Marquette Law Review

Volume 27
Issue 3 *April 1943*

Article 6

Labor Law - The Regulation of Picketing - Peaceful Picketing and Unfair Labor Practices

Thomas McDermott

PEACEFUL PICKETING AND UNFAIR LABOR PRACTICES

Are sections 111.06(2) (b) and (e) of the Wisconsin Employment Peace Act,[1] which seek to restrict the parties to and the objectives of peaceful picketing, violative of the Fourteenth Amendment of the Federal Constitution? The Wisconsin Supreme Court in *Retail Clerks' Union, Local No. 1403, A. F. of L., et al* v. *Wisconsin Employment Relations Board et al*[2] sustained the constitutionality of these sections. In this case the Union made unsuccessful attempts to unionize the employees of the Sears Roebuck store in Racine. None of the store employees attended the meeting, called, with the consent and approval of the employer, for the purpose of organizing them into the local union. Neither the Union nor the employees had any dispute with Sears Roebuck and Company. Peaceful picketing of the store began December 4 or 5, 1940, and continued until February 28, 1941, when it was forbidden by an order of the Wisconsin Employment Relations Board as being in violation of sections 111.06(2) (b) and (e). The circuit court of Racine County upheld the order of the board. Upon appeal, the Wisconsin Supreme Court sustained the judgment of the lower court, and, in the opinion of the writer, if this case comes before the United States Supreme Court, it will, in all probability, declare that sections 111.06(2) (b) and (e) do not violate the Fourteenth Amendment. The trend apparent from recent Supreme Court decisions in picketing cases should logically result in such a holding.

When the United States Supreme Court in *Thornhill* v. *Alabama*[3] held picketing to be an exercise of the right of free speech protected by the Fourteenth Amendment,[4] new labor legislation became imperative. If picketing as a mode of expression were not to be made the cover for an attack on and a violation of the property rights of others, restrictions would have to be imposed upon it. However, the state in "drawing the line beyond which picketing may be prohibited or en-

[1] 111.06(2)(b). It shall be an unfair labor practice: To coerce, intimidate or induce any employer to interfere with any of his employees in the enjoyment of their legal rights, including those guaranteed in section 111.04, or to engage in any practice with regard to his employees which would constitute an unfair labor practice if undertaken by him on his own initiative.
111.06(2)(e). It shall be an unfair labor practice: To cooperate in, engaging in, promoting or inducing picketing, boycotting, or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike.

[2] 6 N.W. (2d) 699 (Wis. 1941).

[3] 310 U.S. 88; 84 L.Ed. 1093; 60 S.Ct. 736 (1940).

[4] "The dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. We concur with Mr. Justice Brandeis: 'Members of a union might without special statutory authorization by a state make known the facts of a labor dispute for freedom of speech is guaranteed by the Federal Constitution.'" Thornhill v. Alabama, Supra.

joined' has the tortuous task of staying within the Fourteenth Amendment. In protecting the right of others the state must not destroy the pickets' right to freedom of speech. The necessary equilibrium is difficult of achievement.

Picketing has three elements: (1) means; (2) parties; (3) aims or objectives. Picketing characterized by violence (show of force, blocking of entrances, etc.) is, of course and necessarily so, prohibited. In *Milk Wagon Drivers' Union of Chicago, Local 753* v. *Meadowmoor Dairies, Inc.*,[5] the United States Supreme Court held that a state court may enjoin picketing in itself peaceful when it is enmeshed with contemporaneously violent conduct. Furthermore, picketing though peaceful may be prohibited, if it is characterized by fraud and misrepresentation. Curbing violent picketing has presented no difficulties because it naturally comes under the police powers of the state. Peaceful picketing, however, presents a more difficult problem and the attempts of the various states to curb it have so far met with little success.

By section 103.535, commonly referred to as the "Stranger Picketing Act," Wisconsin attempted to restrict picketing to those who were parties to the labor dispute in question. "It shall be unlawful for anyone to picket, or induce others to picket, the establishment, employer, supply or delivery vehicles, or customers of anyone engaged in business, or to interfere with his business or interfere with any person or persons desiring to transact or transacting business with him, when no labor dispute . . . exists between such employer and his employees or their representatives."

