Marquette Law Review

Volume 34
Issue 1 *Summer 1950*

Article 12

Labor Law - Financial Contribution by Employer to Union as Unfair Labor Practice

William S. Pfankuch

son unless an emergency exists which makes the curtailment of the right necessary, or unless he is so acting that he is violating the rights of others, or gives indication that he will violate the rights of others, or that he is breaking or will break some valid law.

In the instant case there was no showing of an emergency, nor was there any showing that the defendants were violating the rights of others or that they were violating any valid laws. Therefore it is the opinion of the writer that the ordanance in the instant case is not a valid exercise of the police power because it violates the right of the individual to move about freely without interrogation by police as to his purpose when conducting himself in an orderly manner, without violating the rights of others, or violating any valid law.

EMIL SEBETIC

Labor Law — Financial Contribution by Employer to Union as Unfair Labor Practice — In the midst of negotiations for a new contract between the defendant union and the employer, the proprietor of a small beauty shop employing four employees, the defendant demanded that the employer join the union as a non-voting or non-active member. When he refused to do so the defendant began peacefully to picket his place of business, whereupon the employer applied to the Wisconsin Employment Relations Board for relief. The Board found the defendant guilty of an unfair labor practice under the Wisconsin Employment Peace Act and instituted the present suit for an injunction to enforce their order that the union cease picketing. *Held:* Section 111.06(1)(b), Wisconsin Statutes, defines as an unfair labor practice employer contribution of financial support to any labor organization, and though it is true that the term "financial support" is much broader than the mere payment of dues and includes financial support of any kind, it also includes the payment of dues. Picketing an employer to compel him to do that which the law prohibits him from doing is not constitutionally protected free speech and may be enjoined. *Wisconsin Employment Relations Board v. Journeymen Barbers Union, 256 Wis. 77, 39 N.W. (2d) 725 (1949).*

In *Senn v. Tile Layers Protective Union*[1] the United States Supreme Court held that there is no absolute federal constitutional right of an individual to work with his hands, and that a state statute might authorize or permit the union to picket his shop to make him stop doing so in order to spread employment of union members. And in *Cafeteria Employees Union v. Angelos*[2] they determined that a state court may

[1] 301 U.S. 468, 57 S.Ct. 857, 81 L.Ed. 1229 (1937).
[2] 320 U.S. 293, 64 S.Ct. 126, 88 L.Ed. 58 (1943).

not enjoin a union from picketing to coerce the owners of a cafeteria employing no help to join the union.[3] Since the decision in the Angelos case there have been various and conflicting state court decisions on almost identical fact situations,[4] and at least two courts[5] pointed out that the "union" was not really a union at all but merely an association of proprietors of one man businesses trying to force their hours and prices on others, an objective outweighed by the public interest in free competition.

If there is confusion in the situation involving the one man business, is it any wonder that there is in the situation involved in the principal case. Here the individual picketed is more than merely another worker out on his own. He has, by hiring others[6] to aid him, crossed the line of normal distinction between two economic classes, and has become an employer, though still retaining many of the characteristics of his former status. It is in this area, this Never-Never Land of labor disputes, that the traditional concepts of labor law become rather difficult to apply and, once applied, are sometimes hard to justify and reconcile. The right of a man to work with his hands to make a living must be balanced with the right of the union to seek better conditions for its members and protect their gains against those who have no regard for the legitimate ends of unionism. When the barbers' union, an international organization, changed its constitution to require employer-workers to become non-active members of the union, cases arose in at least two other states[7] on precisely the same

[3] It might be pointed out that in that case there was no statute involved declaring the picketing an unfair labor practice. The result might have been different if there had been such a statute in view of the decision in Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 69 S.Ct. 684. (1949), that picketing may not be used as "an essential part of a grave offense against an important public law." See also 1 Baylor L.R. 455 (1949). Wisconsin Statutes, 103.535 provides that it shall be unlawful for anyone to picket the establishment of anyone engaged in business where there is no labor dispute as defined in 103.62 (3), wherein a labor dispute is defined as any controversy between an employer and the majority of his employees. The above provisions would seem to govern the fact situation in the Angelos case. However, the constitutionality of such a statute has been questioned in view of the decision in American Federation of Labor v. Swing, 312 U.S. 321, 61 S.Ct. 568, 85 L.Ed. 855; see 42 Wis. L.R. 115 (1942).

[4] Accord with the Angels case, Coons v. Journeymen Barbers, 222 Minn. 100, 23 N.W. (2d) 345, 18 LRRM 2084 (1946); Kellar v. Sun, 93 N.Y.S. (2d) 165, 25 LRRM 2044 (1949): contra, Bautista v. Jones, 25 Cal. (2d) 746, 155 P.(2d) 343 (1949); Saveall v. Demers, 322 Mass. 70, 76 N.E. (2d) 12, 21 LRRM 2180 (1947); Hanke v. Teamsters Union, — Wash. (2d) —, 207 P.(2d) 206, 24 LRRM 219 (1949).

[5] Saveall v. Demers, and Hanke v. Teamsters Union, supra, note 4.

[6] The complainant in this case employed four persons but in shops of this kind the number is often only one. This is pointed out by the Court in the instant case at p. 84.

