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Labor Law - Limitation on Picketing as a Form of Free Speech

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LABOR LAW — LIMITATION ON PICKETING AS A FORM OF FREE SPEECH

Prosecutrix, who was employed at an establishment in Roanoke, passed through picket lines manned by defendant and others, who were striking employees of the concern. Defendant led the singing of a song in which the words "whore" and "scab" were directed at prosecutrix, causing her such mental upset that she became ill and unable to continue work. Defendant was prosecuted under Sec. 1, Chap. 229, Acts of 1946 (now VA. CODE ANN. 40-64, 1950), which provides in part that interference or attempt to interfere with another in his exercise of the right to work by use of "insulting or threatening language" shall be a misdemeanor. Defendant was convicted in trial court. On appeal, *held,* affirmed. The statute is constitutional, being within the police power of the state, and not trespassing on the right of free speech, for the latter right is not absolute but subject to the exception of certain undesirable classes of speech. *McWhorter v. Commonwealth,* 191 Va. 857, 63 S. E. 2d 20 (1951).

Far from being protected as a form of free speech, picketing was once considered by American courts to be a tort, readily enjoinable by the employer whose business was being injured, whether or not the picketing was attended by violence.[1] Passage of §20 of the Clayton Act of 1914 created, as far as business in interstate commerce was concerned, a prohibition against the use of injunctions to stifle "peaceful persuasion" in labor disputes. This provision was interpreted by the U. S. Supreme Court in the 1921 *Tri-City* case[2] to allow limited peaceful picketing by non-employees of the business picketed.

In the 1920's the emphasis was on how far the legislature could go in granting the privilege to picket free from injunctive restraint. In *Truax v. Corrigan*[3] the court found that an Arizona anti-injunction statute denied due process of law to an employer harassed by picketing accompanied by abusive language in the form of handbills and other printed matter.

The 1937 *Senn* case[4] affirmed the right of a state to legalize peaceful picketing. Justice Brandeis spoke of the privilege granted as one of free speech. But it was not until the 1940 *Thornhill v. Alabama* decision[5] that the court shifted its emphasis from *privilege* to *right,* holding in that case that peaceful picketing was a form of free speech protected by the Fourteenth Amendment from state infringement. In 1941 the *Swing*[6] case extended this protection to stranger picketing.

The court later recognized the right of a state to enjoin picketing "enmeshed with violence",[7] to localize picketing to the area of the business involved in the dispute,[8] and to enjoin peaceful picketing where it furthers a combination in restraint of trade.[9] In a 1942 case unrelated on its facts to picketing,[10] the Supreme Court stated the doctrine relied on in the instant case, upholding the conviction of a Jehovah's Witness who, because of his use of the charges "damned Fascist" and "damned racketeer", had been indicted under a statute forbidding offensive language in a public place. The punishment of use of such socially undesirable classes of speech as the profane, the insulting, and the libelous was thought by the court never to have raised any constitutional problem.

In the 1943 *Cafeteria* case,[11] however, the court refused to allow an injunction where peaceful picketing was accompanied by the use of signs giving the false impression that the pickets were former employees of the concern and where the pickets accused the concern of selling bad food and "aiding the cause of Fascism." This, said the court, was only loose language and part of the give and take involved in any labor dispute. The more recent *Terminiello* decision[12] protected as free speech utterances which "stirred people to anger, invited public dispute, or brought about a condition of unrest", so long as they did not directly constitute a breach of the peace. The case did not involve a labor dispute, but shows how far the court will go in safeguarding what it considers to be fundamental liberties.

Statutes making it unlawful to interfere by force or intimidation with the right of another to work have been held constitutional by a number of higher state courts.[13] The only case in which such a statute seems to have reached the U. S. Supreme Court is *Michigan v. Washburn*,[14] and there the court denied an appeal from a decision upholding the statute's constitutionality. The statute contained no prohibition against insulting words as does the Virginia statute, and the facts involved intimidation by a mob with clubs, rather than by women with insulting words.

The decision in the instant case, based on decisions not involving labor, comes close to conflict with the *Cafeteria* decision. Since the Virginia Statute of Insulting Words already adequately protects the public from the use of abusive language, it must be readily seen, as the court stated, that the instant statute was designed to protect the individual in his right to work. How far in that direction the legislature may go, when so doing restricts the freedom of labor to picket, is a question which the Supreme Court of the United States must finally answer. In doing so it will decide whether a

statute such as was applied in the *McWhorter* case is a valid protection under the police power of the right to work, or is an unconstitutional restriction of labor's right to free expression on the picket line. In either case it will not be the abstract limits of free speech that determines the issue, but rather a weighing of the economic and legal forces in the labor-management struggle as a whole.

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FOOTNOTES

1. See Book Tower Garage v. Local No. 415, 295 Mich. 580, 582, 295 N. W. 320 (1940).
2. American Steel Foundries Co. v. Tri-City Central Trades Council, 257 U. S. 184 (1921).
3. 257 U. S. 312 (1921).
4. Senn v. Tile Layers Protective Union, 301 U. S. 468 (1937).
5. 310 U. S. 88. *Accord,* Carlson v. California, 310 U. S. 106 (1940).
6. 312 U. S. 321 (1941).
7. Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U. S. 287 (1941).
8. Carpenters and Joiners Union of America, Local No. 213 v. Ritter's Cafe, 315 U. S. 722 (1942). *Cf.* Goldfinger v. Feintuch, 276 N. Y. 281 (1937).
9. Giboney v. Empire Storage & Ice Co., 336 U. S. 490 (1949)
10. Chaplinsky v. New Hampshire, 315 U. S. 568 (1942).
11. Cafeteria Employees Union, Local 302 v. Angelos, 320 U. S. 277 (1943).
12. Terminiello v. City of Chicago, 337 U. S. 1 (1949).
13. See Note, 123 A. L. R. 316 (1939).
14. 285 Mich. 119, 280 N. W. 132 (1938), *appeal denied,* 305 U. S. 577 (1939).