Volume 58 | Issue 4 Article 6

June 1956

Anti-Picketing Injunctions in State Courts As Affected By Free Speech

E. W. C.
West Virginia University College of Law

STUDENT NOTES

Anti-Picketing Injunctions in State Courts as Affected by Free Speech

A recapitulation of the treatment of injunctions against picketing by the Supreme Court and our state courts reveals a change of emphasis over the past fifteen years. In 1940, picketing was raised on a pedestal as a sacred right of free speech. However, a gradual transition has taken place, weakening and limiting that view, as the courts have replaced it with a test of looking to the objective of the picketing and allowing picketing only if the purpose was persuasive and lawful, while enjoining it if coercive[1] and unlawful. It will be the purpose of this note to collect several of the significant Supreme Court cases which have pointed the way for this shift in criterion, compare the few West Virginia cases in point, and look at some of the most recent decisions of other state courts of last resort, in an effort to see where this change has led us in the law of picketing. While the labor relations acts of Congress have played an equally important role in labor law, this note will be concerned only with cases which originated under state law.[2]

An important early case on this subject was *Senn v. Tile Layers Protective Union*,[3] which held that state authorization of peaceful picketing did not violate the fourteenth amendment. Mr. Justice Brandeis, in writing the majority opinion in the 5-4 decision, set forth a dictum that the Court felt freedom of speech guarantees members of a union the right to make known the facts of a labor dispute, and further stated, ". . . the picketing must be peaceful; and that term as used implies not only absence of violence, but absence of any unlawful act."[4]

Those two factors, freedom of speech and lawfulness of the picketing, have had a great influence on the courts in this field. The first was given great emphasis by the Supreme Court for some

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[1] On the coercive element in picketing, see Jones, *Picketing and Coercion: A Jurisprudence of Epithets;* Gregory, *A Defense;* Jones, *A Reply;* Gregory, *A Conclusion,* 39 Va. L. Rev. 1023-1069 (1953).

[2] For a discussion of picketing—free speech under the Labor Management Relations Act (Taft-Hartley Act) see Note, 35 A.L.R.2d 443 (1954).

[3] 301 U.S. 468 (1937).

[4] *Id.* at 479.

time, but in later years the second has gradually displaced it until many state courts have almost completely dropped the freedom of speech and its clear and present danger test, in favor of a wholly-controlling test of lawfulness of purpose.

Thornhill v. Alabama[5] was the first direct holding that picketing itself is such an element of communication that it is protected by the first and fourteenth amendments. The case invalidated as violative of the right of free speech a state law which prohibited all picketing, with Mr. Justice Brandeis's dictum of the *Senn* case being used for authority by the 8-1 majority opinion.[6] The case gave very little indication how the Court might react to limitations on picketing short of complete prohibition, nor did another case decided the same day,[7] but rather the case's significance lies in the fact that the Court was overthrowing sixty years of precedent, replacing tort law with the fourteenth amendment as the basis of picketing law.[8]

In the following year the Supreme Court met the picketing question again in *Milk Wagon Drivers Union v. Meadowmoor Dairies.*[9] The dairy sold its products both door to door through union employees and to retail stores. The union picketed the dairy because the stores were undercutting the union-delivered price. An injunction granted by the supreme court of Illinois was affirmed because the picketing had had some violence in its background which the Court felt so tainted the picketing that any continued picketing would constitute coercion. Thus we see the first limitation on the *Thornhill* generality: picketing blended with violence is not constitutionally protected. Another case decided the same day, *AFL v. Swing,*[10] held the constitutional guarantee of freedom of discussion was infringed by the common law of Illinois when that state court forbade peaceful persuasion through picketing merely because there was no immediate employer-employee dispute. The opinion reiterated the *Thornhill* position, and added that "stranger" picketing by non-employees must be protected because of the "interdependence of economic interest of all engaged in the

[5] 310 U.S. 88 (1940).

[6] The dissent was by Mr. Justice McReynolds, the only remaining member of the 4-man dissent in Senn v. Tile Layers Protective Union.

[7] Carlson v. California, 310 U.S. 106 (1940).