In *American Federation of Labor* v. *Swing*[6] the United States Supreme Court passed on the principle involved in 103.535 and indirectly voided that statute as being violative of the Fourteenth Amendment. The facts of the *Swing* case were: That unsuccessful attempts were made to unionize Swing's beauty parlor. That peaceful picketing of the shop followed. That the picketing was enjoined by an Illinois court on the grounds that since there was no dispute between the employer and his employees, the picketing was illegal. In reversing the Illinois courts the Supreme Court declared: "A state cannot exclude workingmen 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 right of free communication cannot be mutilated by denying it to workers in a dispute with an employer even though they are not in his employ."[7]

[5] 312 U.S. 287; 85 L.Ed. 836; 61 S.Ct. 552 (1940).
[6] 312 U.S. 321; 85 L.Ed. 854; 61 S.Ct. 568 (1940).
[7] Ibid. at 326.

Wisconsin through section 111.06(2)(e), the constitutional of which is still in question, also seeks to limit peaceful picketing to the parties involved in the controversy. This section provides that picketing is illegal unless the pickets represent a majority of the employees against whose employer a strike has been called. Therefore, if only fifty or fewer (or none) of the hundred employees of X Company vote to call a strike, picketing by this minority or by others is under any circumstances illegal and enjoinable. Section 111.06(2) (e) reads: "It shall be an unfair labor practice to cooperate in, engaging in, promoting or inducing picketing, boycotting, or any other overt concomitant of a strike unless a majority of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike."

The constitutionality of 111.06(2) (e) could have been passed upon by both the Wisconsin Supreme Court and by the United States Supreme Court in the *Plankinton House* case.[8] In this case less than a majority of the Plankinton employees went on strike and began to picket the Plankinton House. The Wisconsin Employment Relations Board issued an order restraining the picketing because it was carried on in absence of a majority strike vote.[9] However, neither the Wisconsin nor the United States Supreme Court decided the case in light of the order. Both courts sustained the injunction on the grounds that the picketing was characterized by violence. The United States Supreme Court relied upon the construction placed upon the Board's order by the Wisconsin court. The fallacy of this lies in the very evident fact that "the Board's order, not the Wisconsin decision, was served upon the pickets, and if the free speech character of picketing is to be given full recognition, the order on its face should have been subjected to appropriate judicial scrutiny."[10]

In *Retail Clerks' Union* v. *Wisconsin Employment Relations Board*[11] the Wisconsin Supreme Court sustained the constitutionality of 111.06 (2) (e). In this case the constitutionality of the statute was specifically attacked and the court sustained the cease and desist order which among other findings was based upon the fact that: The defendant union had done or caused to be done acts prohibited by section 111.06 (2) (e), namely, "cooperating in, engaging in, promoting and inducing

[8] 236 Wis. 329, 294 N.W. 632 (1941); 315 U.S. 437; 86 L.Ed. 946; 62 S.Ct. 65 (1941).

[9] "That the respondent unions are guilty of unfair labor practices by co-operating and engaging in promoting and inducing picketing and boycotting, all being overt concomitants of a strike, without first obtaining the approval of the majority of the employees of the Plankinton House by a secret ballot." 236 Wis. at 335.

[10] Ludwig Teller, "Picketing and Free Speech," *Harvard Law Review* (October, 1942), p. 191.

