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Recognition and Organizational Picketing: Limitations on a Non-Certified Union

This Note, like the preceding one, analyzes one of the problems that have arisen under section 8(b)(7)(C) of the National Labor Relations Act, which was enacted in 1959 to limit recognition or organizational picketing. The author of this Note reviews the possible interpretations and the practical problems arising under the proviso that exempts informational picketing not causing a work stoppage from the requirements of this section. He concludes that all the circumstances should be relevant in determining whether there is an object of recognition or organization and whether the picketing is not for the sole purpose of advertising non-unionization. Even if advertising is the sole purpose for the picketing, however, any incident of stoppage should taint the picketing to the extent of stoppage.

INTRODUCTION

The growth in the economic and social strength of organized labor has prompted a corresponding increase in the demand for legislative controls over the exercise of its power. Congress added section 8(b)(7) to the National Labor Relations Act in 1959 to place new limitations on picketing designed to force an employer to recognize or bargain with an uncertified union or to force employees to designate an uncertified union as their bargaining representative.¹ Subparagraphs (A) and (B) of this section prohibit picketing with the object of recognition or organization where the employer has lawfully recognized another union and a representa-
tion issue cannot be raised under section 9(c)² or where there has been a valid NLRB election within the preceding year.³

Recognition or organizational picketing is prohibited in any case under subparagraph (C)⁴ unless the union files a petition⁶


A certification by the NLRB is the clearest proof that the labor organization has a right to represent the employees. Lawful recognition, however, does not require certification. See Local 182, Int'l Bhd. of Teamsters, 129 N.L.R.B. 1459 (1961). The distinction between certification and lawful recognition is important because even though a lawfully recognized union does not violate subparagraph (A), it can nonetheless violate subparagraph (C). See Teamsters Union Local 705, 130 N.L.R.B. 558 (1961).

3. Subparagraph (B) prohibits organizational picketing, as subparagraph (A) does not, where the employees have voted against unionization.

4. It shall be an unfair labor practice for a labor organization or its agents . . .

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

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.


5. A filing by anyone would satisfy the terms of subparagraph (C). Cox, The Landrum-Griffin Amendments to the National Labor Relation Act, 44 MINN. L. REV. 257, 268 (1960). The burden of filing is on the union, however, for it must face the sanctions outlined by the statute.
for an election within a reasonable period of time, not to exceed 30 days.\(^6\) The second or “publicity” proviso to subparagraph (C), however, permits picketing otherwise prohibited by that subparagraph that is for the purpose of publicizing the failure of an employer to employ union members or to have a contract with a union, unless it causes secondary employees to refuse to perform services. A union that violates subparagraph (C) is subject to a cease and desist order\(^7\) and the mandatory injunction provisions of section 10(1);\(^8\) because of the procedural delay involved in effectuating a cease and desist order, the injunction is perhaps the most effective means of enforcing section 8(b)(7)(C).\(^9\) Also the union will be subject to the provision for an expedited election under the first proviso to (C).\(^10\) Thus, when a union engages in

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6. It has generally been held that Congress intended the 30 days as the outer limit and that the Board has the power to fix a shorter period as “reasonable” where the circumstances warrant. See, e.g., District 65, Retail, Wholesale & De'pt Store Union, 52 L.R.R.M. 1426 (1963); Sapulpa Typographical Union, 50 L.R.R.M. 1568 (1962); Cuneo v. Shoe Workers, 181 F. Supp. 324 (D.N.J. 1960). See generally Aaron, The Labor Management Reporting and Disclosure Act of 1959, 73 HARV. L. REV. 1086, 1109 (1960).

7. Since section 8(b)(7) creates an unfair labor practice, the Board is empowered to issue a cease and desist order and to petition the circuit court for enforcement. NLRA § 10(a), (e), 49 Stat. 453–54 (1935), as amended, 29 U.S.C. § 160(a), (e) (1958).

8. NLRA § 10(l), 61 Stat. 149 (1947), as amended, 29 U.S.C. § 160 (1) (Supp. III, 1962). The statute provides that the regional attorney shall make a preliminary investigation and shall petition the district court for a temporary injunction if he has “reasonable cause to believe” that there is an unfair labor practice. Thereupon, “the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper . . . .” The statutory criterion of “reasonable cause” has been interpreted to give the courts a wide range of discretion. See, e.g., Kennedy v. Los Angeles Joint Executive Bd., 192 F. Supp. 339, 341 (S.D. Cal. 1961); Cavers v. Teamsters “General” Local No. 200, 188 F. Supp. 185, 188 (E.D. WIs. 1960).

9. The time required to obtain a temporary injunction is considerably less than the time required to obtain a cease and desist order. Compare Elliott v. Sapulpa Typographical Union, 38 CCH Lab. Cas. 68, 615 (N.D. Okla. 1959) (temporary injunction issued December 9, 1959), with Sapulpa Typographical Union, 50 L.R.R.M. 1568 (1962) (cease and desist order issued August 17, 1962). If the Board must petition for enforcement of the cease and desist order, the permanent sanctions are further delayed. See, e.g., Local 239, Int'l Bhd. of Teamsters, 127 N.L.R.B. 958 (1960) (cease and desist order issued June 1, 1960), enforced, 289 F.2d 41 (2d Cir. 1961) (enforcement granted April 17, 1961), cert. denied, 368 U.S. 833 (1961).

10. If the union fails to submit a timely election petition, the case will be referred to the regional board for an election “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” when a petition is finally filed. NLRA § 8(b)(7)(C), 73 Stat. 544 (1959), 29 U.S.C. § 158(b)(7)(C) (Supp. III, 1962). According to Professor Cox, legal advisor to both po-
recognition or organizational picketing, it will be subject to an
election whether it complies with subparagraph (C) by filing an
election petition or pickets illegally by not filing. In either case, if
the union loses the election, it is prohibited from picketing for one
year under subparagraph (B). In addition, section 9(c)(3) pre-
vents the filing of another election petition during that year.\footnote{11 If
the union wins the election, however, it is certified as the bar-
gaining representative of the employees, and section 8(b)(7) be-
comes inapplicable.

