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ORGANIZATIONAL PICKETING AND THE NLRB: FIVE ON A SEESAW*

BERNARD D. MELTZER†

IN THE Landrum-Griffin Act¹ Congress sought to curb organizational and recognitional picketing by adding section 8(b)(7) as an amendment to the National Labor Relations Act. That effort was, however, marked by calculated and inadvertent ambiguities, which reflected both the political obstacles to a solid consensus and the intellectual difficulties of devising new regulations for pliable instruments of unionization.

Those ambiguities, coupled with changes in the Board's personnel, have resulted in a striking degree of instability in the Board's decisions. At first, the Board, although frequently divided, gave generous scope to the new restrictions. But, after two appointments by President Kennedy,² the Board reconsidered³ and reversed some of its initial decisions⁴ or modified its reasoning even when it left the original results unchanged.⁵ Those reversals progressively blunted the effectiveness of section 8(b)(7) and of section 8(b)(4)(C) of the amended NLRA. The Board's changes were too rapid to be ascribed to institutional developments or to new insights produced by a maturing expertise; they reflected the different value preferences of new appointees interacting with loose statutory provisions. It is the Board's reversals, their impact on the purposes behind section 8(b)(7) and on the over-all statutory scheme, that I am to examine here.

* The substance of this paper was delivered on May 14, 1962, to members of the American Newspaper Publishers Association, attending a seminar arranged by the Industrial Relations Center, University of Chicago.

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¹ Labor-Management Reporting and Disclosure Act of 1959, "LMRDA," 73 Stat. 519 (1959), 29 U.S.C. § 401 (Supp. 1961).

² Chairman McCulloch and Member Brown.

³ The Board's rules and regulations do not expressly provide for rehearings, but the statute authorizes the Board to modify or set aside any order or finding before a case is filed in court. See § 1(d) of the National Labor Relations Act, as amended, 49 Stat. 449 (1935), 29 U.S.C. § 160(d)(1958), and § 102.49 of National Labor Relations Board, Rules and Regulations, Series 8, as amended, 29 C.F.R. § 102.49 (Supp. 1962).

⁴ See, e.g., *Hotel Employees Union (Crown Cafeteria)*, 130 N.L.R.B. 570 (1961) (Jenkins and Fanning, dissenting), *rev'd*, 135 N.L.R.B. No. 124 (Feb. 21, 1962) (Rodgers and Leedom, dissenting); *Hod Carriers Union (Calumet Contractors Ass'n)*, 130 N.L.R.B. 78 (1961), *rev'd*, 133 N.L.R.B. No. 57 (Oct. 5, 1961).

⁵ See, e.g., *Hotel Employees Union (Stork Restaurant)* 130 N.L.R.B. 543 (1961), *aff'd on other grounds*, 135 N.L.R.B. No. 122 (Feb. 21, 1962). *International Hod Carriers Union*, 130 N.L.R.B. 587 (1961), *aff'd on other grounds*, 135 N.L.R.B. No. 121 (Feb. 23, 1962).

Section 8(b)(7) was a logical response to values embodied in the Wagner Act⁶ and clarified by the Taft-Hartley Act.⁷ Free choice by individual employees with respect to unionization and majority rule by the uncoerced members of an appropriate bargaining unit were central objectives of the Wagner Act. Thus, that act had provided legal protection against the exercise of employer power to frustrate employees' desire for unionization and collective bargaining and had also provided for the establishment of election machinery for determining the employees' uncoerced preferences. Later, the Taft-Hartley Act made it plain that the employees were to have the same freedom to reject, as to accept, a putative bargaining representative.⁸

That act left, however, a large gap between its announced principles and its operative provisions. It reached only the cruder pressures through which unwanted unions might foist themselves on employees. It also provided, in section 8(b)(4)(C), only limited protection for the integrity of the Board's election machinery, by proscribing recognitional picketing by one union only where another union had been certified by the Board. The Taft-Hartley Act did not expressly reach organizational or recognitional picketing in other contexts, and for the first decade after its enactment, the act (apart from section 8(b)(4)(C)) was read as not imposing limitations on such picketing.⁹

"Recognitional picketing" (which I will use as including, and as interchangeable with, "organizational picketing")¹⁰ sometimes involved tensions with the ideal of free choice and with the election machinery embodied in the regulatory system. Such tensions arose when picketing exerted sufficient economic pressure on employers to bring about recognition despite the absence of majority support for the picketing union. In such situations, the picketed employer was impaled on the horns of a dilemma. If he capitulated to the picketing and recognized a minority union, he violated the law.¹¹ If he obeyed the law and withheld recognition, he risked loss to, and sometimes destruction

⁶ 49 Stat. 449 (1935), 29 U.S.C. § 151 (1946).

⁷ Labor Management Relations Act, 61 Stat. 136 (1947), 29 U.S.C. § 151 (1958).

⁸ See 61 Stat. 136, § 7 (1947), 29 U.S.C. § 157 (1958); cf. 61 Stat. 136, § 1 (1947), 29 U.S.C. § 151 (1958).

⁹ See *Teamsters Union (Curtiss Bros.)* 119 N.L.R.B. 232, 256 (1957) (Murdock dissenting), *set aside*, 274 F.2d 551 (D.C. Cir. 1958), *aff'd*, 362 U.S. 274 (1960).

¹⁰ "Organizational" picketing, which is directed at enrolling employees into the picketing union, is sometimes distinguished from "recognitional" picketing, which exerts pressure directly on an employer in order to induce him to recognize the picketing union. NLRB and state cases have sometimes attached different consequences to those two forms of picketing. See Cox, *The Landrum-Griffin Act Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 265, n.37 (1959), and Meltzer, *Recognition-Organization Picketing and Right-to-Work Laws*, 9 LAB. L.J. 55, 56 (1958). But commentators have generally agreed that this distinction is essentially verbal and that both forms of picketing should be given identical treatment, as was done in the LMRA, § 8(b)(7).

