Volume 73
Issue 3 *Dickinson Law Review - Volume 73, 1968-1969*

3-1-1969

Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.: The Right to Picket on a Privately Owned Shopping Center

L. Frederick Neff

Notes

AMALGAMATED FOOD EMPLOYERS LOCAL 590 v. LOGAN VALLEY PLAZA, INC.: THE RIGHT TO PICKET ON A PRIVATELY OWNED SHOPPING CENTER

In *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.*,[1] the United States Supreme Court held that peaceful nonemployee picketing of a shopping center store could not be absolutely enjoined on the basis of trespass to private property. Since the shopping center was freely accessible and open to the public it was the functional equivalent of a downtown business block for the purpose of exercising first amendment rights.[2] The decision marked the first time the Supreme Court has ruled on this precise issue.[3] The problem in this area is primarily one of accomodating conflicting interests: the union's interest in peaceful picketing for a lawful purpose must be balanced against the interest of the shopping center owner in the possession and enjoyment of his property. This Note will trace the background of picketing on private property, analyze the competing interests in-

1. 391 U.S. 308 (1968).
2. *Id.* at 325.
3. The Supreme Court specifically left this question open in Amalgamated Meat Cutters Local 427 v. Fairlawn Meats, Inc.:

> One final point remains to be considered. At two of respondent's stores, located in suburban shopping centers, the picketing occurred on land owned by or leased to respondent though open to the public for access to the stores. As one of the reasons for finding the picketing unlawful, the Court of Appeals recited this fact, and "trespassing upon plaintiff's property" is one of the activities specifically enjoined. Whether a state may frame and enforce an injunction aimed marrowly at a trespass of this sort is a question that is not here.

353 U.S. 23, 24 (1957).

volved, evaluate the approach of *Logan Valley* to the problem, and set forth questions which remain unanswered.

Respondent Logan Valley Plaza owned a large, newly developed shopping center complex. It was located on a heavily traveled highway with five entrance roads. The other respondent, Weis Markets, one of two businesses then in the center, owned and operated a supermarket. Weis had an open but covered porch along the front of its building, and a five-foot wide and forty-foot long parcel pick-up zone along the porch. Between this building and the highway were extensive parking lots.

Weis opened for business with a wholly nonunion staff of employees and, in addition, posted signs prohibiting trespassing or soliciting on its porch or parking lot. A few days later the petitioner union began picketing Weis, carrying signs saying the supermarket was nonunion and its employees were not "receiving union wages or other benefits." The pickets were all employees of competitors of Weis. The picketing was carried out almost exclusively in the parcel pick-up area and in the immediately adjacent portion of the parking lot. The picketing was entirely peaceful and unaccompanied by either threats or violence.

Respondents obtained an *ex parte* order which had the effect of requiring that all picketing be carried on along the berms beside the public roads outside the shopping center.[4] Picketing continued along the berms and handbills were distributed asking the public not to patronize Weis because it was nonunion. Petitioners contested the validity of the order, but the original injunction was continued indefinitely without modification. The rationale of the trial court was two fold:

> (a) that the picketing was upon private property and, therefore, unlawful in manner because it constituted a trespass; (b) that the aim of the picketing was to compel Weis to require its employees to become members of the Union and, therefore, the picketing, albeit peaceful, was for an unlawful purpose.[5]

---

4. The injunction restrained the union from: ". . . (1) picketing and trespassing on Weis' property, i.e., the store proper, the porch and the parcel pickup area; (2) picketing and trespassing upon Logan's property, i.e., the parking area and entrances and exists thereto; (3) physically interfering with Weis' business invitees entering or leaving the store or parking area; (4) violence toward Weis' business invitees; (5) interference with Weis' employees in the performance of their duties." 425 Pa. 382, 385, 227 A.2d 874, 876 (1967). Petitioners did not challenge the prohibitions contained in the last three parts of the injunction.

