Marquette Law Review

Volume 50
Issue 3 *April 1967*

Article 5

Labor Law: Public Employees' Right to Picket

Michael B. Rick

RECENT DECISIONS

Labor Law: Public Employees' Right to Picket: A problem of growing concern in the field of Labor law is the right of public employees to use picketing as a means of airing their grievances without necessarily going on strike. This was an issue in a recent Illinois case, *Board of Education v. Redding.*[1] In this case the custodial employees of the Bond County school district, affiliated with the Teamsters, presented plaintiff with a collective bargaining agreement. Plaintiff refused to sign the agreement and on September 2, 1964, a regular school day, the 13 custodial employees did not report to work but with the help and financial support of the union, set up picket lines at each of the communities' seven schools. The schools rapidly felt the effects of this action.

On September 8, a complaint for injunctive relief was filed, and on September 10, a hearing was held and the injunction was denied. The basis for the denial was that defendants had agreed to and did maintain basic necessities for the schools. The School Board appealed, alleging that the strike and the picketing interferred with the constitutional duty of the General Assembly to "provide a thorough and efficient system of free schools."[2]

The Supreme Court of Illinois rather summarily reversed and denied the public employees right to strike. They stated that:

> Although this is a case of first impression in a reviewing court of this jurisdiction, it is, so far as we can ascertain, the universal view that there is no inherent right in municipal employees to strike against their governmental employer, whether Federal, State, or a political subdivision thereof, and that a strike of municipal employees for any purpose is illegal.[3]

---

[1] Board of Education v. Redding, 32 Ill.2d 567, 207 N.E.2d 427 (1965).

[2] Ill. Const., art. VIII, §1 (1870).

[3] Board of Education v. Redding, 32 Ill.2d 567, 207 N.E.2d 427, 430 (1965), where the court cites several cases as examples: e.g., City of Manchester v. Manchester Teacher's Guild, 100 N.H. 507, 131 A.2d 59 (1957); City of Pawtucket v. Pawtucket Teacher's Alliance, 87 R.I. 364, 141 A.2d 624 (1958); International Brotherhood of Electrical Workers v. Grand River Dam Authority, — Okla. —, 292 P.2d 1018 (1956); City of Alcoa v. International Brotherhood of Electrical Workers, 203 Tenn. 12, 308 S.W.2d 476 (1957); Norwalk Teacher's Assn. v. Board of Education, 138 Conn. 269, 83 A.2d 482, (1951), where that court at page 273 stated: Under our system, the government is established and run for all the people, not for the benefit of any person or group. The profit motive, inherent in the principle of free enterprise is absent. . . . The drastic remedy of the organized strike to enforce the demands of unions of government employees is in direct contravention of this principle.

At page 276 that court concluded: In the American system, sovereignty is inherent in the people. They can delegate it to a government which they create and operate by law. They can give to that government the power and authority to perform certain duties and furnish certain services. The government so created and empowered must employ the people to carry on its task. Those people are agents of the government. They exercise some part of the sovereignty entrusted to it. They occupy a status entirely different from

In undertaking the solution of the picketing question, which the defendants argued was a valid exercise of their right of free speech, as long as it was peaceful, the Illinois Supreme Court said:

> While picketing has an ingredient of communication, the cases make it clear that it cannot be dogmatically equated with constitutionally protected freedom of speech, and that picketing is more than free speech because picket lines are designed to exert, and do exert, influences which produce actions and consequences different from other modes of communication. . . .[4] Indeed, these by-products of picketing which go beyond free speech are self-evident in this case. It is now well established that the latter aspects of picketing may be subject to restrictive regulations . . .[5] and while the specific situations must control decision, it is more than clear that a State may, without abridging the right of free speech, restrain picketing where such curtailment is necessary to protect the public interest and property rights and where the picketing is for a purpose unlawful under State laws or policies, whether such policies have been expressed by the judicial organ or the legislature of the State.[6]

Thus, in this case, since the picketing, though peaceful, was for the purpose of fostering an unlawful strike and since the effect of the picketing was to impede a vital public function—public education of children—the court enjoined the picketing.

