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LABOR LAW—ORGANIZATIONAL PICKETING DEFINED AND APPROVED

Plaintiff was the proprietor of a retail liquor store and employed three sales clerks. When the clerks declined to join the Wine and Liquor Store Employees Union, the union began to picket the plaintiff's store. After two years of peaceful picketing, the employer sued to enjoin further picketing. The decision of the New York Supreme Court, Appellate Division, allowing the injunction was reversed by the Court of Appeals of New York, which held that peaceful organizational picketing may continue indefinitely. *Sidney J. Wood v. John M. O'Grady, Wine and Liquor Store Employees Union, Local 122, A.F. of L.*, 307 N.Y. 532, 122 N.E. 2d 386 (1954).

This court has established the New York policy on one of the most controversial issues in the field of labor relations. Picketing is a potent weapon in a union's arsenal, while the equitable injunction against picketing is the devastating retaliatory move on the part of the employer. The states are thus caught between the clash of these two mighty forces, and they have traveled a rocky road in attempting to strike a balance.

By adopting in 1935 an anti-injunction statute[1] similar to the Norris-LaGuardia Act,[2] New York followed the lead of the federal government in discouraging the use of injunctions in labor disputes except where there is fraud or violence. For picketing to be part of a labor dispute, the object of the picketing must be lawful. The word "lawful" is what causes much of the controversy. Some states have anti-injunction acts, but they also have enunciated a public policy against picketing for certain objectives which no longer are lawful. When these objectives are sought by means of picketing, the state declares that there is no labor dispute. Thus the anti-injunction act does not protect that type of peaceful picketing. New York, as the *Wood* case reveals, has no policy which limits the area of labor disputes.

Thornhill v. Alabama[3] sanctioned the use of peaceful picketing in labor disputes. An Alabama statute establishing a general restraint against peaceful picketing was held violative of the workers' right of free speech. *A.F. of L. v. Swing*[4] extended the use of peaceful picketing to labor disputes not in the direct employer-employee relationship. This case, therefore, allowed stranger picketing.

Although peaceful picketing had been held to be a right derived from the constitutional protection of free speech, some states desired to test how far free speech would extend. Washington passed a statute guaranteeing to all employees freedom from coercion in the determination of a bargaining agent.

[1] Civil Practice Act, Art. 51 § 876-a, L. 1935; Consol. Laws, c. 477 (1935).

[2] Federal Anti-Injunction Act, 47 Stat. 70 (1932); 29 U.S.C.A. § 101 et seq. (1932).

[3] 310 U.S. 88 (1940).

[4] 312 U.S. 321 (1941).

Building Service Employees International Union v. Gazzam[5] soon provided the answer. In this case the union demanded that the employer recognize the union as bargaining agent even though the employees had voted not to join the union. An injunction against stranger picketing was upheld by the United States Supreme Court. The court declared:

> Since picketing is more than speech and establishes a *locus in quo* that has far more potential for inducing action or non-action than the message the pickets convey, this Court has not hesitated to uphold a state's restraint of acts and conduct which are an abuse of the right to picket rather than a means of peaceful and truthful publicity.[6]

Because of Washington's public policy, the picketing here was for an unlawful object. Thus evolved the rule that peaceful picketing for an unlawful object is enjoinable. Similarly, in *United Ass'n of Journeymen Plumbers and Steamfitters v. Graham*,[7] peaceful picketing for an object violative of a provision of the Virginia "right-to-work" statute could be properly restrained.

Many authorities on labor law maintain that stranger picketing should be divided into two groups. The first type is recognition picketing, in which the picketing union demands that the employer recognize the union as bargaining agent regardless of the employees' thoughts on the matter. The other type is termed organizational picketing because its purpose is to publicize the employees' non-union status, thereby inducing the employees to become members of the union.

The significant case of *Goodwins v. Hagedorn*[8] presented New York with an opportunity to declare its policy on recognition picketing. A union which was picketing for recognition despite the fact that a certification proceeding between this union and a rival union was pending before the National Labor Relations Board was enjoined from further picketing on the ground that the purpose of the picketing was unlawful. In deciding this case, the court found it necessary to venture into one of the nebulous areas of labor law that has been discussed frequently in cases involving picketing. The union argued that since the Taft-Hartley amendments to the National Labor Relations Act specifically recited unfair labor practices by unions,[9] and since Taft-Hartley was silent on stranger picketing, the injunction should be denied. The court held that the silence in the federal law left the states free to act on stranger picketing. However, one dissenting judge reasoned that the silence meant that Congress indicated that stranger picketing was to be allowed, while another dissenter held that Congress had so pre-empted the field of unfair labor practices that states should not act on questions of stranger picketing. Thus emerged three diverse views as to

[5] 339 U.S. 532 (1950).