5. 425 Pa. at 385, 227 A.2d at 876. In so holding, the trial court specifically rejected the union's claim that the first amendment entitled them to picket on the shopping center property, and also their claim that the suit was within the primary jurisdiction of the NLRB. This later claim was based on the principle that when a dispute is arguably subject to the NLRB's jurisdiction, the Board must be given the first opportunity to hear the case. *E.g.*, Great Leopard Market Corp. v. Meat Cutters Local 196, 413 Pa. 143, 196 A.2d 657 (1964). State courts may accept jurisdiction in

On appeal, the Pennsylvania Supreme Court affirmed the issuance of the injunction on the first ground only, that is, petitioners' conduct constituted a trespass on respondents' property.[6] The United States Supreme Court reversed and remanded adopting the rule that the exercise of first amendment rights may not be wholly excluded on property which serves as a community business block and which is open to the public generally.[7]

Picketing on Private Property

In *Thornhill v. Alabama*,[8] the Supreme Court held that peaceful picketing must be afforded the same constitutional guarantees as other forms of free speech. This holding was later extended in *AFL v. Swing*[9] to protect pickets who were nonemployees of the picketed establishment. These and related cases[10] established the principle that peaceful picketing carried on in a location generally open to the public is protected by the first amendment from arbitrary and indiscriminate prohibition.

But the Supreme Court has recognized that picketing involves both speech and conduct. Because of this mixture of both protected and unprotected elements, picketing may be subject to controls not constitutionally permissible in the case of pure speech. As a result, states are permitted to enjoin picketing when it involves a purpose antithetical to some valid state policy, or when it involves violence or coercion.[11] Although the precise issue in *Lo-*

---

such a case only when it is ceded to them by the Board. Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957); San Diego Bldg. Trades Council v. Garmon, 353 U.S. 26 (1957).

6. 425 Pa. 382, 227 A.2d 874 (1967). Petitioners pre-emption claim was not argued before the Pennsylvania Supreme Court, and accordingly was not passed on. Petitioners did, however, raise their pre-emption contention before the United States Supreme Court, but that Court was precluded from reaching the merits of the question. "The rule that in cases coming from state courts this Court may review only those issues which were presented to the state court is not discretionary but jurisdictional." 391 U.S. at 334 (dissenting opinion).

7. 391 U.S. 308 (1968).

8. 310 U.S. 58 (1940).

9. 312 U.S. 321 (1941).

10. *See, e.g.*, Teamsters Local 795 v. Newell, 356 U.S. 341 (1958); Cafeteria Employees Local 302 v. Angelos, 320 U.S. 293 (1943); Bakery and Pastry Drivers Local 802 v. Wahl, 315 U.S. 769 (1942).

11. *See, e.g.*, Youngdahl v. Rainfair, 355 U.S. 131 (1957) (violence); Teamsters Local 695 v. Vogt, 354 U.S. 284 (1957) (picketing to have employer force his employees to join a union); UAW v. Wisconsin Employment Relations Bd., 351 U.S. 266 (1956) (violence); Steamfitters Local 10 v. Graham, 345 U.S. 192 (1953) (picketing to have employer require union membership as a condition of employment, in violation of state right-to-

gan Valley was one of first impression for the Supreme Court, the confrontation between picketing and private property rights began much earlier. The reasoning of these earlier cases is relevant to an understanding of later state cases involving shopping centers and also for a proper evaluation of *Logan Valley* itself.

Peaceful labor picketing on the private property of an employer has generally been upheld, at least where the property in question was generally open to the public. In *People v. Mazo*,[12] the defendant was convicted of a criminal trespass for picketing and handing out leaflets in the parking lot of the employer. In reversing the conviction, the court found that the employer had virtually dedicated the parking area to public use, and held that where rights of property and free speech conflict, the former must give way.[13] In *Hearn Department Stores, Inc. v. Livingston*,[14] an employer sought to restrain employee picketing on the ground that the picketing took place on a private street. The court held for the defendants concluding that ". . . the relationship of employer and employee does not end where the plaintiff's lines commence and necessarily it carries with it the right to picket peacefully as an incident of a bona fide labor dispute."[15] In *Stafford v. Hood*,[16] however, the right to picket on the private property of the employer on the theory that it was a quasi-public was specifically rejected. The court felt that the invitation to the public to use the lot as customers did not include an invitation to use it to keep customers away.[17]

Cases involving union activity other than picketing have also

---

work law); Building Service Employees Local 262 v. Gazzam, 339 U.S. 532 (1950) (picketing to have employer force his employees to join a union, contrary to state statute forbidding such employer coercion); Teamsters Local 309 v. Hanke, 339 U.S. 470 (1950) (picketing to enlist union deliverymen and union patrons to force self-employer to abide by union working conditions); Hughes v. Superior Court, 339 U.S. 460 (1950) (picketing to have employer practice racial discrimination in hiring, contrary to state policy); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949) (picketing to induce wholesale distributors to agree with union not to sell to nonunion peddlers, in violation of state statute forbidding combinations in restraint of trade); Carpenters Local 213 v. Ritter's Cafe, 315 U.S. 722 (1942) (coercion of an employer to do an act which state public policy declared should be left to his free choice); Hotel Employees Local 122 v. Wisconsin Employment Relations Bd., 315 U.S. 437 (1942) (violence); Milk Wagon Drivers Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941) (violence).

