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stones back, "each a little bigger than the size of a penny" and the small stones fell harmlessly. The Board further stated:

> In our opinion, Ottino's conduct, under the circumstances hereinabove set forth . . . was not of such a serious nature as to pass the limits of protected activity.

As can be seen by the cited authorities, the question of what constitutes misconduct is somewhat vague and is still in the stage of development. However, as a general guide, it is suggested that the definition cited by the trial examiner in the *Tidewater Associated Oil Company* case, citing *Boynton Cab Co. vs. Neubeck,* by the Supreme Court of Wisconsin,[27] may be used. This reads as follows:

> * * * The term "Misconduct" used in (the disqualification provision) is limited to conduct evincing such wilful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has a right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as a result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances or good faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute.

PICKETING — FREE SPEECH?

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The decision of the Supreme Court of the United States in *Thornhill* v. *Alabama*[1] has given rise to extensive speculation as to the legal status of picketing.[2]

Language employed by the court has been quoted to support the contention that picketing is a form of speech on a parity with public debate for purposes of determining its constitutional immunity to regulation.[3] The consequences, of course, would be that picketing could be neither forbidden nor punished unless upon a showing of a clear and present danger of *extremely serious*[4] sub-

[27] 296 N. W. 636 (1941).

[1] 310 U.S. 88 (1949).

[2] Adequate citation to the legal journals alone would require more than the space allocated for this discussion. A few references will be provided below.

[3] One of the most specific statements of this sort, made by the late Mr. Justice Murphy, was: "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution." (*Supra,* n. 1 at 102).

[4] "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." Bridges v. California, 314 U.S. 252, 263 (1941).

stantive evils arising "under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."[5]

Subsequent dissenting opinions suggest that this free speech theory of picketing did no injustice to those from whose opinions the quotations were drawn.[6] It was nonetheless subjected to drastic curtailment in a series of decisions.[7] The culminating and present position of the frequently divided Court,[8] as formulated in *Hughes v. Superior Court*,[9] is that: "Picketing is not beyond the control of a State if the manner in which picketing is conducted or the purpose which it seeks to effectuate gives ground for its disallowance."[10]

ALLOWABLE AREA OF ECONOMIC CONFLICT

As to the manner of conduct, picketing must be peaceful;[11] though the occasional use of strong or insulting language and "isolated incidents of abuse"[12] or a "trivial rough incident or a moment of animal exuberance" [13] does not suffice to remove its constitutional protection. Picketing may be conducted by strangers to the dispute without loss of its constitutional status[14] and this is so though the picketed employer may have no employees at all.[15]

Constitutional protection may be forfeited by pickets who seek to conscript neutrals remote both in interest and in location from

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[5] Thornhill v. Alabama, *supra*, at 105. See *Free Speech and Picketing for "Unlawful Objectives"*, 16 Univ. Chi. L. Rev. 701 (Note - 1949).

[6] See, for example, the dissenting opinions of Mr. Justice Black (Justices Douglas and Murphy concurring) and Mr. Justices Reed in Carpenters and Joiners Union v. Ritters Cafe, 315 U.S. 722 (1942). See dissenting opinion of Mr. Justice Minton (joined by Justice Reed) in International Brotherhood v. Hanke, 339 U.S. 470, 482 (1950): "It seems equally clear to me that peaceful picketing which is used properly as an instrument of publicity has been held by this court in . . . (citing cases) to be protected by the Fourteenth Amendment."

[7] See Fraenkel, *Peaceful Picketing—Constitutionally Protected?*, 99 Univ. Pa. L. Rev. I (1950); Armstrong, *Where Are We Going with Picketing?*, 36 Calif. L. Rev. I (1948); *Picketing, Free Speech and the Unlaw Purpose Tests*, 49 Col. L. Rev. 711 (Note, 1949).

[8] In the most controversial cases Mr. Justice Frankfurter commonly writes the majority opinion of the "now" Court; Justices Vinson, Jackson, Burton and Clark concur; Justices Black, Douglas, Reed and Minton dissent. Devotees of the broad theory of "breakfast jurisprudence" may well speculate as to the impact on the sanctity of picketing of certain recent changes in the personnel of the Court.

