Michigan Law Review

Volume 59 | Issue 4

1961

Labor Law- Recognition and Organizational Picketing - Unfair Labor Practice Charge is a Prerequisite to Initiation of the Expeditied Election Procedure of Section 8 (b)(7)(C) of the NLRA

Steven P. Davis
University of Michigan Law School

LABOR LAW — RECOGNITION AND ORGANIZATIONAL PICKETING — UNFAIR LABOR PRACTICE CHARGE IS A PREREQUISITE TO INITIATION OF THE EXPEDITED ELECTION PROCEDURE OF SECTION 8 (b) (7) (C) OF THE NLRA — Plaintiff union commenced picketing a previously-unorganized company for the purpose of gaining recognition as the bargaining agent of the employees. The next day the union filed a petition with the NLRB seeking an election. Five days later the individual plaintiffs, Reed and Whitney, filed an unfair labor practice charge under section 8 (b) (7) of the National Labor Rela-

tions Act[1] for the express purpose of invoking the expedited election procedure provided by the statute. This charge was prepared by and filed with the sanction of the picketing union. The NLRB refused to grant the expedited election. In an action for mandamus brought by plaintiffs in a district court to compel the regional director to hold an expedited election, *held,* complaint dismissed. There must be a legitimate unfair labor practice charge filed before an expedited election will be directed, and this requirement is not met by one's filing the charges against one's self. *Reed v. Roumell,* 185 F. Supp. 4 (E.D. Mich. 1960).

Section 704 of the Labor-Management Reporting and Disclosure Act of 1959[2] made several important amendments to the NLRA, one of which was the addition of section 8 (b) (7). The new section severely limits recognition and organizational picketing by an uncertified union in those cases where: (a) the employer has lawfully recognized another labor organization, (b) a valid election has been held within the preceding twelve months or, (c) such picketing has continued for an unreasonable period of time, not to exceed thirty days, without the filing of a representation petition under section 9 (c).[3] Section 8 (b) (7) (C) further provides that if a representation petition should be filed within a reasonable time, the NLRB shall direct an election "forthwith," without regard to the provisions of section 9 (c) (1). Under section 9 (c) (1), upon the filing of a representation petition, regional personnel conduct detailed preliminary investigations; these are followed by Board hearings and decision.[4] Although under the procedures prescribed for section 8 (b) (7) (C)[5] largely the same determinations are involved, the process is considerably shortened[6] because these determinations are made at the regional level.[7] This faster procedure will not always be desired by a union, for an election defeat would bar it from further picketing for a period of twelve months.[8] Nevertheless, a union might desire an expedited election if it believed itself to have substantial employee support, but felt its strength waning or feared the effect of management propaganda.

[1] National Labor Relations Act § 8 (b) (7), added by the Labor-Management Reporting and Disclosure Act of 1959, § 704 (c), 73 Stat. 544 (1959), 29 U.S.C. § 158 (b) (Supp. I, 1959).

[2] 73 Stat. 542 (1959), 29 U.S.C. §§ 158, 160, 187 (Supp. I, 1959).

[3] National Labor Relations Act, § 9 (c), 49 Stat. 453 (1935), as amended, 29 U.S.C. § 159 (c) (1958).

[4] There must be a determination (1) that the employer's operation affects commerce, (2) of the appropriate bargaining unit, (3) that the election would effectuate the policies of the act, (4) that the election would reflect the free choice of the employees, and, if petitioner is a labor union, (5) that there is substantial interest in the union. C.F.R. §§ 101.17-.21 (Supp. 1960).

[5] 29 C.F.R. §§ 101.22-.23 (Supp. 1960).

[6] From the filing of a petition to the holding of an election the average "9 (c) (1) election" requires 39 days, while the average "8 (b) (7) (C) election" requires only 17 days. NLRB Release R-702, May 8, 1960.

[7] There must be a determination of issues (1), (2) and (3) found in note 4 *supra.* In addition, the regional employee must find (4) that 8 (b) (7) (C) is applicable. 29 C.F.R. §§ 101.22-.23 (Supp. 1960).

[8] 73 Stat. 544 (1959), 29 U.S.C. § 158 (b) (7) (B) (Supp. I, 1959).