12. 38 CCH Lab. Cas. 65,835 (Ill. Ct. Cl. 1959).
13. *Id.*
14. 125 N.Y.S.2d 800 (1953).
15. *Id.* at 801. A variation of this argument is that the complaining employer, as owner of the adjoining property, also owns the underlying fee to the center of the street. Attempts to bar picketing on public streets or sidewalks on this theory have, however, been unsuccessful. Vonderschmitt v. McGuire, 100 Ind. App. 632, 195 N.E. 585 (1935); Robinson v. Hotel & Restaurant Employees, 35 Idaho 418, 207 P. 132 (1922).
16. 213 Tenn. 684, 378 S.W.2d 766 (1963).
17. *Id.*

generally allowed statutory and constitutional rights to prevail over strictly private property rights. In *NLRB v. LeTourneau Co.*,[18] the Supreme Court held that employees had the right to distribute union literature on company-owned parking lots. Although rejecting the idea that the union activity could be enjoined solely on the basis of trespass, *LeTourneau* nevertheless indicated that labor activity could be prohibited if it interfered with plant discipline or production.[19] In *NLRB v. Babcock & Wilcox Co.*,[20] however, the Court refused to extend *LeTourneau* to nonemployee union activity. But this holding was watered down when the Court added the qualification that nonemployees could not be excluded from company property if the usual means of communicating with the employees were not present or if the nonsolicitation rule was applied in a discriminatory manner.[21]

In 1946, the Supreme Court handed down a decision which has become the cornerstore for cases allowing picketing on private property. *Marsh v. Alabama*[22] held there are certain circumstances in which property that is privately owned may, at least for first amendment purposes, be treated as though it were publicly held.[23] In *Marsh* a Jehovah's Witness distributed religious literature on a sidewalk in the business district of a company-owned town.[24] The company had posted signs against solicitation of any kind and refused to grant Marsh a permit. She continued distributing literature and was arrested for violating Alabama's criminal trespass

---

18. 324 U.S. 793 (1945).
19. *Id.* at 804 n.10 (dictum).
20. 351 U.S. 105 (1956).
21. *Id.* at 112.
22. 326 U.S. 501 (1946).
23. The significance of equating private property with publicly held property is that in the business area of a municipality persons may not be excluded from exercising their first amendment rights, including the right to picket, on the sole ground that title to the property was in the municipality. Jamison v. State, 318 U.S. 413 (1943); Schneider v. State, 308 U.S. 147 (1939); Hague v. CIO, 307 U.S. 496 (1939); Lovell v. City of Griffin, 303 U.S. 444 (1938). This does not mean, however, that municipalities may not control the use of public property. If property is not ordinarily open to the public, access to it for the purpose of exercising first amendment rights may be denied altogether. Adderley v. State, 385 U.S. 39 (1966). Even where such property is open to the public generally, the exercise of first amendment rights may be regulated to prevent interference with the use to which the property is ordinarily put by the state. *See, e.g.*, Cameron v. Johnson, 390 U.S. 611 (1968); Cox v. State, 379 U.S. 559 (1965).
24. The Court noted that the town and its shopping district were accessible and freely used by the public in general. Nothing was found to distinguish it from any other town or shopping center except that title to the property belonged to a private corporation.

statute. In reversing her confiction, the Court balanced the interest in ownership of private property with the interest of freedom of expression. The majority said:

> Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.[25]

Marsh was the primary authority for *People v. Barisi*,[26] in which defendants peacefully picketed the lessee of space in the Pennsylvania Railroad station. Although the picketing was on private property, the court said that by opening the premises to the general public, the owners "have made it a quasi-public place."[27] As such their ownership could not take precedence over the exercise of first amendment rights. *Marshall Field & Co. v. NLRB*[28] applied the *Marsh* doctrine in upholding the rights of nonemployees to conduct organizational activities on privately owned property. The activity took place on a company-owned court-way which divided a department store at street level. The court found that the court-way had assumed the character of a public street and therefore the company could not prohibit constitutionally protected activities.[29] In *People v. Goduto*,[30] however, Illinois limited *Marsh* to its facts and refused to extend its rationale to cover the parking lot of a store.

