

Louisiana Law Review

Volume 20 | Number 2

The Work of the Louisiana Supreme Court for the

1958-1959 Term

February 1960

Minority Picketing and Allied Activities Under the Labor Management Reporting and Disclosure Act

Peyton Moore

Repository Citation

Peyton Moore, *Minority Picketing and Allied Activities Under the Labor Management Reporting and Disclosure Act*, 20 La. L. Rev. (1960)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol20/iss2/28>

This Comment is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

Minority Picketing and Allied Activities Under the Labor Management Reporting and Disclosure Act

In September of 1959, Congress enacted the Labor Management Reporting and Disclosure Act,¹ which includes several amendments to the Taft-Hartley Act of 1947. One of these amendments deals directly with the problem of peaceful picketing for recognitional and organizational purposes by a minority union. The purpose of this Comment is to conduct a brief survey of past Board decisions on the issue of peaceful striking and picketing and to examine the possible impact of the new labor act in this area.

Section 7 of the Wagner Act² of 1935 guaranteed employees the right to join labor organizations and to engage in other concerted activity. Although the act placed restrictions on employer conduct which might interfere with these rights, there was no provision which proscribed any union activity. However, in 1947 the Taft-Hartley Act amended Section 7,³ guaranteeing an employee not only the right to engage in concerted activity, but also the right to *refrain* from union activity if he so desires. The act also denominated certain types of union conduct as "unfair." Among these was that proscribed by Section 8(b)(1)(A),⁴ which provides that it is an unfair labor practice for a union to restrain or coerce employees in the exercise of the rights guaranteed in Section 7. This provision has given rise to a problem of interpretation as to whether 8(b)(1)(A) should be construed as encompassing peaceful picketing by a minority union for recognitional purposes. This section might be interpreted as not prohibiting any union activity, regardless of its objective, as long as the activity is peaceful. On the other hand, it might be held that by picketing for recognition, a minority union is attempting to force the employer to recognize the union, despite the fact that it does not represent a majority of his employees. Such a recognition would be a violation of the employees' rights

1. 73 STAT. 519 (1959).

2. 49 STAT. 449 (1935), 29 U.S.C. § 141 (1935).

3. Pub. L. No. 101, 80th Cong., 1st Sess., amending 49 STAT. 449 (1935), 29 U.S.C. § 141, 157 (1935): "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities. . . ." This section is hereinafter referred to as Section 7.

4. 29 U.S.C. § 158(b)(1)(A) (1947).

under Section 7 to choose their own bargaining representative.

In the cases involving 8(b)(1)(A) the Board has not distinguished between strikes and picketing, treating both activities in the same manner. The *National Maritime Union* case⁵ was the first to arise under 8(b)(1)(A). There the union engaged in a peaceful strike in an effort to force the employer to sign an unlawful hiring hall agreement. The trial examiner found that the union had violated 8(b)(1)(A), as the purpose of the strike was to coerce the employer into signing the agreement, which in turn would force the non-union employees to join the union. The Board reversed the trial examiner, stating that the "legislative history of 8(b)(1)(A) strongly suggests that Congress was interested in eliminating physical violence and intimidation by unions or their representatives, as well as the use by unions of threats of economic action against specific individuals in an effort to compel them to join."⁶ Conceding that the strike was for an illegal objective, the Board continued: "The touchstone of a strike which is violative of 8(b)(1)(A) is normally the means by which it is accomplished, so long as its objective is directly related to the interests of the strikers and not directed primarily at compelling other employees to forego the rights which Section 7 protects."⁷ This case is the leading authority for the proposition that 8(b)(1)(A) does not proscribe peaceful striking or picketing.⁸

The Board's position was affirmed less than three months later in the *Perry Norvell* case.⁹ A work stoppage was prompted by the discharge of an employee. When the recognized union declared that the strike was unauthorized, several employees formed a committee to organize a new union and continued the strike. During this suspension of work the committee demanded

5. *National Maritime Union of America (The Texas Company)*, 78 N.L.R.B. 971 (1947).

