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Notes

Recognition and Organizational
Picketing: Effect of Employer's
Unfair Labor Practices

Section 8(b)(7)(C) of the National Labor Relations Act was passed in 1959 to circumscribe recognition and organizational picketing by a union that has not been certified as the bargaining representative of the employees. The uncertified union may picket for a limited time only unless it petitions for an election. The following two Notes analyze two major problems that have arisen under this section. The author of this Note considers the soundness of the NLRB's position on whether an employer's unfair labor practices should serve as a defense or result in modification to the requirements of section 8(b)(7)(C). In addition, he suggests a change in the NLRB's procedure in these cases to better achieve the desirable objectives embraced within the new section.

The 1959 Landrum-Griffin amendments to the National Labor Relations Act imposed new restrictions on the right of unions

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1. The pertinent provisions of the National Labor Relations Act, as amended, are:

   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:

   (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
to engage in picketing for the purpose of organizing employees or obtaining recognition from an employer.\(^2\) The legislative history of the amendments indicates that these restrictions caused some of the most impassioned and conflicting debates.\(^3\) Congress 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.


2. Recognition picketing refers to activity by a union directed to obtaining the employer's recognition that it is the bargaining representative of his employees. Organizational picketing refers to activity that is directed to obtaining the majority of the employees' consent that the union may act as their bargaining representative. Any distinction between the two is spurious, however, since picketing for either objective is ultimately aimed at obtaining exclusive bargaining status with the employer. Also, both apply the same kind of pressure on the employer and employees in the form of economic coercion through possible loss of business by the employer and the accompanying decrease in available work for the employees. Thus, the Landrum-Griffin amendments did not draw any distinction between these two types of picketing. See Cox, The Landrum-Griffin Amendments to the National Labor Relations Act, 44 MINN. L. REV. 257, 265 (1959); Petro, Recognition Picketing Under the National Labor Relations Act, 2 LAB. L.J. 803, 805 (1951); Rothenberg, Organizational Picketing, 5 LAB. L.J. 689 (1954); Young, Picketing Under the 1959 Amendments, N.Y.U. 13TH CONF. ON LABOR 213, 235 (1960).

Under the Taft-Hartley Act of 1947, recognition or organizational picketing was banned by § 8(b)(4)(C) only when there was another labor organization certified as the representative of the employees. See NLRB v. Knitgoods Workers' Union, 267 F.2d 916 (2d Cir. 1959). Under the so-called Curtis doctrine, the Board also held that picketing by a minority union to force the employer to recognize it constituted restraint of the employees in the exercise of their right under § 7 to participate or refrain from participation in union activity and therefore violated § 8(b)(1)(A). See Drivers Union, 119 N.L.R.B. 232 (1957) (Curtis Brothers, Inc.). See also International Ass'n of Machinists, 121 N.L.R.B. 1176 (1958). In 1960, the Supreme Court rejected the Curtis doctrine and held that peaceful picketing for recognition purposes does not restrain employees in the exercise of their rights guaranteed by § 7 and, therefore, does not violate § 8(b)(1)(A). NLRB v. Drivers Union, 362 U.S. 274 (1960), denying enforcement of 119 N.L.R.B. 232 (1957); see Note, 42 MINN. L. REV. 459 (1958); Note, 44 VA. L. REV. 741 (1958).

3. See 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 [hereinafter cited as LEGIS. HIST.], at 976 (remarks of Senator Goldwater), 993 (remarks of Senator Dirksen), 1028-29 (remarks of Senator Goldwater), 1155 (remarks of Senator Holland), 1175 (remarks of Senator McClellan), 1176 (remarks of Senator Kennedy), 1176 (remarks of Senator Ervin), 1189 (remarks of Senator
seemed to be primarily concerned with protecting employers from prolonged picketing for recognition or organization by a union representing only a minority of the employees. Such picketing for an extended period of time is unfair to the employer since he cannot lawfully recognize a minority union. When recognition is withheld, however, he may be economically harmed due to an employee work stoppage, interruption of deliveries from other employers, or loss of business from consumers sympathetic to the union's appeal. To stop such picketing, an employer in this situation may pressure his employees to join the union so that he can lawfully recognize it. Furthermore, employees, who are aware of possible harm to their employer's business and consequently to their jobs, may attempt to halt the picketing by joining the union. Either of these results is contrary to the policy of the federal labor statutes that protect the employee's right to join a union free of either union or employer coercion.