[7] Riviello v. Journeyman Barbers (Cal. Dist. Crt. of Appeals), 88 C.A.(2d) 499, 199 P.(2d) 400, 23 LRRM 2120 (1948); Foutts v. Barbers Union (Ohio, Common Pleas), 88 N.E. (2d) 317, 25 LRRM 2180 (1949).

facts as in the principal case, both of which clearly recognized as a legitimate labor objective the right of a union to picket the employer-worker to compel him to join their organization, but both of which enjoined the picketing on widely divergent reasoning.[8]

The decision of the Court in the instant case was based solely upon statutory interpretation and involved no considerations of policy other than those considered by the legislature when it passed the Wisconsin Employment Peace Act. But it is a serious question as to whether an act, apparently designed to meet the needs of large scale industry, should be resorted to in order to find an answer for the situation disclosed by the principal case. The intent of the Legislature discernable from a reading of Section 111.06 (1) (b) appears to have been to prevent the domination of a union by an employer in order to safeguard the absolute freedom of association of the employees and to enable the union to maintain its bargaining power as a true representative of the employees free of the influence of the employer.[9] And though at first blush the decision here appears to go beyond that purpose and to stretch the literal language of the statute out of its context because the amount of "financial support" involved is so small,[10] yet is was, as the Court pointed out, large when viewed percentagewise, and for the employer involved constituted twenty per cent of the total amount originating within his place of business. If his employees are to have true autonomy it would seem that twenty per cent of the financial backing of their union cannot come from their employer.[11] And yet is it the main purpose of a union of semi-independent craftsmen to bargain with their employers in the sense that large industrial unions bargain with theirs? It would hardly seem so. On the contrary the interests of the employer are almost the same as those of his few employees

[8] California decided that to coerce the barber-employer to join the union as a non-active member, a membership sterile of all rights save that of paying dues, was discriminatory and hence violative of the public policy of California; while Ohio reached the strange conclusion that the removal of the union card from the premises of the employer was "constructive force."

[9] At least that is the result that the National Labor Relations Board came to in their interpretation of Section 8 (a) (2) of the National Labor Relations Act, 29 U.S.C.A. 158 (a) (2), which is substantially similar to Section 111.06 (1) (b) of the Wisconsin Statutes, the section under discussion. In re Radio Corporation of America, 63 N.L.R.B. 55, 16 LRRM 311 (1943) held that it is merely evidence of the company dominated nature of a union to be financially supported by the employer, and the mere fact that the employer contributed something to the union was not of itself the "support" contemplated by the National Labor Relations Act where the union appeared to have established itself as "a free and untrammeled bargaining agent." See also Teller, Labor Disputes and Collective Bargaining, Sec. 297 (1940).

[10] Appellant union even claimed that the rule of *de minimus non curat lex* was applicable.

[11] In the case of the shop retaining the services of only one employee, the per cent of financial support originating with the employer would seem quite clearly to be excessive if the union is to remain free from the influence of the employer.

since he does the same work as those whom he employs.[12] In fact an organization of men whose labor is personal service sold directly to the public, rather than directly to the employer who in turn sells the product of their labor to the public as in a manufacturing plant, is more like as association of semi-professional men than a labor union.[13] This common interest between employer and employee becomes of less and less importance as the number of employees is increased and the attention of the owner of the shop is increasingly directed more to the running of the shop than to the rendition of personal service by himself. Yet the test of the Wisconsin Supreme Court here as to the per cent of union support attributable directly to the employer also grows less and less pertinent as the number of employees is increased. And so it would appear that as their interests become more dissimilar, and hence the need for the protection of the Wisconsin Employment Peace Act greater, there is increasingly less reason to invoke the prohibition of Section 111.06 (1) (b). This case discloses the need for legislation more pertinent to the specialized relation of the independent and semi-independent craftsmen, comprising so large a part of our laboring class. They have been neglected in the present statute, fashioned primarily to meet the needs of others.

WILLIAM S. PFANKUCH

Corporations — Non-Delegable Powers of Board of Directors — The directors of two corporations considered it in the best interests of both for defendant Carlisle to obtain 80% or more of Dart's outstanding stock by an exchange of defendant's stock for Dart's stock. They caused the two corporations to enter into an agreement whereby defendant promised to make available shares of its stock in exchange for shares of Dart's "on the basis of such number of shares of Carlisle for each 1 share of Dart as may be determined to be fair and equitable by an independent appraiser to be designated by Carlisle, provided, however, that such exchange shall not exceed a maximum of 218 shares of Carlisle for each 1 share of Dart." The rest of the agreement bound defendant irrevocably to issue, but neither Dart or its stockholders bound themselves to accept, up to 174,400 shares of defendant's stock.

[12] The similarity of those interests was used by the appellant union as one of the reasons why the employer should be amenable to the coercion of the union by means of peaceful picketing, so as to require him to share in the expense of furthering those common interests; ". . . the working employer enjoys many benefits as a journeyman which were obtained only by unceasing and costly struggles of the . . . union. The prices he can get for his services, the regulated training under apprenticeship laws, the beneficent legislation regulating the trade and entrance to the trade . . ."; p. 80 of the principal case.

[13] As pointed out above the courts of at least two states have come to the same conclusion; supra note 5.