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Labor Law--National Labor Relations Act--Recognitional Picketing in Violation of Section 8(b)(7)(C) Held Insufficient to Warrant Injunctive Relief (Penello v. Warehouse Employees Local 570, 230 F. Supp. 900 (D. Md. 1964))

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stated that "such a practice if inaugurated would end only in confusion, delay and injustice. . . ." [32] The fact that few executors have demanded such a trial in the past may be attributable to the earlier authorities which strongly indicate that the courts, the bar, and legal scholars believed that there was no such right to a trial by jury in an accounting proceeding in the surrogate's courts. The decision in *Garfield* is sure to substantially increase such demands.

The New York Court of Appeals has rectified a long standing misconception as to the executor's right to a trial by jury in an accounting proceeding. The decision is strongly supported by the history of the development of the surrogate's courts' powers, since such claims at common law were triable at law where a jury was available. The expansion of surrogate court jurisdiction should not eliminate the right to have a jury trial in these cases. Although the decision in the principal case may cause some confusion and consternation in the surrogate's courts, the right to a trial by a jury of peers is a fundamental constitutional right and this decision is a reaffirmation thereof.

LABOR LAW — NATIONAL LABOR RELATIONS ACT — RECOGNITIONAL PICKETING IN VIOLATION OF SECTION 8(b)(7)(C) HELD INSUFFICIENT TO WARRANT INJUNCTIVE RELIEF. — Petitioner, a distributor of paper products, had for a number of years entered into collective bargaining agreements with respondent union. The most recent agreement expired; and when the parties were unable to agree on a new contract the union filed charges with the National Labor Relations Board alleging a refusal to bargain. These charges were subsequently determined by the Board to be without foundation; however, the union continued to picket. The Regional Director sought an injunction under Section 10(l)[1] of the National Labor Relations Act alleging that the acts of the union constituted recognitional picketing in violation of section 8(b)(7)

[32] Matter of Woodward, *supra* note 22, at 449, 173 N.Y. Supp. at 558.

[1] Section 10(l) of the act reads in part: "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of . . . section 158(b)(7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character. . . . Upon the filing of . . . [a] petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law. . . ." Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act) § 704(d), 73 Stat. 544, 29 U.S.C. § 160(l) (Supp. IV, 1963).

(C)[2] of the act. The District Court *held* that the acts of the union constituted recognitional picketing, but refused to find that it was "just and proper"[3] to grant injunctive relief. *Penello v. Warehouse Employees Local 570,* 230 F. Supp. 900 (D. Md. 1964).[4]

At common law when an employer chose to recognize a union as bargaining agent of his employees, he might do so regardless of the union's representative status.[5] This common-law rule was changed initially by the Wagner Act[6] and later by the Taft-Hartley Act.[7] These acts compelled an employer to recognize a union when it achieved a representative status. Many unions sought to achieve this status by engaging in recognitional picketing. Such picketing has been defined as the application of economic pressure on an employer to cause him to recognize a union as the bargaining agent of his employees.[8]

Before the enactment of the 1959 amendments to the National Labor Relations Act, federal statutes dealt only with a very limited aspect of the problem of recognitional picketing. Section 8(b)(4)(C)[9] of the act prohibited picketing, the object of which was to force an employer to recognize a union, where the employees were already represented by another union which had been certified by the National Labor Relations Board as the exclusive bargaining agent of those employees. The Board further undertook to regulate

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[2] Section 8(b) of the act reads in part: "It shall be an unfair labor practice for a labor organization or its agents— . . .

(7) to picket . . . any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees . . . to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees: . . .

(C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing." Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act) § 704(c), 73 Stat. 544, 29 U.S.C. § 158(b)(7)(C) (Supp. IV, 1963).

[3] National Labor Relations Act § 10(l), 29 U.S.C. § 160(l) (Supp. IV, 1963).

