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LABOR LAW-CONSTITUTIONAL LAW-DUE PROCESS OF LAW-STATE POWER TO ENJOIN PEACEFUL PICKETING

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LABOR LAW—CONSTITUTIONAL LAW—DUE PROCESS OF LAW—STATE POWER TO ENJOIN PEACEFUL PICKETING—Plaintiff was a wholesale ice distributor, selling ice to independent contractors. Defendants were members and officers of a union which represented many of the truck drivers employed by these peddlers. In carrying out a scheme to unionize all peddlers, defendants attempted to obtain plaintiff's agreement not to sell ice to non-union peddlers. Such an agreement would violate the state anti-trust law.[1] On plaintiff's refusal, defendants peacefully picketed its plant. Plaintiff immediately suffered an 85% loss of business, and the state court granted it an injunction against the picketing.[2] On appeal to the Supreme Court of the United States, *held*, affirmed. A state court may enjoin picketing which has as its principal object the violation of a valid state statute. *Giboney v. Empire Storage & Ice Co.* (U.S. 1949) 69 S.Ct. 684.

Ever since *Thornhill v. Alabama*[3] held that peaceful picketing was sufficiently akin to free speech to invoke the protection of the Fourteenth Amendment, the Supreme Court has had difficulty in determining the scope of this doctrine.[4] The Court has always purported to recognize that picketing has a duel nature as speech and economic warfare.[5] It is the latter element which allows it to be regu-

[1] Mo. Rev. Stat. Ann. (1939) §§8301, 8305.

[2] 357 Mo. 671, 210 S.W. (2d) 55 (1948).

[3] 310 U.S. 88, 60 S.Ct. 736 (1940). See generally, Armstrong, "Where Are We Going With Picketing?" 36 CALIF. L. REV. 1 (1948); Teller, "Picketing and Free Speech," 56 HARV. L. REV. 180 (1942); Dodd, "Picketing and Free Speech: A Dissent," 56 HARV. L. REV. 513 (1943); Teller, "Picketing and Free Speech: A Reply," 56 HARV. L. REV. 532 (1943).

[4] Shortly after Thornhill v. Alabama, the Court decided that a state could prohibit picketing outside the "area of the industry within which a labor dispute arises. . . ." Carpenters & Joiners Union v. Ritter's Cafe, 315 U.S. 722 at 728, 62 S.Ct. 807 (1942). Within two years the Court unanimously upheld the right to picket a business even though it was conducted without the aid of any employees of the business. The Court said the defendants had a right to picket "regardless of the area of immunity as defined by state policy." Cafeteria Employees Union v. Angelos, 320 U.S. 293 at 295, 64 S.Ct. 126 (1943). The Ritter's Cafe case was not cited.

[5] Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287, 61 S.Ct. 552 (1941); Carpenters & Joiners Union v. Ritter's Cafe, 315 U.S. 722, 62 S.Ct. 807 (1942); Bakery Drivers Local v. Wohl, 315 U.S. 769, 62 S.Ct. 816 (1942).

lated to an extent not permissible in the case of more orthodox forms of free speech. The principal case decides, for the first time, that peaceful picketing for an unlawful objective may be enjoined. The decision rests squarely on the assumption that the union was exercising something more than free speech; it was using economic power to compel a result. To the Court the basic problem seemed to be "whether Missouri or a labor union has paramount constitutional power to regulate and govern the manner in which certain trade practices shall be carried on. . . ."[6] With this surprisingly new approach, the conclusion was foregone. Since the anti-trust law regulated economic affairs, the Court defers to the legislative determination that the statute was a rational means of accomplishing the proper legislative object.[7] As the only purpose of the picketing was to compel violations of a valid statute, it was enjoinable, the basis for sustaining the injunction being the "clear danger, imminent and immediate"[8] that unless granted, the union would be controlling state policy.[9] On its facts the decision presents a striking contrast to *Bakery Drivers Local v. Wohl*,[10] which unanimously held picketing immune from state prohibition. One explanation for the seemingly inconsistent results may be that in the *Wohl* case the picketing violated no statute. At most only state common law policy was violated,[11] and the Court does not defer to judicially determined policy as it does to that announced by the legislature.[12] Moreover, in the *Wohl* case the picketing had no effect on the business picketed, whereas in the principal case it all but ruined plaintiff's business. Adoption of the latter as a basis of distinction would mean that only unsuccessful picketing is con-

[6] Principal case at 691.