[11] 6 N.W. (2d) 699 (Wis. 1942).

strike, without first obtaining by secret ballot the approval of a majority of the employees of the Sears Roebuck store (the employer) to picketing, bannering, boycotting, all being overt concomitants of a call a strike."[12]

Will the United States Supreme Court sustain 111.06(2) (e), especially in view of the *Swing* case? In that case the Court declared: "We are asked to sustain a decree which asserts that there can be no peaceful picketing or peaceful persuasion in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him. Such a bar of free communication is inconsistent with the guarantee of freedom of speech."[13] The principle of law laid down in the *Swing* case is that regardless of one's relation to a labor dispute or lack thereof, he has the right peacefully to express his opinion and viewpoint on the labor dispute. If we compare the fact situation of the *Retail Clerks' Union* case with that of the *Swing* case, we find the two cases to be almost identical. It would seem reasonable then to conclude that the Supreme Court on appeal will decide the *Retail Clerks' Union* case in light of the same legal principles and will declare 111.06(2) (e) unconstitutional. Such a decision is inescapable if the Supreme Court adheres to the principle, which was laid down in the *Thornhill* case and reiterated in the *Swing* case, that picketing is the exercise of free speech.

But *Carpenters' & Joiners' Union, Local No. 213* v. *Ritter's Cafe*[15] and *Allen-Bradley Local No. 1111* v. *Wisconsin Employment Relations Board*[16] would indicate that the Supreme Court is tending to emasculate or, perhaps, to end the identification of picketing with free speech. In the *Ritter's case* the Supreme Court sustained a Texas injunction forbidding picketing before an establishment which industrially had no connection with the labor dispute in question. The Carpenters' Union picketed Ritter's cafe because the contractor building his house, one and a half miles from the cafe, employed non-union labor. In the *Allen-Bradley* case the Supreme Court upheld an order issued by the Wisconsin Court enjoining the picketing of private homes. The Union maintained a picket line before the home of a non-striking employee of the employer with whom the Union was in dispute. The principle of law laid down in these two cases is that peaceful picketing may be illegal if the pickets and the occupant of the place picketed lack a common business interest. The Supreme Court distinguished the *Ritter* and the *Allen-Bradley* cases from the *Swing* case

[12] *Ibid.*, at 702.
[13] American Federation of Labor v. Swing, Supra, p. 325.
[14] 237 Wis. 164, 295 N.W. 791 (1941); 315 U.S. 740; 86 L.Ed. 1154; 62 S.Ct. 820 1942).
[15] 315 U.S. 769; 86 L.Ed. 1178; 62 S.Ct. 118 (1942).
[16] 315 U.S. 722; 86 L.Ed. 1143; 62 S.Ct. 111 (1942).

on the specious grounds that unlike the former the latter involved parties who were interrelated through a community (nexus) of business interest.

It is difficult to follow the court's line of reasoning. For if picketing is, as the United States Supreme Court maintains, the exercise of free speech, then have not pickets the right to speak freely in one locality as well as in another (if there is neither trespass nor breach of peace)? If union beauty operators may speak freely in front of Swing's beauty parlor, even though they have no nexus of employment with him, why may not union carpenters speak freely in front of Ritter's cafe, even though they have no nexus of business interest with him. The lack of an industrial nexus with Ritter's cafe is no more a valid reason for depriving the carpenters of their right to freedom of speech before the cafe, than the lack of a racial nexus with whites would be a justification for depriving negroes of their right to freedom of speech before a public forum. The *Ritter* and the *Allen-Bradley* cases cannot be brought into accord with the *Swing* case.

Under the *Swing* case section 111.06(2) (e) is quite evidently unconstitutional, but the *Ritter* and the *Allen-Bradley* cases mark a decided departure from the *Swing* case toward a willingness to permit the states to restrict the parties involved in picketing. Therefore, the ruling of these two cases should logically result in a sustainal of section 111.06(2) (e). The clear and irreconcilable divergence of the *Ritter* and the *Allen-Bradley* cases from the *Swing* case implies a repudiation of the latter by the United States Supreme Court. It would be sound legal reasoning for the United States Supreme Court to uphold the Wisconsin Supreme Court in *Retail Clerks' Union* v. *the Wisconsin Employment Relations Board.*

