COMMENTS

CONSUMER PICKETING: THE LIMITED RESTRICTIONS OF THE LABOR MANAGEMENT RELATIONS ACT

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A recent case[1] decided in the United States Court of Appeals for the District of Columbia has to a large extent changed the interpretation given in the past by the National Labor Relations Board to Section 8(b)(4)(ii) of the Labor Management Relations Act.[2] Prior to this decision, the Board had held that the statute completely banned consumer picketing at the premises of the secondary employer, branding such conduct as comprising threats, coercion or restraint within the meaning of the act. In the first case in this area of the law to come before a Court of Appeals since the 1959 amendments to the LMRA,[3] the court, far from proscribing such activity, decided that the act tolerates such secondary picketing, except where there is a factual showing of threat, coercion or restraint. This decision would seem to be a veritable boon to the picketing activity of the union; since, by following the simple preliminary precautions set forth below, the union will be immune from charges of violating section 8(b)(4)(ii) before this circuit court.

In the *Teamsters, Local 760* case, the National Labor Relations

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1 Teamsters, Local 760 v. NLRB, D.C. Cir., June 7, 1962 (No. 16588); 45 CCH Lab. Cas. 26,872.

2 It shall be an unfair labor practice for a labor organization or its agents—

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> (4) . . . (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
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> . . .
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> (B) forcing or requiring any person to cease using, selling, handling, transporting or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, . . . PROVIDED, That nothing in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;
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> . . .
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> . . . PROVIDED FURTHER, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including customers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, . . .

(LMRA is popularly known as the Taft-Hartley Act.)

61 Stat. 136 (1947), 29 U.S.C. § 141 (1958), as amended by § 704(a) of the Labor-Management Reporting & Disclosure Act of 1959 (Landrum-Griffin Act), 73 Stat. 542 (1959), 29 U.S.C. § 158 (1961 Supp.).

3 LMRDA, Title VII, § 704(a).

Board, acting upon unfair labor practice charges filed by Tree Fruits Labor Relations Committee, Inc. (collective bargaining representative for its employer-members), found the petitioner union in violation of section 8(b)(4)(ii). The unlawful conduct consisted of picketing the premises of retail stores to urge customers not to purchase produce (apples) supplied by the employer (Tree Fruits' members) with whom the union was engaged in a labor dispute. The union took precautions to insure that the retail stores' employees were neither "induced" nor "encouraged" into a work stoppage, that deliveries and pickups were not halted, that customers were informed the dispute concerned *only* Tree Fruits' produce, and that they were not requested to otherwise refrain from patronizing the stores. The United States Court of Appeals for the District of Columbia reversed and remanded, holding that peaceful consumer picketing at the premises of a secondary employer does not *per se* violate section 8(b)(4)(ii). Such conduct (*i.e.*, consumer picketing) is made illegal under the act only when it *in fact* constitutes a threat, coercion or restraint.

Although Section 8(b)(4) of the LMRA does not expressly mention "primary" or "secondary" disputes, strikes or boycotts, it is recognized as one of the act's secondary boycott sections.[4] A secondary boycott is commonly described as the application of economic sanctions not upon the primary employer who alone is the real adversary, but against some third party (*i.e.*, secondary employer) who has no direct concern in it.[5] The aim of such device is to carry the dispute to the secondary employer and influence him to curtail his dealings with the primary employer, thereby strengthening the union's position and promoting its overall objective. Such secondary pressure is applied in a variety of ways, but our present concern is with secondary consumer picketing. This technique involves stationing patrols at stores which handle the products of the primary employer, and urging the public to refrain from purchasing such products. The union's expressed objective is that the public, once it is made aware of the labor dispute, suspend voluntarily its purchases of the involved goods. However, a result which frequently occurs is that the secondary employer abandons handling the "goods," in hope of removing the pickets from his premises.

In 1947 Congress, in an attempt to limit this area of industrial conflict, enacted legislation prohibiting some secondary boycotts. However, this legislation proved deficient in many respects, as several technical "loopholes" remained. For instance, the 1947 Act dealt with the vice of inducement and encouragement of the "secondary" employees (section 8(b)(4)(A)), but did not reach the situation where

[4] NLRB v. Denver Bldg. & Constr. Trades, 341 U.S. 675, 686 (1951).