¹¹ See *International Ladies Garment Workers Union v. NLRB*, 366 U.S. 731 (1961).

of, his enterprise. Employees, whose interest in self-determination lay at the heart of the statute, were subject to similar difficulties. Although they might, economic pressure aside, reject a particular union, picketing pressures might induce them to join in order to save their jobs or to pave the way for lawful recognition of the union by their employer. Furthermore, in some situations, a union having lost an election resorted to picketing in order to achieve, by economic pressure, the recognition that it could not secure through a secret and orderly election. Such picketing involved the sharpest threat to the values and the integrity of the statutory scheme. But, even before an election, a similar threat existed since the pressures of picketing could undermine the requirement of majority support and make the election machinery wholly academic.

An appreciation of the problems posed by organizational picketing contributed to new approaches, first by the Supreme Court, then by the Board, and ultimately by the Congress. The Court in *Teamsters Union v. Vogt*¹² held that the expansive constitutional protection formerly accorded to peaceful picketing did not preclude restrictions when there was a reasonable basis for concluding that picketing would jeopardize a declared policy in favor of employee self-determination. Ten years after the passage of Taft-Hartley, the Board in the *Curtis* case,¹³ repudiating earlier precedents, discovered in the broad language of section 8(b)(1)(A) a prohibition against recognitional picketing by a minority union. But this approach received a mixed reception from the courts of appeal¹⁴ and had not yet been reviewed by the Supreme Court when the 1959 legislation was under consideration; thereafter, it was rejected by the Court.¹⁵

The explicit legislative response to organizational picketing was in large measure activated by the disclosures and findings of the McClellan Committee. That Committee, by dramatizing corrupt and despotic practices in some unions, had created an atmosphere generally conducive to new restrictions. As for organizational picketing in particular, the Committee had highlighted the familiar difficulties described above and had also shown the utility of that weapon to the shakedown artist, who would forego picketing for the right price.¹⁶ Widespread resentment against such abuses had been reflected, and

¹² 354 U.S. 284, 294 (1957).

¹³ 119 N.L.R.B. 232 (1957).

¹⁴ The cases are discussed in 1959 REPORT OF COMMITTEE ON DEVELOPMENT OF THE LAW UNDER THE NLRA 50-53 (Amer. Bar Ass'n).

¹⁵ NLRB v. Drivers Union, 362 U.S. 274 (1960). The Court found that its construction of § 8(b)(1)(A), added by the Taft-Hartley Act, was confirmed by § 8(b)(7). *Id.* at 291; cf. Cox, *supra* note 10, at 268-70.

¹⁶ See *Interim Report of the Select Committee on Improper Activities in the Labor or Management Field*, S. REP. NO. 1417, 85th Cong., 2d Sess. 6 (1958).

probably deepened, by the epithet "blackmail picketing,"¹⁷ which had not been confined to picketing for extortion but had been indiscriminately used to describe all forms of organizational picketing.

Organizational picketing was, of course, not without its defenders. Without attempting a comprehensive statement of the defenses or a synthesis of the rival arguments, I want to mention three of the principal contentions urged against complete or drastic prohibition.¹⁸ First, organizational picketing is a justifiable means of protecting union standards that are threatened and limited by pressure from the non-union sector. Secondly, the restriction of picketing, insofar as it is an appeal to consumers, as opposed to an appeal to secondary employees, would be an unjustifiable limitation on free speech or would, at least, raise substantial constitutional questions. Thirdly, picketing before an election promotes a more reliable poll because a demonstration of union power counteracts the employees' fears of employer power and of employer reprisal against union supporters.¹⁹

Section 8(b)(7) represented a murky compromise, rather than a clean choice, between the rival arguments. That compromise failed, as already suggested, to resolve issues of critical importance to the reach of the new restrictions. Before turning to such issues, a word about the general thrust of section 8(b)(7) and the interplay among its subsections is in order.

Section 8(b)(7)²⁰ restricts picketing, actual or threatened, only when it has

¹⁷ President Eisenhower used that term in expressing his disappointment over the omissions in the "Kennedy Bill" (S. 1555, 86th Cong., 1st Sess. (1959)); N.Y. Times, April 30, 1959, p. 18, col. 5; *id.*, p. 1, col. 1.

"Extortionate picketing" was made a criminal offense by § 602 of the LMRDA; that section does not, however, reach threats to picket made for purposes of extortion. Employer payments induced by such threats, as well as acceptance of such payments by union personnel, appear to violate § 302 of the LMRA, as amended by § 505 of the LMRDA.

¹⁸ For a survey of the competing arguments, see Isaacson, *Organizational Picketing—What is the Law?* 8 BUFFALO L. REV. 345, 364-67 (1959).

¹⁹ See Cox, *Some Current Problems in Labor Law*, 35 L.R.R.M. 48, 55-57 (1954); *cf.* Cox, *supra* note 10, at 269-70.

²⁰ Section 8(b)(7) provides as follows: "It shall be an unfair labor practice for a labor organization or its agents—

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

"(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 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 commence-

recognition or organization as an object. The restrictions do not, however, apply to all recognitional picketing but only to such picketing as is covered by one of the subsections. Subsection (A) bars recognitional picketing where another union has been lawfully recognized and where the raising of a representation question would be premature because, *e.g.*, it would be barred by contract bar doctrines. That subsection thus fills a gap left by section 8(b)(4)(C) by protecting legitimate and established bargaining relationships, without regard to whether they rest on a Board certification. Subsection (B) extends the prohibition to situations where the employees have expressed their views in a valid election within the preceding twelve months. That subsection, together with section 8(b)(4)(C), is designed to protect the integrity of the Board's election machinery for a limited period regardless of whether that machinery has produced a vote for or against representation. Finally, subsection (C) supplements the other prohibitions by limiting recognitional picketing to a "reasonable period" not to exceed thirty days unless an election petition is filed within that period. The absence of such a petition makes the picketing unlawful; the filing of such a petition coupled with a charge that the picketing union is violating section 8(b)(7)²¹ will, in the ordinary situation, activate an expedited election procedure, which will resolve the representation question. Filing within the statutory period legalizes subsequent recognitional picketing until there is a valid election in which the picketing union is defeated, thereby activating subsection (B). A union that wins an election and is certified may, of course, picket for recognition and related purposes.

