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Albert E. Acker

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PICKETING — ITS BASIS AND LIMITATIONS

The right to picket is founded on the freedom of speech. This has been well established in Federal and Pennsylvania state law. The case of *Thornhill v. State of Alabama*¹ clearly demonstrated the application of the principle in the Federal Courts. The State of Alabama passed a statute which was designed to prevent picketing of any person or business establishment. Thornhill was a picket of a manufacturing company in violation of the statute. Upon conviction by the state courts he appealed to the United States Supreme Court on the grounds that the statute abridged his right of freedom of speech. In declaring the statute to be unconstitutional the court said,

"The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matter of public concern without previous restraint or fear of subsequent punishment."

"The safeguarding of these means [picketing] is essential to the securing of an informal and educated public concern."

Statewise there is abundant proof of the court's application of the principle. In the recent case of *Pennsylvania Labor Relations Board v. Adams*² an amendment to a legislative act was declared unconstitutional because of its denial of this right. On June 30, 1947 the legislature passed an amendment³ to the Pennsylvania Labor Anti-Injunction Act, 1937.⁴ This amendment provided that it was an unfair labor practice for any person to picket a place of employment of which he was not an employee. The case arose when a mine operator initiated complaint proceedings before the Pennsylvania Labor Relations Board in which the gravamen of the charge was "stranger-picketing." The respondents had assigned non-employee pickets to the mine when the owner refused to sign a union contract. The Pennsylvania Labor Relations Board had entered a "cease and desist" order adjuring the stranger-pickets to forthwith cease their picketing activities. The Board thereupon petitioned the Common Pleas Court for enforcement of the injunctive order. In refusing to enforce the Board's order and declaring the amendment unconstitutional the Court said,

"Both Federal and State Courts have affirmed the right of peaceful picketing, which they have declared is merely a form of persuasion. The right of the individual to security of person and property is in no sense subordinate to the right of peaceful thinking."

One of the most recent and best declarations of this right was expressed in

¹ 310 U. S. 88 (1940).

² Mercer County, Court of Common Pleas, No. 54, June Term, 1948. 6 Commerce Clearing House 64,733, Topical Law Reports.

³ Act of June 2, 1937, P. L. 1198, §6, 43 P. S. 206 f (e), (g) (Pa.).

⁴ Act of June 2, 1937, P. L. 1198, 43 P. S. 206 (Pa.).

*Carnegie-Illinois Steel Corp. v. United Steel Workers of America*⁵ where the Court stated,

"Injunctions are not issued against picketing when the latter's only purposes are to advertise the fact that there is a strike in a certain plant and to persuade workers to join in that strike and urge the public not to patronize the employer."

Although picketing as a method of exercising free speech has been firmly implanted in our judicial system, it is subject to important limitations. These limitations are founded on common as well as statutory law.

Limitation on Purpose

The first general limitation on picketing is that it must not be for an illegal purpose. What is considered legal and illegal, of course, is not a matter of definition or precise formula, for the determination of the issue will be found to be vicarious and highly susceptible to local exigency and the peculiarity of the given facts. The general operation of the principle can, however, be illustrated by the case of *Wilbank et ux. v. Chester and Delaware Counties Bartenders, Hotel and Restaurant Employees Union, Local No. 21*.⁶ The plaintiff ran a small hotel which employed fourteen (14) non-union employees. A representative of the defendant-union proffered the plaintiff a contract which limited employment to union-members. The union representative told the plaintiff that if he did not sign he would be picketed. When the plaintiff refused to sign picketing was begun. As a result there was a critical loss of trade. Food suppliers refused to continue their service and several fights resulted between the employees and pickets. The Pennsylvania legislature in an amendment⁷ to the Pennsylvania Labor Anti-Injunction Act of 1937⁸ provided that the Act's prohibition against the issuance of injunctions on "labor disputes" was inapplicable where a majority of the employees had not joined a labor organization and where a union or its representatives engaged in a course of conduct which did or was calculated to attempt to coerce an employer to violate the act. In this case the violation by the employer would be to force his employees to join the union in order to avoid the effects of the strike. The Court felt that his case fell squarely under the act and therefore granted an injunction.