[5] Electrical Workers, Local 761 v. NLRB, 366 U.S. 667, 672 (1960).

the secondary employer was directly approached and pressured by the union. It was through the amendments of the 1959 legislation[6] that Congress endeavored to correct this situation.[7] Yet, as witnessed by the current litigation, it remains to be seen how skillfully Congress accomplished its task; or in fact it may constitutionally control all such secondary boycott devices.

Prior to the current decision, the NLRB read section 8(b)(4)(ii) as directing the prohibition of consumer picketing at a secondary establishment, when such picketing was for a proscribed objective. In the *Perfection Mattress* case[8] the union picketed both the customer and employee entrances of stores of secondary employers who sold Perfection's products. The patrols displayed signs which asked the "consuming public" not to buy Perfection mattresses, and thereby aid the union in its dispute with Perfection. The NLRB found violations of both sections 8(b)(4)(i)[9] and (ii). In relation to clause (ii), the Board concluded that the peaceful consumer picketing did amount to "restraint and coercion," and was in the nature of "economic retaliation" against a retail employer who failed to comply with the union's demand.[10] In the *Minneapolis House Furnishing* case[11] a similar question was involved. There, the union urged several Minneapolis stores to buy more "locally made" furniture. Leaflets were distributed, newspaper publicity obtained, and pickets patrolled customer entrances (used on occasion by employees) asking the public "to patronize home

6 LMRDA, supra note 3.

7 Senator Kennedy: The chief effect of the conference agreement, therefore, will be to plug loopholes in the secondary boycott provisions . . . . There has never been any dispute about the desirability of plugging these artificial 'loopholes.'

105 Cong. Rec., Senate 16413 (Sept. 3, 1959); Legislative History of LMRDA, 1959 (NLRB ed., 1959), Vol. II, p. 1431.

8 United Wholesale & Warehouse Employees, Local 261 (Perfection Mattress & Spring Company), 129 N.L.R.B. 1014, 47 L.R.R.M. 1121 (1960).

9 It shall be an unfair labor practice for a labor organization or its agents—

. . .

(4)(i) to engage in or induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services . . . .

The Board felt the foreseeable consequence or the natural and probable result of picketing an entrance used by secondary employees was to induce and encourage such employees to "make common cause with the picketing union and to refrain from working behind the picket line, irrespective of the literal appeal of the legend on the picket sign."

10 ". . . by the literal wording of the Proviso as well as through the interpretative gloss placed thereon by its drafters, consumer picketing in front of the secondary establishment is prohibited." 129 N.L.R.B. at 1023, 47 L.R.R.M. at 1123 (1960).

11 Upholsterers Frame & Bedding Workers, Twin City Local No. 61, (Minneapolis House Furnishing Co.), 132 N.L.R.B. No. 2, 48 L.R.R.M. 1301 (1961). Unanimous opinion of the Board; McCulloch (Chairman), Brown, Fanning, Leedom, and Rogers.

industry" and to "buy union made" products. The NLRB ruled that such conduct did *not*, on the evidence presented, violate section 8(b)(4)(i).[12] However, they did find that the picketing violated clause (ii), for such patrols, although appealing to the consumer, had as an object[13] the forcing of the employer to cease or diminish his purchases of out-of-state furniture, thereby amounting to coercion and restraint for a proscribed objective.

This approach was again applied by the Board in the *Tree Fruits* case;[14] for here violation of clause (ii) was based on the premise that consumer picketing threatened, coerced or restrained the secondary employer when it had as an object the forcing or requiring of such person to cease handling the products of the primary employer.[15] The Board documented such interpretation by reference both to the legislative history of clause (ii), where it found the requisite intent to ban such activity,[16] and to a literal reading of the proviso of section 8(b)(4) which exempted publicity other than picketing.[17] On appeal,

[12] The picketing of the secondary employer was not *per se* "inducement or encouragement" of secondary employees to strike; nor was it felt to raise an "irrebuttable presumption" of such effect. The issue was to be resolved in light of all the evidence in each particular case. Thus to this extent the interpretation of the *Perfection Mattress* case was overruled.

[13] It is sufficient that one of the objects of the action complained of violates the act, in order to condemn the activity. Carpenters', Local 74 v. NLRB, 341 U.S. 707 (1951).