It should be noted that section 8(b)(7)(C) fixes thirty days as the outermost limit for organizational picketing without the filing of an election petition and that the Board has the power to restrict such picketing to a shorter period. The Board has, however, in general exercised that authority only in connec-

ment 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)."

²¹ Under the Board's rules and regulations, an expedited election will not be directed unless a § 8(b)(7) charge has been filed. See 29 C.F.R. §§ 102.75-.77 (Supp. 1962) (N.L.R.B. Rules and Regulations); 29 C.F.R. §§ 101.22-.23 (Supp. 1962) (N.L.R.B. Statements of Procedure). But if picketing is not for recognitional purposes or is permissible under the second proviso to § 8(b)(7)(C), the direction of an expedited election would be improper, and such an election would not bring § 8(b)(7)(B) into play. See Department Store Employees Union (G. R. Kinney Co.), 136 N.L.R.B. No. 29 (March 21, 1962) (Leedom, dissenting).

tion with violent picketing.²² The Board, in determining a "reasonable period" appears also to have authority to shorten the thirty day period on the basis of the severity of the economic losses involved,²³ but such an approach would involve substantial administrative difficulties, which the Board presumably will seek to avoid. The picketed employer may also be able to shorten the statutory period by filing a petition and an 8(b)(7) charge immediately after recognitional picketing begins. In the ordinary case, the Board will dismiss such charges when it directs an expedited election, which will bring subsection (B) into play if the union loses.

It is plain from the general framework of section 8(b)(7) that it has two general purposes: first, to encourage prompt resort to the election machinery, rather than protracted picketing, as the method for resolving representation questions; secondly, to eliminate recognitional picketing where resort to the election machinery is barred either by a recent election or by a collective bargaining agreement with another union. It is also plain that the impact of the entire section will depend on three factors: (1) the speed of the Board's investigative and election machinery in the context of section 8(b)(7)(C); (2) the interpretation of the second proviso of that section; and (3) the purpose or purposes that are imputed to picketing with a variety of placards in a variety of contexts.

The speed of the Board's machinery will in turn depend on several factors, including (1) the clarity of the evidence concerning the union's objective, (2) the difficulty of the unit question,²⁴ and (3) the existence of unfair labor practice charges against the employer.²⁵ In the absence of complications resulting from those factors, an election may be held, according to informal advice from the Chicago Regional Office, within approximately three weeks after the filing of a petition.²⁶

It is not easy to generalize as to whether employers will be willing to absorb the losses caused by picketing for even that period or will seek to escape them by recognizing the union without regard to its majority status. Much will, of

²² See, e.g., *Cuneo v. United Shoe Workers*, 181 F. Supp. 324 (D.N.J. 1960) (injunction granted at instance of Board even though union filed petition within ten days after beginning of organizational picketing accompanied by violence).

²³ Cf. *Cox*, *supra* note 10, at 270.

²⁴ See generally *Woodco Corp.*, 129 N.L.R.B. 1188 (1961).

²⁵ See text following note 35 *infra*.

²⁶ The Board has held that in determining the date of a "valid election," for the purposes of § 8(b)(7)(B), the decisive date is the date on which a certification of a bargaining representative or of election results is issued, i.e., after all challenges to the election have occurred. See *Retail Store Employees Union (Irwins, Inc.)*, 134 N.L.R.B. No. 53 (Nov. 28, 1961).

In remedying a violation of § 8(b)(7)(B), the Board will ban picketing (presumably recognitional) for twelve months from the period when the union terminated its picketing, either voluntarily or involuntarily. *Ibid.*

I have been informally advised by the Chicago Office that in § 8(b)(7) cases, which are accorded priority by § 10(1) of the statute, election challenges are disposed of within fifteen days.

course, depend on the pressure generated by the picketing and by employer judgments as to the ultimate result of an election. But it seems likely that the smaller and weaker enterprises, which were the objects of special solicitude in the legislative debates,²⁷ will often capitulate prior to an election and without regard to the union's majority status.²⁸

That danger is increased and the administration of section 8(b)(7) complicated when a union charged with a violation of that section defends on the ground that its picketing is exclusively or in part a protest against employer unfair labor practices. The Board has dealt with the complications involved in the *Automobile Workers*²⁹ and *Blinne*³⁰ cases. In *Automobile Workers* the union, after apparently securing a majority in an appropriate unit, unsuccessfully sought recognition. Thereafter, the employer fired one of the union adherents, and the union picketed, ostensibly for his reinstatement. The Board, in a divided opinion, held that the picketing had lacked a recognitional objective and consequently had not been a violation of section 8(b)(7). The Board had to deal with its contrary precedents under section 8(b)(4)(C).³¹ Rejecting the trial examiner's suggestion that different rules for ascertaining purpose should operate under section 8(b)(4)(C) and 8(b)(7), the Board repudiated its earlier position.

The usual difficulty of disentangling recognitional and other objectives was complicated in the *Automobile Workers* case by two apparently discordant aspects of the legislative history: The first was the rejection of Senator Kennedy's proposal that an employer unfair labor practice should be a defense of an 8(b)(7) violation.³² The second was a series of statements suggesting that picketing in protest of an unfair labor practice was not to be a violation of that section.³³ Those two aspects could be reconciled in this way: Unfair

²⁷ See 2 *Legislative History of the LMRDA*, 1518, 1540, 1556, 1568, 1640.

²⁸ For a description of an actual case of such capitulation, see Wollenberger, *The Trouble with 8(b)(7)(C)*, 13 LAB. L.J. 284 (1962).

²⁹ *United Automobile Workers Union*, 133 N.L.R.B. No. 163 (Nov. 3, 1961).

³⁰ *International Hod Carrier's Union (Blinne)*, 130 N.L.R.B. 587 (1961), *aff'd on other grounds*, 135 N.L.R.B. No. 121 (Feb. 21, 1962).

³¹ *Meat Drivers Union (Lewis Food Co.)*, 115 N.L.R.B. 890 (1956) (Peterson, dissenting).