[4] This case is actually the rehearing of an action concerning the same parties, 230 F. Supp. 892 (1964), which was dismissed because of the Board's erroneous view of the law. In that case, the court objected to the Board's determination that the respondent's right to picket changed when the employer withdrew his recognition of the union. The petition was there dismissed without prejudice to bring the present action upon proper conclusions of law.

[5] 1 CCH LAB. L. REP. ¶ 1410.

[6] National Labor Relations Act (Wagner Act), 49 Stat. 449 (1935), 29 U.S.C. § 151 (1958).

[7] Labor Management Relations Act (Taft-Hartley Act), 61 Stat. 136 (1947), 28 U.S.C. § 151 (1958).

[8] Showe, *Federal Regulation of Recognitional Picketing,* 52 GEO. L.J. 248 (1964).

[9] 61 Stat. 141 (1947), as amended, 29 U.S.C. § 158(b)(4)(C) (Supp. IV, 1963).

recognitional picketing beyond the limited scope of section 8(b)(4)(C) by invoking section 8(b)(1)(A),[10] which made it an unfair labor practice for a union to coerce or restrain non-union employees in the exercise of their rights not to engage in collective bargaining and other forms of union activity.[11]

Until the 1959 amendments, therefore, the act did not expressly prohibit a union from picketing to compel an employer to recognize it as the bargaining agent of his employees except in the limited cases controlled by section 8(b)(4)(C). As a result, a union which represented only a minority of the employees, or none at all, could freely engage in recognitional picketing, or, as it was sometimes called, "blackmail picketing."

Congress in enacting the 1959 amendments sought to provide a more fundamental basis for the regulation of this type of picketing. As a result of congressional deliberation, section 8(b)(7)(C)[12] was enacted into law. This section prohibits recognitional picketing where such has been continued for more than a reasonable period of time, not to exceed thirty days, and where no petition for an election has been filed.

There is no doubt that the primary congressional intent was to outlaw "blackmail picketing," but it is equally true that the clear language of the statute goes beyond the mere prohibition of that practice.[13] The only labor organization exempted from the statute's application is one that is "currently certified."[14] In addition, the legislative history of the act shows an intentional acceptance of the House-sponsored requirement that exemption only accrue to unions currently certified, and an equally intentional abandonment of the Senate-sponsored provision which would have exempted all unions having majority status, even though they were not certified.[15] This Senate proposal, if enacted, could possibly have immunized picketing similar to that in the instant case from the statute's application.

In *Dayton Typographical Local 57 v. NLRB*,[16] the court indicated that the clear language of section 8(b)(7) goes beyond

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[10] 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(1)(A) (1958).

[11] Showe, *supra* note 8, at 248, 249.

[12] National Labor Relations Act § 8(b)(7)(C), 29 U.S.C. § 158(b)(7)(C) (Supp. IV, 1963). See Crowley, *The Regulation of Organizational and Recognitional Picketing Under Section 8(b)(7) of the National Labor Relations Act*, 47 MARQ. L. REV. 295, 296 (1963).

[13] Penello v. Warehouse Employees Local 570, 230 F. Supp. 892, 897 (D. Md. 1964) (hereinafter cited as Penello I); Dayton Typographical Local 57 v. NLRB, 326 F.2d 634 (D.C. Cir. 1963).

[14] National Labor Relations Act § 8(b)(7)(C), 29 U.S.C. § 158(b)(7)(C) (Supp. IV, 1963).

[15] 2 U.S. CODE CONG. & AD. NEWS 2512-13 (1959); H.R. 8400, 86th Cong. § 705(c) (1959); II LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 1700(3) (hereinafter cited as LEG. HIST); S. 1555, 86th Cong., 1st Sess. § 708 (1959); I LEG. HIST 583-84; See Dayton Typographical Local 57 v. NLRB, *supra* note 13, at 637-38.