[14] Fruit & Vegetable Packers & Warehousemen, Local 760, (Tree Fruits Labor Relations Committee, Inc.), 132 N.L.R.B. No. 102, 48 L.R.R.M. 1496 (1961). Opinion of McCulloch (Chairman), Brown, and Fanning.

[15] ". . . Such picketing 'threaten(s), coerce(s), or restrain(s)' persons within the meaning of Section 8(b)(4)(ii). And when it has for an object forcing or requiring any person to cease selling or handling the products of any other producer or processor, the picketing violates Section 8(b)(4)(ii)(B). In the present case the picketing had one of these proscribed objectives." 132 N.L.R.B. No. 102 at p. 7, 48 L.R.R.M. at 1498 (1961).

[16] Senator Kennedy: Under the Landrum-Griffin Bill it would have been impossible for a union to inform the customers of a secondary employer that that employer or store was selling goods which were made under racket or sweatshop conditions, or in a plant where an economic strike was in progress. We were not able to persuade the House conferees to permit picketing in front of the secondary shop, but we were able to persuade them that the union shall be free to conduct informational activity short of picketing. In other words, the union can hand out handbills at the shop, can place advertisements in newspapers, can make announcements over the radio, and can carry on all publicity short of having ambulatory picketing in front of the secondary site.

105 Cong. Rec., Senate 16414 (Sept. 3, 1959); Legis. Hist., Vol. II, p. 1432(1).

> Senator Morse: This bill does not stop with threats . . . . It also will make it illegal for a union to 'coerce' or 'restrain.' This prohibits consumer picketing. . . .

105 Cong. Rec., Senate 16397 (Sept. 3, 1959); Legis. Hist., Vol. II, p. 1426(3).

Representative Griffin: In response to a question whether the bill would prohibit "the picketing of customer entrances at retail stores selling goods manufactured by a concern under strike," he replied:

> Our bill would; that is right. If the purpose of the picketing is to coerce or restrain the employer of the secondary establishment, to get him not to do business with the manufacturer—then such boycott could be stopped.

105 Cong. Rec., House 14339 (Aug. 12, 1959); Legis. Hist., Vol. II, p. 1615(2).

[17] Compare the proviso of section 8(b)(4) to the proviso of section 8(b)(7)

the Court of Appeals observed that problems of free speech under the First Amendment arose whenever picketing was restrained, and consequently rejected the Board's approach and interpretation. In its view, clause (ii) did not outlaw peaceful consumer picketing, but proscribed only such conduct as in fact amounted to threats, coercion or restraint. Under this construction the proviso was regarded as exempting from regulation "publicity other than picketing" even though it might contain illegal elements or conduct.[18] The court, although cognizant of the legislative history, "hesitated" to do Congress the disservice of construing the statute so as to raise constitutional issues.

This opinion holds that the NLRB was wrong in assuming that the statute completely bans consumer picketing at the premises of the secondary employer. Instead of branding all such conduct as comprising threats, coercion or restraint, the Board is called upon to examine each situation and determine if such factors are actually present.[19] This approach avoids, at least for the moment, the underlying constitutional problems of clause (ii).[20] The court, although recognizing that some picketing may be within the "ambit of prohibition," argues that in the absence of a *substantial economic impact* on the secondary employer,[21] constitutional justification for such prohibition is hard to find. Thus, in this regard, the court would appear

(C) where the latter reads: ". . . nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising . . . ."

18 The court felt justified in this approach, since there was no "elucidating" house, senate or conference report on this exact question. It also considered as significant, that where Congress wished to outlaw picketing *per se*, it knew how to do so.

19 By plain dictionary definition of these terms—

"'threat': expression of an intention to do harm to another person; menace.

"'coerce': to compel; force; repress.

"'restrain': to check; curb."

[Merriam-Webster Dictionary (1960 edition)]

it would appear that picketing would closely approximate such forbidden conduct. Moreover, under Section 8(1) of the Wagner Act (the same as Section 8(a)(1) in the Taft-Hartley Act), the test of whether the employer has violated the "restrain" provision is whether "the words or deeds . . . taken in their setting, were reasonably likely to have restrained the employees' choice . . . ." NLRB v. Link-Belt Co., 311 U.S. 584, 599 (1940). Would a similar "test" be applicable for section 8(b)(4)(ii)? See generally, Capital Service Inc. v. NLRB, 204 F.2d 848 (9th Cir. 1953); aff'd, 347 U.S. 501 (1954).