³² For references to, and discussion of, this aspect of the legislative history, see *Blinne*, 130 N.L.R.B. 589 (1961).

³³ See 2 *Legislative History*, *supra* note 27, at 1377. Senator Kennedy: "A union would be allowed to picket an employer who has committed unfair labor practices"; *cf. id.* at 1429; see also the references to the legislative history cited in note 29 to the supplemental opinion in the *Blinne* case, 135 N.L.R.B. No. 121 (Feb. 21, 1962).

Section 10, as amended, by the LMRDA, complicates reliance on the legislative history. That section bars an application for injunctive relief against putative violations of § 8(b)(7) when, and only when, the picketed employer has been charged with a violation of § 8(a)(2). The limited exclusion with respect to injunctive relief might arguably imply that picketing protesting unfair labor practices (other than those condemned by § 8(a)(2)) was to be covered by § 8(b)(7). But that argument can be disposed of on the ground that the narrow limitation as to injunctive relief operates only when recognitional picketing is involved; it does not indicate that all unfair labor practice picketing is necessarily recognitional.

labor practice picketing should not, in and of itself, be treated as having a recognitional objective. Where, however, such picketing is accompanied by independent evidence of such an objective, the additional purpose of protesting against an unfair labor practice would not prevent section 8(b)(7) from operating. That reading of the legislative history is a fair one and supports the Board's result in the *Automobile Workers* case.

That result is also supported by other considerations. Employer unfair labor practices, and particularly discriminatory discharges are, of course, a potent weapon for disrupting non-coercive organizing campaigns and for interfering with free choice by employees. Time is often of the essence in such campaigns, and the Board's overloaded machinery often operates too slowly to provide effective remedies. Accordingly, there is an appealing basis for granting the union the right of self-help against lawless employers despite the strong suspicion that picketing in protest against employer misconduct is generally actuated by a recognitional objective.

Such self-help poses, however, obvious difficulties. Organizing campaigns are likely to provoke not only unfair labor practices by employers but also questionable union claims of such practices, which ultimately will be held to be without merit. Where such claims are the subject of formal charges, the Regional Offices presumably will dismiss the manifestly frivolous ones without undue delay. But the Board has not as yet indicated that the failure to file such a charge may be taken as evidence that picketing ostensibly in protest of an unfair labor practice has a recognitional objective. And where a formal charge is filed, it may have sufficient merit to avoid dismissal and yet may ultimately be held to be groundless. While the Board's machinery is operating, the union will have an unrestricted right to picket so long as there is no independent evidence that its picketing is directed at recognition rather than at the alleged unfair labor practice. The close connection between these two objectives will encourage trumped up charges against, and disingenuous demands on, employers. Furthermore, the employer may find that picketing directed at an alleged unfair practice may do him more harm than any order which the Board ultimately may issue against him. He may, therefore, sacrifice his right to be heard and settle the unfair practice charge in the hope (which may be illusory)³⁴ of freeing himself from the greater losses imposed by picketing. And faced with the prospect of a renewal of picketing for publicity or organizational purposes, he may also recognize the union without regard to its majority status. On the other hand, if he stands his ground and ultimately persuades the Board that the complaint against him is groundless, he cannot recover any damages resulting from picketing whose ostensible

³⁴ See *Teamsters Union (Bachman Furniture Company)*, 134 N.L.R.B. No. 54 (Nov. 28, 1961) (post-election picketing in protest of alleged unfair labor practice (unlawful interrogation) by union that had lost election held not recognitional despite employer's previous settlement of charge with union's approval). Rodgers and Leedom, dissenting, high-lighted the risk that such "protest picketing" would be a cover for recognitional purposes.

justification, the employer's misconduct, is held to be groundless. Thus, the sanctioning of unfair labor practice picketing as an extra-statutory remedy against unfair practices may supersede the statutory election machinery where small and weak employers are involved. Such picketing is defensible as a matter of policy only if the statutory remedies against employer unfair practices are so ineffective that the law must be supplemented by the economic force that the law was supposed to displace. Such self-help, even though it appears paradoxical, may well be warranted by the delays in the Board's processes and the inescapable limitations of enforcement. In this context, as in others, the slowness of the Board's machinery, coupled with the special need for prompt remedies, is a serious obstacle to a coherent regulatory system.

Although justification for picketing in protest of an employer's unfair labor practice rests on the inadequacies of the legal remedies against such practices, it should be noted that the doctrine of the *Automobile Workers* case sanctions picketing for reinstatement without regard to whether the discharge was actually or allegedly unlawful. If picketing for reinstatement is non-recognitional, it does not become recognitional merely because it is prompted by a legal, rather than an illegal, discharge. Nevertheless, the employer's antecedent illegality, especially when it is directed at a union adherent, may furnish a motive for picketing which can be characterized as non-recognitional. On the other hand, where a manifestly legal discharge excludes such a motive, its absence may be evidence that recognition rather than reinstatement, is the purpose behind the picketing.

*Blinne*³⁵ differed from *Automobile Workers*, in that the picketing had an unequivocal recognitional objective as well as the objective of protesting employer unfair labor practices. The Board in *Blinne* held that an unfair labor practice by an employer (other than a violation of section 8(a)(5))³⁶ does not relieve a union picketing for recognition from the requirement that an election petition be filed within the statutory period. But the Board substantially qualified the practical significance of that holding by also ruling, in accordance with its established policy, that it would not hold an election until pending unfair labor practice charges against an employer had been disposed of or waived by the charging party as a basis for challenging the election.

The Board's postponement of an election, despite the provision for expedited elections in section 8(b)(7)(C), rested on the convincing ground that

³⁵ 130 N.L.R.B. 587 (1961), *aff'd on other grounds*, 135 N.L.R.B. No. 121 (Feb. 21, 1962).

