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The Labor Management Reporting and Disclosure Act of 1959-New Restrictions on "Top-Down" Organizing

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The Labor Management Reporting and Disclosure Act of 1959— New Restrictions on "Top-Down" Organizing

In the course of investigating labor union corruption, the McClellan Committee[1] uncovered numerous instances of what is commonly called "top-down" organizing — where a union attempts to force the employer to recognize it as bargaining agent for his employees without first securing the employees' support.[2] Disturbed by these findings and by recent court decisions[3] holding that, in most instances, "top-down" organizing was permissible under the Taft-Hartley Act,[4] Representatives Landrum and Griffin introduced legislation in the 86th Congress which, in part, would have amended the Taft-Hartley Act so as to impose severe restrictions on such union activity.[5] The House and Senate failed to agree on these and other provisions of the Landrum-Griffin bill, so a Conference Committee was appointed to settle the differences.[6] The compromises on regulation of "top-down" organizing reached by this committee and eventually incorporated into the Labor Management Reporting and Disclosure Act of 1959[7] are the subjects of this Comment.

Restrictions on "Top-Down" Organizing Prior to LMRDA

Section 7 of the National Labor Relations Act[8] guarantees to

1. The McClellan Committee is properly termed the "Senate Select Committee on Improper Activities in the Labor Management Field."

2. The International Brotherhood of Teamsters was found to be especially vigorous in organizing from the "top-down." See, *Hearings Before the Senate Select Committee on Improper Activities in the Labor and Management Field*, 85th Cong., 1st Sess, pt. 16 at pp. 279-81; pt. 38 at pp. 14414—14467; pt. 45 at pp. 16379-16381; pt. 56, at pp. 19589, 19596 (1958).

3. International Assn. of Machinists, Lodge 942 v. NLRB, 263 F.2d 796 (9th Cir. 1959) (the *Alloy* case); Drivers, Chauffeurs, Helpers, Local 639 v. NLRB, 274 F.2d 551 (D.C. Cir. 1959) (the *Curtis* decision) (affirmed by the Supreme Court subsequent to the passage of the LMRDA, 80 Sup. Ct. 706 (1960)); United Rubber, Cork, Linoleum & Plastic Workers of America v. NLRB, 269 F.2d 694 (4th Cir. 1959) (the *O'Sullivan Rubber* case also affirmed subsequent to the passage of the LMRDA by the United States Supreme Court, 80 Sup. Ct. 759 (1960). These decisions are discussed page 246 *infra*.

4. Labor Management Relations Act, 61 STAT. 144 (1947), 29 U.S.C. § 158 (1952).

5. H.R. 8400, 105 CONG. REC. 13125 (Daily ed., July 27, 1959). Previously Senator McClellan had introduced such remedial legislation in the Senate without success. 105 CONG. REC. 6657 (April 24, 1959).

6. 105 CONG. REC. 15892 (August 14, 1959); 105 CONG. REC. 15965 (August 17, 1959).

7. 73 STAT. 519, 542-544, § 704 (1959), 29 U.S.C. § 158(b)(4), (7) (Supp. 1959).

8. Wagner Act, 49 STAT. 449 (1935), 29 U.S.C. § 451 (1952).

certain employees the right to "form, join and assist labor organizations, to bargain collectively through representatives of their own choosing . . . [or] . . . to refrain from any or all such activities." Section 8 imposes correlative duties on the employer by requiring him to refrain from certain forms of interference with the exercise of these employee rights,[9] and as amended by the Taft-Hartley Act, imposes similar duties upon labor organizations.[10] Prior to the passage of the LMRDA, "top-down" organizing was an unfair labor practice only where the union instigated *concerted* work stoppages in order to obtain its objectives.[11]

In recent decisions the NLRB has tried in vain to forge broad restrictions on "top-down" activities from Section 8(b)(1)(A) of the Taft-Hartley Act which provides that: "[I]t shall be an unfair labor practice for a labor organization or its agent . . . to restrain or coerce . . . employees in the exercise of the rights guaranteed in Section 7."[12] In the *Curtis* case,[13] where a minority union picketed an employer for the avowed purpose of forcing him to recognize it as bargaining agent the Board said:

> "In terms of statutory language, . . . our question is whether this picketing *restrains* or *coerces* the employees in their free exercise of the rights guaranteed in Section 7. These latter 'rights' expressly include the right of all employees 'to bar-

9. 29 U.S.C. § 158(a) (1952): "It shall be an unfair labor practice for an employer —

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: . . .