[8] See Tanenhaus, *Picketing as a Tort: The Development of the Law of Picketing from 1880 to 1940,* 14 U. PITT. L. REV. 170 (1953).

[9] 312 U.S. 287 (1941).

[10] 312 U.S. 321 (1941).

same industry."[11] The Court found there had been violence involved, but the state-court decree had enjoined even peaceful picketing by strangers and the Court distinguished the *Meadowmoor* holding on that basis.

In *Blossom Dairy v. International Brotherhood of Teamsters,*[12] the West Virginia court was called upon to decide the propriety of an injunction against teamsters' picketing aimed at causing the dairy to breach a contract with an independent employee union. The court referred to the binding effect of the Supreme Court cases, the *Thornhill* and *Swing* decisions plus a per curiam reversal of a New Jersey injunction,[13] and concluded, ". . . accordingly, following these decisions, we must hold the plaintiff was not entitled to an injunction on the ground that the picketing would tend to bring about the breach of its contract with the [independent union.]" An earlier West Virginia case to the contrary was distinguished[15] as the court seemed to feel that peaceful picketing was such an inherent part of free speech that the purpose of the picketing was unimportant.

The next Supreme Court case in this field of labor law, *Carpenters & Joiners Union v. Ritter's Cafe,*[16] took another bite out of the *Thornhill* case. The cafe had been picketed because the owner was employing a nonunion contractor to erect a building wholly unconnected with the cafe. The Court, 5-4, held the Texas court had committed no error in enjoining such action as an illegal restraint of trade in violation of the Texas anti-trust statute. The Court felt that picketing a businessman to get him to exert economic pressure upon his building contractor in an effort to unionize that contractor's employees was outside the free-speech immunity, although the Court did not establish any rule as to how close the relationship had to be. A beginning of the trend to downgrade the importance of the free discussion element is indicated in the majority opinion's reference to picketing as an "industrial weapon," and the stress placed upon the *purpose* of the union activity rather than the qualities of communication.

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[11] *Id.* at 326.

[12] 125 W. Va. 165, 23 S.E. 2d 645 (1942).

[13] Journeyman Tailors Union v. Miller's, 312 U.S. 658 (1940).

[14] 125 W. Va. 165, 172, 23 S.E.2d 645, 649 (1942).

[15] Parker Paint & Wall Paper Co. v. Local Union No. 813, 87 W. Va. 31, 105 S.E. 911 (1921). For an opinion that the distinction is "not convincing," see Mahan, *Government by Injunction?*, 52 W. VA. L. REV. 217, 226 (1950).

[16] 315 U.S. 722 (1942).

Bakery & Pastry Workers v. Wohl[17] threw out an injunction by the New York Court of Appeals which prohibited a union from picketing a bakery peddler's supplier and customers because the Court found, first, no unlawful conduct and, second, no abuse of free speech. A concurring opinion distinguished the *Ritter* case by saying these businesses were directly involved in the dispute. *Cafeteria Employees Union v. Angelos*[18] combined the *Meadowmoor* principle that peaceful picketing can be completely prohibited when enmeshed with violence, and the rationale of the *Wohl* and *Ritter* holdings that where there exists a close economic relation between the pickets and the one picketed, no such complete ban is proper. The cafeteria had no employees, only partner-owners, but an injunction against picketing that establishment was held a violation of the fourteenth amendment. The picketing was termed peaceful, for although there had been some misrepresentation and insults to customers, no actual violence was shown.

The Supreme Court then took a six-year respite from picketing cases, with the preceding cases left as a guide to state courts to the effect that no total prohibition of picketing, whether by employees or strangers, can be effective even against self-employers, but violence equalling coercion is not protected nor is the application of economic pressure upon someone not connected with a labor dispute. The state court decisions during that period began to rely heavily upon the lawfulness of purpose test, rather than stressing the *Thornhill* case's right of free speech. One leading case noted that, "It is significant that in those cases where the Supreme Court identified picketing with free speech, no unlawful purpose of the picketing was involved,"[19] and continued, ". . . a strike may be illegal because of its purpose, however orderly the manner in which it is conducted."[20] The court concluded, "[n]either do we believe that free speech is involved where the labor objective is illegal."[21]

Giboney v. Empire Storage & Ice,[22] found a unanimous Supreme Court sustaining a decree which had enjoined peaceful pick-

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[17] 315 U.S. 769 (1942).