³⁶ The Board declared that the filing of a petition would not be required where the union had filed a § 8(a)(5) charge sufficiently meritorious to warrant the issuance of a complaint. See note 24 of the supplemental opinion in *Blinne*, *supra* note 35. Rodgers and Leedom vigorously dissented from this dictum. Since a meritorious charge would block the operation of the election machinery, it is difficult to see what the fight touched off by that dictum was all about.

tainted elections should not govern employee or union representation rights. Much more troublesome, however, was the Board's further conclusion that recognitional picketing may lawfully continue until the blocking charge is disposed of and the election machinery is activated. Those two rulings in combination mean that the express statutory purpose of avoiding protracted recognitional picketing will be sacrificed in order to achieve untainted elections. Such a sacrifice will be avoided only when the blocking charge is frivolous and is promptly dismissed by the Regional Office. But a non-frivolous charge, although ultimately held to be groundless, will in effect be a license for protracted recognitional picketing. And that will be true even though the statute furnishes a remedy, albeit an imperfect one, against any employer unfair labor practice ultimately established, but denies any remedy for employer losses from picketing that is ostensibly directed at alleged employer misconduct ultimately found not to have occurred.

Such a result is not easy to square with the congressional rejection of Senator Kennedy's proposal that any unfair labor practice should be a defense against a section 8(b)(7) charge. Indeed, it is arguable that the Board has improved on the proposal rejected by the Congress; for it has, in effect, made a non-frivolous charge of employer unfairness a defense against extended recognitional picketing. That defense, it is true, is not wholly of the Board's making; it is largely a response to the failure of Congress to indicate how the restrictions of section 8(b)(7)(C) should be integrated with settled election practices.

Nevertheless, there is an approach by which the Board might achieve a better balance between the policy against protracted recognitional picketing and the policy in favor of untainted elections. The Board's suspension of the election machinery might be conditioned on the union's abandonment of recognitional picketing pending the disposition of the unfair labor practice charges filed against the employer.³⁷ Such a procedure might reduce not only tainted elections but also the inroads on self-determination and on the election machinery that accompany protracted recognitional picketing—inroads that section 8(b)(7) was designed to curb.

There is an obvious difficulty with the approach just suggested. It treats the representation issue as essentially a contest between the picketing union and the employer whereas the dominant objective of the statute is to protect the self-determination of employees. And that objective might be sacrificed when the picketing union, by refusing to forego picketing, precipitated a tainted election. But a similar difficulty exists when a union is permitted to

³⁷ Such a rule would appear to be within the Board's broad authority over the administration of the election machinery. In order to prevent a charge of an employer unfair labor practice from shortening the period of permissible picketing, the Board could defer the conditional direction of an election for an appropriate period.

waive an unfair labor practice charge against an employer in order to permit the operation of the election machinery.³⁸

In considering the desirability of a contingent suspension of the election machinery, two important factors are (1) the length of time that picketing that otherwise would be limited by section 8(b)(7) is "on the average" extended by the filing of an unfair labor practice charge against an employer and (2) the percentage of such charges that are not merely meritorious in the sense of leading to a complaint but are also upheld by the Board or in effect admitted in settlement. Informal advice from the Chicago Regional Office suggests that blocking charges, where frivolous, are disposed of "expeditiously" and that meritorious charges usually result in a quick settlement³⁹ and a quick election. But it would be helpful, both in the administration and the appraisal of section 8(b)(7), to have more precise data concerning the effects and the merits of blocking charges. Surely, if such data indicated that charges against employers that are ultimately held to be groundless frequently prolong recognitional picketing beyond the statutory period, a reconsideration of the approach worked out in *Blinne* would be in order.

We turn now to the second factor, which, I suggested earlier, will have an important effect on the impact of section 8(b)(7); that is, the interpretation given to the puzzling language of the second proviso of section 8(b)(7)(C).⁴⁰ That proviso in part was designed to avoid constitutional issues that would have been raised by an attempt to regulate appeals to the general public, as opposed to other workers. The reason for a higher degree of constitutional protection for publicity picketing, as opposed to so-called signal picketing, is not wholly clear. One suggestion has been that signal picketing is an appeal to the group-solidarity of workers, enforced through union sanctions whereas publicity picketing is addressed to the general public, which is usually not subject to such sanctions.⁴¹ But insofar as the customers of a particular enter-

³⁸ In *Blinne* the Board recognized the need to qualify its treatment of the election process as non-adversary, in declaring that a union would not be permitted to benefit itself by committing unfair labor practices to delay the holding of an election and thereby stay the "sanctions of Section 8(b)(7)." See note 26 of the supplemental opinion, 135 N.L.R.B. No. 121 (Feb. 21, 1962). Despite that qualification, where two unions, operating independently, are involved in an organizing contest, an unfair labor practice by either union could presumably be exploited by the other to extend the permissible period of recognitional picketing.

³⁹ See also *Blinne*, 135 N.L.R.B. No. 121, p. 16 of mimeographed opinion, where the Board stated: "[I]t may safely be assumed that groundless unfair labor practice charges in this area, because of the statutory priority accorded Section 8(b)(7) violations, will be quickly dismissed." But the Board passed over the position of the employer and his employees when the enterprise is subjected to picketing prolonged because of a non-frivolous charge which, after complaint is issued, is held to be unfounded. To the extent that such cases occur, the Board appears to have been over-sanguine in stating that as a result of its approach: "[T]he policy of the entire Act is effectuated and all rights guaranteed by its several provisions are appropriately safeguarded." *Ibid*.

⁴⁰ For the text of the proviso, see note 20 *supra*.

⁴¹ See Cox, *Strikes, Picketing and the Constitution*, 4 VAND. L. REV. 574, 591-97 (1951).

prise are unionized, the same organized coercion may exist. Furthermore, the threat to the employer and to employee self-determination depends on the severity of the economic pressure inflicted on the unorganized enterprise rather than on the means through which such pressure is exerted. And in some situations a consumers' boycott triggered by "publicity picketing" may be as potent as the producers' boycott activated by "signal picketing." In both situations, the constitutional issue boils down to the limitations on picketing that are permissible in order to protect the statutory policy of self-determination. The issue of disparate constitutional treatment of appeals to consumers and other workers deserves more extended consideration than it has received or can be given here.