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization [except union shop]."

10. Labor Management Relations Act, 61 STAT. 144, 145, § 8(b) (1947), 29 U.S.C. § 158(b) (1952).

11. 61 STAT. 144, 145, § 8(b) (1947), 29 U.S.C. § 158(b) (1952): "It shall be an unfair labor practice for a labor organization or its agents . . . (4) to engage in, or to induce or encourage the employees of any employer in a strike or a *concerted* refusal in the course of their employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials or commodities or to perform any services, where an object thereof is . . . (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization if another labor organization has been certified as the representative of such employees under the provisons of section 9 . . . ."

12. 61 STAT. 144, 145, § 8(b)(1)(A) (1947), 29 U.S.C. § 158(b)(1)(A) (1952).

13. Drivers, Chauffeurs, and Helpers Local 639, Intl. Brhd. of Teamsters and Curtis Brothers, Inc., 119 N.L.R.B. 232 (1957).

gain collectively through representatives of their own choosing.' If minority union picketing has a restraining or coercive effect upon the employees, and if such coercion cuts into their privilege to choose or reject any particular union, the only two essential elements of the unfair labor practice spelled in Section 8(b) (1) (A) have been established."[14]

The court of appeals refused to sustain this application of Section 8(b) (1) (A) on the ground that it was intended to apply only to union activities "bordering on violence."[15] In the *Alloy* case,[16] where a minority union sought recognition by circulating a "we do not patronize" list, the Board attempted to apply Section 8(b) (1) (A) in a similar manner. The court of appeals reversed this application on the ground that suppression of the list would violate first amendment guarantees of free speech.[17] It was in an effort to implement the Board's reasoning in these two instances and to "overrule" the appellate reversals that Congress passed the LMRDA restrictions on "top-down" organizing.[18]

THE LMRDA AMENDMENTS

Recognition Picketing — Section 8(b)(7)

The LMRDA adds a new section, 8(b) (7), to the Taft-Hartley Act,[19] unmistakably imposing restrictions on "top-down" organizing through pressures in the form of picketing exerted at or near the primary employer's place of business. According to this section it is now an unfair labor practice for a union to picket or threaten to picket in an attempt to force or require the employer to recognize the union as bargaining agent for his employees where (A) the employer has already lawfully recognized another union or (B) where a valid Board election has been conducted within the past twelve months or (C) where the union has not

14. *Id.* at 234.

15. NLRB v. Drivers, Chauffeurs, Helpers, Local 639, 274 F.2d 551 (D.C. Cir. 1959). This decision was affirmed by the Supreme Court subsequent to the passage of the LMRDA, 80 Sup. Ct. 706 (1960). See Petro, *Labor Relations Law*, 35 N.Y.U.L. REV. 733, 745-751 (1960) for critical appraisal of these appellate decisions.

16. Alloy Mfg. Co. & International Assn. of Machinists, Lodge 942, AFL-CIO, 119 N.L.R.B. 307 (1957).

17. NLRB v. International Ass'n of Machinists, Lodge 942, 263 F.2d 796, 799 (9th Cir. 1959): "We consider the conduct of union ['we do not patronize'] listing and persuasion, *except picketing*, to be within the general area of protection of the first amendment guaranteeing freedom of speech."

18. See the Conference Committee Report, H.R. No. 1147, 86th Cong., 1st Sess., § 704(a), p. 41 (1959).

19. 73 STAT. 519, 544, § 704(c), 29 U.S.C. § 158(b) (7) (Supp. 1959).

filed a petition for a 9(c) election[20] within a reasonable period of time after the commencement of picketing, a "reasonable time" not to exceed thirty days. These provisions broaden the Board's *Curtis* doctrine since they are equally applicable to majority as well as minority picketing.

To Section 8(b)(7)(C), the Conference Committee added a compromisory proviso which was adopted:

> "Provided . . . 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 the 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."[21]

The meaning of this proviso is not too clear since it is not readily apparent wherein picketing for the purpose of "truthfully advising the public that an employer does not employ members of, or have a contract with a labor organization" is prohibited in the preceding portions of Section 8(b)(7).[22] The thrust of the section is to regulate picketing *aimed at recognition* and nowhere outside of the proviso are found any restraints on "purely informational picketing." Since the proviso does not relate to the rest of the section, one might tend to discount it as redundant. However, the Board and the courts have not discounted the proviso.