The latest Federal delineation of those acts considered to be for an illegal purpose was set forth in the prohibition against certain types of secondary boycotts which are recited in the Labor Management Act, 1947.⁹ This Act declares it to be illegal "to induce or encourage employees to refuse, by strike or concerted refusal in the course of employment, to use, manufacture, process, transport or handle an object or perform any service where the purpose is to":

⁵ 353 Pa. 420, 430, 45 A. 2d. 857, 861 (1946).

⁶ 360 Pa. 48, 60 A. 2d 21 (1948).

⁷ Act of June 9, 1939, P. L. 302, 43 P. S. 206 d (Pa.).

⁸ See note 4, supra.

⁹ Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C. A. 158 b (Federal).

- (1) force or require an employer or self employed person to
 - (a) join a labor organization; or
 - (b) to cease using, handling or dealing in another's products, or to cease doing business with him;
- (2) force or require an employer to deal with another labor organization *unless* it is the officially certified bargaining representative of the employees involved;
- (3) force or require any employer to recognize or bargain with a union *if* another labor organization has been certified as required by the Act;
- (4) force or require any employer to assign work to employees in one union, trade, craft or class rather than employees of another union, trade, craft or class.

Limitations on Method

The second general limitation on picketing is that it must not be done in an illegal manner or method. Three classes of such activities which are most generally declared to be illegal because of "method", as contrasted to "purpose", are: (1) mass picketing, (2) secondary boycotting, and (3) destroying property.

Mass Picketing

The conduct which constitutes mass picketing is vividly illustrated in *Westinghouse Electric Corporation, Appellant, v. United Electrical, Radio and Machine Workers of America (C. I. O.)*.¹⁰ The Westinghouse Corporation operated five plants in Allegheny County which employed approximately sixteen thousand persons engaged in productive labor and plant-maintenance. The defendant union represented approximately six thousand two hundred (6200) of the total employees working for the plaintiff in that area. A wage dispute arose in which the defendant demanded a two dollar (\$2.00) a day wage increase. Following the inability of the parties to agree, a strike was called. In prosecuting the strike, bands of pickets, numbering from a handful to one hundred and fifty (150) pickets, were stationed by the Union at each gate of the employer's several plants.

The plaintiff produced twenty-one (21) witnesses, non-members of the striking union, who testified that they had on various occasions from the beginning of the strike been denied access to the plant. "The pickets walked closely behind one another at each gate in a compact or elliptical formation and so near to the entrance that it would have been impossible for anybody to edge in without running the gauntlet thus established." Such conduct, the court held, clearly constituted mass picketing and was enjoined.

Inasmuch as, at first blush, mass picketing does not seem to involve indigenous immorality, a question arises as to the right of the legislature to enact limitations, of the nature of *mala prohibita*, upon the "free speech" activities of labor unions

¹⁰ 353 Pa. 466, 46 A. 2d 16 (1946).

which are not intrinsically immural or illegal, or, so to speak, *mala in se*. The Act of June 9, 1939,¹¹ states that the previous Pennsylvania Labor Act of 1937,¹² restricting the issuance of injunctions, should not apply when in the course of a "labor dispute" a union or its representatives seizes, holds, or destroys any plant or equipment with the intention of compelling the employer to accede to the union's demands. The argument may be raised that this statute was intended by the legislature to apply only in cases involving sit-down strikes or cases where the strikers barricade themselves in the employer's buildings. In answer to such arguments the court said,

"..... it is obvious that the seizure of a plant may be effected in many ways other than actual entry into the building itself.....If the owner be deprived of the use and enjoyment of the property so that it becomes utterly valueless to him it is effectively seized and held whether the force employed for that purpose be exerted within the building or immediately without."

It can, therefore, be said that under this decision mass picketing may be said to so closely resemble "seizure" of property that it may be held to be illegal in Pennsylvania. It is a "method" of picketing which is intrinsically immural by its very nature, and, as such, enjoicable.

