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THE REGULATION OF ORGANIZATIONAL AND RECOGNITIONAL PICKETING UNDER SECTION 8(b)(7) OF THE NATIONAL LABOR RELATIONS ACT

JOSEPH R. CROWLEY*

The history of labor legislation in the United States reflects a concern on the part of the Congress to achieve a balance between the rights of labor and management.

Initially in enacting the Wagner Act,1 the Congress recognized that the weapons in the arsenal of management such as, surveillance, discharges, and black lists were most efficacious in thwarting the efforts of labor in the organization and representation of employees. Congress thereupon proclaimed the rights of employees to organize for the purposes of collective bargaining and proscribed certain conduct on the part of employees which interfered with the free exercise of these rights.

Twelve years later the Congress, apparently noting the development of an imbalance in labor management relations, enacted the Taft-Hartley Act2 which evidenced an awareness on the part of our federal legislature that labor need be reminded, perhaps forcibly, that the intended beneficiary of the Wagner Act was not labor organizations, but those for whom such organizations were created.

The hearings held by Senate Select Committee on Improper Activities in the Labor Management Field, during the late 1950's, demonstrated that some individuals and organizations in the trade union movement had not only ignored the congressional reminder of 1947, but were utilizing the laws, enacted by the Congress to guarantee the employee's rights, as a means of denying employees the free exercise of these same rights.3

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3 I LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 446 (Hereinafter cited as Leg. Hist.).
Thus the Congress in 1959 (apparently labor legislation occurs in a duodecimal cycle) enacted the Landrum-Griffin Act, to remedy these abuses and to assure some minimal standard of democratic processes in internal union affairs.

A portion of the remedy provided by the Congress dealt with regulation of organizational and recognitional picketing by uncertified onions. The McClellan Committee found that the traditional weapon of organizational picketing had been used on occasions, not only in disregard of the wishes of employees but also to restrain or coerce employees in the selection and acceptance of a collective bargaining representative.

In formulating a remedy, the Congress had a most difficult task. Picketing had long been the right arm of the labor movement in its efforts not only to organize employees but also to secure advancement in the living standards of the American worker. Congress had to remove the cancer of abuse from the arm and the surgery had to be so exact as not to deprive the patient of the use of the arm. Its use would be restricted but it could still function.

A reading of the statutory remedy adopted by the Congress makes it clear that there was no intention to proscribe all picketing but only picketing with an object of recognition, bargaining or organization and then only in three situations.

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5 I Leg. Hist. 470.
6 Congress amended the Taft-Hartley Act by adding a new section, §8(b) (7), which makes it an unfair labor practice for a labor organization:
   "(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 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.
A review however of the decisions of the Board construing the legislation regulating such picketing by an uncertified union makes it equally clear that there exists in the Board as presently constituted sharp disagreement as to the intent of the Congress and in the interpretation of the language used by the Congress.

This article will discuss and analyze these decisions, to consider whether the Board's administration of section 8(b)(7) is in accord with congressional intent and whether in fact the objective of the enactment is being realized.

Only subdivisions B and C of section 8(b)(7) will be considered for there is a dearth of decisions dealing with subdivision A and the discussion of subdivision B will in many instances be applicable to subdivision A.

Subdivision B

This subdivision of section 8(b)(7) enjoys a simplicity of language shared to a degree by subdivision A but far beyond that of subdivision C. It bars organizational and recognitional picketing "where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted."

The meaning is quite explicit7 and at first blush would appear to reflect accurately the intent of the Congress in enacting it, viz., to bar "picketing for organizational purposes or union recognition for 12 months after an election in order to secure the expressed desire of the employees."8 Yet as pointed out by Professor Cox there was not any unanimity of intention in Congress as to what would be accomplished in the construction and interpretation of the language of the statute.9 There were some members of the Congress who seemingly concluded that the language of the statute in toto was such as to effectively ban all picketing for 12 months by an uncertified union after an election in which "No Union" was the choice of the majority of the employees.10 Admittedly the ban is expressly limited to picketing which has an or-

8II LEG. HIST. 1433 (3); Similarly Senator Morse's statement, "I do not believe that the day after the vote, the employer should have to wake up and see a picket line in front of his plant. . . . I think it is reasonable to provide rules of the game . . . that will give such an employer protection from having a picket line stretched before his plant, for at least a period of reasonable time." II LEG. HIST. 1428(1).
9Cox, The Landrum-Griffin Amendment to the National Labor Relations Act, 44 MINN. L. REV. 257, 266 (1959).
10Congressman MacDonald: "Unless the union won the election picketing would have to cease." II LEG. HIST. 1810(2). Congressman Perkins: "We bar any picketing at all for a year after a union has lost a Labor Board election." Id. at 1728(1). See also Senator Morse's statements note 8 supra and Senator Kennedy's statement, "I suggest that perhaps a much better procedure would be to provide that for a certain period of time following a legitimate election, there could not be picketing." II LEG. HIST. 1182(3)-1183(1).
organizational or recognitional objective yet it could be anticipated that if these two latter objectives were to be accorded their full measure the ban would have been a rather all encompassing one.\textsuperscript{11}

Some courts however in giving this subdivision its initial judicial construction were reluctant to give to it this effect. In considering the proscriptions of section 8(b)(7) generally a distinction was made between the ultimate and immediate object of the picketing\textsuperscript{12} reasoning that every union has as its ultimate purpose the organization of all employees in the particular industry in which the union functions and that it would be unreasonable to construe subdivision B as including within its proscriptions picketing which had this ultimate objective as distinguished from a reasonably immediate object of recognition or organization.\textsuperscript{13}

The validity of this reasoning is not entirely clear particularly in view of the facts in the case espousing it.\textsuperscript{14} For example in Graham v. Retail Clerks International Ass'n Local 157\textsuperscript{15} the legend on the picket signs read "Hested had No Clerks Union Contract and Non-Union Clerks."\textsuperscript{16} The court reasoned that this picketing would not constitute a violation of this subdivision unless there was some evidence, other than the picketing itself, to establish a reasonably immediate object of forcing or requiring recognition or organization and absent such evidence the picketing would be considered purely informational.\textsuperscript{17} This would appear to ignore the fact as recognized by the Board\textsuperscript{18} that a legend indicating that the employer does not employ members of the union clearly imports a present object of organization and a legend indicating the absence of a contract with the union clearly implies a recognitional object.\textsuperscript{19}

This approach by the courts in this early period of the subdivision's interpretation and construction would appear contrary to congressional intent.\textsuperscript{20} Picketing such as in the Graham case would have the same

\textsuperscript{11} Kennedy v. Los Angeles Joint Exec. Board, \textit{supra} note 7, at 342 n. 2.
\textsuperscript{12} Getreu v. Local 58, Bartenders, Hotel & Restaurant Employees Union, 181 F. Supp. 738 (N.D. Ind. 1960).
\textsuperscript{14} See note 13 \textit{supra}.
\textsuperscript{15} Graham v. Retail Clerks International Ass'n, Local #57, \textit{supra} note 13.
\textsuperscript{16} \textit{Id.} at 857.
\textsuperscript{17} \textit{Id.} at 858.
\textsuperscript{19} The term "informational" used to describe picketing here is not to be confused with the informational picketing proviso in subdivision C of §8(b)(7) which proviso is not applicable to subdivision B cases. Penello v. Retail Store Employees, \textit{supra} note 13; \textit{II Leg. Hist.} 1812(3).
\textsuperscript{20} Speaker Rayburn: "When the Labor Board conducts an election, all the employees have a free opportunity to indicate their choice of bargaining representative. If they vote not to be represented by a union, their choice
coercive effect upon employers and employees whether the activity of the union was limited solely to picketing or whether the union implemented the picketing by an unequivocal demand for recognition. The point is not that it may be more desirable to permit consumer appeal by the union after an election by way of informational picketing, rather the point is whether the Congress intended to ban it. It would seem that the Congress did so intend.  