20. Labor Management Relations Act, § 9(c), 61 STAT. 144, 146 (1947), 29 U.S.C. § 159(c) (1952). This section sets forth the normal certification machinery to be used at the instance of either employer or employees. A proviso to Section 8(b)(7)(C) provides for an expedited election circumventing the time-consuming procedures of Section 9(c).

However, it has been held that the union cannot obtain a "quickie" election on its *own motion* but must be accused *by the employer* of violating Section 8(b)(7)(C) before the Board will direct such an election. Nor may a union allege as a defense to a charge of violating 8(b)(7)(C) that the employer has refused to bargain collectively in violation of Section 8(a)(5). The fact that an employer had refused to bargain does not relieve the union of its responsibility to use the ordinary certification procedures outlined in Section 9(c). Greene v. International Typographical Union, Local 285, 182 F. Supp. 788 (D. Conn. 1960). See also *Report of Advisory Panel on Labor-Management Relations Law, United States Senate Committee on Labor and Public Welfare*, 45 L.L.R. 335 (1960).

21. 73 STAT. 519, 544, § 704(c) (1959), 29 U.S.C. § 158(b)(7) (Supp. 1959). See, H.R. No. 1147 on S. 1555, 86th Cong., 1st Sess., § 704(c), p. 41 (1959).

22. Professor Aaron has described this portion of the LMRDA as "drafted in such execrable form as to invite oracular interpretation rather than precise analysis." Aaron, *The Labor Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 1086, 1100 (1959).

The proviso was recently interpreted for the first time at the appellate level in *McLeod v. Chefs, Cooks, Pastry Cooks and Asst's, Local 89*.[23] The case involved an alleged attempt by the union to gain recognition from the Stork Club in Manhattan. The union established a 24-hour picket line with placards advising the public that the Stork Club did not have a union contract, that the club had discriminated against employees for union membership and that union working conditions did not prevail. Subsequent to a declaration by the union that it had no recognitional objectives but was conducting the picket line solely for informational purposes in order to divert Stork Club patrons to union establishments,[24] three truck drivers refused to make deliveries because of the presence of the picket line. The Board sought a temporary injunction in federal district court alleging reasonable belief that the union had violated 8(b) (7) (C).[25] The pivotal issue in the district court was whether or not the union was seeking to force the Stork Club to recognize it as bargaining agent for its employees. The trial court found recognitional objectives and thus held the informational picketing proviso inapplicable.

> "It is difficult, if not impossible to imagine any kind of informational picketing pertaining to an employer's failure or refusal to employ union members or to have a collective bargaining agreement where another object of such picketing would not be ultimate union recognition or bargaining. *In most instances certainly the aim of such informational picketing could only be to bring economic pressure upon the employer to recognize and bargain with the labor organization.*" (Emphasis added.)[26]

It would seem that the trial court indulged in the presumption that a union would not advertise the lack of a collective bargaining agreement unless it desired one. Upon appeal, however, the court of appeals did not apply the presumption:

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23. 46 L.R.R.M. 2577 (1960).

24. The union advised both management and the NLRB of this change in policy.

25. McLeod v. Chefs, Cooks, Pastry Cooks and Ass'ts, Local 89, 181 F. Supp. 742 (S.D.N.Y. 1960).

26. 181 F. Supp. 738, 741 (S.D.N.Y. 1960). The court went on to point out the dilemma in which management would have found itself were it not for 8(b) (7) (C). The employer could not legally recognize the union since it did not represent a majority of his employees. Had not 8(b) (7) (C) been available to him, the pickets could have remained indefinitely. "It was to meet precisely this situation that the amendments were adopted to the Labor Management Relations Act." *Id.* at 748.

