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New Light of Picketing--The Blue Boar Case

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Notes and Comments

NEW LIGHT ON PICKETING—THE BLUE BOAR CASE

The identification of peaceful picketing with the constitutional guaranty of free speech has led to immeasurable confusion in the law relating to picketing.[1] For years state decisions have been vacillating, attempting to keep in step with the changing Supreme Court policy on the question. As a result, there has been an increasing need for definite and enlightened decisions, aligning the state determinations with the prevailing national policy. One such opinion was handed down in 1952 when the Kentucky Court of Appeals was asked to enjoin a union from picketing peacefully. The ensuing decision[2] set what appears to be a cornerstone in the foundation of the modern labor law of this state. It should be noted, however, that the question in that controversy was limited in scope to *peaceful* picketing, by a *minority* of employees or by non-employees, where there was *no dispute between the employer and the employees*, and when the picketing amounted to *coercion* of the employer to compel his employees to unionize.

The case arose when the Blue Boar Cafeteria Co. in Louisville was repeatedly asked to recognize the defendant union as bargaining agent for the cafeteria employees. Blue Boar refused the request, stating that it did not believe the employees wanted to affiliate with the union. The union called a meeting of the 270 employees, but only five people attended and those five refused to join. Nevertheless, the union continued to make demands and subsequently had each of Blue Boar's Cafeterias picketed by people who were, of course, not employees of the company. A temporary injunction was granted by the Chancellor on grounds that there was no dispute between Blue Boar and its employees.

Two years later the union re-opened the question by contending that conditions had changed and that there was then an existing dispute. A second Chancellor denied the injunction, relying on the earlier Kentucky case of *Blanford* v. *Press Pub. Co.*[3] wherein it was held that picketing could not be enjoined although no dispute existed. In accordance therewith, the Chancellor found that even though there was

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[1] 1 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING 98 (Supp. 1947); also in 56 HARV. L. R. 180 (1943).

[2] Blue Boar Cafeteria Co., Inc. v. Hotel and Restaurant Employees and Bartenders International Union Local No. 181, 254 S.W. 2d 335 (Ky. 1952.)

[3] 286 Ky. 657, 151 S.W. 2d 440 (1941).

again no dispute, the union was entitled to picket peacefully in order to disseminate information relating to its grievances.

At this point the case was taken to the Court of Appeals. There it was reversed, the court concluding that the Supreme Court of the United States had reinvested "the several state courts with jurisdiction to exercise control over organized labor where its activity contravenes the law or the public policy of the state;"[4] that the Kentucky statutes[5] provide employers shall not be permitted to coerce their employees to join or to refrain from joining a union; and that

> . . . when we set it [the picketing] up against the factual background of this case, it forms part of a pattern which clearly shows that the union has employed methods, from the very beginning, which we think could have had no other effect than to coerce Blue Boar to compel all its employees to unionize.[6]

Thus, the court held that the picketing should be permanently enjoined because it was being carried on for a purpose which was contrary to the laws and public policy of the state. The court distinguished this case from *Blanford* v. *Press Pub. Co., supra,* by pointing out that the issue of coercion was not raised in that instance, and that the earlier case was decided at the time when picketing was completely identified with free speech. Certiorari was denied by the Supreme Court of the United States on October 13, 1953.[7]

Although the kinship between the right to picket and the right of free speech has been the subject of many judicial opinions and legal treatises, it is still difficult to predict with confidence the circumstances in which picketing will be enjoined. Thus, a brief discussion of the modern trend of opinion is a pre-requisite to the discussion of the problems which have grown out of it. Prior to the present more favorable attitude toward unions, picketing was generally considered a prima facie common law tort, permissible only when legally justified.[8] In 1937 this doctrine was shaken by a Supreme Court decision which advanced, by way of dictum, the proposition that the right to make known the facts of a labor dispute is included in the freedom of speech guaranty of the Constitution.[9] This evidently had an appealing ring, and it appeared to become firmly entrenched in 1940 when the Court, in two famous cases, held peaceful picketing to be a form of speech and therefore entitled to protection under the First Amendment.[10]

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[4] *Supra* note 2 at 338.
[5] KY. REV. STAT. 336.130 (1948).
[6] *Supra* note 2 at 339.
[7] 22 LW 3085 (1953).
[8] *Supra* note 1 at 70.
[9] Senn v. Tile Layers Protection Union, 301 U.S. 468 (1937).
[10] Thornhill v. Alabama, 310 U.S. 88 (1940); Carlson v. California, 310 U.S. 106 (1940).