[16] Dayton Typographical Local 57 v. NLRB, *supra* note 13.

the mere correction of "blackmail picketing." The court held that where a union had not been certified and had not filed a petition for a representation election, recognitional picketing for more than thirty days was prohibited, even though the union held authorization cards signed by a majority of the employees. This case also indicated that under section 8(b)(7) even peaceful picketing would be prohibited if the other conditions of the section were met.[17]

In the instant case, the union walked out of the negotiations for a new contract after only two sessions and thereafter began to picket. The Court pointed out that since the employer, in good faith, had hired replacements for these picketers, there were reasonable grounds for him to withdraw recognition from the union.[18] The opinion concluded that since the picketing, with the added recognitional objective, had continued for more than thirty days, there was a violation of section 8(b)(7)(C) which constituted an unfair labor practice.[19] Whatever "rights" the former employees had under the 1959 amendments were limited to their ability to call for, and vote in, an election.[20]

The respondent did not seriously challenge the fact that it was partially engaged in recognitional picketing. However, it contended that since the principal objective of the picketing was of an economic nature, it was permitted by the act and hence not an unfair labor practice.[21] Relying on the *Dayton* case, the Court rejected this contention, stating that if the obtainment of recognition had in fact become an object of the picketing, regardless of whether it was the original object, the provisions of section 8(b)(7) must be applied.[22] The Court, therefore, held that the picketing was clearly recognitional within the meaning of the express statutory language.

The Court, however, was somewhat reluctant to reach this conclusion. It pointed out that there were powerful policy arguments for allowing the union to picket in such a situation. The Court stated that because of the peaceful nature of the picketing, and the possible inequity in compelling the union to call an election so soon after picketing commenced in order to determine its status, it would be harsh to apply section 8(b)(7)(C). However, the Court stated that it had to take the statute as it was written, and having found the picketing to be recognitional, it concluded that section 8(b)(7)(C) was properly invoked by the petitioner.

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[17] *Id.* at 639-40.

[18] Penello v. Warehouse Employees Local 570, 230 F. Supp. 900, 902-03 (D. Md. 1964) (hereinafter cited as Penello II).

[19] Penello II, *supra* note 18, at 904-05.

[20] National Labor Relations Act § 9(c)(1). 49 Stat. 453 (1935), as amended, 29 U.S.C. § 159(c)(1) (Supp. IV, 1963). See S. REP. No. 187, 86th Cong., 1st Sess. 32-33, 2 U.S. CODE CONG. & AD. NEWS 2318 (1959).

[21] Penello II, *supra* note 18, at 903.

[22] Dayton Typographical Local 57 v. NLRB, *supra* note 13, at 636; Penello I, *supra* note 13, at 898; Penello II, *supra* note 18, at 904-05.

The respondent further contended that the provisions of section 8(b)(7) were designed to prohibit picketing seeking to force an employer's *initial* acceptance of a union.[23] The Court pointed out that the only decision which the respondent cited in support of its position was mere dictum.[24] Hence, it was concluded that there was "no justification in the statute, the legislative history or the cases interpreting the statute, for limiting section 8(b)(7) to picketing having as its target forcing or requiring an employer's initial acceptance of the union as the bargaining representative of his employees."[25]

Despite the holding that the union was engaged in an unfair labor practice, the Court refused to grant the injunctive relief prayed for by petitioner under section 10(l). In support of this holding the Court noted that the picketing was peaceful and that there was no indication that it obstructed the free flow of commerce. Furthermore, the employer himself could always call for an election.[26] The Court held that under section 10(l) courts have been granted discretionary power to refuse to issue an injunction even when an unfair labor practice has been found to exist. Upon the facts of the instant case, the Court decided that it would not be "just and proper" to grant injunctive relief.

In view of the legislative history of section 10(l), it would seem that once a court has decided that a union has committed an unfair labor practice in violation of section 8(b)(7), an injunction should issue as a matter of right.[27] Section 10(l) is designed to give an employer speedy relief by way of injunction when such relief is deemed by a federal district court to be "just and proper."[28] The statute was amended in 1959 to include specifically the unfair labor practice of recognitional picketing.[29]

In *Compton v. Local 346, Int'l Leather Goods Union*[30] the First Circuit stated that where the evidence afforded reasonable

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[23] Penello II, *supra* note 18, at 903.