> "To say that the carrying of signs stating that the employer has no contract with the union is proof of recognitional picketing is to ignore the letter and, we think, the spirit of the statute. This is so because even if there had been a complete absence of any refusals to deliver induced by the picketing, the same reasoning as used by the court below could be applied to render the picketing unlawful. We think . . . that the statute *requires a determination* whether the picketing has as an objective, one of forcing or requiring the employer to bargain with or recognize the union. In considering this question, the fact that the union carried signs *expressly allowed* by the statute should not be a basis for concluding that the union had a recognitional objective. If however, the allowable picketing had the effect of inducing other employees not to make deliveries, then, the picketing is to be declared unlawful but only to the extent that this mode of disseminating information is proven to have an unlawful effect." (Emphasis added.)[27]

Contrasting these two interpretations of the proviso, it seems that the major point of variance is the question of whether recognitional motives may be presumed from the fact of informational picketing, or whether such objectives must be proved. The trial court apparently employed this presumption because it expected to discover a recognitional purpose in almost every case. The court of appeals did not employ the presumption apparently because the statute expressly protects nonrecognitional, purely informational picketing.[28]

To summarize the appellate court's application of Section 8(b)(7), it may be said that if a recognitional objective be proved, the picketing is subject to regulation under paragraphs (A), (B) or (C) of Section 8(b)(7) without reference to the informational picketing proviso. If a recognitional purpose is not proved, the picketing is protected by the informational picketing

27. McLeod v. Chefs, Cooks, Pastry Cooks and Asst's, Local 89, 46 L.R.R.M. 2577, 2580 (2d Cir. 1960).

28. Some non-organizational motives do, however, suggest themselves. If a non-union employer is able to cut corners on wages and working conditions so as to undersell unionized businesses, the union might have a substantial interest in securing union standards in that competing plant rather than risk having to accept lower wages and sub-standard working conditions in order to allow union employers to meet non-union competition. It might be more advantageous to the union merely to apply economic pressure on the non-union employer in order to force him to raise wages and working conditions than to undertake to organize his employees.

proviso unless it has an effect of causing secondary refusals to deliver, pick up, or perform services. However, regardless of where the burden of proving or disproving recognitional objectives is eventually placed, it appears that courts will find it difficult to infer any motive behind such "informational picketing" other than an intent ultimately to gain recognition as bargaining representative.

There is some confusion as to whether publicity, other than picketing, is to come within the ambit of the informational picketing proviso. The proviso first appears to regulate picketing *or other publicity*, but drops the phrase "or other publicity" the second time picketing is mentioned. Although a careful reading of Section 8(b)(7) suggests that *picketing* is the only activity regulated therein, Representative Griffin was of the opinion that this section was meant to reach "other publicity" as well.[29] His interpretation is supported by some rather ambiguous language in the Conference Committee report to the effect that the *Alloy* case was "overruled" insofar as it is inconsistent with Section 8(b)(7).[30] If the informational picketing proviso reaches publicity also, one would assume that such publicity is protected only so long as it does not cause refusals to pick up, deliver, or perform services by employees of persons other than the primary employer. Though, as has been indicated, the applicability of the informational picketing proviso to publicity other than picketing is questionable in the *primary* situation, there is little doubt that another LMRDA amendment to the Taft-Hartley Act was intended to restrict such publicity when used against a *secondary* employer.

"Top-Down" Pressures Via Secondary Employers

It is not uncommon for a union to seek the cooperation of distributors and retailers in refusing to handle the products of a primary employer until he recognizes the union. If the secondary employer refuses, the union may establish a picket line at his

29. "The second proviso to the subsection [8(b)(7)(C)] makes an exception of picketing or other publicity directed to consumers which is for limited purposes and which does not have the effect of inducing employees of others to refuse to cross the picket line to make pickups and deliveries and to perform services. *Any type of publicity*, including picketing, *which has this effect is not protected by the proviso.*" Hon. Robert P, Griffin (Mich.) in speech regarding report of Conference Committee, 105 CONG. REC. 18153 (Sept. 4, 1959).

30. Presumably the court of appeals decision which disallowed application of the *Curtis* doctrine to the circulation of a "we do not patronize" list. See note 18 *supra* and accompanying textual discussion.

place of business. As a result, his employees may refuse to come to work and his customers may refuse to buy. When the picket line's effectiveness becomes intolerable, the secondary employer may agree to cease doing business with the primary employer until the latter recognizes the union.

