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Cleveland Moving Picture Operator's  
Local No. 160  
(Ashtabula Entertainment Corp.)  
Case 8-CP-324

This case was submitted for advice on whether the Union's recognitional picketing fell outside the protection of the second proviso to Section 8(b)(7)(C), either because other contemporaneous picketing and handbilling were in part untruthful, or because the picketing may have a prohibited proviso effect.

#### FACTS

The Charging Party Employer operates a cinema theater which it recently purchased from a predecessor. The predecessor had employed four parttime projectionists represented by the Union. When none of the predecessor employees was hired by the Employer, the Union picketed and handbilled the Employer's theater.

The picketing began on the first evening of the Employer's operation, December 9, 1988, and continued until January 25, 1989. Pickets carried a printed sign reading, "This theater does not hire Union projectionists, [Union's name]." Several handwritten signs also were carried by high school students formerly employed by the predecessor. These signs read, "22 Terminated without notice;" "Unfair; New Owners Will Not Talk to or Hire Past Employees;" and "Do Not Patronize This Theater, Unfair to Local School Students." Various handbills also were distributed. Some handbills contained reprints of local newspaper stories about the controversy. Other handbills contained Section 8(b)(7)(C) proviso language and further stated, "This picketing is not to prevent deliveries from being made or to stop employees from working." One handbill in particular asserted that Union trained projectionists are necessary to ensure customer safety. The Employer contends, without contradiction, that this last assertion is not truthful.

On the first evening of operation, the Employer experienced difficulty in operating the theater projectors. The Employer contacted the predecessor and complained about

the equipment. The predecessor had a service and maintenance agreement for its equipment with A.S.C. Technical Services (ASC). The predecessor therefore asked an ASC employee if he would go to the theater to assure the Employer that the equipment was operational. The ASC employee agreed and did so.<sup>1</sup>

Shortly thereafter, the Union advised ASC that the Union was having problems with the Employer and would appreciate any help ASC could provide. The Union did not specifically ask ASC to refrain from entering into a service contract with the Employer. Nevertheless, when the Employer on January 20, 1989, inquired into the possibility of obtaining a service contract, ASC declined "because of the labor unrest."

Around January 25, the Employer's theater was broken into and vandalized. The Employer contracted with independent cinema service contractor Smith to repair the damage. The Employer asserts that because of ASC's refusal to accept its business, the Employer expended two full days to locate Smith to repair and reopen the theater. It appears, however, that Smith was listed in the commonly used Independent Theater Owners Directory. It also appears that Smith charges a lower rate for its repair services than does ASC.

#### ACTION

The charge should be dismissed, absent withdrawal, because the Union's picketing fell within proviso protection.

Where a Union has engaged in recognitional picketing for more than thirty days without filing a Section 9(c) petition, the picketing violates Section 8(b)(7)(C) unless it can be shown to be informational picketing within the scope of the publicity proviso. To fall within the proviso, picketing must: (1) be for the purpose of truthfully advising the public that an employer does not employ members of or have a contract with a union; and (2) not have the effect of inducing a work stoppage (the "proviso effect").<sup>2</sup>

In order to meet the first proviso requirement, the pickets' message need not iterate the precise language of

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<sup>1</sup> Before crossing the Union's picket line, the ASC employee advised both the Union and the individual picketers that he was going into the Employer's theater solely to look at the machinery, and not to operate it. The ASC employee also is a member of the Union.

<sup>2</sup> Construction Laborers, Local 1140 (Lanco Corp.), 227 NLRB 1247, n. 2 (1977); Local 429, IBEW (Sam M. Melson d/b/a Sam Melson, General Contractor), 138 NLRB 460, 462 (1962); Local Joint Executive Board of Hotel Employees (Leonard Smitley et al. d/b/a Crown Cafeteria), 135 NLRB 1183, 1184-85 ((1962), enf'd. 327 F.2d 351 (9th Cir. 1964)).

the proviso, and need only "embod[y] in substance the language of the publicity proviso."<sup>3</sup> The Board has found language such as "nonunion" or "nonunion conditions" sufficient to fall within the scope of the proviso.<sup>4</sup> Further, the mere fact that proviso protected picketing is occurring simultaneously with other Union activities for recognition, bargaining, or organization, does not remove proviso protection.<sup>5</sup> For example, area standards language does not remove picketing from the scope of the proviso if the signs also state that the picketed employer does not employ members of or have a contract with a union.<sup>6</sup> On the other hand, in cases where the picket signs contained only an area standards message, the picketing has been held not to be protected by the second proviso.<sup>7</sup>