One of the most litigated problems arising under subparagraph
(C) concerns the interpretation of the publicity proviso, which
permits picketing designed to publicize the lack of unionization
unless it causes a work stoppage. This proviso could be interpret-
ed either as an exception to the general prohibition on recognition or organizational picketing or as a prohibition on any picket-
ing that causes a work stoppage. Interpreting the proviso to per-
mit recognition or organizational picketing that is limited to the
purpose of publicizing the lack of unionization within the picketed
establishment makes necessary the definition and classification of the various types of picketing. The first determination that
must be made is whether the picketing has the proscribed recognition or organizational objective; if such an object is found, it be-
comes necessary to determine whether the picketing is for the pur-
litical parties (see 105 CONG. REC. 6109 (1959)), Congress intended "to speed up all elections." Cox, supra note 5, at 268 (1959). Logically con-
strued, the statute does not support such an interpretation. It does not seem reasonable that Congress would incorporate such a significant change in the NLRA in a proviso to a subparagraph. Moreover, where an expedit-
ed election is unavailable, the union cannot circumvent the normal re-
quirements of § 9(c) by accompanying its petition for an election with recognitional picketing. See Local 57, Retail Clerks Int'l Ass'n, 51 L.R.
R.M. 1061 (1962); Redondo Lingerie Div. of Chic Lingerie, Inc., 48 L.R.
R.M. 1127 (1961). See also NLRB v. Int'l Blvd. of Teamsters, 289 F.2d

A statement by former Senator Kennedy further indicates that Con-
gress intended that the Board follow normal election procedures where there is no violation of § 8(b)(7)(C). He suggested that "a union may use pickets in an effort to organize until there is an election in which the NLRB can
determine the employees' wishes. But a union which is stopping truck de-
leveries or other employees would not be allowed to avoid an election." 105 CONG. REC. 17327 (1959). Thus, subparagraph (C) allows a union to picket without employee support, but its right to continue picketing must
be tested by an election. See Come, Picketing Under the 1959 Amend-
ments to the National Labor Relations Act, N.Y.U. 13TH ANNUAL CONFER-
ENCE ON LABOR 185, 188-89 (1960). If the union complies with (C) and
files an election petition within a reasonable time, it will prolong its op-
portunity for picketing since normal election procedures require more
time. See Note, 69 YALE L.J. 1393, 1419 & n.112 (1960).

pose described in the publicity proviso. Even if the recognition or organizational picketing is for the permitted purpose, there is the issue of whether the picketing has caused "any individual employed by any other person . . . not to pick up, deliver or transport any goods or not to perform any services." The purpose of this Note will be to consider these problems of interpretation and application arising under subparagraph (C) of section 8(b)(7).

I. INTERPRETATION OF THE PUBLICITY PROVISO

In 1961, the National Labor Relations Board concluded that picketing, regardless of its object, was illegal whenever it had the work stoppage effect proscribed in the section 8(b)(7)(C) publicity proviso. After a change in personnel, however, the Board in 1962 rejected this interpretation and concluded that the publicity proviso to section 8(b)(7)(C) was designed only to protect recognition and organizational picketing that would otherwise be proscribed under that section.


13. The drafting of this section has been severely criticized. See, e.g., Aaron, supra note 6, at 1100; Come, supra note 10, at 199; Young, Picketing Under the 1959 Amendments to the National Labor Relations Act, N.Y.U. 13TH ANNUAL CONFERENCE ON LABOR 213, 218 (1960).


15. Crown Cafeteria, 135 N.L.R.B. 1183 (1962), 76 HARV. L. REV. 647 (1963). Arguably, the decisions in Stork Restaurant and Crown Cafeteria were limited to recognition and organizational picketing, and the 1962 Board based its construction of the original opinions upon a misunderstanding of ambiguous language. In the first Stork case, the Board stated that "we assume without deciding that the picketing became informational" and held that it was illegal because of a stoppage effect. 130 N.L.R.B. at 546. Similar language appears in Local 239, Int'l Bhd. of Teamsters, 127 N.L.R.B. 958, 971 (1960), enforced, 289 F.2d 41 (2d Cir.), cert. denied, 368 U.S. 833 (1961). The earlier decision may have referred to picketing that advertises lack of unionization, generally regarded as recognition or organizational in nature, when speaking of "informational picketing." Furthermore, Members Rodgers and Leedom, two of the three members who wrote the earlier decision and who remained on the Board, dissented in 1962 and adhered to that opinion. They did not, however, indicate that they had ever believed that the proviso applied to picketing that has no illegal objective. Instead, they agreed with the majority that the proviso "carves out" an exception to the general bar of § 8(b)(7), stating that "by means of a proviso [Congress] . . . exempted such so-called informational picketing from a general prohibition applicable to all recognition or organizational picketing." Crown Cafeteria, 135 N.L.R.B. 1183, 1186-87 (1962). McLeod v. Chefs Local 89, 280 F.2d 760 (1960), modified, 286 F.2d 727 (2d Cir. 1961) (injunction should issue for specified hours during the day).
Both the structure and the overall statutory scheme of section 8(b)(7) support the 1962 Board's interpretation. Since a proviso is a qualification of, or an exception to, the general provisions of a statute, the publicity proviso of section 8(b)(7) should only apply if the picketing comes within the terms of section 8(b)(7). Moreover, debate at the time the proviso was introduced makes clear that Congress intended it to restrict the scope of subparagraph (C). Congress believed that all organizational picketing would be prohibited in the absence of such a proviso and, therefore, amended the bill to protect the "traditional and essential rights of workingmen seeking to improve conditions of employment." An analysis of the other provisions of section 8(b)(7) adds support to the current Board's view. Subparagraph (A) prohibits recognition or organizational picketing by one union.
where another union has been lawfully recognized and a representation issue cannot be raised under section 9(c). It is designed, therefore, to "give effect to the will of the majority and to protect the employer against economic pressure intended to compel him to violate the law (by breaking his contract or ignoring certification) or to punish him for compliance."\(^9\) Subparagraph (B) prohibits recognition or organizational picketing where there has been an NLRB election within the preceding year. It is designed to quiet the disrupting aftermath of a labor dispute and an election.\(^9\)