Whatever its constitutional basis, the second proviso, read together with the general prohibition in the first clause of section 8(b)(7), raises troublesome issues of interpretation, which the Board considered in the *Crown Cafeteria*⁴² and *Stork Restaurant*⁴³ cases. In round one of *Crown Cafeteria*, the Board, in a divided opinion, held that informational picketing, regardless of whether it produces a denial of services, is covered by section 8(b)(7) if evidence independent of the placards shows a *present*⁴⁴ recognitional purpose. The Board defended that result on two grounds: (1) it achieved the purpose of the section—a quick resolution of representation questions that are raised by present demands for recognition; (2) it was consistent with the language of the proviso, which does not exempt picketing with an object described in the first clause of section 8(b)(7), but which confines the exemption to picketing with "the purpose" of advising the public, etc. The difference between the broad language of prohibition and the narrow language of the exemption could be given effect only if the exemptive language is limited to situations where the immediate purpose of the picketing is solely to advise the public.

The Board upon reconsidering its initial decision in *Crown Cafeteria* rejected it, again in a divided opinion. This about-face was based on the following considerations: section 8(b)(7) condemned only recognitional or organizational picketing; consequently, even in the absence of the proviso, picketing

⁴² *Hotel Employees Union (Crown Cafeteria)*, 130 N.L.R.B. 570 (1961) (Jenkins and Fanning, dissenting); *rev'd*, 135 N.L.R.B. No. 124 (Feb. 21, 1962) (Rodgers and Leedom, dissenting).

⁴³ *Hotel Employees Union (Stork Restaurant)*, 130 N.L.R.B. 543 (1961); *aff'd on other grounds*, 135 N.L.R.B. No. 122 (Feb. 21, 1962).

⁴⁴ Section 8(b)(7) does not expressly differentiate between "present" and "ultimate" objects. The Board's distinction appeared to be necessary to give any effect to the second proviso to § 8(b)(7). Without that distinction that proviso could have been substantially nullified by the position that primary picketing of an unorganized enterprise is actuated by a recognitional purpose, ultimate if not immediate, coupled with the Board's initial holding in *Crown Cafeteria*, that the second proviso was inapplicable to "recognitional" picketing.

The Board, after its reconstruction by President Kennedy, cast some doubt on the distinction between "immediate" and "ultimate" purposes. See *Teamsters Union (Bachman Furniture Co.)*, 134 N.L.R.B. No. 54, n.1 (Nov. 28, 1961).

without such an objective would not violate that section. The proviso was designed not to expand, but to limit, the section's definition of unlawful picketing, in accordance with the usual function of a proviso. Consequently, to hold the proviso inapplicable in the face of a recognitional objective would be to render the proviso wholly ineffectual. Furthermore, the original interpretation raised substantial constitutional issues, which should be avoided.

The arguments from the text of this inelegant proviso appear to be evenly balanced.⁴⁵ There is however, a practical consideration which, in my opinion, tips the scales in favor of the Board's second judgment, permitting publicity picketing without regard to the existence of a recognitional objective. That position reduces the number of situations requiring Board determinations of the actual purpose behind the picketing, determinations that involve substantial difficulties because "publicity picketing" usually is accompanied by an unvoiced recognitional objective. Such difficulties are naturally avoided if the decisive factor is the objective consequences of the picketing rather than its elusive purposes. Furthermore, such consequences, rather than the immediacy or remoteness of the union's recognitional purposes, are of critical importance to the interests at stake. Thus, for example, the probable consequences of picketing, whatever the slogans, will determine its effectiveness as an extortion weapon.

In *Crown Cafeteria*, the Board was concerned with the consequences necessary to bring section 8(b)(7)(C) into play where the picketing had an unequivocal recognitional objective. In reconsidering the *Stork Restaurant* case,⁴⁶ the Board changed its emphasis from consequences to purposes. It declared that informational picketing, protesting failure to provide standard union wages, did not have an objective falling within the purposes generally proscribed by section 8(b)(7). Accordingly, it ruled that the statutory restrictions did not

⁴⁵ The Board, in its original decision, also relied on Senator Kennedy's statement that the proviso applies only to "purely" informational picketing. See 130 N.L.R.B. at 573. Unfortunately, it is not clear whether the impurity consists of a recognitional objective or the inducement by picketing of refusals by secondary employees to cross the picket line. The second proviso to § 8(b)(7)(C) would appear to support the latter interpretation. Similarly, in discussing the Conference Report, Senator Kennedy stated: "When the picketing results in economic pressure through the refusal of other employees to cross the picket line, the bill would require a prompt election. Purely informational picketing cannot be curtailed under the conference report, although even this privilege would have been denied by the Landrum-Griffin measure." *Legislative History*, *supra* note 27, at 1431. For other statements implying that picketing which induced stoppage by other employees was not "informational," see *id.* at 1433, 1810.

⁴⁶ In its original decision, the Board unanimously accepted the proposition that informational picketing was subject to § 8(b)(7)(C) if it resulted in the stoppages that rendered the second proviso inapplicable. See *Hotel Employees Union*, 130 N.L.R.B. 543 (1961). The Second Circuit, in reviewing a related injunction proceeding, agreed with this interpretation. See *McLeod v. Hotel Employees Union*, 280 F.2d 760, 763, 765 (1960). On reconsideration, a majority of the Board rejected that proposition while affirming the original order. See *Hotel Employees Union*, 135 N.L.R.B. No. 122 (Feb. 21, 1962). Rodgers and Leedom dissented from the Board's shift of its general position.

apply to such picketing even though it produced the stoppages that rendered the second proviso to section 8(b)(7)(C) inapplicable.