Thus, with few exceptions,[31] the courts have allowed statutory and constitutional rights to prevail over strictly private property rights.[32] Nevertheless, peaceful union activity and the exercise of other first amendment rights on the property of employers and company-owned towns is significantly different than when carried on in a privately owned shopping center. In the latter case the property is opened to and used by the general public. In addition it involves the right of an owner, a disinterested party to the labor dispute, to prohibit trespassing on his property. None of the cases thus far discussed involved this precise question. Yet,

---

25. 326 U.S. at 506. Despite this statement, later state court decisions involving shopping centers and which followed *Marsh*, did not balance the competing rights, but instead based their holdings only on property use and physical characteristics. *E.g.*, Amalgamated Clothing Workers v. Wonderland Shopping Center, Inc., 370 Mich. 547, 122 N.W.2d 785 (1963); Moreland Corp. v. Retail Employees Local 444, 16 Wis.2d 499, 114 N.W.2d 876 (1962); State v. Williams, 37 CCH Lab. Cas. 65,708, 44 L.R.R.M. 2357 (Balt. Crim. Ct. 1959).

26. 193 Misc. 934, 86 N.Y.S.2d 277 (1948).

27. *Id.* at 935, 86 N.Y.S.2d at 279.

28. 200 F.2d 875 (7th Cir. 1953).

29. *Id.* at 380.

30. 21 Ill. 2d 605, 174 N.E. 385, *cert. denied*, 368 U.S. 927 (1961).

31. *E.g.*, Stafford v. Hood, 213 Tenn. 684, 378 S.W.2d 766 (1963); People v. Goduto, 21 Ill. 2d 605, 174 N.E.2d 385, *cert. denied*, 368 U.S. 927 (1961); NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956).

32. For other related cases using this rationale, see, *e.g.*, NLRB v. Stowe Spinning Co., 336 U.S. 226 (1949); Republic Aviation Corp. v. NLRB,

when the advent of the modern suburban shopping center made the issue inevitable, the courts drew on the reasoning of these older cases to resolve the problem.

Shopping Centers and the Accomodation of Conflicting Interests

Only by a thorough consideration of the conflicting values involved can the issue of the legality of peaceful picketing on a private shopping center by properly resolved. A union has a legitimate interest in peaceful picketing for a lawful purpose. Picketing is an integral component of collective bargaining and as such it involves the exercise of a statutory right. More importantly, in the absence of other factors involving purpose or manner, peaceful picketing is an exercise of freedom of speech and is a constitutionally sanctioned right.[33] On the other hand, the shopping center owner has an interest in the possession and enjoyment of his property. The owner of the particular store being picketed has a right to serve his customers free from probable or actual interference with the operation of his business. Unfortunately, of the few courts who have ruled on the precise issue, most have based their decisions upon the physical characteristics and the use made of the property by its owner, instead of attempting to balance the competing interests involved.[34]

In *State v. Williams*,[35] union members peacefully picketed a drugstore located within a shopping center. Although the owner of the property had specifically posted it against picketing, the Baltimore Criminal Court reversed a conviction for criminal tres-

---

324 U.S. 793 (1945); NLRB v. Lake Superior Lumber Corp., 167 F.2d 147 (6th Cir. 1948).

33. See text accompanying notes 8-10 *supra*.

34. Amalgamated Clothing Workers v. Wonderland Shopping Center, Inc., a related case not involving picketing, also based its holding on the physical characteristics and use to which the property was put. An evenly divided court upheld the right to distribute, in a shopping center mall, handbills discouraging the purchase of nonunion made goods. In relying on the nature of the property's appearance, the court stated:

> The change from the operation of a single store by a storekeeper to a large, complex, multiple shopping center, alters the very nature of the operation from one of a purely private character to one of public or quasi-public character. The single storekeeper would still be authorized to prevent any unauthorized intrusion on his private property. The defendants, through this large development, in a highly urban area, no longer can claim the same rights to their property. The property of the defendants has lost its identity as private property.