Under the original provisions of the Taft-Hartley Act, this type of secondary pressure was prohibited only if the union sought to gain the cooperation of the secondary employer by inducing a *concerted work stoppage.*[31] As rewritten in the LMRDA,[32] Section 8(b)(4) makes it an unfair labor practice to induce even *individual* work stoppages.[33] Furthermore, a union may not "threaten, restrain or coerce" *any person in commerce* in order to realize any of the proscribed objectives enumerated in Section 8(b)(4), which includes, ". . . (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer . . . *or to cease doing business with any other person.*"[34] Presumably, the union cannot bring pressure on the suppliers, agents, independent contractors, or customers of the secondary employer in order to force him to cease doing business either with his customers or with the primary employer who is involved in the dispute.[35] If applied with the breadth this statutory language indicates, Section 8(b)(4) as amended spells the end of virtually every lawful form of secondary pressure.

To Subsection 8(b)(4)(B), the Conference Committee added a proviso, "Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any *primary* strike or primary picketing." (Emphasis added.)[36]

31. Labor Management Relations Act, § 8(b)(4), 61 STAT. 144, 145 (1947). See NLRB v. International Rice Milling Co., 341 U.S. 665 (1951).

32. 73 STAT. 519, 542-543, § 704(a) (1959), 29 U.S.C. § 158(b)(4)(i) (Supp. 1959).

33. *Ibid.*: "It shall be an unfair labor practice for a union . . . (4)(i) to engaged 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, material or commodities or perform any services. . . ."

34. 73 STAT. 519, 542-543, 29 U.S.C. § 158(b)(4)(i)(B) (1959).

35. See Senator Goldwater's comments on this point in 105 CONG. REC. A8523 (Daily ed. October 2, 1959).

36. 73 STAT. 519, 543, 29 U.S.C. § 158(b)(4)(B) (1959). Explaining this proviso, the Conference Committee report said: "[T]he purpose of this provision is to make it clear that the changes in Section 8(b)(4) do not overrule or qualify the present rules of law permitting picketing at the site of a primary labor dispute. This provision does not eliminate, restrict or modify the limitations on

> "This proviso was added in response to fears expressed by some union attorneys that the enlargement of Section 8(b)(4)(i) to include union inducement of individual employees, such for example, as inducement of an individual truck driver not to cross a picket line might have the effect of prohibiting even primary picketing."[37]

Then to the entire Section 8(b)(4) was added:

> "*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 consumers 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, as long as such publicity does not have *an effect* of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services at the establishment of the employer engaged in such distribution." (Emphasis added.)[38]

As the AFL-CIO interpreted this proviso:

> "It apparently is the intent of Congress, that if a union is engaged in a primary labor dispute with employer A who makes widgets, which are sold at an establishment not owned by A, the union may handbill the establishment, or otherwise publicize the facts, but may not picket. Even the handbilling or other truthful publicity ceases to be permissible, however, if it has an effect of inducing any employee, other than the employee of A, to refuse to make deliveries or perform services at the establishment where the product is sold."[39]

In summary, where a union seeks to gain recognition from a primary employer, it may not follow his products to a secondary distributor or retailer and there *picket* with the objective of forc-

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picketing at the site of a primary labor dispute that are in existing law." H.R. No. 1147, 86th Cong., 1st Sess., § 704a, p. 38 (1959).

37. AFL-CIO, Analysis of the *Labor Management Reporting and Disclosure Act of 1959*, p. 35.

38. Labor Management Reporting and Disclosure Act, § 704(a), 73 STAT. 519, 543, 29 U.S.C. § 158(b)(4) (Supp. 1959). See H.R. No. 1147, 86th Cong., 1st Sess., § 704a, p. 38 (1959).

39. AFL-CIO, Analysis of the "Labor Management Reporting and Disclosure Act of 1959," p. 35.

ing the retailer to cease selling the product to his customers or to cease ordering the product from the primary employer. However, the union may *publicize* the fact of its dispute with handbills, "we do not patronize" lists, newspaper advertisements, and the like, but such publicizing becomes an unfair labor practice and may be enjoined if as a result any person employed by anyone, save the primary employer, refuses to pick up, deliver or transport any goods, or refuses to perform services at the establishment of the distributor or retailer.