Congress enacted section 8(b)(7) to protect employers from prolonged minority union picketing and to secure the right of employees to freely choose their collective bargaining representative. Section 8(b)(7)(A) prohibits picketing for recognition or organizational purposes when the employer has "lawfully recognized" another union and a question concerning representation.
cannot be raised under section 9(c) of the act. Such picketing is also prohibited by section 8(b)(7)(B) when there has been a “valid election” within the preceding 12 months. If the picketing is not prohibited by either of these provisions, a union may engage in picketing for recognition or organizational purposes. Within a reasonable time, however, but not exceeding 30 days, section 8(b)(7)(C) requires a petition to be filed with the National Labor Relations Board requesting a representation election. If the union shows that it satisfies the substantial interest requirement of section 9(c), a hearing is held, and if a genuine issue of rep-

has signed an agreement with a union that is not entitled to recognition. For example, it is unlawful to recognize a union that represents only a minority of the employees or one that obtained its majority through coercive activities. Also, there is no lawful recognition when the union is dominated by the employer. See, e.g., Bernhard-Altmann Texas Corp., 122 N.L.R.B. 1289 (1959).

10. The language in regard to the raising of a representation issue under § 9(c) could bar picketing whenever the union is unable to prove that it represents 30% of the employees. However, commentators have viewed this language as referring to the contract bar rule of the Board. See Burstein, Picketing—A Management Point of View, N.Y.U. 14TH CONF. ON LABOR 11, 17 (1961); Come, Picketing Under the 1959 Amendments to the National Labor Relations Act, N.Y.U. 13TH CONF. ON LABOR 185, 186 (1960); Cox, supra note 2, at 265.

11. This provision extends the freedom of employees to choose a collective bargaining representative as expressed in the Wagner Act. The employees are now protected from the economic pressure of picketing after they have rejected a union in a Board election. Thus, the act now emphasizes the right of the employees to have no union, which is arguably a part of the employees’ right to self-determination. See Cox, supra note 2, at 265–66.

The 12 month period begins to run from the time of certification by the Board of the results of the election rather than from the time of the balloting. Local 692, Retail Store Employees Union, 134 N.L.R.B. 686 (1961).

12. The Board and the courts agree that under certain circumstances the act allows a shorter period than 30 days to be imposed as the permissible time in which a petition must be filed. In one case, the court issued a temporary injunction against recognition picketing after only ten days because violence had occurred. Cuneo v. United Shoe Workers Union, 181 F. Supp. 324 (D.N.J. 1960). See also Local 239, Int’l Bhd. of Teamsters, 127 N.L.R.B. 958 (1960), enforcement granted, 289 F.2d 41 (2d Cir. 1961).

13. See 29 C.F.R. §§ 101.17–18 (1963) (NLRB). When a petition for a representation election is filed, the union must show that it presently represents at least 30% of the employees. This is usually accomplished by presenting union authorization cards signed by the employees.

14. The first proviso to § 8(b)(7)(C) provides that when a petition is filed, an election shall be held “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.” Despite this language, the Board uses this expedited election procedure only when there is a complaint filed under § 8(b)(7)(C). In the absence of a complaint, the Board holds
presentation is present, an election is ordered. If a majority of the employees vote in favor of the union, it will be "certified" and expressly exempt from the picketing restrictions of section 8(b)(7). When an election petition is not filed within a reasonable time after the picketing commences, the employer may request the Board to take action. A regional officer of the Board undertakes an investigation, and if he finds that the picketing has recognition or organization as an objective, a complaint will be issued. Upon issuance of a complaint, section 10(1) requires the Board's regional officer to petition for a temporary injunction against the picketing. In such a case, the first proviso to section 8(b)(7)(C) provides for an expedited election without a pre-election hearing. By dispensing with such a hearing, the Board is able to quickly resolve the issue of whether the union

a hearing to determine the appropriate representation unit, what employees are eligible to vote, and whether the union represents a substantial number of employees. This procedure has received the approval of the Second Circuit. See NLRB v. Local 239, Int'l Bhd. of Teamsters, 289 F.2d 41 (2d Cir. 1961); cf. Reed v. Roumell, 185 F. Supp. 4 (E.D. Mich. 1960); International Hod Carriers, 135 N.L.R.B. 1153 (1962). The Board has probably taken the wisest approach since the lack of a hearing might readily result in an invalid election because of an erroneous determination of the appropriate unit or what employees may vote.

