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Labor Relations

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I. Introduction
II. Free Speech and Private Property
III. Protection of the Right To Organize
IV. Collective Bargaining Agreements
V. Arbitration
VI. Conclusion

I. Introduction

While primary responsibility for regulating labor relations affecting interstate commerce lies with the National Labor Re-

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lations Board, there are a number of significant areas in which state courts may exercise jurisdiction; during 1969, California courts had opportunity to determine a variety of issues raising fundamental conflicts of position: The State Supreme Court was called on to decide a case of classic tension between constitutional rights of free speech and private property,[1] and the Courts of Appeal passed on the issue of employees' basic right to organize,[2] a claim of duress by an employer who contended he was "forced" to sign a collective bargaining agreement,[3] and competing contentions with respect to the arbitrability of certain disputes.[4] It was familiar territory for labor law, but some new guidelines were posted.

II. Free Speech and Private Property

"The carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information on matters of public concern."[5] Thus, dissemination of information through picketing or handbilling has long been considered a form of speech protected by the First Amendment.[6] Picketing, because it is viewed in the context of a labor dispute as "something more" than speech, is subject to regulation with respect to the lawfulness of the objective sought or the particular means used,[7] but picketing for a lawful purpose and in a lawful manner cannot constitutionally be enjoined.[8]

In recent years, courts have been called on to decide in a number of cases whether and under what circumstances

1. In re Lane, 71 Cal.2d —, 79 Cal. Rptr. 729, 457 P.2d 561 (1969). For further discussion of this case, see Leahy, CONSTITUTIONAL LAW, in this volume.

2. Wetherton v. Growers Farm Labor Association, 275 Cal. App.2d —, 79 Cal. Rptr. 543 (1969).

3. Sabella v. Litchfield, 274 Cal. App. 2d —, 78 Cal. Rptr. 845 (1969).

4. Leon Handbag Co. v. Local 213, 276 Cal. App.2d —, 81 Cal. Rptr. 63 (1969).

5. Carlson v. State of California, 310 U.S. 106, 113, 84 L.Ed. 1104, 1108, 60 S.Ct. 746, — (1940).

6. Thornhill v. Alabama, 310 U.S. 88, 84 L.Ed. 1093, 60 S.Ct. 736 (1940).

7. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 93 L.Ed. 834, 69 S.Ct. 684 (1949).

8. International Brotherhood of Teamsters, Local 695, A.F.L., v. Vogt, Inc., 354 U.S. 284, 1 L.Ed.2d 1347, 77 S.Ct. 1166 (1957).

picketing or handbilling may be subject to an injunction because the conduct takes place on privately owned property that is generally open to public use. Many of the cases have involved shopping centers, and, in 1968, the United States Supreme Court held in *Amalgamated Food Employees Union, Local 590 v. Logan Valley Plaza*[9] that a state court could not constitutionally enjoin union picketing in front of a store in a shopping center, even though the shopping center, including the property involved, was privately owned. Relying on *Marsh v. Alabama,*[10] which involved a company town and which held that "the more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it,"[11] the Court in *Logan Valley Plaza* reasoned that the shopping center mall

> ". . . is the funtional equivalent of a business block, and for First Amendment purposes must be treated in substantially the same manner."[12]

Were the rule otherwise, the Court observed, downtown businesses would be subject to on-the-spot public criticism for their practices, but businesses in the suburbs "could largely immunize themselves from similar criticism by creating a 'cordon sanitaire' of parking lots around their store."[13]

In 1969 in *In re Lane,*[14] the California Supreme Court by unanimous decision applied the *Logan Valley Plaza* doctrine to protect union handbilling on a privately owned sidewalk in front of a single grocery store that was not part of any shopping center. The sidewalk in *Lane* bordered the front of the store and was used as access to and from a parking area extending approximately 150 feet to the nearest public street and sidewalk. Recognizing that handbilling on this distant public sidewalk would be an impractical means of reaching store cus-

9. 391 U.S. 308, 20 L.Ed.2d 603, 88 S.Ct. 1601 (1968).

