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Two Years with Section 8(b)(7)

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by
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I. INTRODUCTION

SECTION 8(b)(7) became effective as an amendment to the National Labor Relations Act on November 13, 1959.[1] Since that date, the National Labor Relations Board has decided only a few meaningful decisions construing Section 8(b)(7), and only one of these has reached a circuit court for an enforcement decree.[2] Of the deepest significance, however, is the fact that the important decisions heretofore rendered are now under reconsideration by the Kennedy Board. However, before we turn to the consideration of the stormy decisional history of 8(b)(7), it seems appropriate to review the statutory provision enacted by the Congress in 1959.

II. SECTION 8(b)(7) IN GENERAL

In broad outline Section 8(b)(7), under certain conditions, proscribes a labor organization from picketing, causing to picket, or threatening to picket where the purpose is to force or require employer recognition or force or require employees to join the Union. The certain conditions under which 8(b)(7) comes into play are set forth in its subparagraphs as follows:

(A) Where the employer has lawfully recognized another union as its employees' representative.

(B) Where within the preceding twelve months a valid NLRB election has been held.

In subsection (C) such picketing is banned after a reasonable period of time has elapsed, not to exceed thirty days, except where a representation petition is filed within such reasonable time. Subsection (C) also contains a proviso which has been the subject of much disagreement:

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Subsequent to November 2, 1961, the NLRB handed down decisions in a number of the cases commented upon by Mr. Kammholz. See Crown Cafeteria, 135 N.L.R.B. No. 124 (1961); Charlton Press, Inc., 135 N.L.R.B. No. 123 (1961); Stork Restaurant, 135 N.L.R.B. No. 122 (1961); and C. A. Blinne Constr. Co., 135 N.L.R.B. No. 121 (1961).

[1] 73 Stat. 544, 29 U.S.C. § 158(b)(7) (1959).

[2] Stan-Jay Auto Parts, 127 N.L.R.B. 958 (1960), *enforced*, 48 L.R.R.M. 2077 (2d Cir. 1961).

> 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.

In essence, this is 8(b)(7). Before examining the decisions, it is of prime importance to remember that these decisions were made by a Board composed of Eisenhower appointees, one of whom, Member Fanning, was and is a Democrat. Most of his dissents and separate opinions in the decided 8(b)(7) cases received only casual attention at the time they were written. Now, however, the Fanning views are highly significant because of his alignment with the two Kennedy appointees: Chairman McCulloch and Member Brown.

III. Cases Construing Section 8(b)(7)

In reviewing the cases, we note first the *Stan-Jay Auto Parts*[3] decision. This was an 8(b)(7)(C) case in which one of the union's defenses was that its picketing was protected by 8(b)(7)(C)'s informational proviso, even though it stopped deliveries, on the ground that there was no showing that the delivery stoppages were the *intended* effect of the picketing. The Board, in rejecting this defense, said it was the *actual* effect of the picketing which counted and not its *intended* effect. Member Fanning did not join in this pronouncement but found, as did the remainder of the Board, that under the facts of the case the union either intended to stop deliveries or could reasonably have anticipated that its picketing would induce employees not to cross the picket line. Accordingly, the question still seems to be open as to how the new Board will regard so-called informational picketing where deliveries are in fact stopped but where the union (at least ostensibly) takes steps to indicate an intent that deliveries are not to be stopped. Nor is any clear guidance received on this issue from the court of appeals where *Stan-Jay* was enforced.[4] There the union again urged its alleged distinction between the "actual" and "intended" effect of the picketing. Although the court labeled such argument as "hairsplitting," it then proceeded to find that in any event the picketing did in fact cause the delivery stoppages. The reluctance of a worker to cross a picket line is so notorious and well-established that where this happens a union *must*

[3] *Ibid.*

[4] NLRB v. Local 239, Teamsters Union, 48 L.R.R.M. 2077 (2d Cir. 1961).

be said to have reasonably anticipated that such would be caused by its picketing, no matter what its concurrent public statements or picket sign legends may be.