370 Mich. 547, 564-65, 122 N.W.2d 785, 794 (1963).

35. 37 CCH Lab. Cas. 65,708, 44 L.R.R.M. 2357 (Balt. Crim. Ct. 1959).

pass. The court cited *Marsh* as controlling and held (1) that by opening the shopping center to the public it became a quasi-public place, and (2) the lessee of the property had no more rights than the lessee of property fronting on a public street.

Moreland Corp. v. Retail Store Employees Local 444,[36] involving peaceful picketing on privately owned sidewalks, also relied on physical characteristics and use of the property. The court affirmed an order below refusing summary judgment because it was not clear whether the owner, by designing its property for use as a shopping center, thereby lost its right to ban otherwise lawful picketing as a trespass. In applying the *Marsh* concept of quasi-public property, the court stated:

> If the record before us clearly established that the property involved is a multi-store shopping center, with sidewalks simulated so as to appear public in nature, we would have no difficulty in reaching a conclusion that the property rights of the shopping center owner must yield to the rights of freedom of speech and communications which attend peaceful picketing.[37]

In *Freeman v. Retail Clerks Local 1207*,[38] the merits of the case were never reached because the court held the right to an injunction to be arguably subject to the National Labor Relations Act, and that therefore the lower court lacked jurisdiction to determine the controversey. The concurring opinion, however, is important because of its understanding of the conflicting interests involved. Judge Hill, quoting the opinion of the trial court, said there were some situations where picketing would always be barred. But there were other situations where every court would require the owner to suffer infringement of his right to control his property. Five factors were listed which, if present, should result in having the court weigh the equities of the parties:

> (1) When the private property owner designs his property for use by the general public in such a manner as to make it difficult or impossible to distinguish its physical characteristics from publicly-owned property similarly so devoted; (2) The exercise of the right of free speech is for the purpose of making a communication to persons naturally upon the premises as a result of the inherent nature of the primary use to which the property is devoted; (3) A similar communication clearly would be permitted under identical circumstances had the property been public; (4) Interference with the owner's fundamental rights of privacy or personal use and occupancy is not involved as distinguished from control, and no direct pecuniary loss will result to the owner; (5) The trespasser had no place or means available as an alternate, or the only alternate would be unrealistic or impractical to the point where there exists a serious restriction upon the trespasser's ability to communicate as effec-

36. 16 Wis. 2d 499, 144 N.W.2d 876 (1962).
37. *Id.* at 505, 114 N.W.2d at 879.
38. 58 Wash. 2d 426, 363 P.2d 803 (1961).

> tively as would naturally and normally be expected were the legal title in public ownership.[39]

Consideration of these factors would enable a court to balance the magnitude and character of the invasion of the property rights against the seriousness and nature of the restriction upon the trespasser's freedom of speech.

In only one case involving picketing of a shopping center, however, was the problem recognized as one of accommodating conflicting interests. In refusing to enjoin the picketing as a trespass, the court in *Schwartz-Torrance Inv. Corp. v. Bakery Workers Local 31*[40] found that the interests of the union outweighed the interests of the lessor owner who sought to vindicate a theoretical invasion of his right to exclusive control and possession of private property. Noting that an injunction would deprive the union of communicating with the public at the most effective point of persuasion, the court stated that ". . .[t]he interest of the union thus rests upon the solid substance of public policy and constitutional right; the interest of the plaintiff lies in the shadow cast by a property right worn thin by public usage."[41]

Logan Valley: A Narrow Holding and Future Problems

Although not enunciated as such, the Court in *Logan Valley* discussed each of the five criteria set forth by Judge Hill in *Freeman.* Thus, *Logan Valley* is to be commended for recognizing the factors which are determinative of this type of case. Nevertheless, their restrictive holding did not result in a true accommodation of the conflicting interests.[42]

The first test is whether the private property was so designed for use by the general public that its physical characteristics are indistinguishable from public property designed for the same purpose. Here the Court relied heavily on *Marsh,* saying that the shopping center and the business block in *Marsh* were virtually identical. Not only was such reliance on *Marsh* not necessary but it was also misguided. In that case, the company town was found to have *all* the attributes of a municipality and the company was

---

39. *Id.* at 432, 363 P.2d at 806.

40. 61 Cal. 2d 766, 394 P.2d 921, 40 Cal. Rptr. 233 (1964), *cert. denied,* 380 U.S. 906 (1965).

41. *Id.* at 774-75, 394 P.2d at 926, 40 Cal. Rptr. at 238.