The Board while indicating a reluctance to rely upon the rationale of the Graham case, does take the position however that “informational picketing divorced from any object of recognition, bargaining or organization falls outside the literal scope of section 8(b)(7) altogether.” No one can dispute this position because the proscriptions of section 8(b)(7) are directed only against picketing for recognition, bargaining or organization, however the difficulty is in the determination of whether such “informational picketing” is, or can be, divorced from the proscribed objects. The decisions of the Board with respect to “informational picketing” under subdivision B not only reflect this difficulty but at times contribute to it.

These decisions indicate that a more definitive term than informational picketing would be “protest picketing” because most of the decisions deal with picketing in protest of (a) unfair labor practices; (b) the discharge of employees or the refusal to rehire strikers; (c) substandard wages or working conditions. The Board’s general position is that picketing in protest of an unfair labor practice or in protest of substandard or non-union conditions or to obtain reinstatement is not per se a demand for recognition or bargaining. This represents a reversal of prior rulings of the Board.

(a) Picketing in Protest of Employer’s Unfair Labor Practice

It should be made quite clear that the mere fact that an employer may have committed an unfair labor practice does not provide a defense should be respected. For a union to picket their employer after losing an election is an attempt to coerce the employees into supporting the union against their express desire.” II LEG. HIST. 1576 (3).

21 Congressman Kearns, II LEG. HIST. 1750(2) (1959). See also Vincent v. Local 182, IBT, 48 L.R.R.M. 2132 (1961); N.L.R.B. v. Local 182, IBT, 314 F. 2d 53, 59 (2d Cir. 1963); note 11 supra.


23 Crown Cafeteria, Supplemental Decision, supra note 18; “[T]he thrust of all the section 8(b) (7) provisions, both structurally and grammatically is directed only against picketing for recognition bargaining or organization and not against picketing for other objects.” Mission Valley Inn, 140 N.L.R.B. ——, 52 L.R.R.M. 1023, 1024 (1963).

24 Bachman Furniture Co., supra note 22.


for picketing which has an organizational or recognitional objective. Although there was concern upon the part of the Congress that the ban of section 8(b)(7) should not apply to picketing in protest of an employer's unfair labor practice it is the fact that the Senate conferees attempted without success to amend section 10(1) of the Act so as to provide that any unfair labor practice on the part of the employer would be a defense to a section 8(b)(7) charge. Thus the conclusion would appear warranted that picketing in protest of an employer's unfair labor practice would violate section 8(b)(7) unless divorced from a proscribed object.

Accordingly, for the majority of the Board, the primary issue in determining whether or not protest picketing violates the ban of subdivision B is whether the true motive for the picketing is protestation or whether the protest is a device to conceal a proscribed motive. In determining the issue of motive the Board has indicated that it may find "a serviceable guideline in the more familiar area of criteria for determining motive in section 8(a)(3) discharge cases," pointing out that

Unlawful motivation in picketing situations, as intent in discharge cases, is not often proved by admission. Rather, the motive for the act in question, be it discharge or picketing, must be ascertained from the context of preceding and subsequent as well as attendant circumstances. While denials or disavowals of unlawful objectives may not be discounted because they are self-serving, they nevertheless are not to be credited merely because they are uttered.

An analysis of two decisions under subdivision B, by the Board, relating to picketing in protest of unfair labor practices by an employer illustrate the difficulty in resolving the question of motive. Both cases involved post election picketing in protest of unfair labor practices. In both cases the unfair labor practices were disposed of, one by the employer complying with the remedial provisions of the trial examiner's report, the other by an informal settlement agreement between the employer and the union. In the former the Board found a violation of section 8(b)(7)(B) concluding that the protest picketing was merely a device by the union to conceal its true objective, viz. recognition. In reaching this conclusion the Board considered the fact that the union

29 II LEG. HIST. 1384(2), 1428(3), 1429(1), 1714(3).
30 II LEG. HIST. 1383(2). The amendment as finally adopted provided that no injunctive relief shall be sought under §10(1) of the Act if there is reasonable cause to believe that an 8(a)(2) violation exists.
31 The Board decision in C. A. Blinne Construction Co., 135 N.L.R.B. 1153, 49 L.R.R.M. 1638 (1962), re a meritorious §8(a)(5) change being a defense to an §8(b)(7)(c) change will be discussed infra.
32 Bachman Furniture Co., supra note 22.
34 Bachman Furniture Co., supra note 22; Bahia Motor Hotel, supra note 33.
35 Ibid.
had acquiesced in the finding that the employer had remedied the unfair labor practice and thus it was “not apparent what further corrective action short of recognition, the Union hoped to secure by publicizing the foregoing unfair labor practice.” It would seem that the same reasoning would have been equally applicable to the latter case, yet the Board adopted the reasoning of the trial examiner to the effect that this protest picketing, with the resultant loss of patronage, would provide further assurance that the employer would not again interfere with the rights of the employees. Admittedly there were other factors which do make the two cases dissimilar but which do not overcome or explain this disparity in the reasoning of the two cases.

The Board appears to have overlooked or at least minimized the realities of the situation. If an employer has remedied an unfair labor practice, to the satisfaction of the Board, and a union thereafter pickets to protest the same misconduct, what is available to the employer to remove the picket line which adversely affects his business? There is naught he can do save bargain with the union. It cannot be denied that the picketing will act to force him to recognize the union. If there is no other recourse open to the employer, it would follow that the picketing in protest of an unfair labor practice which has been remedied is not divorced from a proscribed object and thus would be within the proscriptions of subdivision B.

(b) Picketing in Protest of Substandard Wages and Conditions

As noted previously, the Board has taken the position that picketing to protest substandard wages or working conditions does not per se constitute picketing for an object of recognition or bargaining. This position if it is to be one of broad application would appear certainly to be in conflict with the clear language and meaning of the statute. Congress has proscribed picketing for a recognitional or bargaining object after an NLRB election and picketing to secure conditions which are normally obtained in collective bargaining must logically be presumed to constitute a demand for recognition.

36 Bachman Furniture Co., supra note 22.
37 See Bahia Motor Hotel, supra note 33.
38 Bachman Furniture Co., supra note 22.
39 In the Bahia case, there was pre-election picketing for recognition and bargaining purposes; the protest picketing did not begin until over a year subsequent to the commission of an unfair labor practice and then only upon the certification of the union's loss of the election. In the Bachman case, there was no pre-election picketing, in fact five of the seven employees in the unit approached the union on their own initiative asking to be organized and paid a steep initiation fee so it is fair to assume that the dissipation of interest reflected in the election was at least in part occasioned by the employer's misconduct.
40 Calumet Contractors Ass'n, supra note 27 on 8(b) (4) (c) case; Claude Everett Construction Co., supra note 27 on 8(b) (7) (c) case; Alton Myers Bros., supra note 26 on 8(b) (7) (B) case.
It would seem unlikely that it is within the allowable area of the Board's discretion in carrying out congressional policy to remove from the proscriptions of section 8(b) (7) conduct which is clearly proscribed. However in taking this stand the Board has not acted out of pure caprice, there is an area of legitimate concern. For as Professor Cox pointed out, the banning of organizational picketing after an NLRB election results in a preference being granted to nonunion employees' interest in self-determination over the union's interest in spreading its organization as a means of protecting its wage scale and labor standards. In brief, if the low wages or substandard conditions constitute a substantial threat to existing labor standards, the union should be permitted to protest and to utilize as their mode of protestation the traditional method of labor, i.e., picketing.

