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Labor Law - Organizational Picketing in Industries not Affecting Interstate Commerce

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LABOR LAW—ORGANIZATIONAL PICKETING IN INDUSTRIES NOT AFFECTING INTERSTATE COMMERCE—Representatives of defendant union approached plaintiff, proprietor of a small liquor store,[1] with information that they planned to initiate an organizational campaign to obtain the membership of the store's three clerks, none of whom were members of any union at that time. Subsequent to this meeting, a picket line of two men[2] was established and was maintained without any acts of violence, for over nineteen months until halted by a permanent injunction issued by the New York Supreme Court, Appellate Division.[3] The union did not make any demands upon plaintiff to sign a contract or to recognize it as bargaining agent for the clerks. Although the picket line caused stock deliveries to be discontinued, no evidence was presented that this was more than an "inconvenience" to the plaintiff; no customers were intimidated or refused admittance to the store; and the business volume was not impaired. On appeal, *held,* the picketing was "organizational" and thus a lawful labor objective. As a result, the picketing was not enjoinable by the terms of the New York Anti-Injunction Act.[4] *Wood v. O'Grady,* 307 N.Y. 532, 122 N.E. (2d) 386 (1954).

Stranger picketing, i.e., picketing by a union representing a minority, if any, of the employees of the picketed concern, for the purpose of securing additional union members and bargaining rights, has been one of the most troublesome of the picketing problems. The picket is an effective method of extending the union sphere of influence, but inherent in its exercise is the deliberate infliction of economic injury upon the employer and his employees.[5] Though the extent to which a union is justified in exerting this pressure when pursuing

[1] The plaintiff's business was concededly without the jurisdiction of the NLRB; therefore no problem of state court authority to issue an injunction was involved herein, and the questions raised by Garner v. Teamsters Union, 346 U.S. 485, 74 S.Ct. 161 (1953), are not applicable. See 53 MICH. L. REV. 602 (1955).

[2] The pickets carried placards bearing the legend, "The employees of this store are non-union. Please do not patronize this non-union store. We are members of the A. F. of L., Local 122 of AFL."

[3] Wood v. O'Grady, 283 App. Div. 83, 126 N.Y.S. (2d) 408 (1953).

[4] 29 N.Y. Consol. Laws (McKinney, 1944) §753-a.

[5] Forkosch, "The Status of Organizational Picketing in the State of New York," 6 LAB. L.J. 42 (1955).

the legitimate objective of increased membership and influence should be determined from judicial and statutory definitions of permissible economic competition, it has been strongly influenced by the doctrine that picketing contains an element of free speech, and, as such, is constitutionally protected.[6] Under the influence of *Building Service Employees Intl. Union v. Gazzam*,[7] the most significant denial of this protection, stranger picketing is now considered to be of two types, recognitional and organizational.[8] The former is generally considered to be for an unlawful labor objective and thus enjoinable,[9] and the latter a proper objective and protected by anti-injunction statutes.[10] Significantly, however, the protection afforded organizational picketing is usually expressed in dictum.[11] For this reason the principal case is interesting since the court, after distinguishing between organizational and recognitional picketing, positively approves organizational picketing and extends to it the protection of the anti-injunction statute. However, certain peculiar factual circumstances must be considered in evaluation of the importance of this decision. There was no proof that the employer had suffered any significant economic loss; thus the majority could disagree with the position of the lower court and the dissenting judges that the pressure imposed upon the employer was for the unlawful purpose of requiring him to induce or force his employees to join the union, an unfair labor practice under New York statutes.[12] Second, there was evidence, which the dissenting judges refused to accept, that the employer had warned his employees against joining the union and had made provocative statements and

[6] Jones, "Picketing and Coercion, A Jurisprudence of Epithets"; Gregory, "A Defense," 39 VA. L. REV. 1023 (1953); A. F. of L. v. Swing, 312 U.S. 321, 61 S. Ct. 568 (1941).

[7] 339 U.S. 532, 70 S.Ct. 784 (1950).

[8] Recognitional picketing is defined as application of the economic pressure of the picket to force the employer to recognize the union as exclusive bargaining agent and/or to sign a contract. Organizational picketing, on the other hand, is peaceful solicitation of the employees and of the general public to muster support for the organizational campaign. See Petro, "Free Speech and Organizational Picketing in 1952," 4 LAB. L.J. 3 (1953).