6. *Id.* at 985. One of the most often quoted passages was Senator Taft's answer to Senator Morse's observation that § 8(b)(1)(A) would outlaw all strikes to further organization activities: "I can see nothing in the pending measure which, as suggested by the Senator from Oregon (Morse), would in some way outlaw strikes. It would outlaw threats against employees. It would not outlaw anyone striking who wanted to strike. It would not prevent anyone using the strike in a legitimate way, conducting peaceful picketing or employing persuasion. All it would do would be to outlaw such restraint and coercion as would prevent people from going to work if they wished to go to work." 93 Cong. Rec. 4436 (May 2, 1947).

7. 78 N.L.R.B. 971, 986 (1947).

8. The Board did find that the union violated § 8(b)(2), which prohibits a union from attempting to force an employer to discriminate against an employee.

9. *Perry Norvell Co.*, 80 N.L.R.B. 225 (1948).

that the employer recognize the new union. The employer refused, and hired replacements to resume operations. At this time the strikers began to use threats and other violent tactics to keep production at a standstill. The employer's complaint alleged that aside from the violence involved, the strike itself was a violation of 8(b)(1)(A) in that it attempted to deprive the employees of their Section 7 rights; more particularly the right to bargain collectively through representatives of their own choosing. The Board, relying primarily on its decision in *National Maritime Union*, concluded that the strike, considered alone, was not proscribed by 8(b)(1)(A). The Board further reasoned that if this were not so, Section 8(b)(4)(c),¹⁰ which prohibits a strike for recognition where another union is certified, is superfluous. If 8(b)(1)(A) prohibits a strike where there is no certified union, it would necessarily proscribe one where another union is certified. Consequently, it would overlap the scope of 8(b)(4)(c) entirely. Although the incidents of violence and threats made to the employees were found to violate 8(b)(1)(A), the Board stood firm on its position as to peaceful activity, following its decision in *National Maritime Union*.

In neither of the above cases was the majority or minority status of the union at issue. The problem of a peaceful strike by a minority union for an illegal objective was presented to the Board in the *Miami Copper Co.* case.¹¹ There, one union was certified, but the minority Smelter Workers Union struck to force the employer to settle grievances of the individual employees in the certified union outside the presence of the certified representative. The employer alleged that the Smelter Workers violated 8(b)(1)(A) because through economic pressure they forced employer action which infringed upon the statutory rights of the employees. The Board, assuming without deciding that the employees' rights were violated, found that 8(b)(1)(A) was not applicable, citing *National Maritime Union* as authority.

The Board continued to apply the *National Maritime* rule¹²

10. 29 U.S.C. § 158(b)(4)(C) (1947): "It shall be an unfair labor practice for a labor organization or its agents to engage in, or to induce or encourage the employees of any employer to engage in, a strike . . . where an object thereof is: forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9."

11. 92 N.L.R.B. 322 (1950).

12. District 50, United Mine Workers of America, 106 N.L.R.B. 903 (1953);

until the case of *Curtis Bros. Inc.*¹³ in 1957. A minority union was found guilty of an 8(b)(1)(A) violation when it peacefully picketed for recognition after losing a certification election. The Board reasoned that since the union was in the minority, the employer could not lawfully recognize it as the bargaining representative of his employees. With the picketing, the union was attempting to cause economic loss to the employer; and the employees could not escape a share of the damage caused to the business on which their livelihood depended. Therefore, the picketing was indirectly coercing the employees in the exercise of their right to choose their own bargaining representative. To the union's contention that the legislative history did not support such an interpretation of 8(b)(1)(A), the Board answered that the legislative history was not conclusive. To support its position, the Board cited several passages which would make it appear that the activity here complained of was within the ambit of 8(b)(1)(A).¹⁴ The Board attempted to distinguish *National Maritime Union* and *Perry Norvell* by pointing out that in those cases it was not found that the union's objective was exclusively for recognition, and that picketing for recognition was not "directly related to the interests of the strikers." The Board then stated: "on the other hand, to the extent that these cases cited seem contrary to the results reached here, we would be remiss in our duty were we to consider what is at best dubious precedent as overcoming the clear policy of the statute as a whole."¹⁵ The Board made it clear that this interpretation of 8(b)(1)(A) was to be applied only where the union's purpose was recognition, as opposed to organization. Apparently, then, picketing for organi-

Painters District Council No. 6, 97 N.L.R.B. 654 (1951); Medford Building and Construction Trades Council, 96 N.L.R.B. 165 (1951); United Construction Workers, 94 N.L.R.B. 1731 (1951). In two cases the Board found an 8(b)(1)(A) violation because the object of the strike was directed at compelling an employee to forego his rights under Section 7. See *Pinkerton's National Detective Agency*, 90 N.L.R.B. 205 (1950), where the object of the strike was to force the employer to discriminate against a non-union employee. See also *Clara Val Packing Co.*, 87 N.L.R.B. 703 (1949), where the union threatened to strike if the employer did not discharge an employee who had breached the union's picket line.

