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Peaceful Picketing-An 8(b)(1) Violation

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PEACEFUL PICKETING — AN 8 (b) (1) VIOLATION?

INTRODUCTION

In the nine years since the passage of the Labor Management Relations Act of 1947, the courts and the National Labor Relations Board have had the opportunity to construe all sections of the act.[1] Two major sections of the act which have received considerable attention are those which delineate activities known as unfair labor practices. Those activities which are designated as unfair labor practices are labelled such because they are in violation of a provision or provisions of the act. These violations can be segregated into two groups: (a) Employer unfair labor practices and (b) Union unfair labor practices.

Thus, the act's declaration of employee rights in Section 7[2] is made effective against employers by provisions grouped under Section 8 (a)[3] of the act. Subsections (1) through (5) of Section 8 (a) define certain acts which are generally categorized as employer unfair labor practices when engaged in by an employer or his agents. Each of these unfair practices, generally speaking, involves interference with the rights granted in Section 7 of the act.

On the other hand, the National Labor Management Relations Act prohibits interference with the employee rights stated in Section 7, not only by employers, but also by unions. There is a notable distinction here which should be borne in mind: not all the union unfair practices are designed to protect employee rights; some presuppose the existence of employer or public rights. Section 8 (b)[4] is the portion of the act which insures against encroachment of Section 7 rights by the union in its collective bargaining and organizing activities. Subsections (1) through (6) of Section 8 (b) set forth the definitions of certain acts which are designated union unfair practices.

1. LABOR MANAGEMENT RELATIONS ACT, 61 Stat. 136, (1947), 29 U. S. C. § 141 *et seq.* (1952).
2. LABOR MANAGEMENT RELATIONS ACT, 61 Stat. 136, (1947), 29 U. S. C. § 157 *et seq.* (1952).
3. LABOR MANAGEMENT RELATIONS ACT, 61 Stat. 136, (1947), 29 U. S. C. § 158 *et seq.* (1952).
4. LABOR MANAGEMENT RELATIONS ACT, 61 Stat. 136, (1947), 29 U. S. C. § 159 *et seq.* (1952).

THE PROBLEM

It has been fairly well settled which activities on the part of both employers and employees constitute unfair labor practices. However there remains an area of Section 8 (b) (1) which has not been thoroughly explored.[5] To illustrate this, let us consider the following situation. Under the present interpretation of the law, peaceful picketing and striking are regarded as being protected activities in most instances.[6] Suppose Union "A" made a claim for recognition, and the Union has filed a representation petition in support thereof with the National Labor Relations Board. Thereafter an election is held with Union "A" and "no union" appearing on the ballot, and a clear majority of the employees choose "no union." Subsequent to the election, in spite of their defeat, Union "A" pickets the employer's premises in an attempt to gain more members. The picketing is peaceful, but nevertheless the employer is forced to curtail his operations and his employees are thrown out of work. Thus a majority of the employees have suffered because of the activities of the minority. Does this conduct constitute a restraint and coercion of the right of employees to refrain from union activities as given in Section 7 of the act and protected by Section 8 (b) (1) (A)?[7]

DISCUSSION

It has been uniformly held that violence,[8] threats[9] and economic coercion[10] on the part of unions in an organizational campaign constitute a violation of Section 8 (b) (1) (A)[11]. In the factual situation posed, there is no violence. However,

5. This section provides that any restraint or coercion by a labor organization of the employees in the exercise of rights guaranteed in Section 7 shall be an unfair labor practice. (Hereafter, this section will be referred to as Section 8 (b) (1) (A).) LABOR MANAGEMENT RELATIONS ACT, 61 Stat. 136, (1947), 29 U. S. C. § 158 (b) (1) (A), (1952).

6. NLRB v. Globe Wireless Ltd., 193 F. 2d 748 (9th Cir. 1951); NLRB v. Thayer Co., 213 F. 2d 748 (1st Cir. 1954).

7. Section 7 of the act contains the basic guarantees which allow the employees the right to engage in concerted activity for the purpose of collective bargaining or to refrain from any or all of such activities. (Hereafter, this section will be referred to as Section 7.) LABOR MANAGEMENT RELATIONS ACT, 61 Stat. 136, (1947), 29 U. S. C. § 157, (1952).