In Local 239 and Roumell, the courts held that the complaint against the union must be filed by the employer or an employee without any investigation or assistance from the union to bring into effect the expedited election procedure.

15. Certification does not last indefinitely. After a period of one year, a representation issue may be raised with the Board for an election to either de-certify the presently certified union or to resolve the competing claims for the right to represent a unit of employees. The "certification bar rule" does, however, operate to bar an election for one year. See 29 C.F.R. § 102.61 (1963) (NLRB); Note, 69 YALE L.J. 1393, 1403 (1960).

16. See 29 C.F.R. § 101.37 (1963) (NLRB). Before the regional officer may petition for the temporary injunction, he must investigate the § 8(b)(7)(C) charge. The court will issue a temporary injunction if it is proved that the officer has "reasonable cause to believe such charge is true and that a complaint should issue." McLeod v. Local 239, Int'l Bhd. of Teamsters, 179 F. Supp. 481, 484 (E.D.N.Y. 1960). It is not necessary for the officer to prove that the charges are true or that there has in fact been a violation of § 8(b)(7)(C). See ibid.

17. Cf. note 14 supra. The union will have an opportunity for a hearing in the event that it loses the election and continues picketing for the proscribed objectives. When a complaint is issued under § 8(b)(7)(B), the union may challenge the regional director's findings under the § 8(b)(7)(C) complaint as to the objective and duration of the picketing. The union may also challenge the conduct of the election in regard to selection of the appropriate representation unit and selection of employees eligible to vote. The opportunity for a later hearing before the union is subject to the picketing ban of § 8(b)(7)(B) has led one court to hold that there is no denial of due process. Department Store Employees Union v. Brown, 187 F. Supp. 619 (N.D. Cal. 1960); see Come, supra note 10, at 189–90.
has majority status among the employees in an appropriate bargaining unit.

When an employer has committed unfair labor practices under section 8(a), the argument has been made that picketing for recognition or organization and in protest of the employer's unfair labor practices should be exempt from the limitations of section 8(b)(7)(C). To decide this issue, the Board has had to resolve the dilemma created by a union's desire to engage in unlimited recognition or organizational picketing and the employer's desire to avoid economic coercion. The purpose of this Note is to consider to what extent an employer's unfair labor practices should exempt recognition or organizational picketing from the restrictions of section 8(b)(7)(C) or should cause the Board to modify its normal procedure in resolving the representation issue that is raised by such picketing.

I. SECTION 8(a)(1) TO 8(a)(4) VIOLATIONS AND THE PICKETING RESTRICTIONS OF SECTION 8(b)(7)

A. AS A DEFENSE TO PICKETING RESTRICTION

1. Position of the NLRB

Sections 8(a)(1) to 8(a)(4) are intended to protect the right of employees to freely select their bargaining representative and to engage in union activities. These sections make it an unfair labor practice for an employer to coerce, interfere, or discriminate in any way that will affect the rights of employees to organize.

In 1961, the Board decided two cases in which the unions contended that an employer's unfair labor practices under these sections constituted a defense to the requirements of section 8(b)

19. The relevant portions of those sections are:

8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7,

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it,

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization,

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

In both cases, it was conceded that recognition picketing was involved for more than 30 days without an election petition being filed. The unions argued that they should not be subject to a complaint for an unfair labor practice because the employer had been found guilty of violating sections 8(a)(1) and 8(a)(3) during the time of the picketing. The unions feared that if a petition were filed, the Board would proceed with an election at a time when the employer's unfair labor practice would prevent the employees from freely selecting their bargaining agent. Therefore, since Congress intended an election to be conducted when the employees are not being coerced by an employer's anti-union conduct, they contended that there should be no filing requirement until the employer's unfair labor practices had been remedied by the Board. The unions also argued that their picketing was not within the provisions of section 8(b)(7)(C) since it was not only for recognition, but was also to protest the employer's unfair labor practices.