The Board however in applying its rule has not so limited its application rather it would permit this protest picketing after an election absent any evidence, other than the picketing itself, of a proscribed object.

For example in the Alton Myers case the union at the time of the election in December 1958, was seeking to represent the employees. In the picketing following the election this objective continued until June 1959 when according to the testimony of a union official, the union abandoned all efforts to organize and the picketing thereafter was to enlist public support against the employers nonunion standards. The general counsel contended that as the picketing was continuous and as originally, it had an organizational object, this objective should be presumed to have continued. The Board rejected the application of the presumption on the ground that there was no substantial independent evidence to support it. The Board, in reaching this conclusion, undoubtedly relied upon the testimony of the union official that an organizational objective had been abandoned because absent such a declared change of object it would seem that the General Counsel's contention should have been sustained. The reliance however upon such testimony is questionable in view of the fact it does not appear that the change in objective was communicated to the employer contemporaneously with the change and in fact was not declared publicly until post motam litam, and fails to heed Professor Cox's warning in this regard.

41 Cox, supra note 9, at 266-67.
42 Ibid.
43 Alton Myers Bros., supra note 26.
44 The legend on the picket signs read "Please Do Not Patronize."
45 Here the Board cited N.L.R.B. v. Bakers Union, 245 F. 2d 542, 547 (2d Cir. 1957).
46 The Board was not bound to accept at face value this disclaimer but was entitled to consider the totality of the union's conduct. N.L.R.B. v. Local 182, IBT, supra note 21.
47 "The danger in distinguishing picketing to protest substandard wages or working conditions from picketing for union recognition or organization is..."
In summary the Board should reverse the order of things, that is to say, that picketing to protest substandards should be presumed to be for the purpose of organization or recognition but that such presumption "can be dissipated by proof that the labor conditions of which the union complains are presently a substantial threat to existing standards in other shops as to support a finding that the union has a genuine interest in compelling the improvement of labor conditions or eliminating the competition, even though the union does not become the bargaining representative."^{48}

Absent such a criterion any union could seemingly circumvent subdivision B by (1) announcing prior to an election (which it knows it can not win) that it has abandoned its organizational objective, (2) refrain from any contact with the employer or employees, (3) announce its protest of substandard conditions, (4) utilize picket signs in accord with such protest.

The objection to the Board's position in protest picketing in this category is not that it is reluctant to find independent evidence of a proscribed object because it is not^{49} but rather because it will substantially defeat the purpose of the subdivision and stultify it.

In closing, it is interesting to note an intriguing suggestion by a court of appeals that section 8(b) (7) would not apply if one union were picketing merely to persuade the employer to recognize another.^{50} Intriguing but it is unlikely that such a course of conduct would pass unmolested.

(c) Picketing to Protest the Discharge of Employee or the Refusal to Rehire Strikers

The Board in 1956 in *Lewis Food Company* had held that striking or picketing to obtain reinstatement of a discharged employee necessarily was to compel recognition or bargaining.^{51} In 1961, in *Fanelli Ford Sales* the Board overruled this holding on the ground that while

that it may encourage verbal evasions through disingenuous phrasing of the pickets' placards and union demands." Cox, *supra* note 9, at 267.

^{48} Cox, *supra* note 9, at 267.

^{49} Ames Iga Foodliner, 136 N.L.R.B. 778, 49 L.R.R.M. 1852 (1962). Here the legend on the picket sign "We Do Not Patronize List" was almost identical with the legend in Alton Myers Bros., *supra* note 26. However, there was testimony that the employer was placed on the unfair list because of a referral to receive and bargain with the union. As this was the same International Union in both cases, one might surmise that the purpose of the "We Do Not Patronize" was the same in each case. Firestone Tire & Rubber Co., 139 N.L.R.B. 1477, 51 L.R.R.M. 1552 (1962). Here although union disclaimed interest in representing the employees and the picket legend only mentioned that the employer was non-union, the Board found a violation of subdivision B because of a statement by a union representative that the picket line would be withdrawn only upon execution of a contract. See also Woodward Motors Inc., 135 N.L.R.B. 851, 49 L.R.R.M. 1577 (1962); Joiner, Inc., 135 N.L.R.B. 876, 49 L.R.R.M. 1592 (1962).

^{50} N.L.R.B. v. Local 182, IBT, *supra* note 21, at 58.

recognizing that picketing for an employee's reinstatement may be used as a pretext for obtaining recognition, some independent evidence of a broader objective must be shown. Thus absent evidence to indicate that the picketing would not cease if reinstatement were granted, such picketing does not violate section 8(b)(7).

While this stand of the Board has a basic appeal in the light of the complexities existing in the relations between labor and management, its validity can not properly be considered if viewed in the abstract.

In a recent case the Board held that where the objective of the picketing both before and after the election had been the reinstatement of strikers, the "object cannot reasonably be regarded as in the nature of a pretext to mask a covert demand for recognition and bargaining." In that case the union filed a representation petition. While the election was pending, the union struck the employer and set up a picket line to protest unfair labor practices. The charges were found to be meritorious and were disposed of by way of a unilateral settlement agreement entered into by the employer in which the employer agreed to reinstate certain strikers and to place others on a preferential hiring list. The union appealed from the refusal of General Counsel to issue a complaint on the charges. The appeal was denied on the ground that the settlement agreement "adequately disposes of the charges in this case." The legends on the placards were thereupon changed so as to limit the protest to the employer's refusal to rehire all the strikers. This picketing continued to and beyond the certification of the union's loss of the election.

The changing of the legends on the placards (six months before the election) was deemed by the Board to be a renunciation of a bargaining objective and therefore and thereafter the picketing was solely to obtain reinstatement. The Board concluded that as this is not a proscribed object, there is no violation of subdivision B.

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52 Fanelli Ford Sales, supra note 27.
53 Mission Valley Inn, supra note 25.
54 The legends on the picket signs read:
"We protest Unfair Labor Practices of Mission Valley Inn"
"We protest Employer's Interrogation of Employees"
"MVI says it will refuse to Bargain in Good Faith if Union Wins Election."
55 Mission Valley Inn, supra note 25.
56 "We protest Mission Valley Inn's Refusal to Rehire All Unfair Labor Practice Strikers."
"22 Employees Struck Because Mission Valley Inn Engaged in Unfair Labor Practice—MVI Now Will Take Back Only Part of Employees—MVI is Reaping Benefit of Unfair Labor Practice Without Rectifying Situation."
57 The Board noted that nothing in the conduct of the union after this renunciation was not inconsistent with it.
58 The Board finds support for its conclusion in Dirksen and Goldwater, Statement of Minority Views S. Rep. No. 187, 86th Cong. 1st Sess. (1959) on S. 1555, I Rec. H.R. 473. However, in the cited reference in notes 6 and 9 of the Board's decision, Mission Valley Inn, supra note 25, the Senators speak of picketing to remedy an unfair labor practice, in the instant case the charges
In reaching this conclusion the Board emphasized that it refused to
give recognition to the union's claim that it was engaged in unfair labor
practice picketing on the ground that in the light of the settlement agree-
ment and compliance therewith, the unfair labor practice must be deemed
to have been remedied and the case closed.