Both of these subparagraphs apply to situations where the question of recognition and organization has been settled by a lawful recognition of some other union or by a vote against unionization. On the other hand, subparagraph (C) applies where recognition and organization efforts are appropriate—where a question of representation may appropriately be raised under the act—by prohibiting such picketing unless an election petition is filed within a reasonable time.\(^2\) Since the need for restrictions in such a situation seems less compelling, Congress made legal through the publicity proviso to subparagraph (C) limited recognition or organizational picketing for an unlimited time.

The statutory language of subparagraph (C) and its publicity proviso could be interpreted to mean that there is no violation of section 8(b)(7)(C) unless a work stoppage results.\(^2\) Under such

20. Although subparagraph (B) will normally protect both employer and employees, it may restrict the latter where, due to changing attitudes or new personnel, a majority join the union during the year following an election.

The real objective of section 8(b)(7)(B), therefore, would seem to be industrial stability. Organizational campaigns and representation elections are highly disturbing events and, at least from the employer's point of view, can have profoundly deleterious effects on employee morale and production . . . .

In effect, therefore, Congress has determined that industrial stability is of greater social importance than the unrestricted freedom of employees to bargain collectively through representatives of their own choosing.


21. This requirement may hamper the union organizational activity severely, for filing will afford little relief for a union that has no prior contact with the employees since it would probably lose an election and, as a result, will be barred from picketing for one year. NLRA § 8(b)(7)(B), 73 Stat. 544 (1959), 29 U.S.C. § 158(b)(7)(B) (Supp. III, 1962); see Retail Store Employees Union, 134 N.L.R.B. 686 (1961). On the other hand, the union does have a reasonable time, not to exceed 30 days, in which it may picket. After filing, the union may picket until the election, which may not take place for some time. See Note, 69 \textit{YALE L.J.} 1393, 1419 n.112 (1960).

22. See Olender, \textit{Standards Picketing Under Section 8(b)(7)(C)}, 12 \textit{LAB.
an interpretation, *any* picketing that causes a stoppage would seem to be a violation of subparagraph (C); picketing that does not cause a stoppage, however, would not be violative of subparagraph (C) despite a clear intent to force recognition. While this interpretation simplifies the task of applying the proviso by focusing on results rather than intent, it produces an inexplicable variation in the language of the main clause, which applies only to picketing with "an object" of recognition and organization. Furthermore, if Congress had intended the fact of a work stoppage alone to be determinative of a violation of section 8(b)(7)(C), that result could have been achieved without the use of the "purpose" language in the proviso.

II. A PROHIBITED OBJECT UNDER 8(b)(7)

Although the Board members apparently are in agreement that the proviso applies only to picketing that is within the general terms of section 8(b)(7)(C), they nevertheless disagree over its application to the facts of a particular case. Subsequent to the change in personnel, a majority of the Board altered the previous course of Board opinions by narrowing the situations in which it will find a prohibited object and by broadening the situations in which it will find picketing protected by the proviso. In this way, the present Board has considerably narrowed the scope of section 8(b)(7), especially subparagraph (C).

Picketing by an uncertified union is prohibited under section 8(b)(7) when it has as "an object" the "forcing or requiring" of recognition, bargaining, or organization. The Board has ignored the "forcing or requiring" language and has concentrated on whether the picketing has a recognition or organizational objective. Such an interpretation arguably fails to give effect to what appears to be strong statutory language. At the time Congress drafted section 8(b)(7), however, the Board and the courts had accorded similar treatment to the same language in section 8(b)(4). Had Congress desired to avoid such an interpretation for...
section 8(b)(7), it could have used different terminology. In addition, the Board had developed a presumption that persons intend the foreseeable consequences of their actions before the section was drafted. Thus, if the picketing had a tendency to "force or require" recognition or organization, it would be presumed that such a result was the "object" of the picketing. Such a presumption would seem necessary, for rarely is a union so imprudent that it openly admits a prohibited object.

This general approach is too broad, however, if it includes all picketing simply because it tends to produce organization by means of increasing the prestige and publicizing the strength of organized labor. Such a broad construction would render meaningless the statutory definition of a proscribed object since it would have been sufficient for Congress simply to proscribe "picketing." Moreover, such a construction may be unconstitutional where picketing is equivalent to free speech. For these reasons, some courts have determined that the section should only apply where

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30. Purely informational picketing that has no ultimate objective of recognition and organization is probably limited to "ally" or "struck work" picketing. Feldblum, supra note 2, at 522.