In addition, the Wisconsin Supreme Court in *Retail Clerks' Union* v. *the Wisconsin Employment Relations Board* upheld the constitutionality of 111.06(2) (b). This section provides that picketing is illegal if the objective in view is to force an employer to interfere with the legal rights of his employees. Therefore, if the employees of X Company refuse to join the union, picketing to coerce X Company to force them to do so by threat of dischargal or otherwise is illegal and enjoinable. Section 111.06(2) (b) reads: "It shall be an unfair labor practice to coerce, intimidate, or induce any employer to interfere with any of his employees in the enjoyment of their legal rights, including those guaranteed in section [employees shall have the right of self-organization and the right to form, join or assist labor organizations . . . and such employees shall have the right to refrain from any or all of such activities—111.04] or to engage in any practice with regard to his employees which would constitute an unfair labor practice if undertaken by him on his own initiative." This statute was the

necessary consequence of the *American Furniture* case and the *Senn* case where the courts refused to sustain an injunction against picketing which admittedly sought to compel the employer to coerce his employees to join the union.

The Wisconsin Supreme Court's decision is legally correct and basically sound for it is realistic and appreciative of the true nature of the picketing enjoined. But will the Wisconsin Court be upheld on appeal especially in light of recent United States Supreme Court decisions and that Court's interpretation of picketing? This will, in turn, depend upon the Supreme Court's view of these questions: (1) May state courts enjoin peaceful picketing carried on for an unlawful objective? (2) May the state without violating the Due Process Clause forbid peaceful picketing which has for its objective the compelling of an employer to force his employees to join a union?

A primary principle of the common law is that an individual or a group of individuals may not seek an illegal object through a legal means. Therefore, the common law forbids peaceful picketing which involves a secondary boycott. One may not picket another if his object in so doing is to drive the other out of business or to do him great harm. Wisconsin has made use of this principle to forbid picketing, though peaceful, which seeks an unfair labor practice. While acknowledging and upholding the legality and the right of peaceful picketing, Wisconsin claims jurisdiction "to subject to injunctive relief any labor activity, including peaceful picketing, which conflicts with desirable social and economic policies."

While there is no United States Supreme Court decision determinative of the issue, it would seem that the United States Supreme Court recognizes the states' right to enjoin peaceful picketing carried on for an unlawful objective. There is not to be found "in the Due Process Clause of the Fourteenth Amendment a constitutional command that peaceful picketing must be wholly immune from regulation by the community." Since the Supreme Court in the *Ritter* and the *Allen-Bradley* cases allow the states' right to restrict the locale of peaceful picketing, by analogy one might conclude that the same Court recognizes the states' right to prohibit certain objectives of peaceful picketing. The dictum in *Bakery & Pastry Drivers & Helpers Local 802* v. *Wohl*[17] seems to imply that state courts may enjoin picketing carried on for an unlawful objective. That case involved a dispute between the union and "vendors"—independent business men who owned their own trucks, purchased goods from manufacturers, and sold them to retailers. The union by picketing the manufacturers sought to compel the

[17] Bakery and Pastry Drivers v. Wohl, Supra.

vendors to employ union members. An injunction was granted and sustained by the New York courts because no labor dispute was involved under state law. The United States Supreme Court reversed this judgment on the grounds that the lack of a labor dispute under state law did not impair the union's constitutional right to free expression with regard to the facts of an industrial controversy. Wohl contended that the term "labor dispute" was to be interpreted in light of *Opera on Tour, Inc.* v. *Weber*[18] where the New York Court of Appeals, speaking of the Wohl case, stated: "We held that it was an unlawful objective to attempt to coerce a peddler employing no employees in his business and making approximately thirty-two dollars a week, to hire an employee at nine dollars a day for one day a week."[19] The Supreme Court refused to rely upon this interpretation because "this lacks the deliberateness and formality of a certification"[20] and because the quoted words were "uttered in a case where the question of the existence of a right to free speech under the Fourteenth Amendment was neither raised nor considered."[21] Apparently, then, the Supreme Court would have ruled otherwise had the New York Court in the *Wohl* case made a finding that the picketing was for an unlawful labor objective. Finally, freedom of speech is not license as to its objectives. To advocate the violent overthrow of our government or to encourage resistance to the United States in time of war may certainly be prohibited. Now, if peaceful picketing is freedom of speech, it likewise may seek only lawful objectives.