10. 326 U.S. 501, 90 L.Ed. 265, 66 S.Ct. 276 (1946).

11. 326 U.S. 501, —, 90 L.Ed. 265, —, 66 S.Ct. 276, 278.

12. 391 U.S. 308, 20 L.Ed.2d 603, —, 88 S.Ct. 1601, 1612.

13. 391 U.S. 308, —, 20 L.Ed.2d 603, —, 88 S.Ct. 1601, 1612.

14. 71 Cal.2d —, 79 Cal. Rptr. 729, 457 P.2d 501 (1969).

tomers, who typically used the parking lot and private sidewalk, the Court reasoned that a ruling of the private sidewalk to be "off limits" for the exercise of First Amendment rights would permit the store to immunize itself by the kind of "cordon sanitaire" against which *Logan Valley Plaza* warned.[15] Thus, in upholding the right to distribute the handbills in *In re Lane,* the Court characterized *Logan Valley Plaza* as holding:

> ". . . that when a business establishment invites the public generally to patronize its stores and in doing so to traverse a sidewalk opened for access by the public, the fact of private ownership of the sidewalk does not operate to strip the members of the public of their rights to exercise First Amendment privileges on the sidewalk at or near the place of entry to the establishment."[16]

III. Protection of the Right To Organize

Normally, protection of the right of individual employees to join or participate in the activities of labor organizations is a matter of federal law, subject to the exclusive jurisdiction of the National Labor Relations Board.[17] But there are exceptions to this general rule, and one of them exists where the employment relationship is expressly excluded from coverage under the federal statute. Because agricultural labor falls into this category,[18] a California court, in *Wetherton v. Growers Farm Labor Association,*[19] had an opportunity to consider the scope of protection afforded agricultural labor by California law.

The plaintiffs in *Wetherton* had been employed by a carrot producer in the Salinas Valley, and asserted that they had been

15. 71 Cal.2d —, —, 79 Cal. Rptr. 729, 732, 457 P.2d 561, 564.

16. 71 Cal.2d —, —, 79 Cal. Rptr. 729, 733, 457 P.2d 561, 565.

17. Compare San Diego Building Trades Council Etc. v. Garmon, 359 U.S. 236, 34 L.Ed.2d 775, 79 S.Ct. 773 (1959).

18. Section 152(3) of the Labor Management Relations Act, 29 USC §§ 141 et seq., excludes "any individual employed as an agricultural laborer" from one statutory definition of "employee."

19. 275 Cal. App.2d —, 79 Cal. Rptr. 543 (1969).

discharged because they joined the United Farm Workers Organizing Committee. In addition to the employer, two employer associations and their representatives were named as defendants. The action was based on section 922, of the Labor Code,[20] which prohibits "yellow dog" contracts (requiring, as a condition of employment, that the employee agree not to join a labor organization) and on section 923,[1] which declares it to be the public policy of the state that workers "shall be free from the interference, restraint or coercion of employers" with respect to self-organization, designation of representatives, and concerted activities. The action was settled as between plaintiffs and their former employer, but the action was continued against the defendant employer associations on the theories that they constituted joint employers and that they were participants in a conspiracy to commit the wrongful act of firing. Affidavits indicated that one of the respondents, the vice-president of both employer associations, did participate actively in the decision to fire the plaintiffs, but the Superior Court granted summary judgment in favor of defendants on both causes of action, and plaintiffs appealed.

20. Labor Code § 922 (Coercion Not To Join Labor Organization Misdemeanor) read:

"Any person or agent or officer thereof who coerces or compels any person to enter into an agreement, written or verbal, not to join or become a member of any labor organization, as condition of securing employment or continuing in the employment of any such person is guilty of a misdemeanor."