CONSTITUTIONALITY

Most of the famous free speech cases[40] of the twenties dealt with protections of political and religious speech under the first amendment. From these decisions emerged the classic "clear and present danger" test first propounded by Justice Holmes in *Schenck v. United States.*[41] According to that test, individual speech may not be abridged unless there is a showing that the speech causes a clear and present danger of a substantive evil under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the marketplace of public opinion.[42] Then in 1941, in *Thornhill v. Alabama,*[43] the United States Supreme Court came forth with a definitive pronouncement of first amendment protection of free speech in the context of a labor dispute:

> "The freedom of speech and press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern. . . . Freedom of discussion, if it would fulfill its historic function in this nation must embrace all issues about which information is needed or appropriate to enable members of society to cope with the exigencies of their period.
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> "In the circumstances of our times, the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."[44]

40. Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1925); Schenck v. United States, 249 U.S. 47 (1919).
41. 249 U.S. 47, 52 (1919).
42. *Id.* at 52.
43. 310 U.S. 88 (1941).
44. *Id.* at 101, 102. While engaged in picketing, defendant Thornhill had dissuaded another from going to work. He was accused of violating an Alabama statute which banned virtually all publicizing of the facts of a labor dispute near

Picketing

In subsequent decisions, the *Thornhill* doctrine has been narrowed as regards picketing. The Supreme Court has acknowledged that picketing often persuades because of non-speech or "signal characteristics" due to the physical presence of the picket line, irrespective of what message appears on the placards.[45] For this reason, picketing has come to be regarded as "more than free speech,"[46] and thus not as fully protected by the first amendment as other modes of expression. In a recent pronouncement the Supreme Court summarized these post-*Thornhill* picketing decisions:

> "This series of cases established a broad field in which a state, in enforcing some public policy, whether of its criminal or civil law, and whether announced by its legislature or its courts could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy."[47]

It is clear from Section 8(b)(7) that according to Congress, "top-down" organizing is contrary to public policy. More specifically, it is contrary to public policy for a union to picket a primary employer in an attempt to force him to recognize the union as sole bargaining agent without prior approval from his employees. Though not quite so evident from the statute, it may be said, nevertheless, that according to the second proviso to Section 8(b)(7)(C), purely informational picketing without recognitional objectives becomes contrary to public policy and is therefore enjoinable whenever it causes employees of other employers to refuse to deliver, pick up, or perform services. Therefore, it is submitted that insofar as these new restrictions apply to *picketing*, they should be upheld as constitutional. But

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an employer's place of business. In holding the statute unconstitutional on its face, the United States Supreme Court said: "Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may be persuaded to take action inconsistent with its interests." *Id.* at 104.

45. Mr. Justice Douglas in Bakery & Pastry Drivers v. Wohl, 315 U.S. 769 (1942): "Picketing by an organized group is more than free speech because 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."

46. *Ibid.*

47. International Brotherhood of Teamsters, Local 695 v. Vogt, 354 U.S. 284, 293 (1957).

the constitutionality of the restrictions on *publicity*, other than picketing, is another matter.

Publicity Other Than Picketing

Apparently, the *Thornhill* decision has not been subsequently modified as regards publicity other than picketing.[48] Accordingly, it would seem that suppression of publicity, other than picketing, would be justified only when such publicity constitutes a clear and present danger of a substantive evil.

Assume that a union, attempting to organize from the "top-down," follows the primary employer's product to independent retail outlets and there distributes handbills asking the public not to patronize the retailer so long as he handles that product. Assume further that the union circulates a "we do not patronize" list among its membership and among consumers sympathetic to labor, requesting that they do not purchase the products of the primary employer and that they refuse to patronize retailers who continue to sell that product. Under the terms of Section 8(b) (4), either of these modes of publicizing the dispute would become an unfair labor practice and could be enjoined if as a result any individual not employed by the primary employer should, in the course of his employment, refuse to pick up, deliver or transport any goods, or refuse to perform services at the establishment of an employer engaged in the distribution of the primary employer's product. Should the constitutionality of such suppression of publicity other than picketing be challenged, it seems that on the basis of the *Thornhill* decision, application of the clear and present danger test would be appropriate. The Supreme Court has traditionally reserved to itself final determinations as to whether certain speech constitutes a clear and present danger of a substantive evil. However, there is language in *American Communications Ass'n v. Douds*[49] tending to indicate that, in the context of interstate commerce, the Supreme Court will be most reluctant to overrule the judgment of Congress in this respect.