13. 119 N.L.R.B. 232 (1957).

14. Senator Taft offered the case of *Hall Freight Lines*, 65 N.L.R.B. 397 (1946) to demonstrate that economic pressure by a minority union could induce employees to join against their own wishes. Senator Pepper objected because there was no physical violence involved, to which Senator Taft replied: "The main threat was, 'Unless you join our union, we will close down this plant, and you will not have a job.' That was the threat, and that is coercion—something they had no right to do." 93 Cong. Rec. 4023 (1947). Later in the debate, Senator Taft stated: "There are plenty of methods of coercion short of actual physical violence." 93 Cong. Rec. 4024 (1947).

15. 119 N.L.R.B. 232, 246 (1957).

zational purposes, i.e., to force the employees to join the union, was not to be treated as an unfair labor practice under 8(b) (1) (A). The District of Columbia Court of Appeals reversed the Board, finding that peaceful picketing was not proscribed by 8(b) (1) (A).¹⁶ The Supreme Court has granted certiorari, and is scheduled to review the case in 1960.

Two weeks after the *Curtis Bros.* case, the Board handed down its decision in the *Alloy Manufacturing Company* case,¹⁷ where a similar situation was involved. There, after being refused recognition by the employer, the minority union not only engaged in picketing for recognition, but also placed the employer on a "We do not patronize" list. The Board relied on the *Curtis Bros.* case in finding that the picketing was an unfair labor practice, and on this occasion overruled *National Maritime Union* to the extent that it was inconsistent. Furthermore, the Board declared that there was no legitimate basis for distinguishing between recognitional appeals made by picketing and appeals effected through the means of blacklisting, since both tactics bring pressure to bear on the employer, and in turn on the employee. On appeal, the Ninth Circuit did not have to decide whether the picketing violated 8(b) (1) (A), because the union conceded that the picketing was violative of another section of the act.¹⁸ But as to the question of blacklisting, the court reversed the Board, finding that this activity is protected as free speech under the First Amendment. At least one other circuit court has had occasion to pass on the *Curtis Bros.* doctrine. The Fourth Circuit in the *O'Sullivan Rubber Corp.* case¹⁹ adopted the Board's finding that a minority union's picketing for recognition was violative of 8(b) (1) (A) notwithstanding the absence of violence. The Board has continued to apply the *Curtis Bros.* doctrine to all cases in which a minority union picketed for recognition.²⁰

16. *Drivers Local 639 v. N.L.R.B.* [*Curtis Brothers, Inc.*], 43 L.R.R.M. 2156 (D.C. Cir. 1958). The court relied on legislative history and Sections 8(b) (4) (C) and Section 13 in holding that 8(b) (1) (A) does not proscribe peaceful picketing. Section 13 provides that nothing in the act should be construed to interfere with a strike, except where specifically provided.

17. *Alloy Manufacturing Co.*, 119 N.L.R.B. 307 (1957).

18. *N.L.R.B. v. I.A.M. Lodge 942* [*Alloy Manufacturing Co.*], 43 L.R.R.M. 2548 (9th Cir. 1959). The union conceded that it violated Section 8(b) (2) which provides that a union may not cause or attempt to cause an employer to discriminate against an employee.

19. *N.L.R.B. v. Rubber Workers* [*O'Sullivan Rubber Corp.*], 44 L.R.R.M. 2465 (4th Cir. 1959).