1. Labor Code § 923 reads:
Declaration of Public Policy.

"In the interpretation and application of this chapter, the public policy of this state is declared as follows:

"Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

The Court of Appeal affirmed the summary judgment with respect to the joint employer theory; but it reversed with respect to the conspiracy theory, because it found a triable issue of fact. With respect to the conspiracy question, the Court concluded that the affidavits indicated that the vice-president of the employer associations had met with and advised the employer concerning the discharge of plaintiffs, and had proposed to blacklist them with other employers, and that if this could be established at trial the plaintiffs should prevail. The Court also stated, in accord with a prior appellate decision,[2] that section 932, established a basis for damages as well as injunctive relief in the event of discharge for union activities. In so doing, the Court significantly extended the protection accorded labor under California law, for it rejected the arguments urged by defendants that section 922, provides only a criminal penalty for violation and that section 923, is merely an expression of public policy.

IV. Collective Bargaining Agreements

In the formative period of labor law, when the legal status of collective bargaining agreements was still much in doubt, employers frequently defended enforcement actions by asserting that the agreement was the product of duress, i.e., the result of threatened economic action by the union. But courts rejected this defense on the ground that economic action is inherent in the collective bargaining process.[3] Indeed, one historian of labor law asserts flatly that "there is no reported case of a collective bargaining agreement held void for duress."[4] If that generalization requires some qualification with respect to agreements signed under the threat of illegal strikes or picketing,[5] it appears at least to be accurate in the case of

2. Glenn v. Clearman's Golden Cock Inn, Inc., 192 Cal. App.2d 793, 13 Cal. Rptr. 769 (1961).

3. E.g., Wasserstein v. Beim, 294 NYS 439 (Sup. Ct. 1937). See Annotation, 145 A.L.R. 1171.

4. Teller, *Labor Disputes and Collective Bargaining* § 161 (1940).

5. Compare Lafayette Dramatic Productions v. Ferentz, 305 Mich. 193, 9 N.W.2d 57 (1943). (Strike threat to compel hiring of unwanted musicians, deemed unlawful under state law.) See Annotation, 145 A.L.R. 1171.

economic action that is otherwise lawful. There have been no reported cases invalidating a collective bargaining agreement for duress in the last 20 years.

It is, therefore, rather surprising to find the defense raised at the appellate level in 1969, in the context of lawful union activity, and even more surprising to find the Court according it some recognition by way of *dicta* although rejecting its application to the facts of the case in question. In *Sabella v. Litchfield,*[6] trustees of a union's health and welfare fund brought suit for collection of contributions due from an employer, a restaurant owner, pursuant to a collective bargaining agreement that the latter had signed. The employer's defense was that the agreement had been signed because of a threat that a union representative would picket the restaurant on the night on which a dinner was to be given in honor of the local sheriff and that the dinner would have been cancelled if the agreement had not been signed. The employer claimed he had had no time to read the agreement and that he was not aware of the provision requiring trust fund contributions. These facts, the defendant-employer argued, constituted duress and undue influence. The trial court gave judgment for the plaintiff on a directed verdict, and defendant appealed.

The reviewing Court, observing that the union had a legal right to picket and that a threat to exercise that right could not constitute duress, affirmed the judgment. It is of some interest, however, that the Court opined that its decision might have been different if the union had made a "sudden demand, utterly surprising in its terms," that might "cause an employer to be so distraught that he would be unable to make a real decision, but would yield his signature under emotional stress;"[7] however, the Court continued, because the employer had a running dispute with the union, because the contract that he signed was the standard agreement for the industry, and because he failed to protest the trust fund provisions until suit was brought, such a defense was not available. The

6. 274 Cal. App.2d —, 78 Cal. Rptr. 845 (1969).

7. 274 Cal. App.2d —, —, 78 Cal. Rptr. 845, 846.

Court cited no authority for its *dicta* and probably could not have done so.

V. Arbitration

Federal labor law strongly favors arbitration as a means of resolving labor disputes, and the teaching of the United States Supreme Court is that an order to arbitrate a grievance is not to be denied "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."[8] State courts are bound by the same principle in suits for violation of contracts between an employer and a labor organization that represents employees in an industry "affecting commerce," as defined in the federal act;[9] even with respect to "intra-state" contractual relationships California law is in accord.[10]

In *Leon Handbag Co. v. Local 213*,[11] the employer, a handbag manufacturer, notified the union representing its employees that because of changes in the industry, it intended to cease manufacturing and to engage in the jobbing of handbags, which it would either import from other countries or arrange to have made through independent contractors. The union immediately objected that the proposed action would violate the collective bargaining agreement, which prohibited "outside contracting" except "in extreme emergencies and only after consultation with the union."[12] The employer brought suit in state court for declaratory judgment in support of its "right" to change its business from manufacturing to jobbing as announced.