The Board rejected these arguments and held that section 8(b)(7)(C) forbids a non-certified union from picketing for recognition or organization beyond a maximum period of 30 days unless it files a petition for an election. If a petition is not filed within a reasonable time, the picketing will be immediately enjoined. The Board reasoned that even though the picketing may have other legitimate objectives, such as protesting an employer's unfair labor practices, section 8(b)(7) applies to any picketing that has recognition or organization as one of its objectives. The language of the statute supports the Board's reasoning that Congress did not intend to limit the application of section 8(b)(7) to picketing that has recognition or organization as its sole objective. The use of the language "the object" was rejected in favor of the more comprehensive definition of prohibited picketing embraced in the language "an object."22


21. Of course, when the picketing is solely to protest the unfair conduct of an employer, it is not banned under § 8(b)(7). A problem arises, however, when a majority union pickets against the employer's unlawful refusal to bargain. Picketing in that situation clearly has recognition as an objective. See Come, supra note 10, at 193; Van Arkel, Picketing Under the 1959 Amendments, N.Y.U. 13TH CONF. ON LABOR 201, 203-05 (1960); 2 LEGIS. HIST. 1377 (remarks of Senator Kennedy), 1429 (remarks of Senator Morse).

22. The Kennedy-Ervin Bill, which passed the Senate, proscribed picketing that had recognition or organization as "the object." 1 LEGIS.
The Board concluded that the employer's unfair labor practice should not constitute a defense to a complaint for violation of section 8(b)(7)(C) because Congress had specifically rejected such a proposal. The legislative history indicates, however, that it is doubtful whether Congress considered making an employer's unfair labor practice a defense to a complaint for violation of section 8(b)(7)(C). None of the bills proposed in either the Senate or the House contained language to this effect. Congress did consider, however, a proposal to make all section 8(a) charges against the employer a defense to an injunction against picketing alleged to be in violation of section 8(b)(7)(C). This proposal was passed in the Senate, but rejected by the House. The Landrum-Griffin Bill as passed by the House provided for a mandatory injunction under section 10(1) in all cases where a complaint was filed under section 8(b)(7)(C) regardless of the employer's unfair labor practices. This conflict in the Senate and House bills was compromised in the conference committee, and the final version of the Landrum-Griffin Act exempted recognition and organizational picketing from an injunction only when there is a section 8(a)(2) charge against the employer; this provision, contained in section 10(1), is the only exemption for employer unfair labor practices in the statutory scheme for the regulation of recognition and organization picketing. Thus, even though Congress did reject a defense based upon the employer's unfair labor practices to the injunction provisions of section 10(1), such a

24. See Cox, supra note 2, at 265 n.36.
26. 1 Legis. Hist. 584 (quoting the pertinent portion of S. 1555); 2 Legis. Hist. 1691.
27. 1 Legis. Hist. 685.
28. 2 Legis. Hist. 1428–29 (remarks of Senator Morse), 1720 (remarks of Representative Thompson), 1712 (remarks of Representative Griffin); see 1 Legis. Hist. 934, 944 (quoting the text of the Landrum-Griffin Bill, H.R. 8400, after its amendment in the conference committee).
29. See 1 Legis. Hist. 934.
30. The legislative history fails to disclose why Congress exempted picketing from an injunction when there is a § 8(a)(2) charge against the employer, but did not give such an exemption for other violations of § 8(a) by an employer. The arguments to permit continued picketing in the § 8(a)(2) situations seem to apply equally to the other provisions of § 8(a). One member of Congress has suggested that the § 8(a)(2) exemption is of small importance since there are few charges against an employer for domination or active support of a union. See 2 Legis. Hist. 1428 (remarks of Senator Morse). Thus, it appears that the House conferees prevailed on
defense to the filing of an election petition under section 8(b)(7)(C) should not be rejected on the basis of legislative history.\textsuperscript{31}

2. Position of the Federal Courts

The courts have taken the position that an employer’s unfair labor practices are not a defense to an injunction against picketing allegedly in violation of section 8(b)(7).\textsuperscript{32} To reach this result, the courts have relied on the legislative history and the language of the act. They have reasoned that the only defense to the injunction is the section 8(a)(2) violation provided for in section 10(1). This reasoning seems correct in the light of sound princi-