8. Tungsten Mining Corp., 106 NLRB 903 (1953).

9. Lane v. NLRB, 186 F. 2d 671 (10th Cir. 1951).

10. Bell Aircraft Corp., 105 NLRB 755 (1953).

11. See note 5 *supra*.

are there not other equally effective methods of restraint and coercion which, when practiced by a union, will result in an encroachment of the employees' rights set forth in Section 7?[12]

The unfair labor practices, prescribed by the Act, are designed to protect the rights and privileges given to employees by Section 7.[13] This section in effect gives to employees the right to bargain collectively through representatives of their own choosing, to join and assist labor organizations, or to refrain from such activity. Any encroachment on these rights by employers or labor unions constitutes unfair labor practices.

By the terms of Section 9, Congress has provided a method by which employees can choose their bargaining representative.[14] The Board has the power and facilities for conducting the elections, and certifying the employees' choice as the bargaining agent in the appropriate unit. It is intended that this choice by the employees be free and voluntary, and the employer is prohibited from indulging in any attempt to coerce the employees in their selection.[15] When the bargaining agent is so selected, the employer is under an obligation to deal with this agent and with no other.[16] By the same token other unions must respect this certified bargaining representative. A rival union cannot strike or picket for recognition during the period protected by this certification.[17] Again, seeking freedom of choice for the employees, the act forbids coercion of the employees by the union while they are making their choice.[18] Remember, Section 9 merely sets out the elec-

12. Particular reference is made to the portion of this section which stipulates that the employees shall have the right to refrain from any and all such activities. LABOR MANAGEMENT RELATIONS ACT, 61 Stat. 136, (1947), 29 U. S. C. § 157, (1952).

13. *Ibid.*

14. Section 9 (b) provides for the determination of the bargaining unit by the Board and for hearings on representation questions affecting commerce. Upon the proper findings, the Board is empowered by Section 9 (c) to direct and conduct an election by secret ballot. LABOR MANAGEMENT RELATIONS ACT, 61 Stat. 136, (1947), 29 U. S. C. § 159, (1952).

15. The following cases illustrate four of the basic tactics by an employer which are designed to interfere with the employee's free choice of a bargaining representative: Socony Vacuum Oil Co., Inc., 81 NLRB 1329 (1949); Pure Oil Co., 56 NLRB 1531 (1944); Spiegel Fashion Shops, 89 NLRB 1538 (1950); Atlas Imperial Diesel Engine Co., 91 NLRB 530 (1950).

16. Farmer's Electric Cooperative, Inc., 100 NLRB 746 (1952).

17. Oppenheim Collins & Co., 83 NLRB 355 (1949).

18. Bloomingdale Brothers, Inc., 87 NLRB 1326 (1949).

tion and certification machinery, while Section 8 contains the sanctions. It is manifest that one of the aims of the act is to equalize the respective positions of labor and management. In the words of the act itself, its purpose and policy is:

> . . . to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and prescribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.[19]

The theory has often been advanced that Congress meant for Section 8 (b) (1) (A) to apply only to actual physical violence amounting to restraint and coercion. Indeed, the *Perry Norvell Case*[20] quoted the following language of the late Senator Taft, uttered in the course of the debate on the bill, in support of this proposition:

> The cease and desist order will be directed against the use of threats and coercion. It will not be directed against the use of propaganda or the use of persuasion, or against the use of any of the other peaceful methods of organizing employees.
>
> Mr. President, I can see nothing in the pending measure which, as suggested by the Senator from Oregon, would in some way outlaw strikes. It would outlaw threats against employees. It would not outlaw anybody striking who wanted to strike. It would not prevent anyone using the strike in a legitimate way, conducting peaceful picketing or employing persuasion.

19. LABOR MANAGEMENT RELATIONS ACT, 61 Stat. 136, (1947), 29 U. S. C. § 141, (1952).

20. In this case a group of workers went on a wildcat strike, against the orders of the incumbent local. After the strike was called, the workers formed an independent organization which was to be the bargaining agent. The employer brought an unfair labor practice charge under Section 8 (b) (1) (A), alleging that such strikers had coerced and restrained the employees of the company in their right to self-organization and to bargain collectively through an agent of their own choosing, and also that such strikers had deprived the employees of their right to a continuation of the terms and conditions of work established by the prior agreement. Matter of Perry Norvell, 80 NLRB 225 (1948).