This decision expresses the prevailing opinion on this particular area, but a basic question is left unsolved: How can peaceful picketing, by public employees, which is asserted to be an exercise of free speech, be restricted practically? In a hypothetical situaton, let us say that a group of public high school teachers wish to air their grievances over low salary scales in their community. Let us further suppose that no strike was contemplated and that they merely sought to picket in a peaceful and orderly fashion, on their own time, in the immediate vicinity of the school. Their signs would clearly indicate that they had no intention of barring deliveries or in any way interrupting the normal course of activity—their only object being getting their views on this subject before the public. Would this be an instance when picketing can be restricted?

To attempt to answer such a question, two branches of development in this area of labor law must be examined. These are: 1) state restrictions upon free speech under state statutes or state policy, and 2) federal

those who carry on a private enterprise. They serve the public welfare and not a private purpose. To say that they can strike is the equivalent of saying that they can deny the authority of government and contravene the public welfare.

[4] Redding at page 431 cites Hughes v. Superior Court of State of California, 339 U.S. 460 (1950); International Brotherhood of Teamsters, etc., Local 309 v. Hanke, 339 U.S. 470 (1950).

[5] Bakery and Pastry Drivers and Helpers Local 802 of International Brotherhood of Teamsters v. Wohl, 315 U.S. 769 (1942).

[6] Redding, page 431.

government restrictions as unfair labor practices under the National Labor Relations Act, Sec. 8(b) 7(c).

State Restrictions

The first case in the area of state regulation of picketing was *Thornhill v. Alabama.*[7] The petitioner was charged and convicted of violating §3448 of the Alabama State Code of 1923 which made it unlawful for any person "without a just cause or legal excuse," to go near to or "loiter" about any place of lawful business, for the purpose of, or with the intention of, influencing or inducing other persons not to buy from, deal with, or be employed at such a place of business, or to "picket" a place of lawful business, for the purpose of impeding, interfering with, or injuring such business. Petitioner had been peacefully engaged in picketing at the plant under strike.

The United States Supreme Court in reviewing the prior application of this statute by the Alabama courts said:

> Section 3448 has been applied by the state courts so as to prohibit a single individual from walking slowly and peacefully back and forth on the public sidewalk in front of the premises of an employer, without speaking to anyone, carrying a sign or placard on a staff above his head stating only the fact that the employer did not employ union men affiliated with the American Federation of Labor; the purpose of the described activity was concededly to advise customers and prospective customers of the relationship existing between the employer and its employees and thereby to induce such customers not to patronize the employer.[8]

The Court then expressed its view that, "The statute as thus authoritatively construed and applied leaves room for no exceptions based upon either the number of persons engaged in the prescribed activity, the peaceful character of their demeanor, the nature of their dispute with an employer, or the restrained character and the accurateness of the terminology used in notifying the public of the facts in dispute."[9]

The Court concluded that the statute was invalid on its face stating after balancing the interests sought to be protected against those infringed upon by the statue that:

> Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests. Abridgment of the liberty of such discussion can be

[7] Thornhill v. Alabama, 310 U.S. 88 (1940).
[8] *Id.* at page 98-99 citing, O'Rourk v. Birmingham, 27 Ala.App. 133, 168 So. 206, cert. denied, 232 Ala. 355, 168 So. 209 (1936).
[9] *Id.* at 99.

> justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion.[10]

It was not long after *Thornhill* that the Supreme Court began to place restrictions upon the doctrine enunciated therein. In *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*,[11] the Court in upholding the enjoining of all picketing, and not merely the accompanying violent acts stated, "It was in order to avert force and explosions due to restrictions upon rational modes of communication that the guarantee of free speech was given a generous scope. But utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution."[12] The Court then went on to uphold the Illinois court injunction basing its holding on the fact that the violence was intimately intwined with the picketing in this situation. Because of the strong fear of future violence, it was felt that the State had a right to prohibit the activity as a measure of protection to its citizens.

The Court reaffirmed its holding in a line of cases following this one, and it took great care to point out that:

> . . . Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated.[13]

The state courts have often asserted that certain action contravenes

---

[10] *Id.* at 104-105.

[11] Milkwagon Drivers Union of Chicago, Local 753, v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941).

[12] *Id.* at 293.
A.F. of L. v. Swing, 312 U.S. 321, 326 (1941), in overruling Illinois injunction the court said: "A state cannot exclude working men from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace."

