
[14] *Supra* note 10, at 267.

standard in the *Stan-Jay Auto Parts* case.[15] It rejected the union's disclaimer of responsibility for the disruption of deliveries, holding that there is no legislative history to justify so qualifying the word "effect." The union reasonably should have anticipated that the picket line would induce employees to refuse to cross it, said the Board, and the union took no steps to insure that the picket line would not have this normal effect. Therefore, the Board held that, whatever may have been the union's subjective intent, at least objectively the picketing was intended to disrupt services.

If the "normal effect" of the picket line is to deter outsiders from crossing it, then it appears that the "intent" factor will be disposed of as it was in the *Stan-Jay Auto Parts* case, and the primary question in the *Stork Club* case and in future cases will be whether the effect is "substantial," i.e., is the refusal of one, two, or three outside workmen to cross the picket line sufficient to proscribe all informational picketing? The answer to these and the myriad other questions involved in Section 8(b)(7) remain to be determined by the Board and the courts.[16]

JAMES A. KERN

Federal Income Taxation: Relation of Estate Tax Valuation To Income Tax Basis—In 1939 plaintiffs, a brother and sister, inherited from their father 510 shares of stock in a closely held Brazilian corporation. At the time of this acquisition they were respectively 15 and 12 years of age. The stock was valued by local appraisers at par value which amounted to $11,857.50 when converted at the existing exchange rate. The executors of the estate used this valuation for estate tax purposes, but also submitted a consolidated balance sheet of the company, showing the book value of the stock to be $273,686.40.

A deficiency was assessed against the executors in 1943. However, the only upward valuation relating to the stock in question was an $11,857.50 increase based upon the use of an incorrect conversion rate in 1939. The stock was sold by the plaintiffs in 1947 for $258,948.20. The basis used for computing long-term capital gain was $27,618.04.[1] Subsequently a suit for refund was filed, wherein the plaintiffs contended that the fair market value of the shares in 1939 was $331,418.40, and thus in excess of the price realized at sale. They presented evidence indicating that their alleged basis[2] was, in fact, actual market value in

[15] *Supra* note 11.

[16] For a discussion of some of the other problems under Section 8(b)(7), see McDermott, *Recognitional and Organizational Picketing under Amendments to the Taft-Hartley Act*, 44 Marq. L. Rev. 1 (1960).

[1] This figure is slightly higher than the amended estate tax valuation of $23,715, however, the court offered no explanation for the increase.

[2] Since the amount of $331,418.40 is considerably higher than the 1939 book value, apparently the plaintiffs' evidence embodied more than this. The opinion gives no indication as to what constituted the additional evidence.