On the surface, this would seem to be a very convincing argument. However, Senator Taft's words may not be as all inclusive as they indicate. The statement was made in response to a charge by Senator Morse from Oregon that the section would outlaw strikes for recognition and organizational strikes. The Senator from Oregon said: "Since it has frequently been held that strikes are a form of coercion, it follows, Mr. President, that the pending amendment would outlaw all strikes designed to further organization activities. While I am of the opinion that unions should utilize the election machinery of the act wherever possible, rather than resort to strike in an attempt to solidify organization, it must be recognized that organizational strikes have a legitimate place in some situations."[21]

Taft's statement was in response to this concern over the possibility of outlawing *all* strikes for recognition, and organizational strikes. He did not necessarily mean that all peaceful picketing would be protected. Certainly peaceful striking and picketing for recognition are lawful. However, what about the case which is posed here where the union has already conducted its organizational drive, has been granted every process by the Board for a free and fair election at the request of the union and has lost? Mr. Taft was saying that peaceful picketing for organization activities was lawful. But was he saying that all peaceful picketing *even after* the organizational activities have failed, is lawful? Cannot the type of activity outlined in the hypothetical situation, although peaceful, amount to restraint and coercion so as to deprive employees of their right to refrain from union activity?

Further investigation into the legislative history of the 8 (b) Section will reveal that perhaps Congress meant to outlaw more than just physical restraint and coercion. Senator Ives of New York made the following statement: "What I am bothered about in this instance is the effect this amendment may have on a legitimate attempt to organize workers."[22] Senator Ball, arguing for the section answered thusly, "I will say to the Senator from New York that if any *legitimate* organizing drive is coercing and restraining individual employees in the free exercise of the rights guaranteed by this bill, *I think the union ought to be slowed down a little*

21. 93 Cong. Rec. 4557 (Daily Ed. May 2, 1947).
22. 93 Cong. Rec. 4559 (Daily Ed. May 2, 1947).

bit."[23] It is contended that the organizing drive in the theoretical situation is *not even legitimate.*

Support for the contention that restraint and coercion of the employees in the exercise of their rights need not be physical violence can also be found in the words of Senator Taft himself. The Senator told of a case where organizers, after an unsuccessful attempt to convince several employees in a plant to join their union, called a strike of the other employees over whom they had control, and forced the plant to close. Finally the reluctant employees acceded to the union's demands. In commenting on this situation, Senator Pepper said that there was no physical force present, and if there were they could go to the police. 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 which they had no right to do."[24]

At a later time Taft referred to a case where a union went to a plant in California and said to the employer that they wanted to organize the employees, and told him to call in the workers and tell them to join the union. The employer replied that he had no control over the employees, and besides, such a statement would be contrary to the National Labor Relations Act. The union then retorted that if the employer didn't do so they would picket the plant. They did picket it, and closed it down for a couple of months. Senator Taft referred to this as "coercion."[25]

In neither of the cases which Taft referred to was physical violence present. However, the enlightened Senator from Ohio recognized such activity could still constitute coercion. In fact, at one point in the debate he made the broad statement, "There are plenty of methods of coercion short of actual physical violence."[26]

Thus we see that there is substantial evidence in the legislative history of Taft-Hartley to show that the activity sought to be prohibited in Section 8 (b) (1) (A) was not necessarily physical violence alone. It may very well be that Congress clearly saw that there were other, and equally obnoxious, methods of restraint and coercion. Picketing, after the loss

23. *Ibid.*
24. 93 Cong. Rec. 4144 (Daily Ed. April 25, 1947).
25. *Id.* at 4145.
26. *Ibid.*

of an election even though peaceful, in an attempt to induce the employees to join the union, would seem to be one of these methods. The picketing may very well have a most adverse effect on the employer's business and the consequences are sure to be felt by the employees. Are they not being restrained and coerced in their rights to refrain from any and all union activities in spite of the fact that no physical violence is present?

Let's go back to the hypothetical situation posed. In it, the employees, fearing the loss of their jobs, or because they have actually lost their jobs from the effect of this picketing on the employer's operations, consent to join the union. The election showed that they were formerly opposed to the union; now they join it. Was this choice free and voluntary on their part, or were they coerced into it? Under the circumstances considered it clearly seems that they have been coerced and restrained in their right to refrain from union activity in violation of Sections 7 and 8 (b) (1) (A) of the act.

Again looking to the theoretical factual situation, let us suppose that when Union "A" pickets the plant, the employer, fearing the consequences, recognizes and bargains with the union. He has now recognized as the bargaining representative of his employees a union which does not represent a majority of his workers. This is a violation of Section 8(a) (1),[27] in that the employer has taken from the employees the right to choose their own collective bargaining agent or to refrain from union activity.[28]

Obviously, at least part of the reason for the picketing was to exert economic pressure on the employer in an attempt to force him to accede to the union's demands for recognition. Thus, in effect, the union would be coercing and restraining the employees in their guaranteed right to refrain from union activity if they so desire. Therefore, the picketing would be for an unlawful objective, i. e., forcing the employer to require his employees to join, or be represented by, a labor organization.