31. See Thornhill v. Alabama, 310 U.S. 88 (1940), where the Court held invalid on its face a statute that made picketing to interfere with a business of another a misdemeanor. The Court indicated that the word "picket" was too vague and could include almost any means of publicity. Sweeping language in Thornhill suggested that picketing was equivalent to free speech; this, however, has been modified in subsequent decisions. See International Bhd. of Teamsters v. Vogt, Inc., 354 U.S. 284, 289 (1957) (no deprivation of free speech to enjoin organizational picketing); Building Service Employees Int'l Union v. Gazzam, 339 U.S. 532 (1950); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); Bakery Drivers v. Wohl, 315 U.S. 769, 775 (1942); Carpenters Union v. Ritter's Cafe, 315 U.S. 722, 725 (1942); Milkwagon Drivers Union v. Meadmoore Dairies, 312 U.S. 287 (1941). See generally Williams, Freedom To Speak—But Only Ineffectively, 38 TEX. L. REV. 373 (1960). See also Amalgamated Clothing Workers v. Wonderland Shopping Center, Inc., 50 L.R.R.M. 2160 (Mich. Cir. Ct. 1962), 1962 U. OF ILL. L. FORUM 475. The doctrine of Thornhill v. Alabama is still active, however. See Chauffeurs Union 795 v. Newell, 356 U.S. 341 (1958) (per curiam opinion, citing Thornhill). See also Garner v. Louisiana, 368 U.S. 157, 201, 202 (1961) (Harlan, J., concurring). There is still, therefore, an area of picketing that is protected, but picketing may be limited constitutionally in many
there is an immediate illegal objective; a remote tendency to improve labor organizations should be beyond the scope of the "forcing or requiring" language. To effectuate the purposes of section 8(b)(7), any picketing should be found to have the prescribed object where the employer would reasonably believe that the only way to eliminate the picket line would be by recognizing the union or the employees would reasonably believe that the only way they could avoid unsettling effects of the picket line would be by designating the union as their bargaining representative.

Whether picketing has a prohibited object under section 8(b)(7) depends upon the facts in a particular case, and no single fact should be given conclusive weight in all cases. The members of the Board agree that some union picketing is clearly tainted with a recognition or organizational objective. When an uncertified union pickets in protest to an employer's withdrawal of recognition, for example, the Board has been unanimous in finding an illegal objective—the restoration of recognition. In other situations, however, the Board has vacillated. Where a union protests the discharge of employees, the most apparent goal is reinstatement and not recognition. The Board once reasoned that this, too, was illegal because reinstatement meant hiring union men, which would necessarily entail bargaining. The Board has recently rejected this reasoning and has concluded that section 8(b)(7) does not apply to picketing in protest of discharge and for the purpose of obtaining reinstatement. While reinstatement would not usually require bargaining because the prior employment relationship situations. Thus, the purpose of picketing will be relevant, for "absent an unlawful objective, a statutory restraint of peaceful picketing could raise constitutional questions." McLeod v. Chefs Local 89, 280 F.2d 760, 765 (2d Cir. 1960) (Waterman, J., concurring).

32. Graham v. Retail Clerks Int'l Ass'n, 188 F. Supp. 847, 855-56 (D. Mont. 1960); Brown v. Department & Specialty Store Employees, 187 F. Supp. 619, 623 (N.D. Cal. 1960), aff'd, 284 F.2d 619 (9th Cir. 1961), cert. denied, 366 U.S. 934 (1961). This distinction between an immediate and a remote objective is available to determine whether picketing is designed to force or require recognition. It should not be confused, however, with the distinction suggested by the Board in 1961 that the publicity proviso to subparagraph (C) protects picketing that has an ultimate rather than a present goal of recognition or organization. See Crown Cafeteria, 130 N.L.R.B. 570 (1961), rev'd, 135 N.L.R.B. 1183 (1962).


34. E.g., Local 705, Int'l Bhd. of Teamsters, 130 N.L.R.B. 558 (1961); Lewis Food Co., 115 N.L.R.B. 870 (1956).

would serve to establish wages and conditions of employment,\(^{36}\) bargaining may be necessary. In some cases, for example, the employer is unwilling to reinstate the discharged worker with seniority.\(^{37}\) If reinstatement is the purpose of the picketing, the facts in each case should dictate whether bargaining is necessary to that purpose. If the success of the picketing depends upon compelling the employer to bargain with the picketing union concerning wages or conditions of the employees upon reinstatement, the picketing should be within the prohibitory scope of section 8(b)(7), and the union should be required to file an election petition.\(^{38}\)

The Board once felt that picketing in protest of substandard wages and conditions had the objective of forcing or requiring the employer to recognize and bargain with the picketing union.\(^{39}\) It has recently rejected this view, however, and has concluded that “a union may legitimately be concerned that a particular employer is undermining area standards of employment” without attempting to obtain recognition or organization.\(^{40}\) Adhering to the original Board reasoning, two Board members have argued that due to the many complicated factors involved in adjusting the union’s standards to the needs of a particular business, a change in wages and conditions would have to be negotiated. Such negotiations, they maintain, constitute bargaining.\(^{41}\) Even in the absence of negotiations, however, “standards picketing”


\(^{37}\) In some cases, the employer may have promised the replacements seniority over the absent employees to get the replacements to work. See generally Olin Mathieson Chem. Corp. v. NLRB, 232 F.2d 158 (4th Cir. 1956), aff’d per curiam, 352 U.S. 1020 (1957).

\(^{38}\) Bargaining over these matters has been reserved for the agent that is the representative of a majority of the employees. NLRA § 9(a), 49 Stat. 453 (1935), as amended, 29 U.S.C. § 159(a) (1958).


should arguably be considered recognition or organizational picketing. The natural result of such picketing would be a change in the wages and conditions of employment; this resembles bargaining, for the union makes a demand and supports it with economic pressure. Conceivably, however, a union may only intend to counteract the competitive strength of the picketed employer in order to improve the position of organized employers and be unconcerned with recognition or organization.

Although the Board's position takes account of varying fact situations and provides both for cases where picketing would not tend to produce bargaining and for cases where "bargaining" will be the result of standards picketing, the Board in the last two years has been reluctant to find a prohibited object where the picketing publicizes substandard wages and conditions. Professor Archibald Cox, on the other hand, has suggested that standards picketing should raise a presumption of a prohibited object. His view seems to be based on the probability that an employer will be under pressure from the picketing activity to alter his wage rate and conditions of employment. Since the purpose of section 8(b)(7) is, in part, to require a union to become the certified representative of the employees before it applies such pressure, this presumption may better effectuate the policy of the section. Professor Cox's view does not preclude the union from showing that it in fact was interested only in counteracting the competitive strength of the substandard employer.