The union demurred to the employer's complaint on the ground that the agreement contained a broad grievance and

8. United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574, 582, 4 L.Ed.2d 1409, 1417, 80 S.Ct. 1347, —.

9. E.g., Teamsters, Chauffeurs, Warehousemen & Helpers v. Lucas Flour Co., 369 U.S. 95, 7 L.Ed.2d 593, 82 S. Ct. 571 (1962).

10. Posner v. Grunwald-Marx Inc., 56 C2d 169, 14 Cal. Rptr. 297, 363 P. 2d 313 (1961).

11. 276 Cal. App.2d —, 81 Cal. Rptr. 63 (1969).

12. 276 Cal. App.2d —, —, 81 Cal. Rptr. 63, 64.

arbitration clause that called for arbitration of "any grievance, difference or dispute which arises concerning working conditions or interpretations or application of this agreement."[13] The trial court sustained the demurrer. On appeal, the employer conceded that federal law was controlling and that the proposed contracting arrangement would be subject to the arbitration clause, but it contended that the demurrer was improperly sustained because its "absolute right to cease and terminate its business"[14] was not subject to arbitration. In this connection, the employer relied on federal precedent to the effect that complete cessation of business cannot be held an unfair labor practice, even if motivated by antiunion considerations.[15]

The reviewing Court rejected the employer's argument and upheld the judgment on the demurrer. It was clear from the face of the complaint, the Court held, that the employer was not terminating its business, but rather changing its manner of operation, and, on the basis of the broad arbitration clause together with a sweeping "no-strike" obligation on the part of the union, "it cannot be said that the arbitration provisions do not cover the asserted dispute."[16]

While *Leon Handbag* represented the usual situation in which the issue is whether a particular dispute should be decided by the court or by an arbitrator, the situation was more complicated in *San Diego etc. Carpenters v. Wood, Wire, etc. Union*,[17] where the collective bargaining agreement established two types of arbitral procedures and the question was which type was applicable to a particular dispute. An agreement between the employer, a construction contractor, and the Lathers Union contained a general arbitration clause providing for disputes to be submitted to an arbitration board, which was described in the agreement as a Joint Committee. It also

13. 276 Cal. App.2d —, —, 81 Cal. Rptr. 63, 64.

14. 276 Cal. App.2d —, —, 81 Cal. Rptr. 63, 64.

15. Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 13 L. Ed.2d 827, 85 S.Ct. 994 (1964).

16. 276 Cal. App.2d —, 81 Cal. Rptr. 63, 65.

17. 274 Cal. App.2d —, 79 Cal. Rptr. 164 (1969).

contained a specific clause relating to "jurisdictional disputes," which were to be determined not by the Joint Committee, but by the National Joint Board for the Settlement of Jurisdictional Disputes, which had been established by the Building Trades Department of the AFL-CIO. A dispute arose as to whether the employer was in violation of the agreement by assigning certain work, concerning the installation of panels of plaster base material, to employees represented by the carpenters union rather than to employees represented by the lathers union. The lathers union claimed such work was covered by its agreement, but the carpenters union also claimed the work under its agreement with the same employer.

The lathers union, rather than submit the dispute to the National Joint Board, chose instead to submit it to the Joint Committee (established under its own agreement). That committee decided against the employer and levied a fine of $400, but the Superior Court, on petition by the employer and the carpenters union, set aside the award and the reviewing Court affirmed. Since the issue was not whether the dispute should be arbitrated but which tribunal should arbitrate it, the Court reasoned that the national policy favoring arbitration did not preclude a decision vacating the award, and it was for the Court to decide which of the two procedures was applicable. The lathers union argued that the dispute was not "jurisdictional," but the product of unilateral action on the part of the employer, and that even if it were "jurisdictional," the agreement did not preclude the Joint Committee from ruling on it. The Court rejected both of these arguments in favor of resolution of the dispute by the National Joint Board.