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27. LABOR MANAGEMENT RELATIONS ACT, 61 Stat. 136, (1947), 29 U. S. C. § 158 (a) (1), (1952). "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."

28. See NLRB v. Booker, D.B.A. Atlantic Stages, 180 F. 2d 727 (5th Cir. 1950), for an application of the provisions of Section 8 (a) (1) in a situation parallel with the hypothetical facts here posed.

The Supreme Court of the United States has held that picketing is something more than free speech, and has upheld state injunctions against peaceful picketing which was for unlawful objectives.[29] In *Building Service Union v. Gazzam*,[30] the employer had been asked by the union to sign a contract. He refused, saying that none of his employees were members of the union, but they could solicit the employees if the union so wished. After meeting with the employees, the union was unsuccessful in getting a majority so it picketed the employer's premises. The Washington state court enjoined the picketing as a violation of state public policy. They said the objective of the picketing was to coerce the employer into denying the employees' their right to choose their own bargaining representative as set out in a state statute with wording similar to Sections 7 and 8 (a) (1) of the Taft-Hartley Act. The United States Supreme Court upheld the injunction stating:

> . . . Here as in Gibony, the union was using its economic power with that of its allies to compel respondent to abide by union policy rather than by the declared policy of the state. That state policy guarantees workers free choice of representation for bargaining purposes. If respondent had complied with petitioners' demands and had signed one of the tendered contracts and lived up to its terms he would have thereby coerced his employees. The employees would have had no free choice as to whether they wished to organize or what union would be their representative.

If the activity of the union is unlawful, and tends to force the employer into recognizing a union which does not represent a majority of his employees, which is clearly an unfair labor practice, why wouldn't the union be guilty of an unfair labor practice also? Under the Wagner Act,[31] there was no union unfair labor practices, but Section 8 (b) of Taft-Hartley now provides for them. It is submitted that the 8 (b) section was an attempt by Congress to equate union

29. These cases illustrate the U. S. Supreme Court's view of peaceful picketing when coupled with an unlawful objective: Hughes v. Superior Court of Contra Costa County, 18 L. C. par. 65, 762, 339 U. S. 460 (1950); I. B. T. v. Hanke, 18 L. C. par. 65, 763, 339 U. S. 470 (1950); Building Service Employees International Union v. Gazzam, 18 L. C. par. 65, 764, 339 U. S. 532 (1950).

30. See note 29 *supra*.

31. NATIONAL LABOR RELATIONS ACT, 49 Stat. 449, (1935), 29 U. S. C. §§ 151-168, (1952).

responsibilities with the already existing employer responsibilities, in regard to the protection of employee rights. Support for this contention can be gathered from the legislative history of the act. Senator Ball of Minnesota in introducing Section 8 (b) (1) as an amendment to the bill reported out by committee stated that the purpose was to " . . . insert an unfair labor practice for unions *identical* with the first unfair labor practice prohibited to employers."[32] Senator Morse said: "Just as the Wagner Act now makes it unfair for an employer to interfere with, restrain or coerce his employees in the exercise of their right to select their collective bargaining representative, so I propose that it be an unfair labor practice for labor organizations or their agents, to interfere with, restrain, or coerce an employee in the selection of his bargaining representative."[33] Both of these Senators seem to be drawing a parallel between Section 8 (a) and 8 (b), and saying that what is fair for management is fair for labor. Senator Taft had the following to say on the matter, "It seems to me that a perfectly clear case of necessity exists to include this amendment if we wish to secure the equality which the bill aims to give as between employers and employees."[34] Do we have equality if a union can pressure an employer into committing an unfair labor practice, and not be guilty of committing one itself?

In answer to an observation that it would be difficult to define the words restraint and coercion, Taft answered, "The Board has been interpreting the terms restraint and coercion as they are used in Section 8 (a) (1) for 12 years."[35] It is obvious that he meant for them to be interpreted under the new Section, 8 (b) (1) the same as they were under the old 8 (1). Whereas 8 (a) (1) is a prohibition on the employer, 8 (b) (1) is a prohibition on the union. If an employer in recognizing a union which represents less than a majority of his employees is committing an 8 (a) (1) violation, the union forcing this violation should be guilty of an 8 (b) (1) violation. Also if a union representing a minority of employees is attempting to coerce the majority to accept a union against their wishes expressed in a secret ballot election, the union is

32. 93 Cong. Rec. 4136 (Daily Ed. April 25, 1947).
33. 93 Cong. Rec. 1910 (Daily Ed. March 10, 1947).
34. 93 Cong. Rec. 4144 (Daily Ed. April 25, 1947).
35. *Id.* at 4143.

restraining and coercing this majority in their right to refrain from union activity.

