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Labor Law--Ambulatory Employer--Picketing

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the company, makes commitments within the actual or apparent scope of his authority. *Bond v. National Fire Ins. Co.*, 77 W. Va. 736, 88 S.E. 389 (1916). This is true whether the company actually knows of the adjuster's acts or not, and through him conditions in the policy may be waived, including the right to subrogation. *Everett v. Metropolitan Life Ins. Co.*, 129 Neb. 386, 261 N.W. 575 (1935); *Weber v. United Mutuals Co.*, 75 N.D. 581, 31 N.W.2d 456 (1948); *Powers v. Calvert Fire Ins. Co.*, 216 S.C. 309, 57 S.E.2d 638 (1950).

The principal case is of interest primarily because it settles, in this jurisdiction, a question heretofore unadjudicated. The soundness of the decision is unquestionable as evidenced by the cases discussed above. The case will serve as a convenient starting point on questions of subrogation involving tort liability, decisions on which, as the court noted, are lacking in West Virginia.

R. H. R.

LABOR LAW--AMBULATORY EMPLOYER--PICKETING.—Suit by a sign painting corporation to enjoin peaceful picketing by a union in front of a service station at which employees of the corporation were painting a sign. The picketing climaxed a long struggle to unionize the corporation's employees. Previously, picketing had been done at the company's premises. The placard carried by the single picket stated that the men working on the sign were not members of the local sign painters' union. Picketing occurred both while the men were working and after they had left. While the picketing continued, the service station did no business. *Held*, reversing the lower court, that the injunction should not have been issued, since this was peaceful primary picketing protected by the free speech provision of the Federal Constitution. *Ohio Valley Advertising Corp. v. Union Local 207*, 76 S.E.2d 113 (W. Va. 1953).

The legality of peaceful picketing, in the absence of a strike, was doubted before the decision in *Thornhill v. Alabama*, 310 U.S. 88 (1940). That case established that peaceful picketing is protected under the Fourteenth Amendment, but can be enjoined where a clear and present danger of substantive evil exists. It was said that that states might "set the limits of permissible contest open to industrial combatants" subject only to the constitutional

restriction. The question left unanswered was whether the clear and present danger proviso was the sole basis for state regulation.

Subsequent decisions by the Supreme Court, recognizing that picketing is something in addition to free speech, have said that the states are far from impotent in defining proper purposes and locations of picketing in accord with the state's public policy. *Local No. 10, United Ass'n of Journeymen Plumbers & Steamfitters v. Graham*, 345 U.S. 192 (1953) (picketing amounted to illegal coercion of employer to discharge his nonunion employees); *Building Service Employees International Union v. Gazzam*, 339 U.S. 532 (1950) (coercion of employer to impose union on employees); *International Brotherhood of Teamsters v. Hanke*, 339 U.S. 470 (1950) (picketing of a self-employed person); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949) (picketing encouraged illegal restraint of trade); *Carpenters & Joiners Union of America, Local 213 v. Ritter's Cafe*, 315 U.S. 722 (1942) (picketing of one industrially unconnected with dispute violated state's anti-trust law).

In each of these cases picketing per se was not prohibited, but only that which had as its purpose the contravention of some rule of public policy either legislatively or judicially declared. Furthermore, public policy has varied from state to state, e.g., not all states have found picketing of a self-employed person objectionable, *Senn v. Tile Layers Protective Union*, 301 U.S. 468 (1937), nor of one remotely connected with the dispute. *Galler v. Slurzberg*, 22 N.J. Super. 477, 92 A.2d 89 (1952) (ultimate consumer of primary employer's product; dictum).

In Section 8(b)(4)(A) of the Labor-Management Relations Act, 61 STAT. 141 (1947), 29 U.S.C. § 158 (Supp. 1951), federal policy with respect to restricting picketing has been declared, and the decisions applying and interpreting this section have similarly upheld the policy when the defense of infringing upon free speech was used or available. See *NLRB v. Denver Building & Construction Trades Council*, 314 U.S. 675 (1951). Under the act secondary picketing has been made an unfair labor practice except under certain circumstances. In the common-situs cases the picketing to persuade the nonunion employees to the union's side was held to be primary activity, although the incidental effect was a strike by the secondary employer's workers. *United Electrical, Radio, & Machine Workers (Ryan Construction Corp.)*, 85 NLRB 417 (1949).