[13] International Brotherhood of Teamsters, Local 615, A.F.L., v. Vogt Inc., 354 U.S. 284 at page 289 (1957), where the court adopted the language in the concurring opinion in Bakery Drivers Local v. Wohl, 315 U.S. 769, 776 (1942). The Vogt court also stated at page 291: "The implied reassessments of the broad language of the Thornhill case were finally generalized in a series of cases sustaining injunctions against peaceful picketing, even when arising in the course of a labor controversy, when such picketing was counter to valid state policy in a domain open to state regulation. The decisive reconsideration same in Giboney v. Empire Storage and Ice. Co., 336 U.S. 490." The case involved an attempt by a union to have the company stop selling ice to nonunion peddlers. The activity was held to be in restraint of trade. The court also stated at page 294 that: "Of course, the mere fact that there is 'picketing' does not automatically justify its restraint without an investigation into its conduct and purposes. State courts, no more than state legislatures, can enact blanket prohibitions against picketing."

state policy, especially in the area of strikes by government employees.[14] Teachers have often sought redress from their governmental employers and as a result run afoul of this doctrine. The court in explaining the basis for the state's policy, concerning strikes by public employees stated in *City of Pawtucket v. Pawtucket Teacher's Alliance,* that:

> .... We are not unmindful of the disparity existing in many cases in the salaries of public officers as compared with similar positions in private employment. However, the acceptance of a position involving the exercise of some degree of sovereignty necessarily implies a surrender of certain personal rights and privileges which, though properly excercisable in private employment, are in public employment, inconsistent with the public interest. Hence the question of the necessity and wisdom of providing adequate compensation for those to whom are intrusted the training of our children during their formative years is in no way to be deemed involved in the present decision.[15]

The New Jersey court in 1965, recently affirmed a line of cases which state that, ". . . peaceful picketing for an unlawful purpose may be enjoined without running counter to any constitutional guarantees."[16]

Thus the views taken by the state courts or by the United States Supreme Court seem to have a great deal of uniformity in many ways. It is agreed that public employees do not have the right to strike, but that they may bargain collectively, if statutes permit it. If they do picket and their purpose in doing so is unlawful (i.e. an attempt to blackmail a local government), the picketing may be enjoined. Also, as a factor which most of the courts which have considered these cases seem to give great stress, is the effect of the picketing.

---

[14] Norwalk Teacher's Association v. Board of Education, 138 Conn. 269, 273, 83 A.2d 482, 484 (1951). There the court stated: "Under our system, the government is established by and run for all of the people, not for the benefit of any person or group. The profit motive, inherent in the principle of free enterprise, is absent. . . . The drastic remedy of the organized strike to enforce the demands of unions of government employees is in direct contravention of this principle." Accord: City of Pawtucket v. Pawtucket Teacher's Alliance, 87 R.I. 364, 141 A.2d 624 (1958).
In Gray v. Wood, 75 R.I. 123, 126, 64 A.2d 191, 192, the Rhode Island court stated: "There can be no question that those charged with the supervision, direction and control of public education in Rhode Island are public officers or officials exercising a governmental function." In City of Pawtucket, 87 R.I. 364, 141 A.2d 624, 628 (1958), the court said: "Teachers only in a less degree than supervisory officials participate in such function." See also the following on injunction of peaceful picketing which violates a significant and reasonable state policy:
Independent Dairy Workers Union of Hightown v. Milk Drivers and Dairy Employees Local Number 680, 30 N.J. 173, 184, 152 A.2d 331, 337 (1959).
Hughes v. Superior Court, 339 U.S. 460 (1950); International Brotherhood of Teamsters v. Hanke, 339 U.S. 470 (1950).
Building Service Employers International Union v. Gazzam, 339 U.S. 532 (1950).

[15] 87 R.I. 364, 141 A.2d 624, 629 (1958).

[16] Delaware River and Bay Authority v. International Organization of Masters, Mates and Pilots, 45 N.J. 138, 211 A.2d 789, 795 (1965); See also International Brotherhood v. Vogt, Inc., 354 U.S. 284 (1957).