It seems illogical on the one hand to say that to accord recognition
to a continued protest against unfair labor practices in this circumstance
would be inconsistent with the Board's obligation to respect administra-
tive practice and would impinge upon the statutory authority of the Gen-
eral Counsel, and on the other hand to permit picketing to gain a result
denied in the same administrative proceeding.

It would seem appropriate that the Board should consider modifying
its holding in the Fanelli case and resurrect the Lewis Food rule in cases
where the protested discharge or refusal to reinstate has been the sub-
ject of an unfair labor practice which has been remedied administra-
tively or otherwise. In other circumstances the Board's position has
validity however.

Assume that a union attempted to organize employees of X Com-
pany. An election is held and the union loses. Subsequently X discharges
two employees because of their activities in furtherance of union or-
organization. The union thereupon initiates a picket line to protest the dis-
charge and to force the employer to reinstate the employees. If this be
established as the sole objective of the picketing, it would appear that
the Board is warranted in saying that such picketing would not be pro-
hibited by Subdivision B. Congress intended to protect the employer
from coercion by way of picketing and did not intend to provide a
shield for an employer's misconduct.

(d) Validity of Election

Subdivision B, by its terms, has application only if there were a
valid election, therefore an essential element of a violation of this sub-
division is the conduct of a valid election within the preceding year.

The issue of the validity of an election in a subdivision B proceeding
has arisen in several cases where an expedited election has been con-
ducted pursuant to the first proviso of subdivision C of section 8(b)
(7). In brief this proviso permits an election to be conducted "without
regard to the provisions of section 9(c)(1)." Under this proviso cer-

have been rendered by way of settlement agreement and compliance with
such agreement.

59 "B" where within the preceding twelve months a valid election under §9(c)
of this Act has been conducted.
61 See note 81 infra.
62 This proviso will be considered in detail infra in the discussion of subdivision
C in text.
tain requirements are dispensed with so that the election can be expedited.\^{63}

The point of inquiry in these cases was whether an expedited election was permissible under the circumstances. It is the Board's position that if an election was expedited under the first proviso of subdivision C it would be a valid election only if the pre-election picketing was conducted in violation of subdivision C.\^{64} The Board reasons that if the picketing does not violate subdivision C the holding of an expedited election would exceed the Board's authority.\^{65}

In the *Oakland G. R. Kinney Co., Inc.* case\^{66} an expedited election was held in which the union was unsuccessful. The picketing continued after the election and an 8(b)(7)(B) charge was filed and a complaint issued. The Board refused to sustain the complaint on the ground that although the pre-election picketing was for a proscribed object, it did not violate section 8(b)(7)(C) because the picketing was substantially for the purpose of advising the public of the employer's non-union operation and was thus within the publicity proviso of subdivision C.\^{67}

Therefore the Board concluded that "such publicity proviso picketing is permissible and not in violation of the Act nor subject to an expedited election unless it has the effect of inducing stoppages of deliveries or services. It follows that as there were no stoppages the expedited election in this case was improperly directed."

Accordingly the Board found that the election was not a valid one within the meaning of subdivision B and therefore the post-election picketing was not banned by that subdivision.\^{68}

It would seem clear that in an unfair labor practice proceeding under subdivision B, the Board does have the right to review all questions relating to the validity of the election including the propriety of directing it.\^{69} However it is not clear that an election is wanting in validity solely on the ground that it was expedited absent any showing of pre-

\^{63} Specifically an expedited election procedure dispenses with the requirements of a showing of substantial interest and the pre-election hearing. However, the regional Director may direct a hearing if there are substantial issues which may require determination before an election may be held. *Statements of Procedures, National Labor Relations Board, §101.23(c).*


\^{65} *Hested Stores Co.,* *supra* note 60.

\^{66} *Oakland G. R. Kinney Co.,* *supra* note 64.

\^{67} "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."

\^{68} *Oakland G. R. Kinney Co.,* *supra* note 64. Member Leedom dissented on the ground that the pre-election picketing did constitute a violation of subdivision C and therefore the expedited election was properly directed and valid.

\^{69} *N.L.R.B. v. Local 182 IBT,* *supra* note 21, at 60.
judice thereby, nor is it free from doubt that picketing which meets the requirements of the publicity proviso of section 8(b)(7)(C) renders the expedited procedure inapplicable.  

Another ground upon which the validity of the election has been challenged, in an unfair labor practice proceeding under subdivision B, is the claim that the employer was guilty of unfair labor practices which had not been remedied. This challenge would appear to arise in an election where it is claimed that the rights of the employees were interfered with the General Counsel refused to issue a complaint. This however would not preclude the union in a subdivision B proceeding from raising the issue and establishing, if the facts permit, the fact that a fair election was denied the employees by reason of the employer's misconduct. 

(e) The Date a Violation Occurs; the Date for Computing the Remedy

An important consideration in the application of subdivision B is the date that organizational or recognitional picketing comes within the proscription of this subdivision. The act merely prohibits the picketing after a valid election. Obviously this can not mean the day following the day an election is held because an election can not be said to be valid until the Board has so determined by way of certification of the results. This is the practice eventually adopted by the Board and would appear to be in accord with the legislative history. 

The determination of a date for providing an appropriate remedy is equally important. The Board has decided that as a general policy remedial orders in subdivision B cases will direct that the proscribed picketing shall cease for a period of twelve months and that the twelve

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70 Id. at 61n.8.
71 Id. at 59. This defense would not be picketing in protest of an unfair labor practice, but rather the ground would be that the employer's misconduct prevented a fair and free election.
72 Otherwise, if the charge is a meritorious one, it appears to be the Board's position now that if it is an 8(a) (5) charge, refusal to bargain, it will not entertain the representation petition and thus avoid an election. If it is any other 8(a) charge the election will be delayed pending a resolution of the unfair labor practice charges so as to afford an atmosphere conducive to a fair and free election. C. A. Blinne Construction Co., 135 N.L.R.B. 1153, 49 L.R.R.M. 1638, 1644 (1962); Bachman Furniture Co., 134 N.L.R.B. 670, 49 L.R.R.M. 1192 (1961).
73 Provided the union availed itself of the appeal procedures set forth in the Board's Statements of Procedure, both as to the refusal to issue a complaint and as to the decision directing the holding of an election. Statements of Procedure, §§101.6 and 101.23(b). Cf. Firestone Tire & Rubber Co., supra note 49.
74 N.L.R.B. v. Local 182, IBT, supra note 21, at 60, 61.
76 Cf. LEG. HIST. 1187(3), 1361(1), 1462(3).
month period shall be computed from the date the labor organization terminates its picketing activity either voluntarily or involuntarily.\textsuperscript{77} Thus the Board has, in adopting this formula, banned picketing beyond the twelve month period provided in the legislation. For example in the \textit{Irvins} case,\textsuperscript{78} the election was held on August 18th and the results certified on August 26th but the picketing continued until enjoined by the district court on October 3rd. The remedial order issued banned picketing by the respondent for a twelve month period beginning October 3rd. Thus the picketing was banned not for 12 months following the valid election but for a period in excess of thirteen months. The validity of this practice by the Board is not free from doubt.\textsuperscript{79}

The Board contends however that in adopting this remedial procedure it is not contravening congressional intent rather it is implementing it in securing to employers and employees a twelve month period free from the inconvenience and harassment of picketing.\textsuperscript{80} The Board recognizes that this rule will be subjected to modification in certain circumstances such as when the picketing continues up to the time of the issuance of the Board order or where the picketing has been intermittent.