In the *Blinne* case,[5] one of the union's defenses was that 8(b)(7) did not prohibit a majority union from recognition picketing. The Board disagreed, noting that 8(b)(7)'s specific terms permitted only a "currently certified" union to engage in recognition picketing. Of course, this limitation by 8(b)(7) recognizes the realities of an organizing campaign. A union with a majority of authorization cards is not always the victor in the privacy of Board voting booths.

A perhaps more interesting issue raised in the *Blinne* case resulted from the following facts. After the union had engaged in recognition picketing for twenty-one days, it filed unfair labor practice charges against the employer, alleging violations of 8(a)(1), (2), (3), and (5) of the Act. After the picketing continued for another twenty-one days, making a total of forty-two days, the Regional Director dismissed the (a)(2) and (a)(5) allegations, whereupon the union filed a representation petition. Later, the Regional Director found merit to the (a)(1) and (a)(3) portions of the charge. Under these facts, the union argued to the Board that the employer's unfair labor practices should be a defense to its recognition picketing and also urged that by filing the unfair labor practice charges within thirty days it had satisfied the requirements of 8(b)(7)(C). The Board, with Mr. Fanning dissenting, rejected both propositions, noting from the section's legislative history that Congress had specifically rejected such a defense and that section 10(*l*) of the Act had been specifically amended to provide that only the filing of a valid 8(a)(2) charge would stay an 8(b)(7) restraining order. Section 8(b)(7)(C), concluded the Board majority, explicitly required that a representation petition be filed within a maximum of thirty days to stop an 8(b)(7)(C) complaint, and this the union did not do. Member Fanning's dissent, although lengthy, avoids any serious legal refutation of the majority's position. Rather, he dwells on the equitable argument that the employer's unfair labor practices would have made a free election impossible and, therefore, that the filing of a representation petition was unnecessary to satisfy the statute. Over and above Mr. Fanning's neglect to mention that the union's continued coercive picketing would also prevent a free election, it is alarming to note his apparent willingness to ignore both the legislative history of 8(b)(7) and its *express* language to satisfy his feelings on what is equitable in one particular case. This is even

[5] C. A. Blinne Constr. Co., 130 N.L.R.B. No. 69 (1961).

more disturbing when it is realized that the inequities Member Fanning complains of can be and are avoided by the Board's Regional Directors *without* the necessity of distorting the clear meaning of 8(b)(7)(C). Thus, where a union has been engaged in recognition picketing and the employer commits an unfair labor practice, the union only has to file a timely representation petition along with appropriate unfair labor practice charges. With the filing of the petition, the 8(b)(7)(C) charge is dismissed and the election is stayed pending disposal of the unfair labor practice charges, unless, of course, the union files a waiver signifying its wish to proceed to an immediate election.

The closest thing to 8(b)(7)(A) prior to the Landrum-Griffin Bill was Section 8(b)(4)(C) of the Act which, among other things, prohibited a union from recognition or bargaining picketing where another union had been certified as the majority representative of the employees. In cases decided under 8(b)(4)(C), a common union defense was to claim that its picketing was not to force recognition or bargaining but for various limited objectives such as: to make the employer hire back some strikers, to further a grievance it had with the employer, or to get the employer to raise his working conditions to union levels. Under 8(b)(4)(C), the Board uniformly rejected such defenses, saying that these objectives embraced conditions normally secured through collective bargaining with the employees' bargaining representative and, therefore, that picketing for such purposes was an attempt to force the employer to recognize and bargain with the union on these matters.[6] Therefore, when the unions raised this same type of defense in Section 8(b)(7)(C) cases, such as the *Dallas Gen. Drivers* case and the *Cartage & Terminal* case,[7] the Board relied on its prior 8(b)(4)(C) cases and rationale to affirm again that picketing for such purposes was in fact picketing for recognition and bargaining, which is expressly prohibited by 8(b)(7). It is pertinent to note that although Member Fanning did not dissent in either the *Dallas Gen. Drivers* or the *Cartage & Terminal* case, he did disclaim reliance on the old 8(b)(4)(C) line of cases in finding that the picketing was for recognition. Again, these cases are under reconsideration by the new Board and some further indication of the results of such reconsideration is given in the new Board's recent reversal of position in the *Calumet Con-*

[6] See, *e.g.*, J. C. Penney Co., 120 N.L.R.B. 1535 (1958); Lewis Food Co., 115 N.L.R.B. 890 (1956).