\textsuperscript{31} For the assertion that Congress specifically considered and rejected proposals for defenses to § 8(b)(7), the Board relied on a resolution proposed by former Senator Kennedy to instruct the Senate conference to urge an amendment to § 10(1) providing that a charge against the employer for violation of § 8(a) “shall be a defense both to the application for a temporary restraining order and to any complaint issued under section 10(b).” 2 LEGIS. HIST. 1383. The Board argued from this that Congress was opposed to any such defense since the conferees considered this proposal but did not adopt it. See International Hod Carriers, 130 N.L.R.B. 587, 589 (1961) (Charles A. Blinne).

The second Blinne case correctly pointed out that the Board’s conclusion from this portion of the legislative history was erroneous. There is no evidence that the resolution was adopted by the Senate or that the proposal was either submitted to or considered by the conference committee. International Hod Carriers, 135 N.L.R.B. 1153, 1163 n.21 (1962) (Charles A. Blinne). After noting the Board’s earlier error, however, the majority opinion in the second Blinne case drew a very doubtful conclusion in regard to the Kennedy-Ervin Bill provisions. That bill provided in § 10(1) that when a charge is filed under § 8(b)(7), it would be a defense to an injunction that the employer has committed an unfair labor practice within the meaning of § 8(a). The Board viewed this as a proposal to have § 8(a) violations serve as a defense to a complaint under § 8(b)(7) and to an injunction under § 10(1). Members Rodgers and Leedom pointed out that this was an incorrect interpretation of the bill. 135 N.L.R.B. at 1171 n.36 (dissenting opinion). See also Cox, \textit{supra} note 2, at 265 n.36.


One court has held that an injunction continues until final disposition of the § 8(b)(7)(C) charge or the passage of an unreasonable time, whichever occurs first. The union moved to dissolve the temporary injunction because two years had passed and the Board had not yet finally decided the case. In granting the motion, the court held that a period of two years is an unreasonable time to continue the injunction in the absence of unusual circumstances. Getreu v. International Typographical Union, 205 F. Supp. 931 (S.D. Ohio 1962).
ples of statutory construction; the specific mention of section 8 (a)(2) in section 10(1) indicates that other section 8(a) violations were not to constitute a defense to the statute's injunction procedure.33

The courts have also reasoned that since the injunction procedure is an essential part of the statutory scheme to limit recognition picketing,34 the effectiveness of section 8(b)(7) would be seriously hampered if such picketing were exempt from an injunction whenever a section 8(a) charge is made.35 The purpose of the injunction procedure is to protect employers from prolonged economic pressure resulting from recognition picketing in cases where the union's right to be recognized is in doubt.36 Furthermore, Congress may have assumed that a union's failure to file a timely election petition indicates that it is a minority union and, therefore, is attempting to avoid an early election. Prolonged recognition or organizational picketing in such a case is the evil that section 8(b)(7) was intended to limit. Therefore, the recognition picketing should be temporarily ended until the union's right to recognition is determined in a Board-conducted election. Furthermore, enjoining the recognition or organizational picketing allows the employees to express their views on the representation issue free of coercion by the employer or the union. Thus, in view of the purposes of the injunction procedure, rejection of any defense to section 10(1) based upon the employer's labor practice appears correct even though the section 8(a) charge may be sufficiently meritorious to warrant issuance of a complaint or is found to have merit on final disposition.

B. AS MODIFYING NORMAL ELECTION PROCEDURES

The Board has recently clarified the procedure that it will follow in cases where it is alleged that the union has violated section 8(b)(7)(C) and the union charges that the employer is guilty of an unfair labor practice under sections 8(a)(1) to 8(a)

36. Ibid.
In the *International Hod Carriers* case, the Board concluded that when the election petition is timely filed and the employer is charged with an unremedied violation under sections 8(a)(1) to 8(a)(4), the election will be postponed until final disposition of the unfair labor practice charges against the employer. The Board reasoned that although Congress intended that an election petition should always be filed within 30 days, it did not intend an election to be held at a time when the employer's unfair labor practices would prevent a fair and free expression of the employees' choice. Delaying the election insures a union that it will not be subjected to an election it is likely to lose as a result of the employer's unfair conduct. The Board concluded, however, that it is essential to the statutory scheme to have a petition filed within a reasonable time to permit a rapid resolution of the representation issue as soon as the section 8(a) proceedings are completed. Without a petition on file, a union could picket for an additional 30 days after disposition of the section 8(a) charges before an election petition would be mandatory. Thus, the Board's procedure has the effect of restricting the length of time that recognition or organizational picketing may continue before an election is held.