Weighing heavily in the Court's evaluation of the situation was the fact that two unions were involved, each asserting rights under its own agreement. Relying on federal precedent to the effect that a collective bargaining agreement is not an ordinary contract governed by common-law principles, and that in order to interpret such an agreement, "it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage, and custom pertain-

ing to all such agreements,"[18] the Court observed that arbitration under each union's separate agreement "would not finally settle the dispute between all of the parties interested because of the probability of divergent results."[19] The National Joint Board procedure, by contrast, provided a procedure that was intended to be binding upon all parties.

VI. Conclusion

The court's concern with the probability of divergent results if each union were to proceed under its own agreement, points to difficult legal questions: What if the lathers union agreement had not contained special provisions for resolution of work assignment disputes? Would the award of the Joint Committee under the lathers union agreement have been enforced under those circumstances? What about the interests of the carpenters union, which did not participate in the Joint Committee proceedings, or the interests of the employer, faced potentially with conflicting awards, each exposing him to further liability if he conforms to the other? The questions are of enormous practical significance, both because the survival of the National Joint Board is at present in serious doubt, and because many work assignment disputes arise among parties who are not subject to the National Joint Board procedure.

There are two basic views of the situation. One is that arbitration is a purely contractual institution, with which the courts may not interfere. The arbitrator's jurisdiction is based exclusively on the collective bargaining agreement between the employer and (typically) a single union. If the agreement provides for arbitration of a dispute as to whether particular work is to be assigned to members of the bargaining unit represented by that union, then the arbitrator is to decide the dispute based solely on the terms of that agreement. Unless the agreement so provides or all parties are willing, he may not permit the intervention of a second union in the proceed-

18. 274 Cal. App.2d —, —, 79 Cal. Rptr. 164, 167.

19. 274 Cal. App.2d —, —, 79 Cal. Rptr 164, 167.

ing, nor may he decide the dispute on the basis of some other union's agreement. If the result, in a situation in which two unions each claim the same work, is that two arbitrations are conducted, and the arbitrators come up with conflicting awards, this is the employer's problem; he may have to pay damages to one union or the other, but this is the price he must pay for having entered into two agreements covering the same work. This view is supported to some extent by the U.S. Supreme Court's decision in *Carey v. Westinghouse Electric Corp.*,[20] which the court in the *San Diego* case (properly) distinguished as not involving any provision for joint arbitration procedure.

The other view, represented by a recent decision of the Court of Appeals for the Second Ciruit,[1] is that ordinary principles of contract are not applicable to collective bargaining agreements or to labor arbitration, and that it is both permissible and desirable, at least in certain cases, for a court to order tripartite arbitration where two unions and two agreements are involved. In that case, an employer faced with conflicting demands in a work assignment suit and a pending arbitration with only one of the two unions, brought suit in federal district court to enjoin the pending arbitration and to compel a tripartite joint arbitration with both unions included. Both agreements contained broad arbitration provisions, and the second union was willing to accept the arbitrator selected by the first. The federal district court granted the employer's request, and the court of appeals affirmed, holding that the district court had power to order a joint arbitration and that, under the circumstances, the power was not abused. The Court did not speculate as to what would be the proper result in a situation in which the two unions disagreed as to the selection of an arbitrator or arbitration panel. Conceivably, the Court could seek to persuade the parties to agree to tripartite arbitration by enjoining any arbitration proceedings unless agreement was reached, but that would be particularly

20. 375 U.S. 261, 11 L.Ed.2d 320, 84 S.Ct. 401 (1964).

1. Columbia Broadcasting System, Inc. v. American Recording and Broadcasting Association, 414 F.2d 1326 (1969).

awkward in a case like the *San Diego* case, in which each union's contract specified an established arbitration board. The issue is on the brink between private contract and judicial creativity, and the cases could fall either way.

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