[7] Cartage & Terminal Management Corp., 130 N.L.R.B. No. 70 (1961); Dallas Gen. Drivers (Macatee, Inc.), 127 N.L.R.B. 683 (1960).

tractors case arising under 8(b)(4)(C).[8] In the Board's original decision, not participated in by Member Fanning, it was found as a matter of fact that an object of the union's picketing was to force the employer to meet prevailing rates of pay and working conditions in the area. The Board held that such picketing constituted an attempt to obtain conditions and concessions normally resulting from collective bargaining and therefore violated 8(b)(4)(C) by having the proscribed object of forcing itself upon the employees as their bargaining agent. In October 1960, in response to a petition for reconsideration by the respondent union, Members McCulloch, Brown, and Fanning reversed the original *Calumet* decision. Although still finding as a matter of fact that the union's picketing was to *require this particular employer* to raise his conditions of employment, *i.e.*, that the picketing was not informational to the public, the Board decided that such an object was not tantamount to having an object of recognition or bargaining. This conclusion seems completely divorced from reality. Whether at a negotiating session or on a picket sign, a union demand that an employer pay certain wages is in fact an attempt to bargain.

A further confoundment in the *Calumet* reversal is that it uses almost verbatum the dissent of Member Fanning in an 8(b)(4)(C) case entitled *Industrial Chrome Painting Co.*,[9] including the following passage: "It may be argued with some justification that picketing by an outside union when another union has newly won Board certification is unwarranted harassment of the picketed employer. *But this is an argument that must be addressed to Congress.*" The *Industrial Chrome* case was decided on October 14, 1958. Since then, Congress has in fact spoken in *Landrum-Griffin* and, having before them the line of 8(b)(4)(C) decisions upon which the original *Calumet* decision was based, not only allowed 8(b)(4)(C) to remain as is, but also enacted 8(b)(7) even further to proscribe the use of "blackmail picketing."

The recent *Miratti*[10] case, decided by Members McCulloch, Fanning, and Brown, may indicate further what to expect in the future. There, a union had sought recognition and a contract from an employer for a period of three years. It sought recognition from the employer on the basis of a card check (a union representative testified in the case that he suggested a card check with no idea of recognition but solely to get the employer's reaction to the idea).

[8] Calumet Contractors Ass'n, 130 N.L.R.B. No. 17, *rev'd*, 133 N.L.R.B. No. 57 (1961).
[9] 121 N.L.R.B. 1298 (1958).
[10] 132 N.L.R.B. No. 48 (1961).

A short time later the union told the employer it was not seeking recognition, but shortly thereafter picketed the employer with picket signs proclaiming that the employer had no contract with the picketing union. The Board dismissed the petition, holding that the union had effectively disclaimed any goal of recognition. Accordingly, it would seem that a union can now erase three years of concentrated efforts in one direction by a simple self-serving statement to the contrary. This "flies in the face" of past decisions. It is also contrary to the congressional intent expressed in 8(b)(7).

Also under reconsideration is the *Stork Restaurant* case.[11] Although it is more noted for the bitter tenacity of the parties than its contribution to an understanding of 8(b)(7)(C), it too contains another dissent by Member Fanning. Although his language is somewhat circular, he seems to be previewing his dissent in *Crown Cafeteria*[12] by in effect saying that majority or minority unions may engage in recognition picketing if such picketing is kept within the confines of the second proviso to 8(b)(7)(C).

Perhaps the most significant of the recent 8(b)(7)(C) decisions is the *Crown Cafeteria* case, where the scope of the informational proviso to subsection (C) was put directly in issue. There, the picketing caused no proven delivery stoppages and the legends on the picket signs were fairly well restricted to proclaiming that the employer was "non-union." However, other evidence showed clearly that *an* objective of the picketing was recognition. The Trial Examiner concluded that the picketing, even though for recognition, fell within the protection of the informational proviso to 8(b)(7)(C). The Board, with Members Jenkins and Fanning in dissent, disagreed. Citing legislative history and 8(b)(7)'s express statutory language,[13] the majority of the Board concluded that picketing which had recognition as one of its objects was not protected by the proviso merely because the wording of the picket signs conformed to the limits prescribed in the proviso. The Board stated that to be protected by the informational proviso, the *sole purpose* of the picketing must be informational. The main argument of the dissenting members was that the majority interpretation made the informa-

[11] 130 N.L.R.B. No. 67 (1961).