\textit{Subdivision C}\textsuperscript{81}

The history of the interpretation and application of this subdivision might be characterized as the "War of the Provisos." In the sharp

\textsuperscript{77}Irvins, Inc., \textit{supra} note 75.

\textsuperscript{78}\textit{Ibid.}

\textsuperscript{79}N.L.R.B. v. Local 128, IBT, \textit{supra} note 21, at 53n.9. The court declined to pass on the propriety of this practice. It is interesting to note also in this case that though the twelve month period fixed by the Board had already expired by the time of the court's decision, the order was nevertheless enforced.

\textsuperscript{80}The Board's practice would appear to be within the allowable area of the Board's discretion in carrying out congressional policy. Brooks v. National Labor Relations Board, 348 U.S. 96 (1954).

\textsuperscript{81}Section 8(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:

"(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."
division among the the members of the Board as to the subdivision's application, each faction relies upon the same proviso to sustain its respective position. Each faction appears dismayed that the other fails to acknowledge the clarity of the language of the proviso and to give effect to the clear intent of the Congress.

In fairness to the participants in this conflict, the seeds of such dissension were sown in the Halls of Congress in the drafting and other legislative processes necessary to produce this legislation. Professor Cox's comment of "conflicting intentions" has perhaps greater application to subdivision C than to either of the other two subdivisions of section 8(b)(7).

In fact it would be a fair comment to state that the only unanimity of intention in the enactment of section 8(b)(7) and particularly in subdivision C was that there should be some limitation on organizational and recognitional picketing.

A brief recapitulation of the legislative history of this subdivision may be helpful, if not necessary, to demonstrate these "conflicting intentions" and thus to make more comprehensible the Board's construction and interpretation of it.

The restrictions on organizational and recognitional picketing as passed by the Senate were limited to areas corresponding to subdivisions A and B as enacted and there was not any provision covering or relating to the area now dealt with in subdivision C. The Landrum Griffin Bill as passed by the House did ban organizational and recognitional picketing where it "had been engaged in for a reasonable period of time (not exceeding thirty days) and at the expiration of which period no petition under section 9(c) has been filed." In substance this was the present subdivision C without the provisos. The conferees of both Houses thereafter brought forth the subdivision in its present form.

Senator Kennedy in analyzing subdivision C said it accepts the House provision "except that picketing would be permitted to continue without a petition if it appealed only to the employees to join the union or the public not to patronize the nonunion establishment without causing truckers or the employees of other employers to refuse to cross the picket line." In substance Senator Kennedy's interpretation of this subdivision was the same as that of Professor Cox:

82 Reference is to the second proviso in subdivision C the "publicity proviso."
83 Cox, supra note 9, at 266.
85 H.R. 8400, 86th Cong. §705(c) (1959) as passed by the House. II Leg. Hist. 1700(3).
86 See note 81 supra.
87 II Leg. Hist. 1384(1). Also Senator Kennedy: "Picketing, in the absence of a contract or an election, which has only the effect of notifying the public
Picketing before a union election is divided by Section 8(b)(7) into two categories: (1) picketing which halts pick-up or deliveries by independent trucking concerns or the rendition of services by the employees of other employers, and (2) picketing which appeals only to employees in the establishment and members of the public. 88

The latter "publicity picketing" is placed under no limitation; the former "signal picketing" is that which is regulated by subdivision C. 89

However it does not appear that this interpretation was shared by all the members of the Congress. Senator Goldwater's analysis of this subdivision, for example:

A union may not picket for recognitional 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, * * * * such picketing becomes an unfair labor practice.

Where the union engages in picketing or other publicity for the sole purpose of truthfully advising the public that an employer does not employ members of or have a contract with a labor union. In those circumstances, such picketing may be carried on indefinitely. 90

In brief the "Kennedy-Cox" interpretation would be that absent a contract or an election, organizational or recognitional picketing would be banned only if it had the effect of interfering with or disrupting the employer's business by way of stoppages of deliveries or of services by employees of other employers. 91

Whereas the "Goldwater-Griffin" interpretation would be that all organizational and recognitional picketing is banned after a reasonable period of time without a representation petition being filed. Excepted however is "picketing or other publicity directed to consumers which is for limited purposes" and which does not have the proscribed effect. 92

The difference between these two interpretations is basic, and the difficulty presented thereby is enhanced by the fact that each position does find support in the legislative history and by that fact that neither position is invulnerable as a matter of statutory construction. However it does not appear to be undue criticism to observe that the statute

88 Cox, supra note 9, at 267.
89 Ibid.
90 II Leg Hist., 1858(3) (Provided of course that it does not have the proscribed effect.) See also Sen. Dirksen's remarks, id. at 1823(2); Cong. Pucinski, id. at 1820(3) 1821(1). Cong. Griffin, id. at 1812(1).
91 Id. at 1377(3).
92 Id. at 1812(1).
could have been drafted so as to express more clearly the interpreta-
tion advanced by Senator Kennedy and Professor Cox.93

In any event this was the legislative heritage entrusted to the Board
to administer and it is thus not too difficult to understand the dis-
sension and perhaps the confusion that has resulted.94

The Board, however, in its first decision construing this sub-
division did not have to meet this problem because the picketing which
was the subject matter of the proceeding therein did have the pro-
scribed effect.95 The decision did however resolve initially some basic
questions concerning subdivision C such as that the subdivision does
regulate peaceful picketing and that the proscribed effect of the pub-
licity proviso, i.e., stoppage of deliveries and services need not be the
intended effect.96 However, the unanimity generally present in this
decision was not to be of long duration.

Crown and Crown Revisited

The Board was confronted with the “conflicting intentions” of the
Congress in the Crown Cafeteria Case.97 In that case there was picket-
ing for more than thirty days without a petition under section 9(c)
having been filed. There was evidence, independent of the language
on the picket signs, that an object of the picketing was to secure recog-
nition. The trial examiner concluded that the picketing, even though
for an object of recognition or organization, was within the protection
of the publicity proviso of subdivision C.98 because it did not have the
effect of inducing any stoppage of goods or services. Thus the trial
examiner clearly espoused the Kennedy-Cox interpretation of this
subdivision, i.e., absent a contract or election, organizational or recog-
nitional picketing is not banned unless it results in stoppages of de-
deliveries or services.

93 In making this observation, however, one must be mindful of the fact that
perhaps the realities of the situation, at the time the Congress was considering
this legislation would not have permitted it.

94 It was recognized by the courts fairly early in the life of subdivision C that
various interpretations were possible. N.L.R.B. v. Local 239, IBT, 289 F. 2d
41 (2d Cir.); cert. denied, 368 U.S. 833 (1961); although some courts did
not hesitate to adopt the Kennedy-Cox interpretation, Roumell v. Local 154,
Typographical Union, 49 L.R.R.M. 2038 (1961); Lebus v. Building & Construc-
tion Trades Council, 199 F. Supp. 628 (E.D. La. 1961). See also a recent
decision of the court of appeals, N.L.R.B. v. Local 3, IBEW, 317 F. 2d 193

Other courts appeared to have accepted the Goldwater-Griffin interpreta-
Consentino v. Local 618, Automotive Employees, 200 F. Supp. 492 (E.D. Mo.),

95 Stan-Jay Auto Parts and Accessories Corporation, 127 N.L.R.B. 958, 46
L.R.R.M. 1123 (1960), enf’d, NLRB v. Local 239, IBT, 289 F. 2d 41 (2d Cir.),

96 Ibid.


98 Note 81 supra.
The majority of the Board, as then constituted, rejected the trial examiner's interpretation and conclusion, holding that picketing is immunized by the publicity proviso only when it is for the sole purpose of advising the public that the employer is nonunion or does not have a union contract.\textsuperscript{99} Thus if the informational or publicity picketing has a "present object of recognition" it is not within the publicity proviso.\textsuperscript{100}

The two dissenting members would have affirmed the trial examiner, pointing out that the majority's "interpretation of the proviso renders it wholly ineffectual." The dissent argued that the Congress intended to permit a kind of picketing which but for the proviso would have come within the prohibition of the section.\textsuperscript{100} "It logically follows that the intent was to exclude from the ban picketing which, while it embraced the proscribed object of recognition or organization, was nonetheless permitted because it met two specific conditions." The two conditions referred to were (a) truthfully advising the public as to the nonunion character of the establishment and (b) the absence of an effect of a stoppage of deliveries or services.