Expedited elections have not been as easy to obtain as a literal reading of section 8 (b) (7) (C) might suggest. In its rules and regulations, the NLRB states that the filing of an unfair labor practice charge is a prerequisite to directing an expedited election under section 8 (b) (7) (C).[9] Recent Board decisions have affirmed this practice.[10] The union contends, however, that section 8 (b) (7) (C) makes no mention of the filing of an unfair labor practice charge as a prerequisite for obtaining an expedited election, and, therefore, the court should follow the plain meaning of the statute by granting the requested election whenever a representation petition has been filed by the union within a reasonable time after commencement of the picketing.[11] The court's reasoning in the principal case, and presumably that of the NLRB, is that section 8 (b) (7) (C) must be interpreted as a part of the integrated pattern of sections 8 and 9 which provide respectively the framework for the processing of unfair labor practice charges and elections. Had Congress intended section 8 (b) (7) (C) to provide an independent right to an expedited election they would have done so in a more direct manner than including it as a part of section 8.

The resolution of the disagreement over the interpretation of section 8 (b) (7) (C) must be found by looking to the intent of Congress in imposing limitations upon recognition and organizational picketing. It is fairly certain Congress intended the provisions of section 8 (b) (7) to encourage recourse to Board election machinery and to discourage coercive organizational picketing which Congress believed to be a dangerous threat to peaceful labor-management relations.[12] Very little evidence of precise congressional intent concerning the mechanics of procedure of section 8 (b) (7) is available. Representative Barden, Chairman of the House Committee on Education and Labor, in a post-enactment insertion into the *Congressional Record,* stated that recognition picketing should not be used simply as a device to bring about a prehearing election and that if the Board feels such is the case, it should direct the petitioner to follow the provisions of section 9 (c) (1) in order to afford opportunity for a hearing.[13] This statement is the only piece of evidence found that directly substantiates the NLRB position. In

9 29 C.F.R. §§ 101.22-.23 (Supp. 1960).

10 See, *e.g.*, Bunny Car Wash, 4 CCH LAB. L. REP. ¶ 9176 (NLRB Administrative Decision, Sept. 6, 1960).

11 In McLeod v. Teamsters, 179 F. Supp. 481, 488 (E.D.N.Y. 1960) the court in dictum discussing the expedited election procedure indicated that when a conflict exists between the NLRB rules and regulations and the plain meaning of the statute, the court must be guided by the terms of the act.

12 "When we refer to blackmail picketing we mean this: A situation wherein pickets are put around a place of business and the employer is told 'You either sign up or else'; without the union signing up a sufficient number of his employees to call for an election. . . ." 105 CONG. REC. 15826 (1959) (remarks of Rep. Landrum). See also 105 CONG. REC. 15829 (1959) (remarks of Rep. Hiestand); 105 CONG. REC. 1727 (1959) (statement of James P. Mitchell before Subcommittee on Labor, Senate Committee on Labor and Public Welfare).

13 105 CONG. REC. A8062 (daily ed. Sept. 12, 1959).

contrast, several commentators[14] have stated that the NLRB interpretation is not warranted by legislative history and that the plain meaning of the statute should be followed. But in taking this view they fail to consider fully Congress' desire to limit the practice of recognition and organizational picketing. It is further argued by these commentators that, if the NLRB position is accepted, excessive power will be given to the employer. In an unorganized shop he alone will have the option of invoking the expedited election procedure by filing an unfair labor practice charge.[15] Should the employer feel that an expedited election would be more advantageous to the union, however, he would not file an unfair labor practice charge and the representation election would be held under the provisions of section 9 (c) (1). But if the union's position is adopted, it will be able to obtain an expedited election whenever it desires to do so, simply by putting up a picket line and then filing a representation petition with the NLRB. This would encourage rather than limit the use of recognition picketing by the unions, and would render section 9 (c) (1) procedures meaningless. Absent agreement of all parties to a consent election,[16] section 9 (c) (1) specifically grants to each party the right to present its case at a hearing and to secure a decision by the full Board. And the Board itself is charged with the duty to determine the validity of a representation petition before directing a certification election. If the union position is adopted, most representation elections will be held without a board hearing or decision. There is nothing to indicate that Congress, in passing section 8 (b) (7), intended to revoke section 9 (c) (1). For these reasons the interpretation of the NLRB affirmed in the principal case is preferable.

Steven P. Davis

[14] For thorough discussions, see Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 1086, 1108 (1960); Comment, 45 CORNELL L.Q. 769, 788-93 (1959); see also Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN. L. REV. 257, 268 (1959).

[15] It is probable that if the employer's business is partially unionized and a second union begins recognition picketing, the unfair labor practice charge could be filed by the previously-recognized union rather than by the employer.

[16] See 61 Stat. 144 (1947), 29 U.S.C. § 159 (c) (4) (1958), and 29 C.F.R. § 101.19 (Supp. 1960).