In our case, the picket signs, and some of the picketers' handbills, contained the precise statutory proviso language. It seems clear that the predominant picketing message here fell under the proviso. Therefore, the mere fact that some picket signs and handbills also contained additional messages would not remove proviso protection. Nor was proviso protection lost merely because one of the handbills untruthfully claimed that Union trained projectionists are necessary for customer safety. The proviso sanctions publicity for "truthfully advising the public (including consumers) that an employer does not employ members of or have a contract with, a labor organization. . . ." Under a plain, literal reading of this language, the Union's publicity need not be truthful in any other respect. Thus, the Union's misstatement here was not inconsistent with proviso protection.<sup>8</sup>

Finally, we concluded that ASC's refusal to enter into a service contract with the Employer did not constitute a prohibited proviso effect. First, it is not clear that ASC's refusal was in response to the Union's proviso

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<sup>3</sup> Retail Clerks, Local 1404 (Jay Jacobs Downtown, Inc.), 140 NLRB 1344, 1346 (1963).

<sup>4</sup> See, e.g., Lanco Corp., supra, 227 NLRB 1247 at n. 2 ("does not pay union wages and conditions"); Crown Cafeteria, supra, 135 NLRB at 1184-85, 130 NLRB 570, 581 (1961) ("This Establishment is NON-UNION.")

<sup>5</sup> Crown Cafeteria, supra, 135 NLRB at 1185.

<sup>6</sup> See Jay Jacobs Downtown, supra, 140 NLRB at 1345-46; ("Jay Jacobs Non-Union. . . Help us protect and better our wage standards and working conditions").

<sup>7</sup> See, e.g., Local 275, Laborers International (S.B. Apartments, Inc.), 209 NLRB 279, 280 (1974) ("Workers. . . do not receive wages and working conditions as good as Local 275"); Building & Construction Trades Council of Philadelphia (Fischer Construction Co.), 149 NLRB 1629, 1644 (1964), enf'd. per curiam, 359 F.2d 62 (3d Cir. 1966) ("THIS BUILDER Is Destroying Building Industry Standards"); IBEW, Local 113 ("I.C.G., Electric, Inc.), 142 NLRB 1418, 1419 (1963) ("I.C.G. HAS SUBSTANDARD WORKING CONDITIONS").

<sup>8</sup> Cf. Hotel & Restaurant Employees Union, Local 717, 223 NLRB 1058, 1063 (1976) (ALJ's contrary statement was mere dictum).

picketing. When ASC refused to enter into a contract with the Employer, it did not specifically refer to the Union's picketing. Moreover, an ASC employee did cross the picket line on December 9 to assure the Employer that its equipment was operational. Second, even assuming that the Union's picketing caused ASC to withhold its services, this was not considered a sufficient disruption of the Employer's business to amount to prohibited proviso effect.

In Barker Brothers,<sup>9</sup> the Board stated:

". . . a quantitative test concerning itself solely with the number of deliveries not made and/or services not performed is an inadequate yardstick for determining whether to remove informational picketing from the proviso's protective ambit. . . it would be more reasonable to frame the test in terms of actual impact on the picketed employer's business. . . whether the picketing has disrupted, interfered with, or curtailed the employer's business.<sup>10</sup>

In our case, there is absolutely no evidence that the Union's picketing disrupted any deliveries to the Employer's business. Concededly, the Union appealed to ASC for any help it could provide, and ASC refused to enter into a service contract. However, there is insufficient evidence to show that ASC's refusal in fact disrupted or curtailed the Employer's business. It is not clear that the Employer's theater was closed longer than necessary because of the unavailability of ASC. Further, based upon a cost comparison between the Employer's current service company and ASC, it does not appear that the Employer has suffered any economic losses. Since "the General Counsel must do more than simply show that one or more stoppages or delays have occurred,"<sup>11</sup> there is insufficient evidence to show that the Union's picketing here lost the proviso's protection.

H.J.D.

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<sup>9</sup> Retail Clerks Unions Local 324 (Barker Bros. Corp.), 138 NLRB 478 (1962).

<sup>10</sup> Id. at 491. The Board also made it clear that it is the General Counsel's burden of proof to show "that the picketing did in fact interfere with, disrupt, or curtail the employer's business."

<sup>11</sup> Barker Brothers, supra, 138 NLRB at 491, note 39.