This decision was reconsidered by the Board (a change in membership of the Board having occurred in the interim) and the dissenting opinion in the original was adopted as the ruling of the Board,\textsuperscript{101} thus bringing the Kennedy-Cox interpretation out of what was but a temporary eclipse.

The reversal of the Board's ruling can not be attributed to a reconsideration of the problem in the usual sense but was the result solely of the change in personnel.

In support of the reversal or reconsideration, the newly constituted majority pointed out that the express words of the proviso "does not employ members of" clearly imports a present object of organization and "[does not] have a contract with" just as clearly implies a recognition and bargaining object and that therefore Congress must have intended that the publicity proviso applies where organization, recognition or bargaining is an object of the picketing.

The dissenters in this supplemental decision set forth their position with greater clarity than was the case in their original opinion. The dissenters argued in substance as follows:

(a) the ban of subdivision C applies to picketing having an organizational or recognition object.

\textsuperscript{99} "We cannot believe that Congress meant to permit picketing merely because the picketing takes the form of truthfully advising the public that the employer is nonunion or does not have a union contract. Rather we believe that Congress was careful to state that picketing will be permitted only if it is for "the" purpose of so advising the public." Note 97 supra, at 1323.

\textsuperscript{100} This would be in keeping with the Goldwater-Griffin interpretation.

(b) the ban would thus apply to picketing which advised the public that the employees were non-union or that the employer does not have a contract with the union because an object of the picketing would necessarily be organization and recognition respectively.

(c) Congress exempted such picketing from the prohibition for the purpose of truthfully so advising the public.

(d) if the publicity picketing has any other purpose than advising the public it is not exempted from the ban.

(e) therefore where there is evidence, independent of the picketing itself using signs which conform to the language of the proviso, of an organizational or recognitional object, such picketing is not within the exemption of the proviso.

Both the positions of the majority and of the dissent in the supplemental decision are each supported by cogent arguments. However the majority does not appear in its ratiocinations to have given due consideration to the use of the words “for the purpose” in the publicity proviso. These words do limit the application of the publicity proviso and it would follow logically that if the publicity picketing has any other or even another purpose it loses the immunization of the proviso. Thus if it were shown that the tactical purpose of the picketing was to signal economic action it would seem to be without the protection of the publicity proviso even though the signs conformed to the language of the proviso and the picketing did not have the proscribed effect.

On the other hand it must be recognized that even in circumstances in which the dissent would hold the picketing to be within the protection of the publicity proviso, that the ultimate objective of the picketing may be organization and recognition, and the development of standards or criteria to be used in distinguishing a present object from an ultimate one, would be a formidable task.

The impact of the Crown decision is pointed out quite vividly in Fowler Hotel Inc. There the conceded object of the picketing was for “renewal of the contract” and the picket signs so stated. The majority of the Board held that the picketing was within the protection of the publicity proviso and as the proscribed effect was absent, subdivision C was not violated. Here the stated purpose of the picketing was to obtain a renewal of the contract. There was evidence independent of the language of the picket signs that this was the object

102 There are frequent references in the legislative history to the publicity picketing characterizing it as “purely information.” H R Exs. Hirs. 1720(3), 1431 (3), 1810 (2).
103 NLRB v. Local 3, IBEW, supra note 94, at 2120, 2121.
of the picketing thus the conclusion that the purpose of the picketing was to advise the public is difficult to sustain.

The cases subsequent to Crown in which the majority did find the picketing in violation of the subdivision, other than because of the proscribed effect, indicate that the majority is taking cognizance of the language in the proviso "for the purpose of truthfully advising the public" in ruling that the publicity proviso picketing is to be directed to the public and not to the employees of the picketed employer. In Atlantic Maintenance Co., the Board found that the picketing though ostensibly directed at the public was in fact focused upon the employees qua employees and as such was not for informational purposes and therefore not within the proviso. Similarly in Ypsilanti Press, Inc. where the picketing was extended to entrances and parking lots set aside for use of employees, the picketing was held not immunized by the publicity proviso. In Jack Picoult, the picketing was focused on employees of secondary employees and thus not protected.

These latter cases indicate a departure, though slight, by the "new" majority of the Board from a wholeharted espousal of the Kennedy-Cox view of subdivision C. For the Kennedy-Cox interpretation would remove from the ban of this subdivision picketing which "appeals only to employees in the establishment." The "new" majority, while it apparently believes that the Kennedy-Cox interpretation is one that is more compatible with and would best effectuate the purpose of the entire Labor Act, appears in these latter cases to be aware that the language itself of the subdivision is not in complete and clear accord with the Kennedy-Cox view. While the intent of the drafters of legislation is certainly to be accorded great weight nevertheless it may not be used to prevail over the language of the legislation itself.

In the main, however, the difference in the Board as to the interpretation of subdivision C as expressed in the Crown Case revisited, still persists.


109 137 N.L.R.B. 1401, 50 L.R.R.M. 1411 (1962); remanded to the Board for further findings, N.L.R.B. v. Local 3, IBEW, supra note 94.

110 The fact that the new majority does espouse the Kennedy-Cox interpretation is made clear by their analysis of §8(b)(7)(C) in Barker Bros. Corp. & Gold's Inc., 138 N.L.R.B. 478, 51 L.R.R.M. 1053, 1055, 1056 n. 22 (1962).

111 See references in notes 87 and 88 supra.

In summary the respective positions of the majority and dissent are:

**Majority:** Picketing for an object of organization and recognition directed to the public, including consumers, is not barred by subdivision C unless it has the proscribed effect for the publicity proviso carved out a significant exception to the general ban on recognition and organizational picketing.\(^{113}\)

**Dissent:** The publicity proviso carves out for informational picketing a narrow exception to the general limitation or recognition and organizational picketing which is contained in subdivision C. Informational picketing is protected only if the language on the picket sign is consistent with language of proviso and there is no independent evidence of either a recognition or organizational object.\(^{114}\)

It appears that this difference in the basic interpretation of subdivision C shall continue until there is a definitive interpretation by the Supreme Court. It would seem desirable that this latter event occur prior to a change in the Administration so as to avoid what might be in effect a re-reconsideration of the *Crown* case.

**Other Considerations of Subdivision C**

(a) *A Reasonable Period*

Subdivision C by its terms proscribes organizational or recognitional picketing if a representation petition is not filed "within a reasonable period of time" not to exceed thirty days from the commencement of the picketing.\(^{115}\)

Congress did not define "a reasonable period of time" but it is clear from the language of the subdivision and the legislative history that picketing for less than thirty days without a petition having been filed may give rise to a violation of the subdivision.\(^{116}\)

Obviously no general rule could be enunciated as to what would constitute "a reasonable period." Rather it is clear that Congress in-

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\(^{113}\) See note 81 supra for complete text of subdivision C.\(^{116}\)

\(^{114}\) Dissent in *Jay Jacobs Downtown, Inc.*, supra note 112.