[6] Ibid., at 537.

[7] 345 U.S. 192 (1953).

[8] 303 N.Y. 300, 101 N.E. 2d 697 (1951).

[9] National Labor Relations Act, as amended by the Labor Management Relations Act (Taft-Hartley), 61 Stat. 140, 141, 142 (1947); 29 U.S.C.A. § 158 (b) (1947).

how the Taft-Hartley Act has affected state jurisdiction over peaceful picketing.

Now that peaceful recognition picketing could be restrained, the stage was set for a challenge to the validity of peaceful organizational picketing, which challenge is the crux of the instant case. The Special Term of the Supreme Court dismissed the plaintiff's petition to enjoin the organizational picketing, ruling that the purpose of the picketing was lawful. The Appellate Division, on the other hand, decided that the length of time of the picketing (two years) made the purpose illegal. Citing the *Goodwins* decision on recognition picketing, it allowed the injunction.

The Court of Appeals, in reversing the Appellate Division, considered four aspects of the organizational picketing problem. First, the labor policy of New York was reviewed. An impressive list of cases cited by the court revealed that New York has been consistently reluctant to enjoin peaceful picketing. This policy obviously was in contrast to the Washington and Virginia public policy of curbing peaceful picketing. Then the court cited the Civil Practice Act,[10] which declared that injunctions may not be used in labor disputes unless unlawful acts have been threatened or committed and substantial and irreparable injury to the complainant's property has occurred. The inconveniences to the plaintiff, the court found, were merely those usually accompanying peaceful picketing in a labor dispute. A labor dispute was involved here, the court decided, since the picketing was reasonably connected to wages, hours of employment, and the right of collective bargaining. Next, the court ruled that the *Goodwins* case on recognition picketing was not a precedent to the instant case, which involved organizational picketing. Third, a search of New York cases failed to establish that organizational picketing was unlawful. Thus *Building Service Employees v. Gazzam* could not be applied here because of the lack, under New York policy, of an unlawful object. Finally, the court held that the length of time of the picketing was immaterial. In the words of the court:

> The test of illegality, as we see it, is not whether any particular picketing has "gone on long enough," but rather whether such picketing is being lawfully conducted in the furtherance of union interests in a statutory labor dispute. If picketing is a legally protected right one day, it continues as such into the next.[11]

It is interesting to note here the reaction of the Special Term to the reversal of its decision in the *Wood* case by the Appellate Division. Two weeks after the Appellate Division ruled, the Special Term declined, in *Cortlandt Co. Dept. Store v. Cohen*,[12] to restrain peaceful organizational picketing which had continued for only two weeks. The Special Term distinguished the Appellate Division's ruling in the *Wood* case on the ground that the length of time of the picketing

[10] Art. 51, § 876-a, L. 1935; Consol. Laws, c. 477 (1935).

[11] 307 N.Y. 532, 540, 122 N.E. 2d 386, 390 (1954).

[12] 205 Misc. 165, 127 N.Y.S. 2d 261 (S. Ct., 1953).

was the factor leading to an injunction. The Special Term obviously did not consider the Appellate Division to have banned organizational picketing per se.

The principal case contained a vigorous dissent. In emphasizing the dilemma of the employer, the dissenting judges contended that the plaintiff must either go out of business as a result of the picketing or accede to the union's demand for recognition despite the wishes of the employees. This latter course would be a violation of both the New York State Constitution[13] and the New York State labor law which prohibits an employer from requiring union membership as a condition of employment except where a union shop agreement has been reached.[14] Secondly, the dissenters reasoned that organizational picketing should not be allowed today. They admitted that it was a potent weapon in the days of the lockout and the "yellow dog" contract. But since the employer's use of his two clubs has been curtailed by modern legislation, likewise courts today should outlaw organizational picketing. Lastly, the dissent stated that there was no organizational picketing here since the picketing was directed at the store, which the employer, not the employees, owned.[15] They alleged that even if the picketing could be construed as organizational, any distinction between recognition and organizational picketing was theoretical because the union has the same desire (exclusive bargaining status) in both situations, regardless of whether the picketing is directed at the employer or the employees.