Picketing solely in protest of an employer unfair labor practice

42. See Meltzer, supra note 4, at 91, where the author suggests that the prior Board position that picketing for a demand normally made in collective bargaining is recognition picketing should be retained since Congress apparently enacted § 8(b)(7) in approval of these earlier Board opinions and because an expansive reading of the section is necessary to give it effect.

43. Whenever a union pickets a nonunion employer, it is strengthening the position of organized labor by improving the status of firms that recognize a union. This, however, should not be a consideration. The test of whether the picketing is subject to § 8(b)(7) should be whether the employer would feel compelled to recognize or bargain with the union to eliminate the picketing. If he does, the union should be subject to a Board-conducted election.

44. The Board has considered the possibility that picketing in protest of substandard conditions could be recognition. Local 107, Int'l Hod Carriers Union, 50 L.R.R.M. 1545 (1962). The Board noted that the union would not refer union men to the picketed employer and suggested that this implied that the union was not interested in organizing the employer's business. Id. at 1546.

45. See cases cited note 40 supra.

46. Cox, supra note 5, at 267. See also Meltzer, supra note 4, at 93-94.

47. Cf. text accompanying notes 5-10 supra.
is considered free of recognition or organizational objectives except where the employer has unlawfully withheld recognition. This picketing may be motivated, however, by a desire to attain recognition or organization even where the legends indicate a protest over matters unrelated to such purposes. In one instance, for example, the International Ladies Garment Workers picketed an employer to protest unfair labor practices only after the Garment Workers had lost an election when it had knowledge of the practices prior to the election. In another situation, although an adequate remedy had been provided by the NLRB, the uncertified union picketed in protest of employer discrimination and coercion of employees. Thus, the surrounding circumstances—the fact that the union failed to protest prior to election or the fact that the unfair labor practices had been remedied—may suggest that the union is not genuinely concerned with merely protesting the employer unfair labor practices. Where a union pickets to protest an employer action under circumstances that suggest that such a protest is a disguise for a more basic motive of recognition or organization, an employer, realizing that his unfair labor practice is no longer a current issue, would reasonably believe that he must recognize the union to be free of the picket line. Therefore, the Board should look to the underlying purpose and intent of the picketing and prevent it from being used as an instrument to achieve results that are inconsistent with the purpose of section 8(b)(7). Moreover, such an approach rests upon the language of section 8(b)(7), which focuses on the object of the picketing.

Picketing to advise the public of the employer’s lack of a union contract or failure to employ union members is specifically protected under the publicity proviso in subparagraph (C) so long as it does not cause a work stoppage. It is necessary, nonetheless, to determine whether such picketing is for a prohibited object because if it is found free of a recognition or organizational object,

51. Local Joint Executive Bd., 132 N.L.R.B. 737, 740–41 (1961); accord, Kennedy v. Los Angeles Joint Executive Bd., 192 F. Supp. 339 (S.D. Cal. 1961) (petition for temporary injunction granted). In Local Joint Executive Bd., the union notified the employer that it would only picket to advertise the unfair labor practices committed by the employer after it had lost an election. The signs stated that the employer, “1. Formed a fraudulent labor union; 2. Spied on its employees; 3. Discriminated against union members.” 132 N.L.R.B. at 739–40. Prior to the election the union had filed charges of a violation of §§ 8(a)(1), (3).
section 8(b)(7) becomes inapplicable. Although there is some judicial opinion that there is no "reasonable cause to believe" that such picketing is recognition or organizational, other courts and the Board have indicated that this picketing is recognition or organizational in nature. Advertising the lack of unionization is similar to picketing that protests substandard wages and conditions; therefore, the union may be interested solely in weakening the competitive strength of the employer to the advantage of organized employers. Arguably, picketing that merely advertises an employer's lack of unionization would not by itself be likely to induce recognition or organization. To alleviate the economic pressure upon the business that may result from advertising the lack of unionization, however, the employer may be induced to sign a union contract or the employees may be induced to join a union. Moreover, the publicity proviso in subparagraph (C) is an indication that Congress believed that picketing for this purpose may have a recognition or organizational objective; otherwise, there would be no reason for adding such a proviso to the section.
A union that is not the currently certified representative for the employees of an employer is prohibited by section 8(b)(7)(C) from engaging in recognition or organizational picketing against that employer for an unreasonable period of time, not to exceed 30 days, without filing an election petition. The limitation of subparagraph (C) is not applicable, however, if the recognition or organizational picketing is "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 . . . ."

The Board seems to have no definite standard that must be met if picketing is to come within the protective terms of the publicity proviso.\(^5\)\(^8\) It has rejected the standard proposed by a minority of the Board that picketing should not be protected by the proviso if there is "independent evidence" of a purpose other than advertising the fact of non-unionization.\(^6\)\(^9\) In rejecting this test, the majority of the Board argued that such a test imports "into the statutory language a criterion with no foundation in the text, no basis in legislative history and no correlation with the legislative remedies devised to meet the actual problem presented."\(^5\)\(^0\)

\(^5\)\(^8\) At one time, the Board apparently refused to apply the publicity proviso because of a future rather than a present recognition or organizational objective. In *Crown Cafeteria*, the Board stated:

We are satisfied that Congress added the proviso only to make clear that purely informational picketing, which publicizes the lack of a union contract or the lack of union organization, and which has no present object of recognition, should not be curtailed . . . .

130 N.L.R.B. 570, 572 (1961) (Emphasis added.), *rev'd*, 135 N.L.R.B. 1183 (1962). This distinction, however, has not been determinative in more recent cases.