Furthermore, the statute contemplates that an election always be held after a union engages in recognition picketing to decide the representation issue raised by such activity. To protect employers and employees from continued recognition picketing after a Board election, section 8(b)(7)(B) prohibits such picketing for one year after any election. If a petition were not filed, however, and the union ceased picketing after resolution of the section 8(a) charges, there would be no election, and this objective of the statutory scheme would be frustrated.

The Board has found further support for its delayed election procedure in the language of section 8(b)(7)(B). That section operates to bar recognition or organizational picketing for 12 months after a "valid election." A "valid election" would seem to mean one held at a time when the employees are free of pressure or coercion from either the employer or the union in their choice of a bargaining representative. Thus, the delayed election

37. International Typographical Union, 135 N.L.R.B. 1178 (1962) (Charlton Press, Inc.); International Hod Carriers, 135 N.L.R.B. 1153 (1962) (Charles A. Blinne). These were the same cases that came before the Board in 1961 in which the unions initially argued the question of defenses to § 8(b)(7). The unions requested reconsideration of these cases after the appointment of two new Board members in 1961.
39. *Id.* at 1165.
procedure may be necessary in such a case to satisfy the statutory requirements of section 8(b)(7)(B). 41

C. EVALUATION

Although the language and purpose of section 8(b)(7) does not condone the use of an employer's unfair labor practice as a defense to a complaint or an injunction against recognition or organizational picketing, it would be unfair to a union and frustrate the statutory objective of a free election if an employer's violations of section 8(a) were to be completely disregarded. 42 If the union files a timely election petition under section 8(b)(7)(C), the regular procedures for processing representation petitions, including a pre-election hearing, 43 will be used. 44 During this hearing, the union may show that a charge is pending against the employer for violations of section 8(a) and that because of these alleged violations, an immediate election may not accurately reflect the employees' desires concerning representation. 45 When such facts are shown, the Board should delay the election until the unfair labor practice charge against the employer is resolved. 46 This procedure

41. Ibid. The Board declared that § 8(b)(7) envisages an election that will represent the "free and uncoerced choice of the employee electorate." Section 8(b)(7)(B) does not ban picketing after an election when the employees were restrained or coerced by the union or the employer.


43. A timely filed petition will protect the union from a § 8(b)(7)(C) charge and, therefore, the expedited election procedure is inapplicable. See note 14 supra.


9 (c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section . . .

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice.

. . . If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

45. See authorities cited in note 42 supra.

46. See International Hod Carriers, 135 N.L.R.B. 1153, 1165 (1962); International Hod Carriers, 130 N.L.R.B. 587, 592 (1961) (Member Fanning, dissenting).

The Board has also found support for delaying the election from the
will accomplish the statutory objective of insuring the right of the employees to freely select a bargaining representative. Since the picketing will be permitted to continue until completion of the election,\textsuperscript{47} the union will have an opportunity to counteract any adverse effects the employer's conduct may have had on its organizational efforts.\textsuperscript{48}

The Board's delayed election procedure seems to be the fairest resolution of the conflicting interests involved in such cases. Arguably, however, the Board may overcompensate in favor of a union when it permits the picketing to continue until the section 8(a) charges are resolved.\textsuperscript{49} Although a union should have some opportunity for continued picketing before the election is held, picketing throughout the period required for resolution of an 8(a) case may result in serious consequences to the employer. Since disposition of a contested unfair labor practice charge requires an average time of 475 days,\textsuperscript{50} continued recognition or organizational picketing may economically destroy an employer. Confronted with this possibility, an employer may recognize a union, even though it is not a majority representative, merely to end the picketing.\textsuperscript{51}

\textsuperscript{47} See International Hod Carriers, 135 N.L.R.B. 1153, 1165 (1962).