The issue resolved in *Stork* was perplexing because the language of that section pulled in one direction while the industrial realities, the Board's pre-Landrum-Griffin precedents,⁴⁷ and the legislative history pulled in the opposite direction. The language is directed at union efforts to secure representation and read literally does not nicely apply where picketing is, in fact, seeking only to affect the terms of employment or to divert business from the picketed enterprise.⁴⁸ The Board under section 8(b)(4)(C) had, however, rejected such literalism and ruled that picketing for a demand customarily made in collective bargaining or grievance adjustment is picketing for recognition.⁴⁹ Although as an original question that interpretation may be challenged as unduly expansive,⁵⁰ there were, I believe, good reasons for maintaining it after the enactment of the Landrum-Griffin Act. Thus, it is, of course, arguable that Congress, by failing to disturb those precedents, while enacting closely related restrictions, approved them.⁵¹ A more important reason for maintaining those decisions, for the purposes of section 8(b)(7)(C), is that their generous view of recognitional purposes is necessary to avoid the frustration of the statutory purposes. Experience suggests that primary picketing of an unorganized enterprise, even though ostensibly designed as a protest against employment standards, typically is directed at achieving recognition, eventually, if not now. Such an expectation will, moreover, govern the reactions of employers, employees and other unions, who are unlikely to be affected by the rhetoric on the picketing placards. Consequently, "informational picketing," whether or not it is accompanied by independent evidence of a recognitional objective, is likely to have the same adverse consequences on employee free-choice and to give rise to the same abuses which lay behind the enactment of section 8(b)(7). Furthermore, an approach that gives different treatment to recognitional and informational picketing, even where their economic consequences are indistinguishable, will encourage verbal evasions in picket signs and disingenuous and delphic demands on employers. Under that approach, section 8(b)(7) is not likely to curb significantly the abuses that led to its enactment; instead, it is likely to legitimize them provided only that the union uses the

⁴⁷ See note 45 *supra*.

⁴⁸ See Cox, *supra* note 10, at 266. The Board's new position became the basis for decision in *Houston Bldg. Council*, 136 N.L.R.B. No. 128 (Mar. 10, 1962).

⁴⁹ See *International Ass'n of Machinists*, 121 N.L.R.B. 1298, 1300 (1958) (Fanning dissenting). *But cf.* *Radio Broadcast Technicians*, 123 N.L.R.B. 507 (1959).

⁵⁰ See note 48 *supra*.

⁵¹ The purpose described by § 8(b)(4)(C) is included within the broader purposes described by § 8(b)(7). But the force given to reenactment of statutory language by the Supreme Court is uncertain (see 1 DAVIS, *ADMINISTRATIVE LAW* 330 (1958)), and, in this context, is further weakened by the dissent in 1958 from the Board's generous interpretation of § 8(b)(4)(C). See note 49 *supra*.

right rhetoric and is cagey about disclosing its recognitional objective until it is certain that the picketed enterprise is ready to surrender.

In an effort to reduce such difficulties, Professor Cox has recommended that primary informational picketing should be presumed to have a recognitional objective, with that presumption rebuttable by evidence that the substandard labor conditions are presently 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 labor conditions or eliminating the competition even though the union does not become the bargaining representative.⁵²

Professor Cox's approach would have the desirable result of reducing instances in which recognitional picketing could successfully masquerade as "standards" or "informational picketing." But his proposal has not, to my knowledge, been adopted by the Board. Furthermore, his proposal would give rise to a new set of difficulties and administrative burdens, which may be suggested by listing some questions and hypothetical situations: How substantial a difference between union standards and plant standards is necessary for rebuttal purposes? Suppose the union standards include "featherbedding" practices that are not established in the picketed plant. Is the union's interest in preserving such legal, but questionable, standards sufficient? Suppose non-union wages are lower but the non-union employees have lower skills, with the result that wage costs per unit of production are not materially different in the unionized sector or a part of it and in the picketed plant. Suppose the non-unionized standards are better for some categories of employees and worse for others. Suppose non-union base wages are lower but incentive or profit-sharing arrangements hold out a genuine prospect of higher wages. Without multiplying such questions, two points seem clear: (1) There is nothing in the presumption formula or in the statute that tells us how to deal with them.⁵³ (2) Even if that formula resolved such questions, the comparisons it would require between the standards of the plant and union standards would involve grave evidentiary and administrative burdens.

If such difficulties lead to the rejection of the presumption approach, the Board (and the courts) will be left to a choice between two unsatisfactory alternatives, *i.e.*, either permitting section 8(b)(7)(C) to be frustrated by recognitional picketing that leads to stoppages but that is successfully disguised as standards picketing or stretching the statutory language so as to classify all standards picketing as recognitional. The ultimate choice here will depend on whether the interest in self-determination should prevail over the union's interest in protecting its standards against non-union pressures. Two considerations suggest that the Board should have read section 8(b)(7)(C) as giving

⁵² See Cox, *supra* note 10, at 267.

⁵³ For a more optimistic judgment about Professor Cox's formula, see Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 1086, 1105-06 (1960).

paramount weight to self-determination: The first and most important one is that the union's interest in limiting non-union pressures was a classic justification for unrestricted recognitional picketing and that section 8(b)(7) rejected that justification. Secondly, the suggested approach would have reduced the administrative burdens of the sorely pressed Board⁵⁴ and would have been calculated to promote the underlying purposes of the statute.

When we turn from section 8(b)(7)(C) to the other provisions of that section and other sections of the statute, the failure to classify standards picketing as recognitional gives rise to even more formidable difficulties. Those difficulties are suggested by *Calumet Contractors*,⁵⁵ in which the Board again reversed its direction. In that case, the Hod Carriers, several months after another union had been certified as the bargaining representative for employees of employer-members of an employers' association, picketed a member of the association for the stated purpose of forcing the picketed employer to conform to prevailing standards.⁵⁶ The Board, by a unanimous three-man panel, initially held, in accordance with established Board doctrine, that the picketing was designed to force bargaining or recognition by the employer in violation of section 8(b)(4)(C).