20. *Shepherd Machinery Co.*, 119 N.L.R.B. 320 (1957); *Ruffalo's Trucking Service, Inc.*, 119 N.L.R.B. 1268 (1958); *Fisk & Mason*, 120 N.L.R.B. 135 (1958);

One of the 1959 amendments to the Taft-Hartley Act goes to the very crux of the problem faced in *Curtis Bros.* The new provision, Section 8(b) (7),²¹ enumerates the instances in which picketing "where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization" (recognition) or "forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative" (organization) will be an unfair labor practice. Subsection (A) will prohibit these activities where the employer has lawfully recognized another union, and Subsection (B) where there has been a valid election within the preceding twelve months. Both of these provisions seem to be applicable to both majority and minority unions, and should serve primarily to protect the stability of the employer-employee labor relations. Subsection (C), on the other hand, appears to be directed primarily at minority unions, and is of greater significance to this discussion. This provision will prohibit both

Harou, Inc., and En Tour, 120 N.L.R.B. 659 (1958); H. A. Rider & Sons, 120 N.L.R.B. 1577 (1958); Andrew Brown Co., 120 N.L.R.B. 1425 (1958); Biltmore Furniture Mfg. Corp., 120 N.L.R.B. 1728 (1958); Alling & Covy Co., 121 N.L.R.B. 315 (1958); Machinery Overhaul Co., Inc., 121 N.L.R.B. 1176 (1958). In the most recent case involving minority picketing for recognition, the Board's decision was rendered after the 1959 statute was passed. But because the unfair labor practice took place before the new act was passed, the Board found a violation of 8(b) (1) (A) and did not apply the new amendment. *Sierra Furniture Co.*, 45 L.R.R.M. 1075 (1959).

21. 61 STAT. 136, § 8(b) (7) (1947): "It shall be an unfair labor practice for a union or its representatives:

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

"(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act,

"(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or

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

"Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section (8) (b)."

recognitional and organizational picketing unless a representation petition is filed within a reasonable time, not to exceed thirty days. If a petition is filed, the Board is to conduct an election, without requiring the hearing and showing of a substantial interest that normally must precede a certification election. It appears then that the minority union which pickets for the purpose of either recognition or organization is going to be in a vulnerable position. If no representation petition is filed, the picketing will become violative after a reasonable time, not to exceed thirty days. Just what criteria the Board will use in determining a reasonable time remains to be seen, but, as indicated, in no event may the picketing exceed thirty days. However, if a minority union engages in this type of picketing, it is more than likely that the picketed employer will file the petition; and an election will ensue. The union, not representing a majority of the employees, will necessarily lose the election. Then, Subsection (B) of the new amendment will come into play, prohibiting any further recognitional or organizational picketing for twelve months; and Section 9(c) (3)²² of the act will preclude another certification election for the same period of time. Therefore, it is unlikely that a minority union which hopes to become the certified representative in the near future will engage in any recognitional or organizational picketing.

From a literal reading of Subparagraph (c) of the new Section 8(b) (7), it would appear that a majority union might use this provision to circumvent the normal delays required before a certification election would be ordered. In other words, the requirements to obtain the expedited election would appear to be met if the union threw up a picket line, either recognitional or organizational, and then filed a representation petition. However, in its recently published rules of interpretation,²³ the NLRB stated that no election would be held under these circumstances, unless an unfair labor practice charge had been filed against the picketing union. This apparently leaves the employer to determine whether or not an expedited election will be held, leaving the majority union with very little to gain by engaging in this activity.

With the new amendment, Congress is apparently endorsing

22. 29 U.S.C. § 159(3) (1947): "No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. . . ."

23. 24 Fed. Reg. 9095 (1959).

the Board's position in *Curtis Bros.*, that recognitional picketing by a minority union is an unfair labor practice. However, it has gone one step further by proscribing organizational picketing as well. The distinction between these activities has been vague at best, and in several cases in which the picketing union has claimed that its purpose was organization, the Board has found that an additional purpose was recognition, and therefore violative of 8(b) (1) (A).²⁴

There is one further provision in Subsection (C) which should lead to some very interesting problems of interpretation. Subsection (C) provides that nothing in the subsection should be construed to prohibit picketing or any other method of publicity directed at informing the public that an employer does not have a union contract or that he employs non-union workers. There is, however, one exception to this provision. Where the informational activity causes an employee of another employer to refuse to perform services, then the activity becomes unfair. The problem of interpretation will arise if the activity causes unsolicited secondary refusals to work. For example, suppose a union, with no intent of causing any refusals to work, employs a single picket, for the purpose of advising the public that a certain employer has no union contract. However, a union truck driver of another employer refuses to deliver while the picket is there. Then, according to the wording of the proviso, the picket would be illegal. But it may be that the Board will require an intent to produce the secondary effects before it will consider the informational activity as an unfair labor practice.