[9] 339 U.S. 460 (1950). As to the lower court decision, see Groves, *Right of Negroes to Picket for Proportional Hiring*, 22 So. Cal. L. Rev. 442 (Comment 1949); (Note) 62 Harv. L. Rev. 1077 (1949).

[10] This is also the position generally taken by state courts even during the period of seeming uncertainty in the decision of the United States Supreme Court. See *Free Speech and Picketing for "Unlawful Objectives," supra*, n. 5; James v. Marinship Corp., 25 Cal. 2d 721, 155 P. 2d 329 (1944); Colonial Press v. Ellis, 321 Mass. 495, 74 N.E. 2d 1 (1947); Hotel and Restaurant Employees International Alliance v. Greenwood, ... Ala. ....., 30 So. 2d 696 (1947); Schwab v. Moving Picture Machine Operators Local No. 159, 165 Ore. 602, 109 P. 2d 600 (1941); Wolferman, Inc. v. Root, 356 Mo. 976, 204 S.W. 2d 733 (1947); Swenson v. Seattle Central Trades Council, 27 Wash. 2d 193, 177 P. 2d 873 (1947); International Association of Machinists v. Downtown Employees Association, Texas, Court of Civil Appeals, First District at Galveston. 13 Labor Cases, Paragraph 64,053, 7/31/47.

[11] If it is "enmeshed in violence," all picketing, for the time being, may be forbidden, Milk Wagon Drivers Union v. Meadowmore Dairies, Inc., 312 U.S. 287 (1941).

[12] Use of epithets such as "Unfair" or "Fascist" is protected, Cafeteria Employees Union v. Angelos, 320 U.S. 293 (1943).

[13] Milk Wagon Drivers Union v. Meadowmore Dairies, Inc., *supra*, n. 11..

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

[15] Cafeteria Employees Union v. Angelos, 320 U. S. 293 (1943). (former employees having become partners; a technique not unknown even in Colorado).

the controversy[16] or who follow employees from the job and picket them in their homes.[17] It may not be declared forfeit, however, simply because there is no labor dispute as defined in a state regulation of industrial relations[18] or because picketing discourages customers or reduces services of the employer.[19]

Picketing also may lose its constitutional immunity to injunctive relief if the purpose it seeks to effectuate is to compel a violation of state anti-trust laws,[20] a state labor relations act,[21] or the National Labor Relations Act.[22] The illegality of the purpose may likewise derive from judicial as compared with legislative policy.[23]

Thus picketing "has an ingredient of communication"[24] that may not be forbidden or punished except in conformity with the strict limitations of the clear and present danger rule. Yet picketing "cannot dogmatically be equated with the constitutionally protected freedom of speech"; it may be forbidden or punished provided in conduct or objective it is found unlawful by legislative or judicial test not inconsistent with the "rooted traditions of a free people." Picketing, as Mr. Justice Frankfurter so clearly stated in the *Hanke* case, is "indeed a hybrid."[25]

STATE DECISIONS NOT VERY HELPFUL

The Colorado decisions during the period under discussion require brief comment. In *Denver Local Union* v. *Perry Truck Lines*[26] and *Denver Local Union* v. *Buckingham Transportation Co.*[27] the Colorado Supreme Court applied the rule that peaceful, stranger picketing is entirely lawful. In *Milk Producers* v. *Brotherhood*[28] the Court seems[29] to have sustained a restraining order based upon unlawful manner of conduct and not precluded by the Colorado Labor Peace Act.[30] In *Meat Cutters* v. *Green*[31] it would appear that similar freedom from the inhibtions of that Act[32] enabled a restraint based upon illegality of objective.[33]