20 The court by this construction of the provisions felt the following questions were not before it and consequently need not be handled; to wit, "whether the consumer boycott can be said, in light of Congress' tolerance of it, to be an evil of sufficient gravity to justify complete suppression of picketing" or "whether the explicit exemption of other forms of communication from the reach of the statute, saves its constitutionality?" 45 CCH Lab. Cas., at 26,876, n. 11.

21 ". . . in the absence of a showing that a substantial economic impact on the secondary employer has occurred or is likely to occur, we would be hard-put to find a constitutional justification for prohibiting a union from using picketing as the form of making 'do not patronize' appeals, so long as the picketing is conducted in an entirely peaceful and non-coercive manner, is addressed solely to consumers, and has no side effects, which might be a basis for distinguishing it from any other form of publicity." 45 CCH Lab. Cas., at 26,876.

to stress the economic results of such activity (*i.e.*, picketing), and not merely follow the usual pattern of section 8(b)(4) regulation; to wit, the finding and condemnation of specific union conduct (illegal means, namely to threaten, coerce or restrain) directed to specific objectives (illegal object, such as forcing or requiring any person to cease selling the products of any other producer).[22]

Granted that the court's concern with the problems inherent in a ban of picketing are justified,[23] picketing is not considered to be the legal equivalent of free speech.[24] For with its physical presence at a particular locale, its appeal to "class" loyalties and its ability to induce action, it involves more than the mere communication of ideas.[25] Although blanket prohibitions of picketing are not to be tolerated,[26] picketing is not immunized from all regulation; particularly where it meets a valid law or public policy.[27] In the area of labor relations, Congress has formulated policies which on occasion outlaw particular conduct and objectives. How extensive this control will prove to be in relation to secondary consumer picketing, must now await further litigation and definition. Yet, if followed by the Board and in the absence of a Supreme Court ruling. the impact of this decision will be to require that the threat, coercion or restraint is clearly established at the hearing. Moreover, it appears (as far as this court is concerned) that if the picketing union takes care to limit its appeal to the customers and public (both through the legend on the sign and the location of the patrol), and both insures that there are no interruptions in the deliveries or shipments at the secondary site due to the presence of the pickets and informs the secondary employees that the dispute does not concern them and that they are urged to continue working, secondary consumer picketing must be tolerated.

[22] The usual consideration given a factor of "substantial economic effect" is in determining if such effect upon interstate commerce is sufficient to warrant taking federal jurisdiction. NLRB v. Denver Bldg. & Constr. Trades, 341 U.S. 675, 683-85 (1951). Yet, here, the Court would require the picketing to have such an economic impact before it would grant relief.

[23] Peaceful picketing was once characterized as a medium of communication protected by the constitutional right of free speech. Thornhill v. Alabama, 310 U.S. 88 (1940). (But see decisions in subsequent cases.)

[24] Hughes v. Superior Court, 339 U.S. 460, 465-66 (1950).

[25] Building Service Union v. Gazzam, 339 U.S. 532, 536-37 (1950). Or as stated by Mr. Justice Douglas in his concurring opinion in Bakery & Pastry Drivers v. Wohl, 315 U.S. 769, 776-77 (1942): "Picketing by an organized group is more than free speech, since the very presence of a picket line may induce action of one kind or another, quite irrespective of the ideas which are disseminated. Hence those aspects of picketing make it the subject of restrictive regulation."

[26] Teamsters, Local 695 v. Vogt, 354 U.S. 287, 294-95 (1957).

[27] In the following cases, state regulation of picketing was upheld:
Carpenters' Union v. Ritter's Cafe, 315 U.S. 722 (1942)—Texas anti-trust law.
Giboney v. Empire Storage Co., 336 U.S. 490 (1949)—Missouri antitrade-restraint law.
Hughes v. Superior Court, 339 U.S. 460 (1950)—California policy against involuntary employment on a racial basis.
Teamsters, Local 309 v. Hanke, 339 U.S. 470 (1950)—Washington policy against union shop.