The Court's movement toward the extreme reached its peak in 1941 when it was held in *American Federation of Labor* v. *Swing*[11] that due to the constitutional rights involved, peaceful picketing could not be enjoined even when there was no dispute between the employer and his employees.

While this doctrine was developing, the state courts had struggled to keep their decisions in conformity with those of the Supreme Court, since the question had become one of such widespread federal cognizance.[12] But shortly thereafter even the late state decisions were outmoded as the Supreme Court, finding itself in an untenable position, began to backtrack.[13] In a series of cases[14] the Court expounded upon and extended its previous decisions until the idea evolved that "while picketing has an ingredient of communication it cannot dogmatically be equated with the constitutionally protected freedom of speech."[15] Picketing, it was recognized, is of a dual nature as both speech and economic warfare; and since it is more than a form of communication, regulations can be made which would not otherwise be permissible.[16]

Having concluded from these late holdings of the Supreme Court that picketing is subject to regulation in certain instances, the important question before us today is under what circumstances can peaceful[17] picketing be enjoined?

That peaceful picketing can be enjoined when its object is contrary to the public policy of the state is now clear.[18] The Supreme Court has defined state public policy as that "found in [the state's] constitution, acts of the legislature, and decisions of its courts"[19]—as distinguished from public policy based on custom and mode. Therefore, when picketing is carried on for an objective which is repugnant

[11] 312 U.S. 321 (1941); also see Cafeteria Employees Union v. Angelos, 320 U.S. 293 (1943).

[12] *Supra* note 1 at 76.

[13] *Ibid.*

[14] Carpenters and Joiners Union v. Ritter's Cafe, 315 U.S. 722, 725 (1942); Bakery Drivers Local v. Wohl, 315 U.S. 769 (concurring opinion at 776-7); Giboney v. Empire Storage Co., 336 U.S. 490, 503 (1949); Building Service Employees International Union v. Gazzam, 339 U.S. 532 (1950); Hughes v. Superior Court of California, 339 U.S. 460, 464 (1950).

[15] Per Frankfurter, J., writing for the Court in International Brotherhood of Teamsters v. Hanks, 339 U.S. 470, 474 (1950).

[16] See NOTE, 47 MICH. L. R. 1228 (1949).

[17] Cases wherein injunctions were sought on grounds of violence and threats of violence are beyond the scope of this note.

[18] Carpenters and Joiners Union v. Ritter's Cafe, 315 U.S. 722 (1942) (Violation of state anti-trust law); Giboney v. Empire Storage Co., 336 U.S. 490 (1949) (Violation of state anti-trust law); Building Service Employees International Union v. Gazzam, 339 U.S. 532 (1950) (Violation of state labor disputes act); also see ANNOTATION 11 A.L.R. 2d 1338, 1350 (1950); 31 AM. JUR. 948 (1940); NOTE, 36 VA. L. R. 1097 (1950).

[19] Building Service Employees National Union v. Gazzam, 339 U.S. 532, 537 (1950).

to the legislative acts or judicial decisions of a state, it may be enjoined if the acts and decisions are constitutional.

The problems arising out of the public policy cases are varied and often peculiar to the prevailing law of a certain state. However, mention should be made of the dispute over what constitutes coercion not only because of its importance in the *Blue Boar* case but also because of the frequency with which it arises in cases from other jurisdictions.