42. "All we decide here is that because the shopping center serves as the community business block . . . the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their first Amendment rights . . . ." 391 U.S. at 319.

found to be exercising official power as a delegate of the state.[43] The only municipal attribute of a shopping center is that it resembles a business district. The reasoning of a case so factually different should not be applied indiscriminately to the shopping center problem. The majority should have extended *Marsh* instead of trying to draw such a close analogy. As will be discussed later, more substantial reasons existed for refusing to bar the picketing completely than the mere physical characteristics of the property.

The second test is whether the purpose of the picketing is to communicate with those persons naturally upon the premises because of the use to which the property is put. In *Logan Valley* there is no question that the pickets were attempting to inform patrons of Weis that the market was nonunion, and that the customers were there as a result of an invitation by Weis.

The third factor, that the communication clearly would be permitted had the property been public, was likewise present.[44] The majority's position is strengthened by the fact that barring picketing solely on the basis of title to the property would create an artificial distinction between shopping center businesses and downtown businesses when in fact there is little practical difference. It would allow suburban stores to immunize themselves by creating large parking lots to separate them from the public streets, while their downtown counterparts would be subject to on-the-spot criticism for their practices.

As applied to the facts in *Logan Valley*, the fourth inquiry shows equities in favor of both sides. Lack of interference with the owner's right of privacy and no direct pecuniary loss weigh heavily in favor of allowing the picketing. Because of the public character of a shopping center, the claimed infringement of the right of personal use and occupancy is largely theoretical. Unlike a situation involving a private place of residence, the owner of a business establishment can make no meaningful claim to a protection of his right of privacy. He is merely asserting naked title and the absolute right to prohibit the use of his property by others. Such claims fail to realize that those rights carry concomitant burdens when the property is used by the public. On the other hand, the owner is entitled to be protected in the normal business operation of his property. Here there was some question as to probable or actual interference in the parcel pick-up zone.[45]

---

43. The Court in *Marsh* emphasized that the property consisted of residential buildings, streets, a system of sewers, a sewage disposal plant and a business block. 326 U.S. at 502.

44. See note 23 *supra*.

45. The trial court found that "'(7) . . . . (a) small groups of men and women wearing placards . . . walked back and forth in front of the Wies supermarket, more particularly *in the pick-up zone* adjacent to the covered porch (emphasis added); (b) occasional picketing as above described has

As pointed out by Justice Black in his dissenting opinion, a parcel pick-up zone is an integral part of any modern supermarket.[46] The place where a customer comes to pick up the goods he has purchased is as much a part of the store as the inside counters where customers select the goods or the check-out section where the goods are paid for. Certainly, pickets would not be allowed to enter the store itself. For the same reasons, an owner has a legitimate interest in banning even nonobstructive picketing in the parcel pick-up zone, an area intimately connected with the normal business operation of the store.

The fifth element to be considered is the availability of an alternative place or means to communicate effectively with the public. The union's message can be effectively communicated only if it is focused upon the patrons of a particular store; this can be accomplished only by picketing that store.[47] Restricting the picketing to the shopping center's entrances and the berms along the public road, as was done in *Logan Valley*, has a number of drawbacks. First, it prevents the union from focusing attention upon the disfavored store. Secondly, it exposes the pickets to danger by forcing them to walk along heavily traveled roads. Finally, picketing the entrance to an area which serves a number of stores could conceivably expose the union to a charge of conducting a secondary boycott.[48]

Even though *Logan Valley* recognized that the above five criteria were determinative factors in a case of this type, the decision was based primarily on the finding that the shopping center was the functional equivalent of the company town in *Marsh*.[49] The Court was correct in its narrow holding that access to the

---

taken place *on the covered porch itself* (emphasis added), . . .'" 391 U.S. at 327 (dissenting opinion).

46. *Id.* at 327-8.

47. See generally GOULD, *Union Organizational Rights and the Concept of "Quasi-Public" Property*, 49 MINN. L. REV. 505 (1965).

48. When a common situs is picketed (a situation where primary and neutral employers occupy the same premises) the union must confine its message to the disfavored store so as not to dissuade customers from buying and employees from working at other establishments inside the center because of the belief that the shopping center as a whole is the object of the protest. The requirements which must be met for the picketing of the shared premises to be termed primary and not secondary are: "(a) [t]he 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. Moore Dry Dock Co., 92 N.L.R.B. 547, 549 (1950).