\textsuperscript{48} The Board might require the union to prove that the employer's unfair labor practices under § 8(a)(1)–(4) are likely to affect the outcome of an immediate election. A per se rule that the unfair conduct always has such an effect seems somewhat inconsistent with the Board's recent trend to dispense with the mechanical regulation of labor relations involved in the use of such rules. See generally Christensen, \textit{The "New" NLRB: An Analysis of Current Policy}, N.Y.U. 15th Conf. on Labor 213, 219–31 (1962); McDermott, \textit{Recognition and Organizational Picketing Under Amendments to the Taft-Hartley Act}, 44 MARQ. L. REV. 1, 10 (1960); \textit{cf.} Fruit Packers Union v. NLRB, 308 F.2d 311 (D.C. Cir. 1962). It seems apparent, however, that any conduct by an employer that warrants issuance of a complaint under § 8(a) is probably going to have some effect on the election if it is held before the unfair conduct is remedied.


\textsuperscript{51} See note 5 \textit{supra} and accompanying text.
Since one of the purposes of section 8(b)(7) is to protect an employer from being forced to recognize a non-qualified union, Board procedure that may expose the employer to such a choice would seem inconsistent with the policy of the act. Allowing recognition or organizational picketing for such an extended period of time may also interfere with the employees' right to self-determination. The employer may encourage the employees to join the union to enable him to lawfully recognize it. Continued picketing in such cases seems even more unjustified when the section 8(a) charge is eventually resolved in favor of the employer.

Since organizational picketing may be essential for the union to maintain or increase its support among the employees until an election is held, this analysis is not intended to suggest that there should be no picketing during disposition of the section 8(a) charges. The Board should not permit continued picketing, however, when the picketed employer is able to show that the recognition or organizational picketing is causing, or is likely to cause, substantial economic harm to his business. Although a few interruptions of deliveries or the loss of a few customers would not seem to be a sufficient reason to end the picketing, the picketing should be curtailed when the very economic life of the employer is threatened.

IV. SECTION 8(a)(5) AS A DEFENSE TO THE PICKETING RESTRICTIONS OF SECTION 8(b)(7)

Section 8(a)(5) of the act provides that the employer must bargain collectively with the bargaining representative designated by a majority of the employees. A successful complaint under this section requires a finding by the Board that the union in fact represents a majority of the employees in an appropriate bargaining unit and that the employer has refused to bargain with that representative in "good faith." The Board concluded in the

52. See note 4 supra and accompanying text.
56. See, e.g., Globe Cotton Mills v. NLRB, 103 F.2d 91 (5th Cir. 1939); Highland Park Mfg. Co., 12 N.L.R.B. 1238 (1939). For an article discussing the "good faith" test in § 8(a)(5), see Feinsinger, The National Labor Re-
Blinne case that a charge against the employer under section 8 (a)(5) that is found to be meritorious on initial investigation will exempt a union engaging in recognition or organizational picketing from the requirement of filing an election petition under 8(b)(7)(C). The union may, therefore, continue picketing until final disposition of the refusal to bargain charge without being subject to a complaint under section 8(b)(7)(C).

The union should not be required to file an election petition when there is a section 8(a)(5) charge pending against the employer because such a charge and a petition for an election are based on inherently inconsistent positions. A refusal to bargain charge presupposes that the union represents a majority of the employees, while a representation petition indicates that there is doubt over the majority status of the union. The Board pointed out that because of this basic inconsistency, it has always refused to process a petition for a representation election under section 9(c) when a meritorious 8(a)(5) charge has been filed.

The same considerations apply where a meritorious Section 8(a)(5) charge is filed in a Section 8(b)(7)(C) context. Congressional acquiescence in the Board's long-standing practice prior to the enactment of Section 8(b)(7)(C) imports, in our view, Congressional approval of a continuation of that practice thereafter.