[9] Enjoinable because the economic pressure obviously falls upon the employer who is faced with the alternative of suffering substantial economic loss or of inducing or forcing his employees into the union, an unfair labor practice under most state labor statutes. Building Service Employees Union v. Gazzam, note 7 supra; Goodwin's v. Hagedorn, 303 N.Y. 300, 101 N.E. (2d) 697 (1951). See also 51 MICH. L. REV. 1217 (1953); 11 A.L.R. (2d) 1338 (1950).

[10] From a practical standpoint there is little difference in the effect of recognitional and organizational picketing. They both place the employer in the same dilemma, they both result in similar pressure upon the employees, depriving them, in some measure, of their right to exercise a freedom of choice in determining their bargaining representatives. Dissent, principal case. Metropolis Country Club v. Lewis, 202 Misc. 624, 114 N.Y.S. (2d) 620 (1952), affd. 280 App. Div. 816, 113 N.Y.S. (2d) 923 (1952).

[11] This is evidence that, despite a trend toward this result, picketing has never been completely divorced from free speech and courts continue to pay lip service to the doctrine. Building Service Employees Union v. Gazzam, note 7 supra; Blue Boar Cafeteria Co. v. Hotel and Rest. Union, (Ky. 1952) 254 S.W. (2d) 335.

[12] 30 N.Y. Consol. Laws (McKinney, 1944) §§703-704. Obviously, if a court so evaluates the picketing an injunction will lie: Goodwin's, Inc. v. Hagedorn, note 9 supra; Kenmike Theater, Inc. v. Moving Picture Operators, 139 Conn. 95, 90 A. (2d) 881 (1952).

gestures to the pickets. Third, the placard language was not questioned by the employer despite the fact that the courts of New York impose rigid standards upon such language in making the determination of the existence of organizational picketing.[13] One cannot predict the influence of this case without speculating on the extent to which these factors influenced the court in making the crucial finding that the purpose of this picketing was neither to induce the employer to violate the law nor to exert improper economic pressure on the employees. It is interesting that the court should find that picketing extending over nineteen months without obtaining any favorable response from the employees was not designed primarily to exert economic pressure upon the employer.[14] The decision does illustrate, however, that the dubious distinction between organizational and recognitional picketing is being maintained. The union desiring to conduct organizational picketing must avoid suggesting to the employer that he recognize the union or negotiate a contract, it must make a genuine attempt to organize the employees,[15] and its picket placard language must not do other than solicit membership and request that the public patronize union establishments.[16] These are matters of form and methods which do not alter the influence or effect of the picketing, and one might well question the advisability of continuing the distinction. If it is disregarded, however, all stranger picketing could be enjoinable if the "motivation" or unlawful purpose definitions are applied to their logical conclusion.[17] Most state courts have not been faced with this problem, for in the overwhelming number of recent cases the stranger picketing issue has been presented in the context of overt union attempts to achieve recognition without a claim of majority representation,[18] i.e., recognitional picketing by definition. It is very likely that stranger picketing will be protected only where it is pursued without incident, without undue economic pressure upon the employee or marked damage to the employer.[19] In short, "organizational" picketing may be permissible if it is ineffectual.

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[13] LaManna v. O'Grady, 278 App. Div. 77, 103 N.Y.S. (2d) 476 (1951); Saperstein v. Rich, 202 Misc. 923, 114 N.Y.S. (2d) 779 (1952).

[14] *Contra,* Anchorage, Inc. v. Waiters Union Local 301, (Pa. Com. Pl. 1954) 25 CCH Lab. Cas. ¶68,235.

[15] Katz Drug Co. v. Kavner, (Mo. 1952) 249 S.W. (2d) 166 (1952).

[16] LaManna v. O'Grady, note 13 supra.

[17] This result is reached in Michigan: Postma v. Teamsters Union, 334 Mich. 347, 54 N.W. (2d) 681 (1952); Way Baking Co. v. Teamsters Local 164, 335 Mich. 478, 56 N.W. (2d) 357 (1953).

[18] See notes 10, 11 and 12 supra.

[19] Douds v. Local 50, Bakery and Confectionery Workers, (D.C. N.Y. 1955) 127 F. Supp. 534; Larson Buick Co. v. UAW, Local 995, 113 N.Y.S. (2d) 905 (1952).