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Labor Law - Insulting Language on the Picket Line

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traordinary methods of equity.[14] This theory which underlies the *Rule* decision is supported by the numerical weight of authority and the trend of recent cases.

The *Tailby* case appears to be on thin ground, while the *Rule* case is the better reasoned and the more modern view. Although the judge in the *Tailby* case was not bound to follow the view of the Second District in the *Rule* case,[15] the reasoning in *Rule v. Rule* should have been given more than a mere passing reference. With the conflict in the appellate court level between the *Rule* and *Tailby* decisions, a final determination by the Illinois Supreme Court is most desirable. Affirmance of the theory of *Rule v. Rule* would seem preferable.

LABOR LAW—INSULTING LANGUAGE ON THE PICKET LINE

Defendant while acting as a picket was arrested for singing a song which referred to workers who refused to respect the picket lines as "scabs" and "whores." Her defense was predicated on her constitutional right of free speech. The Supreme Court of Virginia in upholding her conviction declared constitutional a unique statute[1] making it a crime to use insulting language which induces one to refrain from working. *McWhorter v. Commonwealth*, 191 Va. 857, 63 S.E. 2d 20 (1951).

Some thirty-three states have enacted statutes which protect the right to work.[2] Constitutional attacks on these statutes predicated upon equal pro-

[14] Bruton v. Tearle, 7 Cal. 2d 48, 59 P. 2d 953 (1936); Creager v. Superior Ct., 126 Cal. App. 280, 14 P. 2d 552 (1932); German v. German, 122 Conn. 155, 188 Atl. 429 (1936); Ostrander v. Ostrander, 190 Minn. 547, 252 N.W. 449 (1934); Fanchier v. Gammill, 148 Miss. 723, 114 So. 813 (1927); Cousineau v. Cousineau, 155 Ore. 184, 63 P. 2d 897 (1936); Johnson v. Johnson, 196 S.C. 474, 13 S.E. 2d 593 (1941); Shibley v. Shibley, 181 Wash. 166, 42 P. 2d 446 (1935). For a further discussion of this problem and other cases falling under notes 12, 13 and 14, consult, Decree for alimony rendered in another state or foreign country as subject to enforcement by equitable remedies or by contempt proceedings, 97 A.L.R. 1197 (1935); 109 A.L.R. 652 (1937).

[15] Decisions of one Illinois Appellate Court are not binding upon another. Hughes v. Bandy, 336 Ill. App. 472, 84 N.E. 2d 664 (1949), aff'd 404 Ill. 74, 87 N.E. 2d 855 (1949).

[1] "It shall be unlawful for any person singly or in concert with others to interfere or attempt to interfere with another in the exercise of his right to work or enter upon the performance of any lawful vocation, by the use of force, threats of violence or intimidation, or by the use of insulting or threatening language directed towards such person to induce or attempt to induce him to quit his employment." Va. Code (1950) c. 229, § 40–64.

[2] States not having such statutes are: Arizona, Delaware, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Montana, New Mexico, North Carolina, Pennsylvania, Tennessee, Utah, and Wyoming. Interfering with another's right to work was not indictable at common law. State v. McGee, 80 Conn. 614, 69 Atl. 1059 (1908).

tection[3] and free speech[4] have been unsuccessful. Insulting language has never been held to be protected by the First Amendment.[5] In *NLRB v. Maryland Drydock Company*[6] a federal court of appeals stated, in considering the extent of freedom of speech allowed in labor activities under federal legislation: "The constitutional right of free speech nowhere means freedom to wantonly lampoon or insult anyone." The Virginia court in the *McWhorter* case was reluctant to hold that insulting language was not protected by the First Amendment, stating: "The section [of the statute] is not aimed at the use of 'insulting language' as such.... Its plain purpose is to protect... the right to work from the 'clear and present' danger of destruction by those who, by the use of... insulting words would prevent the exercise of that right."[7] Insulting language is not like obscene, lewd, or profane language. Oftentimes the freedom of dissemination of ideas guaranteed by the First Amendment may be accomplished through language which, to one group, is insulting, while only the highly imaginative could conceive a situation where obscene, lewd, or profane language is an essential part of free discussion. The Virginia court's ultimate reliance on the "clear and present danger" rule was therefore on firmer ground than its implication that insulting language is not the type of speech protected from state abridgement by the Fourteenth Amendment, which curbs state infringement of the right of free speech to the same extent that the First Amendment limits the federal government.