The dissenting Board members argued that the language of section 8(b)(7)(C) fails to support the Board's conclusion since it recognized no exceptions to the requirement of an election petition. Furthermore, they maintained that since Congress rejected a proposal for such an exemption, to excuse the filing of an election petition because of a pending section 8(a)(5) charge was contrary to legislative intent. The dissent also contended that a pending refusal to bargain charge is not inconsistent with the mere filing of an election petition if the election petition is held in abeyance. Therefore, to facilitate a quick resolution of the representation issue, the union should be required to file an election petition in all cases where it has engaged in recognition and organizational picketing for a reasonable time. If initial investigation

57. International Hod Carriers, 135 N.L.R.B. 1153 (1962) (Charles A. Blinne); accord, International Typographical Union, 135 N.L.R.B. 1178 (1962). A § 8(a)(5) violation by the employer is a defense to § 8(b)(7)(C) picketing only if the union has actually filed the refusal to bargain charge with the Board. See International Typographical Union, 50 L.R.R.M. 1156 (1962).


59. Ibid.
shows that the refusal to bargain charge has merit and warrants issuance of a complaint, the election petition can be dismissed; if the section 8(a)(5) charge is found to lack merit, an immediate election can be held if an election petition is on file. 60

The result in the Blinne case may be justified on the ground that a meritorious charge under section 8(a)(5) indicates that the union probably possesses majority status. In the initial processing of a section 8(a)(5) charge, a Board officer investigates the majority status of the union; if the union is unable to prove its claim on that issue, a complaint is not issued. 61 Thus, in a meritorious section 8(a)(5) charge, there is a finding by a Board officer, even though informal, on the union's majority status. One of the purposes of section 8(b)(7) was to limit recognition or organizational picketing by a union under circumstances where the employer could not lawfully recognize and bargain with it. 62 Therefore, when a Board officer has found "reasonable cause" to believe that the union possesses majority status, the reasons for limiting recognition or organizational picketing may not be present. If the union in fact has majority status and the employer refuses to bargain with its designated representative, there is clearly no need to protect the employer from continued picketing since the picketing is the result of his violation of a statutory duty.

This reasoning seems to ignore the language of section 8(b)(7), however, which exempts only a "currently certified" union. Furthermore, the Board and the courts have uniformly held that a majority union is not exempt from the operation of section 8(b)(7)(C). 63 The reason for such a position, however, would seem to be to insure, on the basis of a finding by the Board, that the picketing union has a majority status and may be legally recognized by the employer. When there is a meritorious 8(a)(5) charge, the union has proved to the satisfaction of a Board officer that it possesses a majority status and may be legally recognized. Therefore, the Board's conclusion that the union in such a case is exempt from the limitations imposed by section 8(b)(7)(C) would not seem unreasonable. 64

60. 135 N.L.R.B. at 1168-71 & n.35 (dissent).
61. See 29 C.F.R. §§ 101.4, .5, .6 (1963) (NLRB).
62. See note 4 supra and accompanying text.
64. But see Christensen, note 48 supra, at 222, where the writer states that the exemption from § 8(b)(7) in the refusal to bargain situation "is patently an 'interpretation' rather than a literal reading of the Statute and
The Board’s position allowing continued recognition and organizational picketing until resolution of the refusal to bargain charge seems necessary to enable the union to preserve its representation status among the employees. During the long period required to dispose of a contested unfair labor practice charge, the union’s status may be diminished either from loss of employee interest or from anti-union conduct not amounting to an unfair labor practice that is engaged in by the employer. In the event that the union is unable to maintain its majority status during the resolution of the refusal to bargain charge, the fact that a petition is not on file protects it from an election that it might lose if held immediately after the section 8(a)(5) decision.

The length of time after the refusal to bargain charge is settled that a union will be permitted to engage in recognition and organizational picketing without filing an election petition is uncertain. Arguably, the union should be allowed to picket for “a reasonable time not to exceed thirty days” after the Board’s final disposition of the refusal to bargain charge. Since a union is allowed to engage in recognition or organizational picketing throughout the period that the section 8(a)(5) case is being resolved, however, further picketing to bolster its representative status would seem unnecessary. Therefore, when picketing continues after the Board has decided the section 8(a)(5) charge, an election petition should be filed immediately to avoid any additional delay of the election.

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1029
The employer's interest should not be completely subverted, however, in the interest of protecting the union's representative status. As in all cases, when the employer is able to show that the recognition or organizational picketing is causing, or is likely to cause, substantial economic harm to his business, the picketing should be restricted. The Board could accomplish this result by issuing a complaint under section 8(b)(7)(C) and seeking an injunction on the ground that the picketing has continued beyond a reasonable period of time.