The question as to whether or not the state may without violating the due process clause forbid peaceful picketing which has for its objective the compelling of an employer to force his employees to join a union is still to be determined by the United States Supreme Court. The picketing in the *Swing* case sought the compulsory unionization of employees who had refused to join the union. The United States Supreme Court impliedly ruled favorably on the objective in that it permitted the picketing to continue. But the *Ritter* and the *Allen-Bradley* cases have substantially altered the judicial interpretation of picketing apparent in the *Swing* case. Texas and Wisconsin were permitted to restrict picketing to the locale involved in the dispute on the grounds that the right to picket may be qualified by considerations of public policy. Moreover, the *Thornhill* case, which placed picketing under the Fourteenth Amendment, emphatically stated: "The rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject

[18] 285 N.Y. 348, 34 N.E. (2d) 349 (1941).
[19] *Ibid.*, at 363.
[20] Bakery and Pastry Drivers v. Wohl, Supra, at p. 774.
[21] *Ibid.*, at 775.

to modification or qualification in the interests of the society in which they exist."[22] Wisconsin enacted 111.06(2) (b) to obviate the injustice and detriment to the general welfare occasioned by the *Senn* and the *American Furniture* cases. Beyond cavil, Wisconsin has the right and the duty to protect the rights not only of union employees but also of non-union employees. Section 111.04, giving employees the right to refrain from joining the union, would be nugatory if their unionization could be compelled by coercing the employer through picketing. In addition, the employer is obligated by section 111.06(2) to respect the rights of his non-union employees given them by section 111.04. If the employer is not free to carry out his obligation, then an impasse must result which will be harmful to the common good. Therefore, the general welfare of Wisconsin is best served by forbidding peaceful picketing which has for its objective the compelling of an employer to force his employees to join a union. For these reasons it is the opinion of the writer that the Wisconsin Supreme Court's ruling in *Retail Clerks' Union* v. *Wisconsin Employment Relations Board* will be sustained.

The unreserved declaration in the *Thornhill* case that peaceful picketing is freedom of speech and its practical effectuation in the *Swing* case placed the United States Supreme Court in an untenable position. The identification of picketing with free speech would prevent any effective restriction of picketing by the states. In effect the pickets could picket for what, against whom, and where they pleased. Knowing that this would work incalculable harm and injustice, the United States Supreme Court tacitly admitted in the *Ritter* and the *Allen-Bradley* cases that picketing is, at most, akin to free speech. In the *Wohl* case, Mr. Justice Douglas in his concurring opinion stated: "Picketing by an organized group is more than free speeh, since it involves patrol of a particular locality and since the very presence of the picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence, those aspects of picketing make it the subject of restrictive regulation."[23]

Indeed picketing is more than free speech, it is a form of economic pressure. The purpose of the picket line is not to interchange ideas and opinions, but to prevent the delivery and purchase of goods and thereby to force the employer to comply with the union's wishes. Union members will not pass the picket line regardless of their relation to the employer. Customers naturally are reluctant to deal with an embattled business. "The only intellectual conviction to which picketing leads is

[22] Thornhill v. Alabama, Supra, at p. 103.
[23] Bakery and Pastry Workers v. Wohl, Supra, at p. 776.

the understanding that if the picketed enterprise does not give in, it will eventually wish it had."[24]

The realization that picketing is basically coercive in nature and, for that reason, that it must be regulated in terms of such principles of the law of torts as lawful purpose, just cause, and proper parties caused the Wisconsin Supreme Court to sustain sections 111.06(2) (b) and (e) as constitutional. The *Ritter, Allen-Bradley,* and *Wohl* cases indicate that the United States Supreme Court is now appreciative of the true character of picketing. If *Retail Clerks' Union* v. *Wisconsin Employment Relations Board* comes before the United States Supreme Court, the judgment of the Wisconsin Supreme Court will be affirmed and sections 111.06(2) (b) and (e) will be declared constitutional.

THOMAS MCDERMOTT.

[24] Gregory, "Peaceful Picketing and Freedom of Speech," 26 A.B.A.J. (1940), at 710.