\(^5\)\(^9\) *Crown Cafeteria*, 135 N.L.R.B. 1183 (1962). The dissenters did not, however, specify the factors that would constitute independent evidence sufficient to take picketing out of the protection of the publicity proviso. Presumably, they referred to the fact that the union representative requested that Crown use the union hiring hall when hiring employees and that it sign the standard union contract; the trial examiner had concluded that, "apart from the picketing," the union was seeking recognition. See *Crown Cafeteria*, 130 N.L.R.B. 570, 571-72 (1961), adopted in 135 N.L.R.B. 1183, 1186 (1962) (dissent). See also *Carpenters Dist. Council*, 136 N.L.R.B. 855, 857 (1962) (Member Rodgers, dissenting). This test would be satisfied in cases where there was solicitation of the employees shortly before the picketing appeared, *id.* at 857; where the picketing union sent a letter to trade organizations to discuss the "unfairness" of the nonunion standards of the employer, *Local 344, Retail Clerks Int'l Ass'n*, 136 N.L.R.B. 1270, 1274 (1962) (dissenting opinion); and where a union representative passed out circulars and solicited memberships, *Local 123, Philadelphia Window Cleaners Union*, 136 N.L.R.B. 1104 (1962) (concurring opinion).

\(^6\)\(^0\) *Crown Cafeteria*, 135 N.L.R.B. 1183, 1185 (1962).
They did not, however, show how this summary rejection of the “independent evidence” test is supported by an analysis of text, legislative history, or the overall statutory scheme, nor do they suggest an alternative rule for distinguishing protected picketing from recognition or organizational picketing without the favored purpose. Unless the Board is acting arbitrarily, however, the cases should reveal a consistent pattern of considerations relied upon by the majority in making such a distinction. The derivation of a general rule from such a pattern will make possible a comparison of the positions of the majority and minority members of the Board in light of the purpose of the publicity proviso.

The Board has consistently found a violation of subparagraph (C), without any reference to the publicity proviso, where the picket legends reveal that the picketing is not merely for the purpose of advertising a lack of unionization. For example, picketing with a legend reading “We Demand Recognition of the Union” would not be entitled to protection of the proviso. The Board has also consistently found a violation of subparagraph (C) where the picket legend indicates that the employer is “unfair.” Such a legend indicates that the purpose of the picketing is to compel the employer to bargain about the terms and conditions of employment rather than to advise the public. Furthermore, where the picket legend indicates that the employer is “unfair,” the picketing may be an indication to organized labor to observe the picket line because of a dispute with the employer. The employer, to remove the picket line, would reasonably believe that he must bargain over the subject matter of such a dispute. To gain such bargaining status, the policy of section 8(b)(7)(C) would dictate that an election pe-

61. Local 346, Int'l Leather Goods Union, 133 N.L.R.B. 1617, 1622 (1961). See also Kennedy v. Construction Laborer's Union, 199 F. Supp. 775 (D. Ariz. 1961) (petition for temporary injunction granted). The court noted that the picket sign indicated that the union desired to organize and represent the employees and found that there was reasonable cause to believe that the picketing violated § 8(b)(7)(C). Id. at 777. The court did not consider the applicability of the publicity proviso. But see Bartenders Union Local 58, 51 L.R.R.M. 1180 (1962), where the placards read “ON STRIKE—For Renewal of Our Union Contract.” The Board dismissed the complaint; only two members, however, based the dismissal on the protection of the publicity proviso. Id. at 1181; accord, Getreu v. Bartenders Union Local 58, 181 F. Supp. 738 (N.D. Ind. 1960).

62. Sapulpa Typographical Union, 50 L.R.R.M. 1568 (1962); Local 154, Int'l Typographical Union, 50 L.R.R.M. 1312 (1962) (but the Board relied on the fact that the picketing extended to employee entrances); cf. Local 1439, Retail Clerks Int'l Ass'n, 136 N.L.R.B. 778 (1962) (the employer was put on the unfair list; the signs read "We Do Not Patronize").
tition should be filed within a reasonable period of time after the picketing begins.

A more difficult problem arises where unions model the picket legends after the language of the publicity proviso. Although such picketing would appear to be limited to the permitted purpose, it may in fact have the additional purpose of blackmailing the employer to recognize or the employees to join the union. In this situation, the Board has found that the picketing was not for the purpose allowed in the publicity proviso where it takes place at employee or delivery entrances or where the picketing union solicits membership from the employees. A demand upon the employer for recognition has not been sufficient to take the picketing out of the protection of the publicity proviso. Arguably, when the union's organizational activities progress to a point where it makes direct contact with the employer or the employees concerning recognition or organization, the union should be required to file a petition for election and to test its right to represent the employees; if it does not, the employer or his employees should be able to obtain an expedited election. Such activities would seem to indicate that the picket line is not being used to merely advise the public, but is being used as an instrument of influence wielded by the union against the employer or his employees—a purpose clearly not protected by the publicity proviso.

Where the picket legends comply with the language of the publicity proviso and there is no concurrent evidence of a non-protected purpose, the Board has refused to consider recognition or organizational activity occurring prior to the appearance of the pic-
kets to determine the purpose of the current recognition or organizational picketing. On the other hand, the Board unanimously agrees that where there is evidence of a continuing unprotected purpose, the picketing is not within the proviso.

The Board has refused to consider prior recognition or organizational conduct in determining the objective of the current picketing where the prior conduct occurred before the enactment of section 8(b)(7)(C). This analysis seems correct since a different result would give the section retroactive effect. The reasoning used by the Board, however, has an application that extends beyond the situation where the motive appeared before the enactment of section 8(b)(7). The Board has argued that there should be no presumption that a prior motive continues; therefore, a union should not be restricted in picketing for the purpose of advertising lack of unionization merely because of prior activities that it has discontinued. Instead of completely disregarding the union's prior motives in its recognition or organizational activities, a more reasonable approach would seem to be to consider such motives in determining the purpose of the current picketing unless the union comes forth with some evidence of a change of motive and tactics.