Several states[20] have statutes similar to the Kentucky enactment which specifies that "Neither employers or their agents . . . shall engage . . . in unfair or illegal acts or practices or resort to violence, intimidation, threats or coercion."[21] When employers whose workers do not wish to join the union allege that subjecting them to picketing will force them to coerce their employees to join the union in contravention of statutes similar to the one set out above, the question of what constitutes coercion is brought to the foreground. The union generally replies that the picketing is not a form of coercion but merely a bid for "recognition" or "organization" or "an attempt to make known the facts." The proposition receives some support from a 1950 Supreme Court decision where Mr. Justice Minton wrote:

> The construction of the statute which we are reviewing only prohibits coercion of workers by employers. We cannot agree with petitioner's reading of this injunction that 'whatever types of picketing were to be carried out by the union would be in violation of the decree.' Respondent does not contend that picketing per se has been enjoined but only that picketing which has as its purpose violation of the policy of the State. *There is no contention that picketing directed at employees for organization purposes would be violative of that policy.*[22] (Emphasis supplied)

From these words it would appear that the Supreme Court believes there could be picketing for organizational purposes which would not be coercive.

On this subject Professor Sylvestor Petro of New York University has written:

> Picketing for organizational purposes is only fictionally different from picketing for immediate recognition. The same kind of pressure on both employer and employees exists in either case; furthermore, the union is trying to force the employer to coerce his employees in either case; and finally, the union's basic desire—the desire for exclusive bargaining status—is the same in either case. The only difference re-

[20] GA. CODE ANN., sec. 54-804 (1951 Supp); NEW YORK CONSOLIDATED LAWS SERVICE, Vol. 6, sec. 704 (1951); CODE OF VA., sec. 40-70 (1950); WIS. STAT. 111.06 (1951).

[21] *Supra* note 5.

[22] *Supra* note 19 at 539.

> lates not to the conduct of the union, or its effects, but to the union's explanation of its conduct. To make legal decisions vary on such a basis seems peculiar, if not unique.[23]

These words were quoted with favor in the *Blue Boar* case when the Kentucky Court asserted that despite the union's explanation for its conduct, the picketing was coercive.

If, in the foregoing quotation from Mr. Justice Minton's opinion for the majority of the Supreme Court, the emphasis in the last sentence is placed on the word "employees" instead of the word "organization," the sentence conveys a different meaning to the reader. If by these words the Court meant to distinguish between the categories of persons against whom the picketing is being directed, rather than between the alleged purposes behind the picketing, an incisive reply is found in a California opinion wherein the court stated:

> Nor does it help to argue that picketing may be directed against employees only, to persuade them to join the picketing union. In such circumstances it is the employer's business which inevitably suffers, and which may indeed be destroyed if it is a small one.[24]

A second approach to the problem of whether picketing can be directed against employees was taken by a Michigan court recently. The union in that controversy had not contacted the employer at all, but had set up a picket line admittedly for the purpose of inducing the employees to join. The court in its decision asserted that not only were the employer's rights unlawfully impaired, but the employees' rights to sell their labor for an agreed price and to contract freely upon any lawful subject (property rights) were denied without due process of law.[25]

It has been said that peaceful picketing cannot be enjoined on the sole ground that there is no dispute between the employer and his employees.[26] The Supreme Court indicates that it had taken a firm stand on this issue so that the states could not prevent most picketing by defining "dispute" in narrow terms.[27] Yet it should be noted that whether there is or is not an existing dispute between the employer and his employees could be an important factor in determining whether coercion is being practiced. If such a dispute exists, it is less

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[23] PETRO, LABOR LAW JOURNAL (1951) as cited in Blue Boar Cafeteria Co. v. Hotel and Restaurant Employees and Bartenders International Union Local No. 181, 254 S.W. 2d 335 (Ky. 1952).

[24] Seven Up Bottling Company v. Grocery Drivers Union, 233 P. 2d 617 (Cal. 1951).

[25] Winkelman Brothers Apparel, Inc. v. Local Union No. 299, International Brotherhood of Teamsters, 22 Labor Cases, [Sec. No. 67, 262] (1952).

[26] American Federation of Labor v. Swing, 312 U.S. 321, (1941).