Secondary Boycott

A secondary boycott, as defined by Black, *Law Dictionary* 245 (3rd Ed. 1933), is a combination not merely to refrain from dealing with a person or to advise or by peaceful means persuade his customers to refrain, but to exercise *coercive* pressure on such customers, actual or prospective, in order to coerce them to withhold or withdraw their patronage, through fear of loss or damage to themselves. Pennsylvania has followed this general definition and has held such coercive pressure to be illegal and subject to injunction. In the development of the law, however, the scope of those subject to an injunction for secondary boycott has been materially reduced. The first Pennsylvania case on the subject was *Brace Brothers v. Evans*¹³ decided in 1888. The court in that case restrained employees of the plaintiff from contacting his customers in an attempt to dissuade them from continuing to deal with the plaintiff. In its opinion the court said that the right of boycott,

"..... would subject every citizen to the jurisdiction of an unauthorized and irresponsible tribunal, by which he might be condemned unheard and subjected to penalties far beyond the gravity of the offense, the infliction of which he would have no remedy unless it was provided by the courts."

The view that all persons participating in secondary boycotts were subject to injunctive restraint, whether having a common interest or not with the employer,

¹¹ See note 7, *supra*.

¹² See note 4, *supra*.

¹³ 5 County Court 163 (1888).

continued¹⁴ until the passage of the Pennsylvania Anti-Injunction Act, 1937, June 2, 1937 P. L. 1198 Section 6, 43 P. S. 206 f (e), (g). These sections state, in effect, that no court can restrain acts of an individual, association, or corporation arising from a "labor dispute" if they are giving publicity, picketing, patrolling a street or lawfully persuading others to cease patronizing or to leave the employment of the employer. This statute was applied by the Pennsylvania Supreme Court in *Alliance Auto Service, Inc. v. Cohen*.¹⁵ The plaintiff sold gasoline supplied by the Petrol Company. This supplying company, the Petrol Company, was engaged in a labor controversy with the defendant, the International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America. The union dispatched pickets to a number of the plaintiff's service stations which sold the products of the Petrol Company. Each picket carried a sign which read, "Petrol Unfair to Organized Labor, A. F. of L. 107." It is to be noted that the signs did not say that the plaintiff was unfair to organized labor. The pickets informed the plaintiff's customers, either by their signs or verbally, that the station was picketed. As a result the plaintiff's business dropped off at some stations as much as seventy percent. The lower court believed the union's acts were of a coercive nature against the plaintiff and its customers and conveniently enjoined the union. The Supreme Court felt, however, that in light of the statute the acts were non-enjoinable. This was based on the belief that the act meant that as long as the parties had a common interest and that the case arose from a "labor dispute", as defined by that Act, it was *not* enjoinable. This decision reduced the scope of those subject to injunction, but it did not make secondary boycotts legal in Pennsylvania. Neither the Amendment to the Act, nor the recited case removed the pristine illegality of secondary boycotts. They merely rescinded the right of injunctive relief therefrom. This immunity, however, does not derive from the "free speech" exemption, but by grace of legislative magnanimity.

The Federal view on secondary boycotting was declared in the recent case of *United Brotherhood of Carpenters & Joiners of America v. Sperry*.¹⁶ The plaintiff in this case was involved in a labor dispute with the Wadsworth Building Company, a producer of prefabricated houses. Approximately ninety-five percent of the raw materials were shipped into the state for use in manufacturing, and approximately fifty percent of the finished products were sold out of the state. Klassen, a contractor, had agreed before the beginning of the strike to purchase some of the Wadsworth Company's houses. Klassen had just begun business and did employ some non-union men but intended eventually to hire only union men. A union representative approached Klassen and informed him that the Wadsworth Company was being picketed and urged Klassen to use his influence to force that company to come to terms with the union. Klassen refused but did inquire about hiring

¹⁴ *Sweeny v. Torrence*, 1 County Court 497 (1892).

¹⁵ 341 Pa. 283, 19 A. 2d 152 (1941).

¹⁶ U. S. Court of Appeals, 10th Circuit No. 3654, (September Term, 1948). 6 *Commerce Clearing House*, 64,814, *Topical Law Reports*.

union employees. Shortly afterwards a picket was placed by the union on one of Klassen's building sites. The picket carried a sign reading, "Non-union building tradesmen are employed on this job. A. F. L." Klassen's name was also put on the so-called "we do not patronize" list and was circulated to all unions in the union council. Soon Klassen could not obtain the necessary supplies to continue business, for other members refused to cross the picket line.