[24] *Ibid.* Building & Trades Council of Santa Barbara County, (Sullivan Electric Co.), Case No. 21-CF-107, 146 N.L.R.B. 138 (1964).

[25] Penello II, *supra* note 18, at 904.

[26] *Id.* at 905. National Labor Relations Act § 9(c), 29 U.S.C. § 159(c) (1958).

[27] See Dayton Typographical Local 57 v. NLRB, *supra* note 13; Phillips v. United Mine Workers of America, 217 F. Supp. 552 (E.D. Tenn. 1963); Compton v. Local 346, Int'l Leather Goods Union, 184 F. Supp. 210 (D. P.R. 1960), *aff'd*, 292 F.2d 313 (1st Cir. 1961); see also interesting discussion of the statement of minority views in S. REP. No. 105, 80th Cong., 1st Sess., pt. 2, at 5, 18-19, 41 (1947), and the debates in the House and Senate, 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 887 (1948); 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1109-10, 1180, 1481, 1585 (1948).

[28] National Labor Relations Act § 10(l), 29 U.S.C. § 160(l) (Supp. IV, 1963).

[29] *Ibid.*

[30] Compton v. Local 346, Int'l Leather Goods Union, *supra* note 27.

cause for the Regional Director to believe a charge that a labor union was engaged in an unfair labor practice in violation of section 8(b)(7)(C), a temporary injunction should issue pending the final disposition of the charge.[31] Thus, it would appear that in cases where an unfair labor practice is actually present, an injunction should a fortiori issue.[32] However, the Court in *Penello* held that the finding of an unfair labor practice did not ipso facto make it "just and proper" for a court to grant injunctive relief to the victim of that practice, and that in a proper case, as in the instant case, it would not be "just and proper" to issue an injunction.

The holding of the Court is open to the criticism that it has assumed a legislative function and by this means has diluted the purpose and force of a statute. The legislative history of section 8(b)(7) shows that the statute was enacted to proscribe the evil of recognitional picketing. Section 10(l) was enacted to provide an essential remedy for the victim of such an unfair labor practice. By limiting the remedy provided by section 10(l), the Court in the instant case may have mitigated the effect that Congress sought to achieve when it enacted section 8(b)(7).

TAXATION — TERMINATION OF EMPLOYMENT REQUIRED FOR PREFERENTIAL TREATMENT OF LUMP-SUM DISTRIBUTIVE SHARE OF EMPLOYEES' TRUST — In 1945 plaintiff's employer, the Waterman Steamship Corporation, established a non-contributory retirement plan for its employees. Ten years later, on May 5, 1955, C. Lee Company purchased over ninety-nine per cent of the outstanding stock of Waterman. A newly elected Board of Directors voted to terminate the plan as of the date of the stock acquisition and pursuant to the Board's resolution, distribution was made on August 1, 1955. Subsequently, Lee merged into Waterman. The Internal Revenue Code provides for long-term capital gains treatment of lump-sum distributions of employees' trusts, if such distribution is on account of the employee's death or other "separation from the service."[1] Plaintiff brought this suit for recovery of income taxes on the contention that the change in stock ownership, resulting in the new management's termination of the plan, was a change of employers tantamount to a "separation from the service." In reversing

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[31] *Ibid.*

[32] Phillips v. United Mine Workers of America, *supra* note 27; Compton v. Local 346, Int'l Leather Goods Union AFL-CIO, *supra* note 27; Alpert v. Local 271, Int'l Hod Carriers' Bldg., and Common Laborers' Union of America, 198 F. Supp. 395 (D.R.I. 1961).

[1] INT. REV. CODE OF 1954, § 402(a)(2).