67. International Ladies Garment Workers, 136 N.L.R.B. 524, 536 (1962); Local 400, Retail Store Employees, 136 N.L.R.B. 414 (1962); Local 1265, Dep't & Specialty Store Employees, 136 N.L.R.B. 335 (1962); cf. Local 344, Retail Clerks Int'l Ass'n, 136 N.L.R.B. 1270 (1962). But see Phillips v. Int'l Ladies Garment Workers, 38 CCH Lab. Cas. 68, 725 (M.D. Tenn. 1959), where the court found at least reasonable cause to believe that there was a violation although all of the organizational activity took place prior to the passage of § 8(b)(7).


69. Ibid.

70. This rule was stated prior to the enactment of § 8(b)(7). See NLRB v. Local 50, Bakery Workers, 245 F.2d 542, 547 (2d Cir. 1957), where the court held that there could be no presumption of continuation of intent without independent supporting evidence in a § 8(b)(4)(C) case. This rule has been followed in § 8(b)(7)(C) cases. See Hoffman v. Retail Store Employees, 206 F. Supp. 271 (N.D. Cal. 1962) (petition for temporary injunction denied); Greene v. International Typographical Union, 182 F. Supp. 788 (D. Conn. 1960) (petition for temporary injunction denied); McLeod v. Chefs Local 89, 181 F. Supp. 742 (S.D.N.Y.) (petition for temporary injunction granted), modified, 280 F.2d 760, 764-65 (2d Cir. 1960).

71. Such evidence might consist of a repudiation by the union of the
seem unfair since the union is seeking the protection of the publicity proviso. Furthermore, it is the purpose of the union's conduct that is in issue, and evidence concerning its motives would probably be more readily accessible to it than to the employer. Although it has not formulated a general rule, the Board is apparently considering only activity that is a part of the picketing to determine the purpose of the picketing.

Even though the Board has rejected the minority position that "independent evidence" should be considered, it does in fact look beyond the statement on the picket sign to determine the purpose of the picketing. Thus, in rejecting the "independent evidence" concept, the Board seems to have only rejected the relevancy of factors that do not occur at the site of the picketing.

Considering only factors that are part of the picketing seems to circumvent the general thrust of subparagraph (C) and its publicity proviso. In rejecting the "independent evidence" test, the Board argued that the section applies only to picketing; other activities are unaffected by its provisions, and recognition or organizational picketing for the purpose specified in the publicity proviso is not limited by the section. Furthermore, the Board argued that an "independent evidence" test would produce the anomalous result that picketing and other activities when occurring separately would be legal, but would be illegal when combined. The Board's analysis seems unsound because it assumes that an "independent evidence" test would prohibit independent organizational activities. Since section 8(b)(7) proscribes only picketing, it is clear that independent organizational activities are not limited by that section.


72. See notes 66-67 supra and accompanying text.

73. "The thrust of Section 8(b)(7)(C) is directed at picketing. If the picketing comes within the permissive ambit of that proviso, such picketing, in our opinion, is privileged." Crown Cafeteria, 130 N.L.R.B. 570, 577 (1961), adopted in 135 N.L.R.B. 1183 (1962).


75. E.g., Local 3, Int'l Bhd. of Electrical Workers, 50 L.R.R.M. 1410 (1962); Culinary Workers, 134 N.L.R.B. 1505 (1961); see 105 CONG. REC. 6648 (1959) (remarks of Senator McClellan); id. at 6650 (remarks of Senator Ervin).
should be relevant, however, to show the purpose that motivates the uncertified union to set up a picket line. When it enacted section 8(b)(7), Congress was concerned with the problem of an uncertified union forcing recognition or organization upon unwilling employers and employees. The section was not intended, however, to limit the right of workingmen to improve conditions of employment; therefore, the publicity proviso was enacted to permit unlimited recognition or organizational picketing for the purpose of advising the public of the lack of unionization. To determine whether the picketing is for the limited purpose permitted in the publicity proviso or for the purpose of forcing recognition or organization upon unwilling employers or employees, the surrounding circumstances, as well as the picketing activity, should be considered.

IV. EFFECT OF A STOPPAGE UNDER THE PUBLICITY PROVISO

If the recognition or organizational picketing is found to have the limited purpose specified in the publicity proviso to section 8 (b)(7)(C), such picketing may continue for an unlimited time without the filing of an election petition. Even though the proviso is applicable, however, the picketing may be illegal if it has interfered with pick-ups and deliveries or other employee services. There is a controversy among Board members over the number of incidents that must occur before it will find a work stoppage within the meaning of the publicity proviso. The majority has indicated that a stoppage must interfere with the employer's business; it must disrupt his normal business routine and compel him to modify his usual practices. Members Rodgers and Leedom,

76. Congress intended to curtail the power of a union to use picketing as a weapon to gain recognition or organization. 105 CONG. REC. 5201 (1959) (remarks of Senator Goldwater); id. at 6433 (remarks of Senator Mundt); id. at 6648 (remarks of Senator McClellan); id. at 6650 (remarks of Senator Lausche); id. at 6652 (remarks of Senator Dirksen); id. at 15531 (remarks of Representative Griffin); id. at 18153 (remarks of Representative Borden); id. at 15520 (remarks of Representative Landrum); id. at 17326 (remarks of Senator Goldwater).

77. Arguably, the publicity proviso, which proscribes picketing where there is an actual stoppage, may be read to give protection in any case where there is no stoppage in fact; it then would not be illegal to try to stop pick-ups or deliveries as long as the attempt failed. Such a reading of the proviso, however, would fail to give full consideration to all of its terms by overlooking the requirement that picketing be for the purpose described therein. In other words, if the picketing is attempting to stop deliveries, it seems clear that its purpose is not merely to advise the public of non-unionization.