Picketing of an ambulatory employer, that is, one whose workers provide services on the premises of another employer, has recently been sanctioned in *NLRB v. Service Trade Chauffeurs*, 191 F.2d 65 (2d Cir. 1951). Such picketing was said not to be an unfair labor practice under Section 8 (b) (4) (A) if “ (a) The picketing is strictly limited to times when the situs of dispute is located on the secondary employer’s premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the situs; (c) the picketing is limited to places reasonably close to the location of the situs; and (d) the picketing discloses clearly that the dispute is with the primary employer.” *Id.* at 68.

The court in the principal case stated that these requirements had been met. *Bakery & Pastry Drivers & Helpers v. Wohl*, 315 U.S. 769 (1942) was cited as being in point. That case stands for the proposition that picketing may be protected when the subject matter of the dispute is followed. In the *Wohl* case picketing was threatened of the bakery products of the primary employer on sale in certain *retail* stores. In the principal case apparently the sign, the product of the primary employer, was picketed after the workers had left. However, the service station was an *ultimate consumer* of the product.

In the absence of controlling federal legislation, the New York decisions apply the unity of interest concept, implicit in the *Wohl* case, that allows picketing of the retailer, because he is deemed a party to the labor dispute. Nevertheless, the cases have refused to extend the concept to permit picketing of the ultimate consumer of the primary employer’s product, *Weil & Co. v. Doe*, 168 Misc. 211, 5 N.Y.S.2d 559 (1938), or to allow general picketing of the retailer, *Goldfinger v. Feintuch*, 276 N.Y. 281, 11 N.E.2d 910 (1938). The case of *Enterprise Window Cleaning Co. v. Slowuta*, 273 App. Div. 662, 79 N.Y.S.2d 91 (1st Dept. 1948), refused to allow picketing of ambulatory workers who washed windows on the premises of a secondary employer. The court, however, did not consider the permissibility of picketing the workers because it was searching for some tangible product of the work which could be properly picketed. Not finding any, picketing was enjoined. Perhaps, at the present time the New York courts might be persuaded by the *Service Trade Chauffeurs* case, *supra*, to allow picketing of the ambulatory workers.

The restrictions against picketing the ultimate consumer and picketing the retailer in order to encourage the public to withdraw totally its patronage from him seem reasonable. The policy behind them is the same declared by the Texas court in the *Ritter's Cafe* case, *supra*, *viz.*, that the picketing should be confined to those industrially related to the primary employer and unmistakably show that the dispute is with the latter. The public interest in the free flow of commerce is at stake. It will be remembered that a prime requirement in the ambulatory employer picketing cases is also that the placards show with whom the real dispute is.

In summary, the criterion is not so much *can* the secondary employer do something which will influence the primary employer favorably for the union, as *will* the court allow picketing to occur before the secondary employer's premises when he is relatively remote from the dispute, although not a neutral of purest ray. Perhaps in the principal case picketing of the service station which dealt only briefly and occasionally with the primary employer should not have been tolerated while the men working on the sign were absent. Two recent cases are indicative of a trend to forbid product picketing altogether. *Way Baking Co. v. Teamsters & Truck Drivers Local No. 164*, 335 Mich. 478, 56 N.W.2d 357 (1953); *Capital Service v. NLRB*, 204 F.2d 848 (1953).

R. L. D.

LABOR LAW—COLLECTIVE BARGAINING—RENT ON COMPANY-OWNED HOUSES.—Employer announced a rent increase on all of its dwellings leased to employees. Employees protested this unilateral action, deeming it to be a "pay cut", and stated that the matter of house rent must be taken up with the union as a mandatory subject of collective bargaining. The NLRB in *Lehigh Portland Cement Co.*, 101 NLRB No. 110 (Nov. 24, 1952), upheld employees' contention. [Apparently, in *Bemis Bro. Bag Co.*, 96 NLRB 728 (1951), the Board opined rent to be *ipso facto* a mandatory subject of collective bargaining.] *Held*, on review, that the employer must bargain collectively on the proposed rent increase by virtue of §§ 8 (d), 9 (a) of the National Labor Relations Act, 49 STAT. 449 (1935), 29 U.S.C. § 151 (1946), as amended by Labor Management Relations Act 1947, 61 STAT. 136 (1947), 29