[12] 130 N.L.R.B. No. 68 (1961).

[13] For an excellent summary of legislative history and Supreme Court decisions on the meaning of the information proviso, see the Intermediate Report by Trial Examiner George A. Downing in the *Fowler Hotel* case. See particularly the text roughly embraced between his footnotes 4 and 6. [Editor's note—The opinion of the Trial Examiner in the *Fowler Hotel* case has not been published as of the date of this printing. However, for the district court treatment of this case see: Getreu v. Bartenders Union, 181 F. Supp. 738 (N.D. Ind. 1960).]

tional proviso meaningless. In support of this "meaningless" argument, the dissent reasoned that *all* "non-union" type informational picketing has recognition or bargaining as one of its objectives. Therefore, when Congress inserted the informational proviso in subsection (C), it meant to exempt *recognition* picketing which truthfully advised the public that an employer did not employ members of, or have a contract with, the union unless such picketing stopped deliveries. Such a conclusion is intolerable. It writes "an object" out of 8(b)(7)'s enacting clause and places a premium on deceit. Thus, under the *Crown Cafeteria* dissent, picketing would be permitted as long as the picket signs made an ostensible appeal to the public and did not stop deliveries—even though the union contemporaneously said to the employer, "Regardless of what you *or your employees* want, we will picket you until you sign up." This is blackmail picketing and as such it is intolerable. The majority seems to have reached the correct result.

Implicit in the majority opinion is that even at the outset, the minority's "meaningless" argument is self-defeating. This is so because, even if it is assumed that a basic repugnancy does exist between 8(b)(7)'s enacting clause and the proviso in question, the weight of the authority holds that the proviso must be strictly construed and, if necessary, give way to the purpose and spirit of the enacting clause.[14]

More basically, the *Crown Cafeteria* majority seems to say that those who think that Congress intended to permit recognition picketing under the conditions set forth in subsection (C) ignore several important facts. They ignore the express words of the statute which state that picketing, in order to fall within the protection of the proviso, must be for *"the purpose"* of truthfully advising the public. They ignore the legislative abhorence of "top down" organizing which prompted the very enactment of 8(b)(7). And lastly, they ignore the fact that if Congress had wanted to except truthful *recognition* picketing from the proscription of 8(b)(7)(C), Congress would have labeled such exempt picketing in the same words as used to proscribe it in the enacting clause. This argument runs as follows: If Congress wished to exempt recognition picketing under certain circumstances, it could have accomplished this much more easily, and much more accurately, by proviso or exception to the enactment clause of 8(b)(7), which might have read as follows:

[14] Evans v. Carter, 93 U.S. 78 (1876); Dollar Savings Bank v. United States, 86 U.S. 227 (1873); United States v. Dickson, 40 U.S. 141 (1841); Thompson v. United States, 258 Fed. 196, 201 (8th Cir.), *cert. denied*, 251 U.S. 553 (1919).

> Except where such picketing or other publicity is limited to truthfully advising the public that an employer does not employ members of, or have a contract with, a labor organization . . . .

But Congress did not say this. In the complex of 8(b)(7)(C) it speaks of two different kinds of picketing: First, in the enacting clause it speaks of picketing which has recognition as one of its objects or purposes. Second, in the second proviso to subsection (C) it speaks of picketing which has as its sole purpose or object the truthful advising of the public that an employer is non-union. Congress here differentiated not only between "an object" and "the purpose" but also between two different types of picketing. And it cannot be assumed that this differentiation was aberrant.