78. Bartenders Union Local 58, 51 L.R.R.M. 1180 (1962); Local 429,
however, have scrutinized the statutory language and conclud-
ed that one stoppage is enough to constitute a violation of the pub-
licity proviso. They argue that a single stoppage satisfies the
requirement of the statute that refers to “an effect” inducing
“any individual or any other person” to refuse to deliver “any
goods” or render “any services.” Under this analysis, based upon a
literal reading of the statutory language, a finding of an unfair la-
bor practice could hinge upon the actions of one person who
has disregarded the union’s direction that pick-ups and deliveries
should continue as usual. Thus, the union could act in good faith
and nonetheless be guilty of causing a stoppage. The Board’s pre-
sent position avoids this harsh result by overlooking the literal
language of the statute. Arguably, however, Congress used the
terms “an individual,” “any goods,” and “any services” to make
clear that such a stoppage “effect” would constitute a violation
of the publicity proviso. The language of the proviso clearly ap-
ppears to contemplate much less than a substantial interference
with the employer’s business. A literal reading of the language,
however, would place a substantial burden on the union to see
that no stoppage occurs. This burden would seem unduly harsh to
a union acting in good faith to publicize its requests.

Arguably, the single-stoppage rule would not be unfair since
the union is in the best position to see that the picket line has no
adverse effects. Nor is a literal reading of the statute unduly harsh
if the Board considers illegal only that part of the picketing that
causes a stoppage. One court has recognized that sound policy sup-
ports such a result. The Court of Appeals for the Second Circuit
has held that an injunction should be effective only during hours
in which a stoppage occurs. The court reasoned that the stop-

Int'l Bhd. of Elec. Workers, 51 L.R.R.M. 1065 (1962); San Diego County
Waiters Union, 51 L.R.R.M. 1063 (1962); Local 57, Retail Clerks Int'l
Ass'n, 51 L.R.R.M. 1061 (1962); Retail Clerks Union, 51 L.R.R.M. 1053,
1055-56 (1962).

79. Bartenders Union Local 58, 51 L.R.R.M. 1180, 1181 (1962) (dis-
sent); Local 429, Int'l Bhd. of Elec. Workers, 51 L.R.R.M. 1065, 1067
(1962) (concurring opinion); San Diego County Waiters Union, 51 L.R.R.M.
1063, 1065 (concurring opinion); Local 57, Retail Clerks Int'l Ass'n, 51
L.R.R.M. 1061, 1063 (1962) (dissent); Retail Clerks Union, 51
L.R.R.M. 1053, 1059 (1962) (dissent). One member of Congress suggested,
in arguing that the addition of the publicity proviso accomplished nothing,
that an employer could direct some employee to refuse to perform services
and this would constitute a stoppage sufficient to make the picketing illegal.
105 CONG. REC. 18142 (1959) (remarks of Representative Roosevelt).

80. McLeod v. Chefs Local 89, 280 F.2d 760 (1960); modified, 286 F.2d
727 (2d Cir. 1961) (Stork Restaurant). In Stork Restaurant, 135 N.L.R.B.
1173 (1962), Member Fanning preferred to enjoin the union only during
delivery hours. See id. at 1177 n.7. In this way, the illegal aspect of the
page effect of the picketing was its only undesirable aspect and this could be eliminated without affecting the permissible aspect of the picketing. Since Congress has determined that picketing to publicize lack of unionization is permissible under the publicity proviso to subparagraph (C) except when it causes stoppage, the only objectionable element of the picketing is the stoppage. Thus, the legislative objectives would be effectuated by permitting the picketing for the purpose outlined in the publicity proviso where possible. Where this can be done through partial removal of the pickets, there would seem to be no justification for enjoining all of the picketing. 81

CONCLUSION

The Board has derived a logical interpretation of the effect of the imprecise wording of the publicity proviso in subparagraph (C), but it has not always given its interpretation the best possible implementation. The entire section only applies to picketing with an object of recognition or organization by an uncertified union. In general, no such object exists where the union is making a bona fide attempt to reinstate discharged workers, to counteract the competitive force of a non-union employer paying substandard wages, or to protest an employer's unfair labor practice. Such picketing, however, may necessitate negotiations and enable the uncertified union to act as the representative of the employees, or it may merely disguise an underlying prohibited object. In these cases, section 8(b)(7)(C) should apply to require the uncertified union to become certified in an NLRB election unless the purpose of the picketing comes within the permissive ambit of the publicity proviso.

The Board has not formulated any criterion for determining activity—that which caused delivery stoppage—would be eliminated, and the remainder of the activity would continue under the protection of the publicity proviso. Apparently dissenting members Rodgers and Leedom did not agree with this view, as Member Fanning joined in the opinion of Chairman McCulloch and Member Brown who determined that no cease and desist order should issue.

81. In view of the Second Circuit's doctrine, however, it is doubtful that the Board could obtain a blanket injunction over all picketing by a union. Typically, however, the Board's cease and desist order specifically enjoins only prohibited picketing. See, e.g., Local 429, Int'l Bhd. of Elec. Workers, 51 L.R.R.M. 1065 (1962) (cease and desist from unlawful recognition and organizational picketing); Local 1199, Drug Employees, 50 L.R.R.M. 1033 (1962) (cease and desist from recognitional picketing). Possibly the Board intends by these orders to permit picketing that has no prohibited object and picketing under subparagraph (C) that would qualify under the publicity proviso. But see Culinary Workers Union, 134 N.L.R.B. 1505 n.1 (1961).
when picketing comes within the publicity proviso, but apparently considers relevant only activity that is part of the picketing. This overlooks the language of the section, which speaks of "object" and "purpose," and it also overlooks the fact that picketing often achieves results that are unrelated to the legends on the picket signs. An examination of all the circumstances, on the other hand, gives full consideration to the language and the practical effect of the activity involved.

The Board has also distorted the literal terms of the statute by requiring a substantial interference with business before it will find a stoppage. This distortion would be unnecessary if the Board would consider limiting its cease and desist order to the hours or locations where picketing caused stoppage, thereby giving the employer protection from stoppages and permitting the union to publicize lack of unionization as contemplated by the statute.