[18] 320 U.S. 293 (1943).

[19] Peters v. Central Labor Council, 179 Ore. 1, 10, 169 P.2d 870, 874 (1946).

[20] *Ibid.*, citing Dorchy v. State of Kansas, 272 U.S. 306, 311 (1926).

[21] *Ibid.*

[22] 336 U.S. 490 (1949).

eting carried on for the purpose of coercing ice distributors not to sell to nonunion peddlers, when the picketing violated the antitrust law of the state. Again the purpose was unlawful by virtue of a statute, as in the *Ritter* case. The next year, in *Hughes v. Superior Court of California*,[23] the Court upheld an injunction which prohibited picketing of stores to enforce a demand for the hiring of clerks on a racial basis proportional to customers. The California court had found such a purpose to be contrary to a judicially-established state public policy against discrimination, and the Supreme Court affirmed the injunction, finding no infringement on free speech when the purpose of the picketing openly opposed state public policy, even though not statutory.

Two other decisions delivered on the same day as the *Hughes* case gave further impetus to the unlawful purpose doctrine. The strongest of the day's decisions in this respect, *Teamsters Union v. Hanke*,[24] affirmed a supreme court of Washington holding enjoining peaceful picketing of business places having no employees. There had been no prior public policy in the state against such action, judicially or legislatively announced, but the Washington court felt the purpose objectionable, enjoined it, and the Supreme Court affirmed it. The majority opinion seemed to wave good-bye to the free-speech test of picketing,[25] saying, ". . . while picketing has an ingredient of communication, it cannot dogmatically be equated with the constitutionally protected freedom of speech." The third case of the day, *Building Service Union v. Gazzam*,[26] did not raise a new point, for the Washington court had found a prior-established public policy prohibiting employer coercion in employee choice of bargaining representatives so the Court only followed the *Hughes* case in upholding an injunction against picketing a hotel having 15 employees when none were union members.

After a preoccupation with picketing under the National Management Relations Act (Taft-Hartley Act),[27] and a decision that

[23] 339 U.S. 460 (1950).

[24] 339 U.S. 470 (1950).

[25] One commentator suggests that with Giboney v. Empire Storage & Ice, the three cases of May 8, 1950, (the *Hughes, Hanke* and *Gazzam* cases) marked the date of a complete retreat from the protection of the *Thornhill* case. Howard, *The Unlawful Purpose Doctrine in Peaceful Picketing and Its Application in the California Cases*, 24 So. CALIF. L. REV. 145 (1951).

[26] 339 U.S. 532 (1950).

[27] One day brought forth four cases on picketing under federal labor laws: NLRB v. International Rice Milling Co., 341 U.S. 665 (1951); NLRB v. Denver Building & Construction Council, 341 U.S. 675 (1951); International Brother-

a temporary state-court injunction was not "final" hence not reviewable by the Court,[28] one further Supreme Court case dealt with the unlawful purpose doctrine as intermingled with free speech: *Plumbers Union v. Graham*,[29] affirming a Virginia state court injunction against peaceful picketing which violated the state right-to-work statute. Since 1952, the Supreme Court has remained silent on the question of free speech and unlawful purpose in picketing.[30]

The West Virginia court once again met the question of picketing in *Ohio Valley Advertising Corp. v. Union Local 207*.[31] There the court dismissed an injunction against a union which had picketed a service station where nonunion sign painters were working, holding it ". . . repugnant to the First and Fourteenth Amendments to the Federal Constitution to deny the right of free communication to either party engaged in an industrial dispute . . ."[32] The court quotes with approval from a Virginia case[33] to the effect that ". . . picketing is subject to regulation by the State, either by legislation or by court action. But such regulation must have a reasonable basis in prevention of disorder, restraint of coercion, protection of life or property, or promotion of the general welfare. The instrument of State action . . . must be specifically directed to acts or conduct which overstep legal limits, and not include those which keep within the protected area of free speech."