The reconstructed Board reconsidered and, with two members dissenting, reversed the initial decision and overruled earlier decisions reached prior to the enactment of *Landrum-Griffin*. In holding that the challenged picketing lacked the purpose required for a violation of section 8(b)(4)(C), the Board emphasized the legitimate interest of a union in protecting "area standards" from erosion by "substandard conditions" and suggested that a picketing union might forego organization and recognition once the picketed employer conformed to such standards. The Board did not go behind the pickets' placards to determine whether substandard conditions had existed in fact. It conceded, in a masterpiece of understatement, that picketing for "area standards," after the certification of another union, might justifiably be viewed as "unwarranted harassment," but, with perhaps disingenuous humility, suggested that that argument should be addressed to Congress.⁵⁷

"Unwarranted harassment" was an overgeneralized description of the serious tensions between the Board's result and the total statutory scheme. Certi-

⁵⁴ The Board was established in order to promote discriminating adjustment to a broad range of situations. Consequently, convenient administration is only one of the factors relevant to the choices confronting it. Nevertheless, that factor deserves more force than it has sometimes received, given the Board's congested docket and the ease with which statutory purposes may be frustrated by distinctions that are not maintainable in practice.

⁵⁵ *International Hod Carriers Union (Calumet Contractors Ass'n)*, 130 N.L.R.B. 78 (1961), *rev'd*, 133 N.L.R.B. No. 57 (Oct. 5, 1961).

⁵⁶ The picketing union, although disclaiming an interest in representing the employees involved, had, together with other unions, intervened in the election in order to contest the appropriate unit.

⁵⁷ See 48 L.R.R.M. 1667.

fication confers upon the certified union the exclusive responsibility for proposing and negotiating arrangements that it considers appropriate for the bargaining unit. Actual or threatened picketing by another union is a serious limitation on the incumbent union's discharge of its responsibility. In this connection, it is important to remember that under the Board's rationale in *Calumet Contractors*, area-standards picketing does not become illegal merely because it results in a denial of services to the picketed employers by truckers and others.⁵⁸ Thus, in the negotiating stage, the incumbent union may be subject to strong pressures designed to cause it to abandon or reshape its views as to what bargain is desirable for the employees whom it represents. Furthermore, it should also be noted that while the union picketing for area-standards may exert pressure on the employer for the ostensible purpose of shaping the terms and conditions of employment, he may not lawfully negotiate with that union in order, for example, to show the obstacles to adopting area standards or integrating them with plant standards. Thus, an outside union, in contrast to an incumbent union, is privileged to present its demands on a "take it or leave it" basis. Such results are scarcely compatible with either the ideal of rational discussion behind the duty to bargain or the exclusive bargaining rights of the certified union.

Similar incongruities result when area-standards picketing occurs and is permitted after the certified union and the employer have entered into an agreement. The statute bars an incumbent union from striking for the purpose of effecting a change in the provisions of an agreement to become effective prior to its expiration.⁵⁹ But under the Board's approach in *Calumet Contractors* an outside union may exert economic pressure for the purpose of achieving such modification. Such pressures whether they emanate from an incumbent or an outside union plainly threaten the contractual stability that the statute is designed to protect.

It is difficult to defend a result that exposes an employer to the pressure of area-standards picketing even though he has complied with his statutory obligations and has entered into an agreement with the union certified by the Board's machinery. Such vulnerability is, moreover, not calculated to promote respect for employee free choice before an election or for certification thereafter. Before an election, an employer may be encouraged to violate the law by coercing his employees into, or by recognizing, the union which, if it lost, could damage him most by area-standards, or other forms of so-called non-recognitional, picketing. If, nevertheless, that union loses an election, the pressure of picketing may be an incentive for the employer to undermine the

⁵⁸ See *Houston Bldg. Council*, 136 N.L.R.B. No. 128 (Mar. 10, 1962), where the Board invoked *Calumet Contractors* to support its holding that picketing against substandard wages was not recognitional and, accordingly, did not violate § 8(b)(7)(C) even though it extended beyond thirty days without the filing of an election petition and led to a denial of services by secondary employees.

⁵⁹ See LMRA §§ 8(b)(3), 8(d).

winning and certified union even though the law commands him to recognize it. And if the employer avoids such temptations and meticulously respects his statutory obligations, his reward may be the pressure of picketing from one union or the other.

The Board's only answer to the difficulties flowing from its position was that Congress had willed them. But section 8(b)(4)(C) scarcely contains so clear a mandate as to warrant a result so incompatible with other elements of the statutory scheme. That section makes recognition or bargaining a proscribed objective and leaves to the Board the delineation of what constitutes "bargaining." Furthermore, the proviso exempting publicity picketing applies only to subsection (C) of 8(b)(7); its inapplicability to the situations reached by the other subsections arguably implies that publicity picketing in those situations is unlawful. And if such picketing is unlawful, absent the certification of another union, there is an even stronger case for its illegality in the face of such certification. Finally, the Board, prior to Landrum-Griffin, had, as we have seen, interpreted the legislative direction differently and Congress had not disturbed that interpretation. On the contrary, by expanding the means covered by section 8(b)(4)(C) and by enacting section 8(b)(7), Congress had sought to enlarge the protection accorded to legitimate and established bargaining relationships. The Board's abrupt about-face thus appeared to be a perverse contraction of the legislative objectives. Against such a background, the Board's pretense that Congress had clearly dictated the result in *Calumet Contractors*, coupled with its failure to treat the difficulties involved, was scarcely calculated to promote confidence in the Board's disinterested craftsmanship.

It is time to leave the details of the Board's decisions and to look at the over-all impact of the rapid changes in the Board's direction. It is plain that the Board has systematically expanded the latitude accorded to picketing that appears to be tinged with, if not dominated by, recognitional purposes. As a consequence, a variety of openings now exist through which the pressures of protracted picketing may supersede or disrupt the election machinery or may serve as an extortion device, thereby limiting the protection which section 8(b)(7) was designed to afford. But it is a fair question whether the basic responsibility for limiting the larger statutory purpose rests with the Board or with the Congress, whose unsatisfactory legislation committed to the Board basic value choices which the Congress could not or would not make or did not fully understand. There is, of course, no clear dividing line between statutes that involve only the inherent uncertainties of all complex legislation or that provide for a wise flexibility and those whose standards are so ill-defined as to represent legislative abdication of basic policy choices. But the ambiguities of section 8(b)(7), together with the Board's seesawing and its ultimate inhospitality to the underlying legislative purpose, suggest that that section was on the wrong side of that line.