In the case of the teachers picketing without being on strike, to merely emphasize their low salaries, the purpose (i.e. the exercise of their right to free speech) may not be unlawful. However, the effects may have such a result. These effects, especially upon their students, should be subject to close scrutiny by a court. In analyzing the effect it is well to note that "the right of free speech . . . is not an unlimited, unqualified right, but the societal value of speech must, on occasion, be subordinated to other values and considerations."[17]

Federal Regulation of Picketing

Section 8(b) of the National Labor Relations Act lists those acts which are denominated as unfair labor practices for a labor organization, or its agents. Subsection (7) specifically states that picketing which has as its object recognition or organization may be prohibited. However, a provision in 8(b)(7)(c) states:

> . . . That nothing in this subparagraph (c) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver, or transport any goods or not to perform any services.[18]

One of the greatest problems in construing this section involves the fact that the partially synonymous words *object* and *purpose* are used in two different parts of the section. "The introductory language to the entire section prohibits picketing that has recognition or organization as 'an object.' The proviso to Section 8(b)(7)(c) allows picketing that has the purpose of truthfully advising the public."[19]

In the second *Crown Cafeteria*[20] case the N.L.R.B. was faced with a dual picketing situation where the unions' assumed objective was ultimately obtaining recognition but the instant purpose of the picketing was informational. They determined that the proviso protects picketing that also has the purpose of informing the public.

The appeals court in agreeing with the Board's interpretation read section 8(b)(7)(c) as follows:

> First, it must be determined whether picketing has either recognition or organization as an object. If it does not, then it is wholly outside the prohibitions of section (8)(b)(7).
>
> If it is determined that picketing has recognition or organization as an object, it still is not prohibited unless it falls within one of the situations described in subparagraphs (A), (B) and

[17] Dennis v. U.S., 341 U.S. 494, 503 (1951).
[18] 49 Stat. 449, as amended by 61 Stat. 136 and 73 Stat. 519, 29 U.S.C. §158(b)(7)(C) (1952).
[19] B.N.A. Labor Relations Expediter — L.R.X. 546 h, §54A.
[20] Crown Cafeteria (49 LRRM 1648).

(C) of Section 8(b)(7). If it falls within subparagraphs (A) or (B), there are no exceptions and the picketing is unlawful, even if it also purports to have an informational purpose.

If it is determined that the picketing has recognition or organization as an object and falls within the situation described in subparagraph (C), it still may be lawful if it satisfies the informational picketing proviso.[21]

If the picketing measures up to these requirements the ultimate step in determining if it is protected or not is to inquire as to whether the picketing is "for the purpose of truthfully advising the public."

The court in the *Crown* case and in *N.L.R.B. v. Local 3, IBEW*,[22] drew the distinction between *signal picketing*, "where the union's purpose is to use the picket line as a signal to obtain organized economic action backed by union discipline, thereby halting pick-ups, deliveries, and other services by neutrals" and *true publicity picketing*, "which appeals only to employees and to the unorganized public for spontaneous popular support."[23]

The courts in drawing such a line have thus held that signal picketing is not protected by 8(b)(7)(c) and is prohibited if it has recognition or organization as an object. "True publicity picketing is protected, however, unless it actually interferes with deliveries or communicates more than the limited information expressly permitted by the proviso."[24]

Thus unless the school teachers in the previously mentioned hypothetical were seeking to inform the public that their "employer does not employ members of or have a contract with a labor organization"[25] they would have great difficulty in drawing upon any analogy to the federal statutes in the defense of their conduct in a state court. It must be remembered that the federal law in this area has no direct application at the present time. Teachers are public employees and "Congress itself has consistently excluded public employment from the operation of the labor relations statutes enacted under the commerce or war power."[26] Thus teachers find themselves without many of the protections accorded to those who work in private industry.

The basis for this congressional exclusion was similarly expressed by the Connecticut Supreme Court in *Norwalk Teacher's Association*

---

[21] Smithley d/b/a Crown Cafeteria v. NLRB, SS LRRM (1963), cited in LRX at page 546c. (2nd Cir. 1963).

[22] NLRB v. Local 3, IBEW, 53 L.R.R.M. 2116 (1963).

[23] B.N.A. Labor Relations Expediter §546e.

[24] *Supra*, note 22.

[25] *Supra*, note 18.