The court in its decision relied on Section 8 (b) (4) (A) of the Labor Management Relations Act, 1947.¹⁷ This section, as may be recalled, is that portion of the Act which enumerates unfair labor practices by labor unions. It provides in effect that it is an unfair labor practice to force or require an employer or self-employed person to cease using, handling or dealing in another's products, or to cease doing business with another. In this case the union was attempting by picketing and the use of the black-list to force Klassen to cease using the Wadsworth Company products. The court said:

"The promulgation and circulation of a black-list and the picketing of premises as the means of waging a secondary boycott which has the effect of substantially burdening or obstructing interstate commerce is not protected by the First Amendment [guarantee of free speech] or Section 8 (c) of the Act.

In order, however, for the Labor Management Relations Act, 1947, to be applied it is necessary that interstate commerce be involved. Both Klassen and the Wadsworth Company were in the same state. In its interpretation of interstate commerce the court said,

"Congress may regulate not merely transactions or goods in interstate commerce but activities which in isolation might be deemed to be local and yet in the course of the interlacing of business across state lines affect adversely interstate commerce."

The court did not weigh the freedom of speech against the right of unobstructed interstate commerce. Instead it held that the use of a secondary boycott is an illegal labor practice under the Labor Management Relations Act, 1947, and is not protected by the freedom of speech.

In summary, it may be said that secondary boycotts are subject to an injunction in both the Federal and Pennsylvania State Courts. In order for the Federal courts to take jurisdiction, however, it is necessary for interstate commerce to be involved. Statewise the right of injunctive relief has been held to exclude those parties having a "common interest" with the employer being picketed.

Property Damage

Unfortunately unions have destroyed great amounts of property during attempts to accomplish their legal objectives. Such destruction has been enjoined by both the Federal and State courts. Federalwise damage of a very serious nature was reported in *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor*

¹⁷ See note 9, *supra*.

*Dairies, Inc.*¹⁸ In that case the union during a prolonged strike broke more than fifty windows, ".....exploded bombs caused substantial injury.....stench bombs were dropped in five stores; three trucks.....were wrecked, seriously injuring one driver, and another was driven into a river, a store was set on fire and in a large measure ruined; two trucks.....were burned; a store keeper and a truck driver were severely beaten, workers were held with guns and severely beaten about the head while being told 'to join the union', carloads of men followed vendor's trucks, threatening the drivers, and in one instance shot at the truck and driver." The court in enjoining the union said,

"It must never be forgotten.....that the Bill of Rights was the child of the Enlightenment. Back of the guarantee of free speech lay faith in the power of an appeal to reason by all peaceful means for gaining access to the mind. It was in order to avert force and explosions due to restrictions upon rational modes of communication that the guaranty of free speech was given a generous scope. But utterance in a contest of violence can lose its significance of appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution."

Destruction of property by unions is likewise enjoined in Pennsylvania. In *Carnegie-Illinois Steel Corporation v. United Steel Workers of America*¹⁹ the union prevented maintenance personnel from entering the plaintiff's plant. As a result "great and irreparable loss and damage" resulted. This was not done by violence directed at the plant itself but by preventing proper care to be taken for its preservation. In justification of its injunction the Court said,

"Forcibly to deny an owner of property or his agents and employees access to that property for the purpose of maintaining it and its equipment.....is in practical and legal effect a seizure or holding of the property.....Collective coercion is not a legitimate child of collective bargaining. The forcible seizure of property is the very essence of communism."

Property damage can, therefore, be of two types. Direct injury to the property or indirect injury effected by refusing the owner or his employees access for its care. Both types of damage are enjoined.

Summary

1. Picketing is based on the freedom of speech.
2. The limitations on this right are of two general classifications:
 - a. Picketing for an illegal purpose.
 - b. Picketing done in an illegal manner. Three examples are:
 - (1) Mass Picketing.
 - (2) Secondary Boycott.
 - (3) Property Damage.

Albert E. Acker

¹⁸ 312 U. S. 287 (1940).

¹⁹ See note 5, supra.