[27] *Id.* at 326.

likely that the objective of any picketing would be to force the employer to coerce his employees into acting contrary to their desires. On the other hand, what picketing could not be deemed coercive when there is no active dispute? Thus, when courts enjoin picketing on grounds of coercion, are they in truth going in the back door when they could not go in the front, i.e., enjoining picketing when there is no dispute to protect the helpless employer? And if this is the result of the coercion cases, is it not a commendable attempt to protect the employer when he is himself not guilty of any act complained of by the opposition, and when he is unable to seek any compromise without adversely affecting the desires and interests of his employees?

Another issue brought to the foreground by the new picketing concept is, can a minority of employees picket? If picketing were a pure form of speech, the necessary answer to this question would be that of course a minority can picket—a minority group has as much right to free speech as a majority. Even with picketing considered to of a dual nature, it is probable that, as in the cases where there is no dispute, the courts would not enjoin picketing on the *sole* ground that it is being carried on by a minority of a group of employees. But again analagous to the dispute cases, the fact that the picketing is being carried on by a minority is an important element in determining whether or not coercion is being exerted. This issue is treated by the Restatement of Torts which asserts:

> . . . in the absence of applicable legislation to the contrary, this object [collective bargaining] is proper though only a minority of the employer's employees are members of the union or engage in the concerted action.[28]
>
> At the same time the Restatement makes it clear that: An act by an employer which would be a crime or a violation of a legislative enactment or contrary to defined public policy is not a proper object of concerted action against him by workers.[29]

Thus, it would seem that even though, in theory, a minority can picket,[30] this action should be barred in states where coercion of employees on the part of the employer is prohibited, and the purpose of the picketing minority is to induce the employer to so act.

In conclusion, it would appear from the holding in the *Blue Boar* case that the present rule in Kentucky is—peaceful picketing can be enjoined if its purpose is to effect something which is against the public policy of the state; it is against public policy in Kentucky for

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[28] RESTATEMENT OF TORTS, sec. 785, comment b (1938).

[29] RESTATEMENT OF TORTS, sec. 794 (1938).

[30] See generally, State ex rel. Culinary Workers Union, Local No. 226 v. Eighth Judicial Dist. Ct. in and for Clark County, 66 Nev. 166, 207 P. 2d 990 (1949); Whitehead v. Miami Laundry Co., 160 Fla. 667, 36 So. 2d 382 (1948).

an employer to coerce his employees to join a union; hence picketing, the purpose of which is to force the employer to so coerce his employees, is enjoinable. Even though picketing cannot be enjoined either for the sole reason that (1) there is no dispute between the employer and his employees or (2) that only a minority is participating, it can be inferred from the practical effect of the *Blue Boar* case that when either of these factors exists, a finding of coercion is likely to follow.

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PROCEDURE IN MINORS' TORT CLAIMS IN KENTUCKY

Because of their incapacity, both legal and natural, minors' interests must be protected from designing persons who would take advantage of them. Hence they are said to be favorites of the courts who assume the role of protector. The purpose of this note is to outline the procedure by which this protection is afforded in Kentucky, its scope being limited to the compromise and settlement of minors' tort claims. Since an infant cannot maintain an action until he has reached majority, when he has a claim for personal injuries a suit may be brought for him in one of two ways. A guardian may be appointed to settle or prosecute the claim, or a person qualifying as next friend may bring suit in the name of the minor. Sometimes the parents acting on behalf of the minor settle and release the claim of the child not knowing they have no authority to do so, and unaware that the release is ineffective. Each of the above methods will be discussed in greater detail in the body of this note in the order which they appear above.

In many situations where the minor has a claim for personal injuries his interests are placed in the hands of a legally appointed guardian.[1] This guirdian is one whose appointment is provided for by statute,[2] and is not to be confused with the natural guardian who is either a parent or next of kin. The statutory guardian may be any person who has first made proper application to the county court in accordance with the applicable Kentucky statutes,[3] and has met with the approval of the county court. There is, however, an order of precedence placed upon those who may be appointed guardian: 1) If both parents are living, whichever is most suitable, 2) if one is

[1] KY. RULES CIVIL PROC. sec. 17.03 (1953).
[2] KY. REV. STAT. sec. 387.025 (1953).
[3] KY. REV. STAT. sec. 387.020 (1953). KY. REV. STAT. sec. 387.025 (1953).