Further support for the contention that the type of activity described in the factual situation posed is an unfair labor practice, can be adduced by a careful examination of the following two cases: *Capital Service, Inc. v. N. L. R. B.*[36], and *Pocahontas Terminal Corporation v. Portland Building and Construction Trade Council.*[37] Both of these cases were ultimately decided on preemption grounds, a subject too far afield to warrant consideration in this discussion, but both contain some very significant language pertaining to the topic under consideration. In the *Pocahontas Case*[38] the Plaintiff had hired the Bethlehem Steel Co., Snodgrass, Inc., and W. H. Hinnant and Co. to construct an oil terminal. Bethlehem employed union labor, but Snodgrass did not. Defendant union picketed plaintiff's construction site with placards bearing the legend that plaintiff was unfair to union labor. Defendant's picketing was to enforce their demand that Snodgrass employ only union labor. As a result of the picketing, employees of Bethlehem Steel Co., which was unionized, refused to cross the line or perform work on the job, and the construction of the terminal ceased.

It appears that in 1948, the employees of Snodgrass voted in a NLRB election not to have a union. In discussing whether the plaintiff should properly seek relief from the defendant's activities in the state or federal court, the Federal Court of Appeals held that proper jurisdiction was in the federal court. The court went on to say: "The complaint further states, in effect, that the picketing by the Defendants seeks to coerce the employees of Ellis C. Snodgrass, Inc. to become members of a union even though they have voted in an NLRB election against joining the unions involved. If true, this allegation would constitute a violation of Section 8 (b) (1) of the Taft-Hartley Law."

In the *Capital Service Case*,[39] the Bakery Union sought to force the workers in Service's bakery to join the union. The attempt was to persuade the public not to buy Service's products by means of a boycott of the sale of these products at the retail food stores to which they were sold by Service. The

36. 204 F. 2d 848 (9th Cir. 1953).
37. 93 F. Supp. 217 (Maine, 1950).
38. See note 37 *supra*.
39. 204 F. 2d 848 (9th Cir. 1953).

union established picket lines at the retail customer's entrances of several stores. The California state court issued an injunction against such picketing. The Federal Court of Appeals for the 9th Circuit held that "such a boycott to enforce unionization is prohibited by the Taft-Hartley Act, Section 8 (b) (1) (A)."[40] The court then goes on to quote Sections 8 (a) (1), and 8 (b) (1), and to draw a parallel between the two. The court said, "It is inconceivable that the Taft-Hartley Act intended the identical words 'restrain or coerce' of 8 (a) (1) and 8 (b) (1) to have a different meaning when applied to a labor organization from that when applied to an employer."[41] As stated by Senator Taft, "All that is attempted is to apply the same provision with exact equality to labor unions."[42] The court denominated the type of activity carried on by the union, in this case economic coercion, as that type of activity which tends to prevent the employees of Service from exercising their right to work. It is this economic coercion which that court considered a violation of Section 8 (b) (1) of the act. The economic coercion present in the factual situation posed at the beginning of this discussion is just a very short step from that present in the *Capital Services Case.*

CONCLUSION

The problem which has been posed here is a novel one, but of current interest. In recent months, at least two complaints have been issued on the very problem posed here.[43] As of the date of this writing, there has been no decision as to how the NLRB and the Federal Courts will ultimately decide the issue. Hence, the solution which has been suggested is based on interpretation of the Congressional intendment behind the passage of the Taft-Hartley Act, and the observation of the trends which the courts and NLRB have followed in applying the act to similar fact situations. However, the result which is pre-

40. *Id.* at 852.
41. *Id.* at 852.
42. *Legislative History of Labor Management Relations Act,* (1947), Vol. 2, 1207.
43. At the writing of this article, the trial examiner's report in Willard W. Shepard and Norma D. Shepard, d.b.a. Shepard Machinery Co. v. International Union of Operating Engineers, Local No. 12, (Case No. 21-CB-805) (Nov. 1956) was issued. The trial examiner found, in a factual situation identical to the one posed here, that the union conduct constituted an unfair labor practice within the meaning of Section 8 (b) (1) (A).

sented has been reached through the application of principles which seem to be in keeping with the objectives of the act and which would effectuate the basic policies of the act.

It is submitted that the activity herein discussed is designed to restrain and coerce the employees in the exercise of their rights under Section 7. The union which conducts such picketing, even though it be peaceful, is guilty of illegal restraint and coercion and hence has violated Section 8 (b) (1) of the act.

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