As an aid to understanding the *Crown Cafeteria* majority on this point, it is essential to examine more closely the full nature of a legislative proviso. The function of a proviso is not only to except something from an enacting clause, or to qualify or restrain its generality, but also to exclude some possible ground of misinterpretation of it as extending to cases not intended to be brought within its purview.[15] Thus, the term "proviso" from its origin suggests the employment of prevision, as if Congress had declared: "Look out for it. See that the general words of the enacting clause shall not have a particular effect."[16]

What misinterpretation did the majority say that Congress urged us to look out for? Clearly, Congress was warning us not to indulge in the commonly held supposition that under every circumstance non-union or no-contract type picketing must be equated with recognition picketing. That such a caution was needed is evidenced by the indulgence in such a supposition on the part of the *Crown Cafeteria* dissent. In their argument they adopt the following statement: "It is difficult, if not impossible, to imagine any kind of informational picketing pertaining to an employer's failure or refusal to employ union members or to have a collective bargaining agreement where another object of such picketing would not be ultimate union recognition or bargaining."[17] With regard to 8(b)(7)(A) and (B), the majority might agree with this statement, in that by not including an informational proviso in subsections (A) or (B), Congress, in effect, said that where there is another lawfully recognized union or where an election has been held within twelve months, it is patently unbelievable that non-union picketing could be other than an at-

[15] See, *e.g.*, Perry v. Larson, 104 F.2d 728, 730 (5th Cir. 1939).
[16] See Sherman v. Santa Barbara, 59 Cal. 483 (1881).
[17] *Supra* note 12.

tempt by the picketing union to gain recognition or bargaining rights for itself; however, not so, with reference to 8(b)(7)(C). Under the circumstances set forth in subsection (C), Congress forbade equating non-union or no-contract type picketing, in itself and by itself, with a demand for recognition. This, suggests the *Crown Cafeteria* majority, is made clear in the second proviso to subsection (C) where it is specifically recognized, in so many words, that non-union or no-contract type picketing *may* have as its sole purpose the truthful advising of the public. The Board minority erroneously, in the opinion of the majority, negated this possibility, a possibility which Congress held up for view by conjoining the term "the purpose" with the words "truthfully advising the public." Accordingly, it is submitted that the practical impact of the majority opinion is that when we are confronted with truthful non-union or no-contract type picketing in an 8(b)(7)(C) situation, we cannot infer from the fact of such picketing alone that one of its objects is recognition. Thus, the Board infers that Congress has, in effect, established a rule of evidence, *i.e.*, to show a recognition object under such circumstances it is necessary to adduce additional evidence.

To complete the picture, and consistent with the principle that provisos are to be strictly construed, the majority further implies that Congress has restricted the application of this rule of evidence by saying that in subsection (C) situations you can not use truthful non-union or no-contract picketing as evidence of a recognition object *unless it has the effect of stopping deliveries.* This, because if such picketing stops deliveries, it becomes clear that one of its objects is to put economic pressure on the employer and employees to "sign up" with the union, and, therefore, is *not* solely for *the purpose* of giving truthful information to the public.

However, it should be noted that this is only the writer's interpretation of the *Crown Cafeteria* case. It may not be the right one, and particularly with the case being reconsidered, it is not the view which will be forthcoming from the Kennedy Board. However the *Crown Cafeteria* majority opinion does not distort the express language of Congress, and it is also in accord with accepted rules of legislative construction and the section's legislative history. More importantly, it is in accord with the very spirit of the section, which is to proscribe all "blackmail" recognition picketing.

IV. Conclusion

The scope and purpose of this Article has been to consider the

available legal theories under 8(b)(7) and the apparent purpose of the Kennedy Board to blunt the intent of Congress as it relates to blackmail picketing. The position of the private practitioner on the labor relations scene today is critically important indeed. For the General Counsel of the Board will be obliged to follow the new decisions of the Kennedy Board and refuse to issue complaints.

Thus, it is incumbent on the private practitioner to seek authoritative court of appeals determinations on the 8(b)(7) cases pending or just decided. To do less is a disservice to the client and to the employees whom the law is designed to protect. It is my prediction that the Kennedy Board's new views can only result in a loss of confidence in the agency across the land, and confidence, like innocence, is more easily retained than recovered.

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