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[16] Carpenters and Joiners Union v. Ritters' Cafe, 315 U.S. 722 (1942).
[17] Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board, 315 U.S. 740 (1942).
[18] Bakery & Pastry Drivers v. Wohl, 315 U.S. 769 (1942). *See* Teller, *Picketing and Free Speech*, 56 HARV. L. REV. 180, 193 (1942).
[19] Carlson v. California, 310 U. S. 106 (1940).
[20] Giboney v. Empire Storage and Ice Co., 336 U.S. 490 (1949); (Note) 10 LA. L. REV. 541 (1950); (Note) 62 HARV. L. REV. 1402 (1949); *Free Speech and Picketing for "Unlawful Objectives"*, *supra*, n. 5.
[21] Building Service Employees v. Gazzam, 339 U.S. 532 (1950); Wilbank v. Bartenders Union, 360 Pa. 48, 60 A. 2d 21 (1948); cert. den. 336 U.S. 945 (1949).
[22] International Brotherhood of Electrical Workers v. National Labor Relations Board, CCA-2, 1950) 181 F. 2d 34. *See* (Note) 45 ILL. L. REV. 408, 409 (1950).
[23] Hughes v. Superior Court, *supra*, n. 9; International Brotherhood v. Hanke, 339 U.S. 470 (1950). *See* (Note) 3 VAND. L. REV. 313 (1950).
[24] International Brotherhood v. Hanke, *supra*, n. 23.
[25] Idem, *supra*, n. 23. As W. S. Gilbert has so clearly stated: "Of this there is no manner of doubt, no probable possible shadow of doubt, no possible doubt whatever" (Gilbert and Sullivan, *Gondoliers*, Act I).
[26] 106 Colo. 25, 101 P. 2d 436 (1940).
[27] 108 Colo. 419, 118 P. 2d 1088 (1941).
[28] 116 Colo. 389, 183 P. 2d 529 (1947).
[29] "Because of the inadequacy of the record we decline to decide the constitutional issues involved." 334 U.S. 809 (1948 per curiam).
[30] COLO. STAT. ANN., (1935), c. 97, § 94.
[31] 119 Colo. 92, 200 P. 924 (1948).
[32] Idem, *supra*, n. 30.
[33] The union seemingly demanded an agreement unlawfully forcing union membership upon employees as in Building Service Employees v. Gazzam, *supra*, n. 21.

Brotherhood v. *Publix Cab Co.*[34] presents a set of kaleidoscopic facets that, it is to be hoped, will not soon recur.[35] After a caution as to limited applicability of its decision to other situations,[36] the court concluded with reference to only a few of the conflicts and ambiguities as follows:[37]

> Where, as in this case, the record shows the absence of any negotiations having taken place, or a dispute having occurred, or a statement of grievances having been submitted by the individuals striking and picketing to the individuals against whom the strike has been called and against whom the pickets are presumably picketing, we say that it is against the public interest to allow such picketing because a bona fide dispute has not been shown to exist.

The quest for certainty in this field is rewarding in neither state nor national jurisdiction. Could it be that the legal problem has a political aspect and thus will be solved more easily after a few more Supreme Court vacancies are filled, or, perhaps, after November 4, 1952?

A GUIDE TO THE TRIAL OF AN EMPLOYEE SUIT UNDER THE WAGE AND HOUR LAW

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This article has been prepared primarily to aid the general practitioner who is called upon either to sue or defend a claim arising out of the Fair Labor Standards Act. The busy practitioner faced with an employee suit for these claims is bewildered by the maze of statutory, judicial, and administrative rulings. He has not had many occasions to delve into a new field of law which in a short time has developed into a complexity of rules and decisions which compare to that developed in other fields in over a hundred years. This article does not presume to be a treatise on the law. It does not claim to be exhaustive. It will deal with substantive law only incidentally. The object is to point out certain common problems of procedure and practice which you will probably face when you sue for an employee or defend his employer.

Let us assume that you represent the employee. He seeks to recover minimum wages or overtime pay which his employer

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[34] 119 Colo. 208,, 202 P. 2d 154 (1949).

[35] Two attempts at strike votes were "unsuccessful"; union collective bargaining authorizations and revocations circulated like counterfeit bills; an unheralded strike was called; the union officials said the strike was against the owner-drivers, but all the strikers except one said it was against Publix Cab Co.; no attempt had been made by the union to negotiate with the owner-drivers against whom the officials said the strike was called and whom the union at the same time purported to represent. Controversy raged as to who represented whom, who was employed by whom and for what purpose, and which statute if any was applicable.

[36] In which the writer respectfully joins.

[37] *Supra,* n. 34 at 217.