\(^{115}\) Eastern Camera & Photo Corp., 141 N.L.R.B. ----, 52 L.R.R.M. 1426 (1963); Cong. Griffin, II Leg. Hist. 1812(1): "Of course, the picketing may be enjoined in less then 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."
tended to delegate to the Board the power to resolve this issue on a case by case basis.

Violence or other coercive conduct on the part of the picketing union has been a factor in the determination that a violation arose even though the picketing was for a period of less than thirty days.117

Absent violence or similar misconduct the Board apparently will let the union have near full measure,118 even though the picketing results in some stoppages of deliveries.119

Under this case by case determination, a union may be placed in a disadvantageous position. For example if a union picketed for 25 days and filed a representation petition on the 26th day and the Board determines post facto that 25 days was an unreasonable period under the circumstances, there will be a violation of subdivision C. The filing of the petition on the 26th day will not prevent the issuance of a cease and desist order prohibiting any further picketing.120

Thus it would behoove a union which wishes to comply with the mandate of the subdivision to file the petition reasonably soon after commencement of the picketing.

(b) Expedited Election121

The subject of an expedited election has been considered, in part, in the discussion of subdivision B.122 However it would be desirable to discuss it further here even though some repetition will be involved.

The Board has ruled that the expedited election procedure is permissible only when the picketing is in violation of Subdivision C.123 This would mean under the new Crown decision that the expedited election could occur only where the picketing had the proscribed effect124 or where the picketing though purportedly for the purpose of advising the public was in fact directed at the picketed employer's employees.125 Picketing which satisfies the requirements of the publicity proviso of subdivision C would therefore not be subject to an

117 Ten days was considered an unreasonable period in Cuneo v. United Shoe Workers, 181 F. Supp. 324 (D.N.J. 1960), and 26 days in Eastern Camera & Photo Corp., supra note 116.
118 Colson & Stevens Constr. Co., 137 N.L.R.B. 1650, 50 L.R.R.M. 1444 (1962). In this case one union picketed from October 19 to November 17, 1960 and another union, a member of the same Trades Council picketed from January 26, to February 20, 1961.
119 Ibid.
120 Eastern Camera & Photo Corp., supra note 116.
121 This relates to the first proviso of subdivision C: “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 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.”
122 See discussion of subdivision B supra in text, particularly the subheading “Validity of Election.”
125 Atlantic Maintenance Co., supra note 107.
expedited election. It has been suggested by a court of appeals, by way of dictum, that a reading of section 8(b)(7)(C) permits of an interpretation that the expedited election procedure is applicable to publicity proviso picketing. The court's interpretation of the language of subdivision C in reaching this conclusion is difficult to find fault with. However under the court's suggested construction purely publicity picketing could be curtailed and this would seem to contravene congressional intent as reflected in the legislative history.

The Board in the C. A. Blinne Construction Co. case made two gratuitous observations concerning expedited elections which warrant a brief consideration. First, a union may not obtain an expedited election simply by engaging in organizational or recognitional picketing and filing a representation petition. This observation is in accord with Congressional intent. Second, a picketing union which files a representation petition "pursuant to the mandate of section 8(b)(7)(C) and to avoid its sanctions will not be propelled into an expedited election." The statement is quite confusing. If the Board refers to a situation where the picketing is regulated by subdivision C and the union files a petition on the day the picketing commences and the employer thereafter files an 8(b)(7)(C) charge, it is unclear why the expedited election procedure would not be applicable. For an expedited election was directed where the petition was filed prior to the commencement of the picketing.

(c) The Proscribed Effect

As noted previously the publicity proviso of subdivision C immunizes picketing "for the purpose of truthfully advising the public * * * unless the 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."

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127 N.L.R.B. v. Local 182, IBT, 314 F. 2d 53, 61, 62n.8 (2d Cir. 1963).
128 If the union were forced into an election and lost, it would be subject to an 8(b)(7)(B) charge if it continued picketing.
129 Senator Kennedy, II Leg. Hist. 1431 (3) ; Senator Dirksen, id. at 1823 (2).
130 See note 126 supra.
131 See Cong. Barden's statement, II Leg. Hist. 1813 (1). This is true even if a charge is filed by one fronting for the picketing union. See note 10 supra; C. A. Blinne Construction Co. case, supra note 125.
132 C. A. Blinne Construction Co., supra note 126, at 1640.
133 The Board can mean only this, otherwise there would be no necessity to file a petition.
134 Woodward Motor, Inc., 135 N.L.R.B. 851, 49 L.R.R.M. 1577, (1962) enforced, N.L.R.B. v. Local 182, IBT, supra note 127. The fact that the petition in the Woodward case, supra, was filed by the employer is not material because the subdivision does not distinguish between a petition filed by an employer or by the union; nor does the Board's regulation, §102.76.
Obviously if this "effect" clause is construed literally then the proscribed effect would occur if but one individual, employed by one other than the picketed employer, refused to perform services.

The Board decided in the tetralogy of September 7, 1962 not to accord the "effect" clause this literal construction. The Board reasoned that the effect clause may not be invoked merely on the basis of a few isolated instances of drivers refusing to cross the picket line. Rather the Board concluded that the effect clause is applicable only where the refusal to perform services or to make deliveries is of such a character as to interfere with, disrupt or curtail the picketed employer's operation. Thus where in twelve weeks of picketing at eighteen of the employers stores there were three delivery stoppages, several delivery delays and two work delays, the picketing was not found to have had the proscribed effect in the absence of any evidence of the impact such stoppages or delay had on the employer's business.

The Board emphasized that it is not the number of stoppages per se that will determine the existence of the proscribed effect rather the point of inquiry will be the actual impact of such stoppages upon the operations of the picketed employer's business. "That is, the presence or absence of a violation will depend upon whether the picketing has disrupted, interfered with or curtailed the employer's business." The majority, using this standard, found a proscribed effect where liquor deliveries could not be made to the employer's establishment but were made to a neutral location where the employer arranged to pick up the supplies, and where the employees of subcontractors refused to cross the picket line.

The dissent differed basically with the majority. The dissent contended that the "effect" clause was to be construed literally so that if one individual refused to make a delivery the proscribed effect would have been had, apart from any consideration as to the extent, if any, that the stoppages affected business operations.

136 In reaching this conclusion the Board was divided as in the Crown case. The "new" majority in the Crown decision constituted the majority here.
137 Barker Bros. Corp. & Gold's Inc., supra note 135.
138 Ibid. A significant factor in the Board's consideration of the problem was the fact that the picketing union made an effort to avoid any interference with deliveries or rendition of services.
139 Id. at 1057.
140 Joe Hunt's Restaurant, supra note 135.
141 Sam Melson, General Contractor, supra note 135.
142 The dissent in Barker Bros. and in Hested relying upon their dissent in the supplemental decision in the Crown case would have found a violation of §8(b) (7) (C) on the ground that the picketing had a present object of recognition, bargaining and organization and therefore was outside the protection of the publicity proviso.
In an effort to justify their respective interpretations the majority and dissent entered upon what might be termed the battle of "the singular and plural." Each faction resorted to the legislative history, the former to cite references indicating more than a single stoppage or delay was intended in order to make the "effect" clause applicable,\(^4\) the latter cited references to the contrary.\(^4\) However, the legislative history is not at all persuasive on this point.