[7] See Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505 (1934).

[8] Principal case at 691.

[9] Although it is conceivable that plaintiff might continue to ignore the union's demands and allow its business to be ruined, such a course was unlikely, since all other wholesalers in the community had already acceded to the union's wishes and were violating the anti-trust law. Principal case at 685.

[10] 315 U.S. 769, 62 S.Ct. 816 (1942).

[11] The majority stated in the Wohl case that if the object were unlawful, perhaps the injunction would be justified. However, the Court did not think the New York courts had made it clear that the object was unlawful. 315 U.S. 769 at 774, 62 S.Ct. 816 (1942). The Supreme Court apparently thought the only reason New York had granted the injunction was because there was no "labor dispute," as defined by the state anti-injunction statute. Cf. Opera on Tour, Inc. v. Weber, 285 N.Y. 348, 34 N.E. (2d) 349 (1941).

[12] Duplex Printing Co. v. Deering, 254 U.S. 443 at 488, 41 S.Ct. 172 (1921); A.F. of L. v. Swing, 312 U.S. 321, 61 S.Ct. 568 (1941). In this respect, perhaps, the type of statute involved in the Thornhill case should be distinguished from that in the principal case. The Alabama statute was construed as forbidding all picketing near the scene of a labor dispute. This might well have been held "unreasonable legislation," unconstitutional even under the rule of Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505 (1934), without resorting to the "clear and present danger" test that is invoked where civil liberties are concerned. The Court conceded that a statute "narrowly drawn to cover the precise situation giving rise to the danger" might be valid. Thornhill v. Alabama, 310 U.S. 88 at 105, 60 S.Ct. 736 (1940). By analogy, a "narrowly drawn" judge-made policy has also been upheld. Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287, 61 S.Ct. 552 (1941).

stitutionally protected.[13] The reason given in the *Thornhill* case for extending the shelter of the Constitution to picketing was that the public might thereby become enlightened as to the facts concerning labor controversies. Unless the union activity in the principal case could be interpreted as simply urging the public to change the present statute, this rationale cannot apply here.[14] However, the unanimity of the decision weakens the *Thornhill* line of cases and may furnish some comfort to state courts and legislatures which have honored the *Thornhill* doctrine more in the breach than in the observance.[15]

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[13] Justices Douglas, Black and Murphy, concurring in Bakery Drivers Local v. Wohl, 315 U.S. 769, 62 S.Ct. 816 (1942).

In Cafeteria Employees Union v. Angelos, 320 U.S. 293, 64 S.Ct. 126 (1943), the injunctions were granted to prevent irreparable damages, yet the Supreme Court reversed the judgments.

[14] Defendants argued that since their "primary objective" was the improvement of labor conditions, they had a constitutional right to violate the anti-trust laws. As the Court viewed the question, the union was demanding greater constitutional immunities than accorded other persons, and the union's contention was quickly refuted. In Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 69 S.Ct. 251 (1949), the union contended that union members had a constitutional right to work without non-union co-workers, but that non-union workers had no comparable right. These "startling ideas" were similarly rejected. Id. at 531.

[15] Intl. Assn. Mach. v. Downtown Emp. Assn., (Tex. Civ. App. 1947) 204 S.W. (2d) 685; Silkworth v. Local 575, A.F.L., 309 Mich. 746, 16 N.W. (2d) 145 (1944); Fashioncraft v. Halpern, 313 Mass. 385, 48 N.E. (2d) 1 (1943); Retail Clerks' Union v. Wis. Emp. Rel. Bd., 242 Wis. 21, 6 N.W. (2d) 698 (1942); Schwab v. Moving Picture Operators, 165 Ore. 602, 109 P. (2d) 600 (1941). Cf. Park & Tilford Corp. v. Intl. Bro. of Teamsters, 27 Cal. (2d) 599, 165 P. (2d) 891 (1946); Glover v. Minneapolis Bldg. Trades Council, 215 Minn. 533, 10 N.W. (2d) 481 (1943).