In light of the Supreme Court cases since the *Blossom Dairy* case was before the West Virginia court, the weight of the language about "free communication" in the *Ohio Valley Advertising* case would seem negligible; nevertheless it is submitted the decision fits within the lawful purpose rules set forth by the Supreme Court. As stated by a judge in an adjoining jurisdiction, "it may fairly

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hood of Electrical Workers v. NLRB, 341 U.S. 694 (1951); Local 74, Brotherhood of Carpenters & Joiners v. NLRB, 341 U.S. 707 (1951).

[28] Montgomery Building & Construction Trades Council v. Ledbetter Erection Co., 344 U.S. 178 (1952).

[29] 345 U.S. 192 (1952).

[30] One reason for the shortage of appeals from state courts may be found in the case of Weber v. Anheuser-Busch, 348 U.S. 468 (1955), which held the federal labor relations acts preclude state courts from enjoining labor unions from picketing to compel an employer not to employ contractors having no collective agreement with the union. State court jurisdiction was held pre-empted by the federal acts.

[31] 138 W. Va. 355, 76 S.E.2d 113 (1953).

[32] *Id.* at 367, 76 S.E.2d at 120.

[33] Edwards v. Commonwealth, 191 Va. 227, 60 S.E.2d 916 (1950).

be said that it is difficult to rescue the principles of law decided from the ocean of words in which they are submerged,"[34] but the various Supreme Court decisions seem to allow no state-court injunctive relief when the purpose of the picketing does not contravene state public policy, either legislatively or judicially announced, when there is some connection between the pickets and the one picketed, and when there is no violence. The peaceful picketing of the *Ohio Valley Advertising* case violated no public policy of West Virginia theretofore announced; the persons picketed were in a position of close economic relation within the rule of the *Wohl* and *Ritter* cases;[35] and no violence was shown. It is therefore submitted that although the court stressed the much-weakened free speech idea of the *Thornhill* case, the holding is more strongly defensible on the newer lawful purpose doctrine.

Inasmuch as objects of peaceful picketing have not yet been categorically enumerated as lawful and unlawful by the Supreme Court or the West Virginia court, some cases from other state courts of last resort which have arisen within the past year may lend some insight to the types of purposes the courts look for. A decision by the supreme court of Maine[36] upheld a permanent injunction of peaceful picketing for solely organizational purposes on the ground that it violated a state statute which guaranteed workers freedom from interference, restraint or coercion by their employers or other persons.[37] The Maine court said the picketing was aimed at coercing the employer to put pressure on non-member employees, in violation of the state public policy as set forth in the statute, and concluded, ". . . In our opinion the restraint of such picketing does not abridge the right of free speech under the decisions of the Supreme Court."[38]

The supreme court of Ohio, after collecting the various Supreme Court decisions, enjoined peaceful stranger picketing for the purpose of bringing pressure upon a restaurant to compel its employees

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[34] Judge Taft in Chucales v. Royalty, 164 Ohio St. 214, 129 N.E.2d 823 (1955).

[35] See 56 W. VA. L. REV. 64 (1951), dealing with the *Ohio Valley Advertising* case on the point of picketing a secondary employer to induce him to influence a primary employer favorably to the union.

[36] Pappas v. Stacey, 151 Me. 36, 116 A.2d 497, *appeal dismissed*, 350 U.S. 870 (1955).

[37] The case is discussed pro and con in Petro, *Labor Relations Law*, 31 N.Y.U.L. REV. 286, 298 (1956), and in 31 N.Y.U.L. REV. 411 (1956).