The position of the majority is clearly a more realistic one. Purely informational picketing should not be prohibited unless it does result in an interference with the operation of the employer's business. The mere fact that one driver refused to make a delivery should not provide a basis for the curtailment of all picketing.

However the issue is not what the Board, in its conceded expertise, considers to be the most desirable course so as to strike a balance between the rights of labor and management in this area. Rather the issue is what did Congress say. Congress said the picketing could not be curtailed "unless an effect * * * is to induce any individual * * * not to perform any service." This language is clear. This language is unambiguous. It is quite difficult to comprehend how this language could be construed other than to mean that if one individual employed by another employer refuses to perform services because of the picketing, the proscribed effect has been established.\(^4\) There is nothing in the language of the "effect" clause which would otherwise qualify or alter such a construction.\(^4\)

Admittedly this construction may render the "effect" clause ineffectual to a large extent and may result in an imbalance in favor of management. However the Board's task is to administer the legislation enacted by the Congress and not to in effect amend the legislation so as to accomplish what a particular majority deems to have been congressional intent where the language chosen by the Congress is quite clear.

\((d)\) **Protest Picketing**

In the consideration of subdivision B above, it was noted that the majority of the Board has concluded that picketing in protest of unfair labor practices, the discharge of employees, or substandard wages is not per se a demand for recognition or bargaining, and therefore, absent any independent evidence of a proscribed object, such picketing would not be within the proscriptions of section 8(b)(7).

The same considerations therein discussed would, in the main, have equal application to cases under subdivision C, namely the difficulty of

\(^{143}\) II Leg. Hist. 1377(3), 1431(3), 1722(2).  
\(^{144}\) Id. at 1858(3), 1729(1).  
\(^{145}\) Absent of course any evidence that the effect was achieved by some collusive conduct on the part of the picketed employer.  
\(^{146}\) See Cong. Roosevelt's analysis, II Leg. Hist. 1729(1).
divorcing such picketing from a proscribed object. It would therefore be repetitious and quite unnecessary to undertake a discussion of protest picketing under subdivision C.\textsuperscript{47}

However, in view of the fact that some criticism of the Board's position was made,\textsuperscript{148} it should be pointed out that the Board is, as in the cases under subdivision B, not loathe to find violations where there is some independent evidence that the protest picketing is a device to conceal a proscribed object\textsuperscript{49} or that the protest is not made in good faith.\textsuperscript{150}

(e) Employer's Unfair Labor Practices as a defense to a charge under subdivision C.

The majority opinion in Blinne\textsuperscript{51} recognized, after a rather prolonged discussion, that the Congress did not intend "to write an exemption into section 8(b) (7) (C) dispensing with the necessity for filing a representation petition whenever employer unfair labor practices were alleged."

The legislative history of section 8(b) (7) not only supports this statement but would support a more definitive one, namely, that Congress did not intend that any section 8(a) violation, save section 8(a) (2) would constitute a defense to a charge under section 8(b) (7).

The legislation as passed by the Senate\textsuperscript{152} specifically provided "That where a charge is filed under section 8(b) (7) it shall be a defense to show that an unfair labor practice within the meaning of section 8(a) has been committed."\textsuperscript{153} The legislation as passed by the House did not contain a similar or comparable provision.\textsuperscript{154}

Unquestionably the Senate conferees were of a mind to persuade the House conferees of the desirability of accepting a provision similar in concept to that passed by the Senate.\textsuperscript{155}

Finally the fact is that the law, as enacted, did not contain the provision in the Senate bill but it did provide rather that if a meritorious


\textsuperscript{48} See discussion of subdivision B, supra in text.


\textsuperscript{51} C. A. Blinne, supra note 126. This decision like new Crown decision supra is a reconsideration of a prior Board decision (130 N.L.R.B. 587). Unlike Crown however the Board reaffirmed the order issued under the prior decision.

\textsuperscript{152} S. 1555, 86th Cong. 1st Sess. §708 (1959), I LEG. HIST. 583-84.

\textsuperscript{153} Ibid.

\textsuperscript{154} H.R. No. 8400, 86th Cong., §705(c) (1959), II LEG. HIST. 1700(3).

\textsuperscript{155} II. LEG. HIST. 1383(2).
section 8(a)(2) charge was filed injunctive relief may not be sought in a proceeding brought under an 8(b)(7) charge.\textsuperscript{156}

Thus it is clear that the Congress did not intend that an employer’s unfair labor practice (save an 8(a)(2) violation) would constitute a defense to a charge filed under section 8(b)(7).\textsuperscript{157}

Nevertheless the majority opinion in the \textit{Blinne} decision in the obscurity of a footnote and by way of dictum advanced the pronouncement that the filing of a meritorious charge under section 8(a)(5) (refusal to bargain with a union which represents a majority of the employees) will dispense with the requirement of filing a petition in a section 8(b)(7)(C) situation and picketing may continue undisturbed.\textsuperscript{158}

The majority reasoned that a meritorious section 8(a)(5) charge moots the question of representation because if a union has been designated as the bargaining representative of the majority of the employees there is no question of representation to be resolved by an election and thus no need for a petition. Further reasoned the majority, as the Board has in the past uniformly refused to entertain representation petitions where a meritorious “refusal to bargain” charge has been filed, Congress in enacting section 8(b)(7)(C) must have acquiesced in such practice. The majority’s reasoning is certainly questionable.

Congress must have been equally aware of the Board’s practice in not applying the contract bar rule unless the union had an uncoerced majority at the time the contract was executed and there were no conflicting claims to recognition,\textsuperscript{159} yet Congress deemed it necessary to provide that an 8(a)(2) violation would bar injunctive relief in an 8(b)(7)(A) proceeding.\textsuperscript{160} No similar provision was made by the Congress with respect to a refusal to bargain charge.

This is not to say that the majority’s position is without merit insofar as it may be a more desirable practice in such a situation. Rather the question is whether the majority’s position is one sanctioned by the Congress and on the basis of the legislative history it appears that this question must be answered in the negative.

\textit{Conclusion}

The foregoing discussion was concerned solely with the question of whether the Board’s administration of section 8(b)(7) is in accord


\textsuperscript{157} \textit{Cf.} Senator Morse’s comment, \textit{II Leg. Hist.} 1428(3)-1429(1).


\textsuperscript{159} Cox, \textit{supra} note 9, at 265.

\textsuperscript{160} The §8(a)(2) proviso was not limited by the Congress to a §8(b)(7)(A) proceeding but applies to all subdivisions of §8(b)(7). However, generally its application would be in a subdivision A proceeding.
with Congressional intent and whether the objective of the enactment is being realized.

In subdivision B, the position of the present majority of the Board with respect to "protest picketing" appears to be too broad. Admittedly, as noted in the discussion, there may be a few instances where the banning of such "protest picketing" would not be in accord with Congressional intent as expressed in the law itself or as reflected in the legislative history, but the majority's rather sweeping approach to this type of picketing would not seem to be in such accord. Rather it would unduly circumscribe the use of this subdivision and perhaps encourage its circumvention.

As to subdivision C, the majority's interpretation of the "publicity proviso" gives to this proviso a status not warranted by the language of the subdivision by making the exception the rule. Admittedly the majority finds some support in the legislative history but in view of the fact that there is also support in the legislative history to the contrary, the majority should not go beyond the language of the statute which is not unclear.

The majority undoubtedly and sincerely believe that to accord the "publicity proviso" the interpretation insisted upon by the minority would seriously impair the use of a traditional weapon of labor. The majority may be right. However if the legislation unduly harasses or restricts labor, the remedy is to be provided by the Congress and not by the Board.