49. 391 U.S. at 325.

shopping center may not be absolutely denied solely on the basis of trespass. Nevertheless, they missed the opportunity to set forth clear guidelines to be followed in future cases.

In addition, the Court did not balance the interests of the instant parties. The majority stated:

> Because the Pennsylvania courts have held that "picketing and trespassing" can be prohibited aboslutely on respondents' premises, we have no occasion to consider the extent to which respondents are entitled to limit the location and manner of the picketing or the number of pickets within the mall in order to prevent interference with either access to the market building or vehicular use of the parcel pick-up area and parking lot.[50]

This statement ignores the wording of the injunction, which enjoined petitioners from

> (a) Picketing and trespassing upon the private property of plaintiff Weis Markets, Inc., . . . including as such private property the storeroom, porch and parcel pick-up area.
>
> (b) Picketing and trespassing upon the private property of plaintiff Logan Valley Plaza, Inc., . . . including parking area and all entrances and exits leading to said parking area.[51]

As previously stated, the parcel pick-up area is as much an integral part of the business operation of the store as the inside counters.[52] Picketing which interferes with customers in either place should be prohibited. The injunction contained separate and easily divisible parts. Its wording clearly differentiated between picketing within the confines of the shopping center in general and on Weis' porch and pick-up area in particular. By sustaining the first part of the injunction, the Court could have balanced the union's interest in having access to the shopping center with the property owner's interest in not having the operation of his business impaired.

The majority said that state courts may still make reasonable regulations of picketing on respondents' property. By failing to give any indication of what is a reasonable regulation, however, two important questions are left unanswered: (1) to what extent may pickets utilize the property of the non-participant shopping center owner; and (2) whether pickets may be totally barred from areas adjacent to the participant store which are intimately connected with its business operation. Although what is a reasonable regulation will vary with the particular case, an affirmance of the first part of the injunction in *Logan Valley* would have been a

---

50. *Id.* at 321.

51. Brief for Petitioner at 20, Amalgamated Food Employees Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968). The opinion of the Court of Common Pleas of Blair County, Pennsylvania, is unreported.

52. See text accompanying note 46 *supra.*

strong indication of what is permissible.

A further problem is whether the rule concerning shopping centers will be extended to other business establishments which have sidewalks or parking lots on their own property. If the physical characteristics and use of the property must be the functional equivalent of the company town in *Marsh*, the answer must be no. If, however, an attempt is made to balance the competing interests by adopting the five point test of *Freeman*, such picketing could very well be upheld.

Another unanswered question is whether all first amendment rights will be permitted when exercised in shopping centers. Future problems could include distribution of religious literature, other types of union activity, protests, and political campaigning. The facts of *Logan Valley* only involved the right to picket; yet the Court continually refers to first amendment rights, which indicates that other activities will also be protected. On the other hand, the Court said the rights must be exercised ". . . in a manner and for a purpose generally consonant with the use to which the property is put."[53] This indicates that certain qualifications may be imposed. *State v. Miller*,[54] a state case decided shortly after *Logan Valley*, interpreted that decision broadly, as one not limited to the right to picket. Defendants had entered a shopping center for the purpose of distributing pamphlets on behalf of certain political candidates, and were convicted of trespassing on private property. In reversing the conviction, the Minnesota Supreme Court noted that the shopping center had many diverse business on its premises and was generally open to the public. *Logan Valley* was cited and held to control these facts. It therefore appears that any nonobstructive exercise of a first amendment right will be protected, even though the activity may have no connection whatsoever with the shopping center's occupants or with the conduct of their businesses.

Conclusion

The modern shopping center has created a situation where traditional private property rights can no longer maintain their sanctity. The technical distinctions upon which a finding of trespass so often depends must yield to the statutory and constitutional right to picket. Yet, at the same time the property owner's rights have not been wholly lost. The natural operation of his

53. 391 U.S. at 319-20.
54. 159 N.W.2d 895 (Minn. 1968).

business must not be impaired and the picketing must be for a purpose connected with the use of the property. In *Logan Valley*, the Pennsylvania Supreme Court recognized only the rights of the property owner. In reversing, the United States Supreme Court recognized only the right to picket. The approach that should have been taken is to recognize that both parties have valid but antithetical rights, and that the problem in each case of this type is one of accommodating conflicting interests.

L. FREDERICK NEFF