[38] Pappas v. Stacey, 151 Me. 36, 116 A.2d 497, 503 (1955).

therein to join a union, finding industrial strife to be contrary to state public policy.[39] The court said, "In our opinion, picketing of the kind involved in the instant case is and will continue to be unlawful in Ohio until legislation making it lawful is adopted." A recent Missouri case enjoined picketing as having an unlawful objective when a union attempted to cause a nonprofit country club to intervene and coerce its employees into union membership, in violation of a constitutional provision giving employees the right to organize and bargain collectively through representatives of their own choosing.[40]

The most recent pronouncement concerning picketing came from the supreme court of Pennsylvania in a January, 1956, decision.[41] That court stated that "picketing may be enjoined if *one* of its objects is unlawful even though not the *sole* object."[42] In that case the picketing of a restaurant was enjoined because, ". . . its real object was to compel the employer . . . to . . . agree to the maintenance of a closed shop and thus coerce the employer into forcing its employees to join the union,"[43] in violation of the state labor relations act.

The common trend running through all these recent decisions from the various state courts is, again, the unlawful purpose test with little or no importance placed on free speech. Perhaps exemplary of the attitude of these state court cases[44] was a statement in an earlier Massachusetts case:[45] "The defendants rely upon certain of the more recent cases in the Supreme Court of the United States. . . . We do not understand, however, that that court has held that picketing in support of an unlawful objective cannot be enjoined. . . . Until there is an unequivocal pronouncement to that effect we adhere to the view of the law laid down in our own decisions." Since that 1947 remark there still has been no "unequivocal pronouncement" from any source, but as has been pointed out in the

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[39] Chucales v. Royalty, 164 Ohio St. 214, 129 N.E.2d 823 (1955).

[40] Bellerive Country Club v. McVey, 284 S.W.2d 492 (Mo. 1955).

[41] Anchorage v. Waiters and Waitresses Union, 119 A.2d 199 (Pa. 1956).

[42] *Id.* at 201, citing the cases in note 27, *supra.*

[43] *Id.* at 202.

[44] An earlier state court decision along similar lines was Building Trades Council v. Thompson, 68 Nev. 384, 234 P.2d 581 (1951), which held a union's compelling an employer to make a contribution to a named charity as a penalty for using an employee not in good standing with the union was an unlawful object of picketing.

[45] Colonial Press v. Ellis, 321 Mass. 495, 74 N.E.2d 1, 4 (1947).

cases above, the decisions of the courts have more and more tended to retreat from the free-speech protection first announced in the *Thornhill* case. Although the West Virginia court indicated in the *Blossom Dairy* and *Ohio Valley Advertising* cases that it felt it was strictly bound by the earlier Supreme Court holdings and, therefore, picketing had to be protected as an element of free speech, it is submitted that if the question were to arise today the court could feel free, if it wishes, to follow this indicated trend away from free speech and toward unlawful purpose as the test of the propriety of an injunction against peaceful picketing.

E. W. C.

THE "FRINGE AREA" OF PUBLIC UTILITIES

The United States Supreme Court in *Munn v. Illinois*[1] took the first, and a very important, step in establishing a new concept of public utilities when, on sustaining state rate control of the grain industry, the court recognized that it is the facts that make a business a public utility, not legislation. This decision was followed by a series of decisions which not only firmly entrenched this concept, but established a "fringe area" of regulated industry; an area wherein a business "affected with a public interest . . . is subject to control for the public good".[2] The day has long passed in which there remains any question of the power of the government and the courts to regulate such industries "affected with a public interest." However, there are three questions remaining in relation to such industries: (1) the extent of the regulation in the "fringe area"; (2) what rights the "fringe area" industries have to protection that private industries do not have; (3) when does a private industry enter the "fringe area?".

When radio saw the light of day in 1920 the operators submitted to regulation under the Radio Act of 1912[3] which had been passed by Congress to regulate point to point wireless operators. The introduction of radio brought forth a new problem, that of electrical interference. Regulation of license permits was under

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[1] Munn v. Illinois, 94 U.S. 113 (1876).

[2] Nebbia v. State of New York, 291 U.S. 502 (1934), wherein the court said: "We may as well say at once that the dairy industry is not, *in the accepted sense of the phrase, a public utility.*" At 531. (Italics ours.)

[3] 37 STAT. 302 (1912), 47 U.S.C.A. §§ 51-54 (1928).