An application of the new legislation to a hypothetical situation will reveal a few of the possible problems that may arise. Suppose that a union which is clearly in the minority demands recognition from the employer. Upon his refusal, the union sets up a picket line with the intention of exerting enough economic pressure on the employer and the employees so that (1) the employer will recognize the union despite its minority status, or (2) the employees will become members, even against their own choosing. Under Subsection (C) of the new amendment, the picketing union has a maximum of thirty days within which it

24. In the following cases, the union has claimed that the picketing was for organization, but the Board has found an auxiliary purpose to be recognition: *Fisk & Mason*, 120 N.L.R.B. 135 (1958); *Harou, Inc.*, and *En Tour*, 120 N.L.R.B. 659 (1958); *H. A. Rider & Sons*, 120 N.L.R.B. 1577 (1958). In *Shepherd Machinery Co.*, 119 N.L.R.B. 320 (1957), union claimed to be picketing for a union shop, but Board found that another purpose was recognition.

must file a petition if the picketing is either recognitional or organizational. Therefore, when thirty days have elapsed, and the union has not filed a petition, the employer could file an unfair labor practice charge under 8(b)(7)(C), and the Board would probably enjoin the picketing. Suppose further that the union then puts out a single picket, whose sign reads, "Unfair, No Union Contract." At first blush this appears to be the very activity which the new amendment will protect, i.e., informational picketing. Of course, if an employee of another employer refuses to perform services because of the presence of this picket, this activity may be considered as illegal, as specifically provided in the new amendment. But, if no secondary refusals to work are caused by the picket, the employer nevertheless might file an unfair labor practice charge under 8(b)(7)(C), claiming that this is still recognitional or organizational picketing. The union would undoubtedly claim that the picketing was strictly for the purpose of informing the public that the employer had no union contract. However, in view of the preceding events, the Board might easily find that the actual purpose of the picket was still to exert enough economic pressure on the employer so that the union would be recognized, or the employees would join, and therefore the picket would be illegal.

A further problem might develop if the union persisted in its efforts by posting a leaflet distributor at the employer's place of business, or placing the employer on a "We do not patronize" list. These activities would appear to be covered by the provision that protects activities designed to inform the public that the employer has no union contract. Of course, they might be enjoined if they caused secondary refusals to work, as previously mentioned. But suppose that no such effects are caused, and that the actual result of these activities is to exert economic pressure on the employer and his employees, just as the picket had. In this case it is possible that the Board might enjoin these activities in reliance on the last sentence of the new amendment. This sentence reads: "Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under Section 8(b)."²⁵ It is arguable that here Congress was endorsing the Board's position in the *Alloy* case, where it refused to distinguish between picketing and blacklisting, finding both to be coercive and violative of 8(b)(1)(A). If

25. See note 21 *supra*.

so, the Board might rely on this section to prohibit both of the informational activities mentioned above. It is submitted that such an interpretation could raise serious constitutional questions in the area of free speech.²⁶ While the Supreme Court has allowed certain restrictions to be placed on picket lines,²⁷ it has continued to protect other informational activities.²⁸

In conclusion, it is submitted that the new amendment has definitely answered one question. Peaceful picketing for the purpose of either recognition or organization will be prohibited unless the picketing union files an election petition within a reasonable time, not to exceed thirty days. The other problems discussed do not seem quite so clear. The Board will probably find itself making the determination of whether the purpose of the picketing is recognition or organization, or merely "to inform the public," in numerous cases. This determination will not always be an easy one, and will have to be decided on the facts of each case. As to the other forms of publicity that the union might use to "inform the public," it appears that they remain protected. Even if the Board were to rely on the last sentence of the new amendment to enjoin these activities under 8(b) (1) (A), it is doubtful that the injunctions would stand under the First Amendment. Therefore, the minority union has lost its primary means of exerting pressure through picket lines, but it still may resort to these allied activities, which may well be just as coercive in accomplishing the same objectives.

Peyton Moore

26. This is the very issue on which the Ninth Circuit reversed the Board in the *Alloy* case.

27. In *Hughes v. Superior Court*, 339 U.S. 460, 464 (1949), where the California state court had granted an injunction against peaceful picketing, the Court said: "But while picketing is a mode of communication it is inseparably something more and different. Industrial picketing 'is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated.'"

28. *Id.* at 465: "Publication in a newspaper, or by distribution of circulars, may convey the same information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word."