[26] Annot., 31 A.L.R.2d 1142 (1953): "The National Labor Relations Act of 1935 and the subsequent Labor Management Relations Act of 1947, which secure the right of collective bargaining to employees of employers engaged in interstate commerce, expressly provide that the term 'employer' as used in the acts does not include the United States or any state or political subdivision."

v. Board of Education[27] in denying plaintiff's right to strike because teachers are agents of the government. The court stated an idea which has since been ratified many times by the courts of several states. That is, that teachers ". . . serve the public welfare and not a private purpose."[28]

Conclusion

There must be some distinctions drawn at this point in order to clarify the rights which teachers presently appear to have. This might best be done by a process of first excluding those activities which are prohibited to public employees. It seems very clear that picketing in support of a teacher strike, as long as there are anti-strike laws on the books would be clearly prohibited. However, even if strikes were not barred, teachers who picketed in support of a teacher's strike might well be enjoined because their activities could have a devastating effect upon the attitude of the young who are incapable of discerning the true nature of the civil disobedience argument. Finally in the situation where the picketing was clearly *not* in support of a strike but has the effect of causing nondelivery of goods, nonperformance of services for the schools or a substantial decrease in student attendance it might be struck down under the Taft-Hartley Act because of its effect upon neutrals to the activity.

There remains a certain amount of latitude open to teachers in the conduct of their picketing activities. This would be in the situation where the teachers picketed on their own time and made it completely clear that they were only publicizing the fact that they were underpaid. Such action would be permissible as an exercise of their right to free speech. Of course this right is not an absolute right as both the state and federal decisions indicate and teachers must always take care to avoid any dangerous consequences which might occur as a result of their picketing. But these must be discernible effects or free speech will win out.

In such a situation there is a possibility that the employer might argue that these effects have occurred in virtue of the fact that the teacher was accepting his pay, yet disrupting the operation of the system. The corresponding teacher's argument is that high quality education cannot be had without qualified and happy teachers and that underpaid teachers are not happy. But rather than leaving the situation at this somewhat stalemated position there may be a somewhat better solution.

This would be a public employee bargaining statute that gives teachers the right to negotiate and bargain collectively. If set up like the Federal statute it would eliminate many of the problems experienced presently in getting employers to come to the bargaining table volun-

[27] 138 Conn. 269, 83 A.2d 482 (1951).
[28] *Ibid.*

tarily. Recognition or organization picketing could be handled as it is under the National Labor Relations Act, with limitations similar to those under section 8(b)(7). This would require state legislative action; however, it would appear to be a worthwhile starting point from which to gain a workable basis for economic improvement as a group.

Without such a foundation it would seem that any teacher picketing could be closely scrutinized by the courts. This is so because of the very nature of their employment, which many courts view as partaking in a share of the state's sovereignty. If one stops to consider the awesome responsibility a teacher has in educating the youth of a given state, this idea is not at all difficult to accept. Traditionally a higher set of standards and a higher degree of care has been demanded of teachers. Their professional responsibilities have never been looked upon lightly by the courts,

The very fact that teachers choose to use such a mode to air their grievances could well lead to a generally unfavorable reaction in their community. Their profession could to a certain degree fall in disrepute in the eyes of parents and local officials. This feeling might well be imparted to the young people whose pliable minds the teacher hopes to educate. Also the very fact that these young people see their teachers using this means to air their grievances could lead to an immediate lowering of esteem by the pupils. The gravest result of such an experience upon immature minds could be a break-down of authority in the classroom.

This seems to be clearly a possibility. If such a result did occur it seems to this author that a state court would find little difficulty in finding that in the balance between free speech and harmful effects, this action posed a ". . . clear danger of substantive evils . . ."[29] and would thus prohibit it.

Upon final analysis, teachers who choose such a method to put their case before the public may be using a means which is fraught with danger. While the courts have often recognized their plight, they and the public in general have frowned upon such activity by professional people. In a profession which commands and requires dignity to accomplish its ultimate end there is little justification for such activity when there is a legislative avenue open and a federal pattern already laid out.

MICHAEL B. RICK

Wills: Made Pursuant to a Contract: When Parties Bound: It is not unusual to find a joint and mutual will[1] or separate mutual wills used when two persons, each owning property individually, desire a common disposition of their property and agree on such a plan.

[29] Thornhill v. Alabama, 310 U.S. 88, 105 (1940).

[1] ATKINSON, WILLS §49 (1953).