Until the instant case was decided, the trend of cases had been with the dissenting opinion. Wisconsin, in *Wisconsin Employment Relations Board v. Retail Clerks*,[16] outlawed all stranger picketing, refusing to recognize a distinction between organizational and recognition picketing. Michigan also enjoined peaceful organizational picketing in an interesting decision.[17] In rejecting the union's protests against a violation of free speech, the court stated that picketing involved other elements besides communication, namely, economic pressure and the signalling of fellow union members as to trouble with a particular employer. The familiar argument over conflicting federal-state jurisdiction was also raised. Although the court admitted that some states, notably Minnesota, be-

[13] N.Y. Const. Art. I, § 17.

[14] New York State Labor Relations Act, §§ 703, 704, L. 1937; Consol. Laws, c. 443 (1937).

[15] Conceding that the pickets were stationed at the plaintiff's store, one might ask where else the union could place pickets in order to induce the non-union employees to join the union. Certainly, the union could not picket the employees' residences. Also, the majority considered the placards carried by the pickets to be a truthful representation of the dispute. The signs read: "The employees of this store are non-union. Please do not patronize this non-union store. We are members of the American Federation of Labor, Local 122." Thus the signs contained no charge that the employer hired non-union workers only or even that he was the cause of the non-union status of the employees.

[16] 264 Wis. 189, 58 N.W. 2d 655 (1953).

[17] Hall Steel Co. v. Teamsters, 53 A.L.C. 132 (1952).

lieve that federal jurisdiction is exclusive in picketing situations, it commented that considerable legislative action and judicial interpretation must occur before Michigan will cede exclusive jurisdiction in picketing disputes to the federal government. The federal-state conflict was labeled, "a shadowy field of uncertainty." Only when there is "direct and positive conflict" will Michigan yield its jurisdiction. This latter statement is somewhat surprising since the states can enact so-called "right-to-work" legislation only when the state laws against union-security clauses in bargaining agreements are more restrictive than the Taft-Hartley Act.[18]

Illinois has not yet been confronted with a case squarely presenting the issue of whether peaceful organizational picketing shall be restrained. Like many other states, Illinois has an anti-injunction act,[19] but, as has been observed, state public policy may remove the protection of an anti-injunction statute. In *Bitzer Motor Co. v. Teamsters, Local 604*,[20] Illinois adhered to the nation-wide trend and prohibited peaceful recognition picketing. Illinois, therefore, has three avenues to pursue in the controversy over peaceful organizational picketing: 1) such picketing may be held to be for an unlawful object under Illinois policy, and thus will be enjoined, 2) Wisconsin's refusal to distinguish between recognition and organizational picketing can be followed, or 3) the *Wood v. O'Grady* decision allowing such picketing may be preferred.

Pennsylvania rendered a decision between the time that the New York Appellate Division and the Court of Appeals ruled in the *Wood* case.[21] Organizational picketing that had continued for five years was restrained. The Appellate Division's decision in the instant case was specifically referred to in this case. The criterion as to the length of time for organizational picketing was established as follows: for a business involving a small number of workers, two or three weeks of picketing is sufficient; and where more than one hundred workers are involved, two or three months should be enough time for picketing. It is questionable as to whether this case will stand, in lieu of the subsequent developments in the instant case.

Ultimately, the question of peaceful organizational picketing involves basic policy considerations. On the part of the union, organizing reluctant workers adds numerical and financial strength to the union. It aids the benefits already acquired by the union workers in the form of high wages and fringe benefits by attempting to reduce the number of employers with non-union workers, who generally do not have such benefits, giving those employers a competitive

[18] National Labor Relations Act, as amended by the Labor Management Relations Act, 61 Stat. 151 (1947); 29 U.S.C.A. § 164 (b) (1947).

[19] Ill. Rev. Stat., c. 48 § 2a (1925).

[20] 349 Ill. App. 283, 110 N.E. 2d 674 (1953).

[21] Anchorage v. Waiters and Waitresses Union, 54 A.L.C. 759 (1954).

advantage over employers hiring union members. But most important is the fact that picketing is the union's greatest weapon. Any curbing of picketing seriously damages its bargaining power. On behalf of the employer, there is the disturbing dilemma discussed by the dissent in the *Wood* case. Of course, the employer does not want to go out of business. On the other hand, it would defeat the purpose of labor legislation if a union could pressure an employer into committing unfair labor practices. Whether the decision in *Wood v. O'Grady*, which contravenes the previous trend of state cases on peaceful organizational picketing, will be followed by other states because of the pivotal importance of New York in labor relations, will be interesting to observe.