"It should be emphasized that Congress, not the courts, is

48. Apparently it is still the law that "abridgement of such discussion can be justified only where the clear and present danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the marketplace of public opinion." Thornhill v. Alabama, 310 U.S. 88, 104 (1941).

49. 339 U.S. 382 (1950).

> primarily charged with determination of the need for regulation of activities affecting interstate commerce. This Court must, if such regulation unduly infringes personal freedoms, declare the statute invalid under the First Amendment's command that the opportunities for free public discussion be maintained. But insofar as the problem is one of drawing inferences concerning the need for regulation of particular forms of conduct from conflicting evidence, *this Court is in no position to substitute its judgment as to the necessity* or desirability of the statute for that of Congress." (Emphasis added.)[50]

In attempting to defend the constitutionality of the proviso, the government might be expected to argue that since Congress, in exercising its acknowledged expertise in such matters, has determined the necessity of curbing publicity other than picketing which results in secondary work stoppages, the Supreme Court is in no position to substitute its judgment for that of Congress as to the necessity of the publicity proviso. Followed to its logical, if dubious, conclusion, this line of reasoning would hold that whenever Congress imposes restrictions on freedom of speech, in the area of interstate commerce, it has impliedly determined the existence of a clear and present danger, which determination may not be disputed by the Supreme Court.

In opposition, the union might contend that nowhere in the legislative history of this proviso was the *danger* of such publicity even discussed. The proviso was passed as an accommodation to the secondary employer, to save him the inconvenience and loss of business accompanying refusals to deliver, pick up, or perform services. According to *Thornhill,* such "inconvenience" is insufficient to justify intrusions upon free publicity of labor disputes by means other than picketing.[51] Cessation of deliveries may be inconsistent with the interests of a secondary employer but the Supreme Court has repeatedly held that freedom of speech cannot be abridged merely because the effects of the speech are *inconvenient* — the effects must be dangerous, and clearly so.

For the reasons set forth in this latter argument, it is sub-

50. *Id.* at 400.

51. *Id.* at 104: "[T]he group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that other may be persuaded to take action *inconsistent* with its *interests.*"

mitted that the union should prevail, and that the publicity proviso to Section 8(b)(4) should be declared unconstitutional.[52]

CONCLUSIONS

Though reportedly the informational picketing proviso and publicity provisos were added as concessions to pro-labor factions,[53] their application may prove most convenient to management. For example, if a trucker refuses to deliver through a purely informational picket line, the picketing may be enjoined without a showing that employee rights have been violated, as would have been required by the NLRB's *Curtis* doctrine. A similar easy remedy is supposedly available to stop secondary publicity resulting in secondary work stoppages. Moreover, these provisos seem open to widespread abuse by management, as noticed by Congressman Roosevelt:

> "[O]ne does not have to be a lawyer or legal draftsman to see how empty and meaningless this so-called compromise language is. Surely one can readily see how a primary employer could break such informational picketing. All he would have to do is to get a fellow employer, not kindly disposed to trade unions, to instruction [sic] his secretary — say — to refuse to deliver a message to the primary employer on the pretext that her service would violate her conviction aroused by the picket line. And there you have it. The picket line would be declared unlawful . . . . We are faced with the same language gimmick — regarding the secondary boycott provisions."[54]

However, Section 8(b)(7) does implement the basic concept of the NLRB's *Curtis* doctrine — that recognitional picketing by an uncertified union tends to restrain or coerce employees in the exercise of the rights of free choice guaranteed by Section 7. On the other hand, Congress has probably failed in its efforts to curb "top-down" pressures exerted through publicity other than picketing because of first amendment guarantees of free speech.

As the rather complex provisions of Section 8(b)(7) are disentangled by the courts, perhaps the restrictions on primary

52. The same reasoning would apply to the informational picketing proviso to Section 8(b)(7)(C) if the latter is construed to apply to publicity other than picketing. See discussion of this possibility at page 255 *supra*.

53. See Senator Kennedy's remarks in 105 CONG. REC. 17898 (Sept. 3, 1959).

54. 105 CONG. REC. 18142 (Sept. 4, 1959).

picketing will become useful in prohibiting most forms of "top-down" organizing. It is submitted, however, that perhaps the same result could have been realized by amending Section 8(b)(1)(A) specifically to include peaceful picketing, thereby implementing the NLRB's *Curtis* doctrine without resorting to the intricacies of Section 8(b)(7).

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