Whether there is a danger to any right from certain activities depends upon the extent of the right and the nature of the activities. The Virginia statute should be considered in a light different from other state statutes protecting the right to work. Inducing a person to refrain from exercising his right to work is far different from preventing his exercise of that right. "To prevent" connotes physical interference while "to induce" includes persuasion without physical force.[8] The danger inherent in activities preventing the exercise of a right are far greater than those which seek to induce another to forego the same privilege. The free right of choice of

[3] Gurein v. State, 209 Ark. 1082, 193 S.W. 2d 997 (1946); Smith v. State, 207 Ark. 104, 179 S.W. 2d 185 (1944); Ex parte Sanford, 144 Tex. Cr. R. 430, 157 S.W. 2d 899 (1941), appeal denied 316 U.S. 647 (1942); Ex parte Frye, 143 Tex. Cr. R. 9, 156 S.W. 2d 531 (1941).

[4] People v. Washburn, 285 Mich. 119, 280 N.W. 132 (1938), appeal denied 305 U.S. 577 (1939).

[5] The use of insulting language in labor disputes has often been enjoined but always there have been other acts of violence of which the language was a part. Great Northern Railway Company v. Brosseau, 286 Fed. 414 (N.D., 1923) is a typical case.

[6] 183 F. 2d 538 (C.A. 4th, 1950).

[7] McWhorter v. Commonwealth, 191 Va. 857, 864, 63 S.E. 2d 20, 24 (1951).

[8] The general judicial definition of "induce" is in accord with the standard dictionary definition; thus it is considered synonomous with persuade, coax, prevail upon, or move by persuasion or influence.

employment is, under this type of statute, protected from any but the fairest means of persuasive interference.

That insulting language, used in the course of a labor dispute, presents a danger to the right to work cannot be denied. The use of the word "scab" together with a distribution of Jack London's vile definition of the word to a worker's neighbors had a marked effect in deterring a person from crossing a picket line in a recent transportation industry strike. The technique used by McWhorter was not so drastic, yet the insulting language there resulted in the prostration of one woman and a marked decrease in the efficiency of others. The effect of insulting language when used by a picket is more pronounced than in other situations because picketing itself, without violence and for a legitimate purpose, has been recognized as having a coercive effect.[9]

Ultimately, the validity of these statutes will depend on the extent that the Supreme Court of the United States will permit the states to abridge the freedom of speech in order to protect the right to work. Speaking for the Court in *AFL v. American Sash & Door Company*, Justice Black wrote: "... concerning state laws we have said that the existence of evils against which the law should afford protection 'is a matter for the legislative judgment.' "[10]

The Virginia decision also can be supported by recent pronouncements of the United States Supreme Court concerning labor activity and freedom of speech. *Giboney v. Empire Storage Company*[11] presents an apt illustration of the conscious return of the Supreme Court to the earlier constitutional principle allowing the states to forbid injurious practices in their internal affairs.[12] In enjoining peaceful picketing the court therein said: "It has never been deemed an abridgement of freedom of speech to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language either spoken, written or printed."[13] Such a statement could well be applied to the situation in the instant case. Therefore, in the light of the *Giboney* case it would seem that a statute prohibiting the use of insulting language during a labor dispute for the purpose of inducing another to refrain from pursuing a lawful course of employment is not an abridgement of freedom of speech.

[9] Hughes v. Superior Court, 339 U.S. 460 (1950); International Brotherhood of Teamsters v. Hanke, 339 U.S. 470 (1950); Building Service Union v. Gazzam, 339 U.S. 532 (1950); Bakery & Pastry Drivers & Helpers Local v. Wohl, 315 U.S. 769 (1942).

[10] 335 U.S. 538, 542 (1949); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937).

[11] 336 U.S. 490 (1949).

[12] Lincoln Union v. Northwestern Company, 335 U.S. 525 (1949).

[13] Giboney v. Empire Storage Co., 336 U.S. 490, 502 (1949).