

1956

Lloyd D. Sutton et al v. Nick Marvidikis et al : Brief of Defendants and Appellants

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

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LLOYD D. SUTTON, HARVEY L.
RANDALL, GALE V. BARNEY and
PAUL ANNELLA, a co-partnership,
doing business under the name and style
of BLUE FLAME COAL COMPANY,

Clerk, Supreme Court, Utah

Plaintiffs and Respondents,

—vs.—

NICK MARVIDIKIS, FAYE OLSEN,
CLARON GOLDING, MALIO PECOR-
ELLI, FRANK SACCO, and all others
engaged in the picketing of the coal mine
of the Blue Flame Coal Co.; and
UNITED MINE WORKERS OF
AMERICA,

Defendants and Appellants.

BRIEF OF DEFENDANTS AND APPELLANTS

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IN THE SUPREME COURT of the STATE OF UTAH

LLOYD D. SUTTON, HARVEY L.
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engaged in the picketing of the coal mine
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AMERICA,

Defendants and Appellants.

Case No.
8587

BRIEF OF DEFENDANTS AND APPELLANTS

The parties will be referred to as they appear below, the respondents herein being the plaintiffs and the appellants, the defendants.

The figures in parentheses refer to the page number of the Record.

STATEMENT OF THE CASE

On or about February 10, 1956, the coal mining property involved herein was operated by Walter Odendahl and Theron Odendahl, his son, under the firm name and style of Star Point Coal Company (96-97). Said company had only eight employees, including plaintiffs Harvey L. Randall, Gale V. Barney, and Paul Annella (180). About said date, representatives of the employees contacted defendant Frank Sacco, then Vice President of District 22, United Mine Workers of America (177, 178) relative to forming a local union of said mine workers at said mine to improve wages, hours, and working conditions thereat, and for other benefits. Thereafter all said employees, including said three plaintiffs met with the said Sacco and Malio Pecorelli, international board member of said union, and voted unanimously to join said union, signed membership application blanks for said purpose, and written authorization for payroll deductions of initiation fees and dues (180, 181). Defendant Pecorelli communicated to said Walter Odendahl, the actions of said employees (186). Odendahl later told the said employees there would not be any jobs for them if they joined the United Mine Workers; that he would shut the mine down (269). Pecorelli had suggested to Odendahl that he continue operating the mine pending negotiations for a union contract (186). He refused. He did not want them to come to work if they were going to belong to this union (255).

There is evidence that he coerced three employees into terminating their employment (199) and declined

a written invitation to meet with the representatives of said Union to bargain collectively for an employment contract (147). The Odendahls subsequently completely shut down said mine rather than to have the same unionized.

On or about February 21, 1956, while said mine was so shut down, plaintiffs Randall, Barney and Annella, three of the eight employees who voted to join said union, and plaintiff Sutton, obtained a lease of said mining property from the Odendahls (96, 97) (149), and thereafter entered into a so-called partnership among themselves. (Ex. D). Substantial financial benefits were retained in said lease by the Odendahls (Ex. B). The question arises as to whether said lease was bona fide or sham. It appears to defendants to be merely an attempt to circumvent and evade the issues involved in said labor dispute, and to deny to the remaining five employees of Mr. Odendahl their rights under Section 7 of the Taft-Hartley Act, and Sec. 34-1-7, U.C.A. 1953, and to deprive them of their jobs merely because they sought to organize a union at said mine, as well as to deny them the right to work under the provisions of the Utah Right To Work Act simply because of union activities. The said three former employees, who are now plaintiffs, contributed none of the property used in the partnership business and are allowed to withdraw the sum of about \$22.00 per day which is the equivalent of the prevailing wage being paid to coal miners in Carbon County (133). All of the plaintiffs well knew of said labor dispute involved at said mine at the time said lease was made and

entered into, and had full knowledge and notice that the same was unresolved at said time. In fact, all of the plaintiffs, except Mr. Sutton, by voting to join the union, precipitated said labor dispute which continued under the new owners, to-wit: the plaintiffs.

After the plaintiffs leased the said mine from the Odendahls as aforesaid, they did not attempt to contact the defendants to settle said labor dispute. It was at defendants' solicitation that Sutton, Sacco, and Pecorelli met. Very little took place at this first meeting (110). Mr. Sutton made no proposals. The second and last meeting was held also at the suggestion of the defendants. One of the plaintiffs was absent therefrom (115). The same was very brief. Plaintiffs asked what the Union's proposal was with respect to settlement of the labor dispute, and the defendants replied in substance that defendants wanted the usual union contract which was in force with nearly all of the coal operators in Carbon County and that said contract should embody terms of seniority of employment (114, 116). The meeting was friendly. There was no suggestion by anyone that plaintiffs should not operate their mine pending negotiations for contract. Plaintiffs requested additional time to consider defendants' proposal and to confer with the absent partner. The plaintiffs did not at said time make any counter proposal or engage in any detailed discussion, made no effort to compromise the differences between the parties, and the very next day after the last meeting (March 1) plaintiffs caused the trial court's temporary restraining order to be served upon the defendants (14, 15). Said restraining order was granted

ex parte without hearing any evidence thereon by the trial court and without compliance with any of the other terms and conditions set forth in Sec. 34-1-28 U.C.A. 1953. The five employees were never permitted to return to their jobs.

Moreover, the plaintiffs pursued the same anti-union policies as their immediate predecessors toward said employees. It is defendants' position that by taking over said mine while there was an unresolved labor dispute thereat, of which they had full knowledge and by pursuing the same anti-union policies toward said five employees as their predecessors, plaintiffs thereby assumed and accepted said labor dispute. See *National Labor Relations Board v. New Madrid Manufacturing Co.*, 215 F. 2nd 908; *Regal Knitwear Co. v. N.L.R.B.* 324 U.S. 9, 65 S. Ct. 478; *N.L.R.B. v. Atkins*, 67 S. Ct. 1265, 331 U.S. 398.

Since said restraining order was granted, plaintiffs have made no effort whatsoever to settle said labor dispute. Plaintiffs have been working said mine since March 1, 1956 under the protection of said temporary restraining order, preliminary injunction and permanent injunction, all of which enjoined all picketing, making no distinction between peaceful or violent picketing (12, 32, 75). The restraining order was granted upon a bond of \$1,000 (12) and the preliminary injunction upon a bond of \$2,000 (32) both of which are grossly inadequate. Defendants contend that there is a labor dispute existing in this case pursuant to Sec. 34-1-34, U.C.A. 1953, and within the definitions contained therein. Said picketing

had commenced on or about February 23, 1956 insofar as the same affected the plaintiffs, and continued to the date of the service of said restraining order on March 1, 1956 (229), (14, 15).

The evidence shows that said picketing was established and maintained by defendants Faye Olsen and Claron Golding, two of the original eight employees at said mine (271). They were joined in this picketing by persons sympathetic to them (191). Picketing was for the purpose of protecting the jobs of the remaining five employees who continued their efforts to unionize the mine and exercise their rights under Sec. 7 of the Taft-Hartley Act, and Sec. 34-1-7, U.C.A. 1953 (227). The picketing was not violent (235) and occurred on a public highway about seven miles from plaintiffs' mine (92). Said picketing constituted an exercise of defendants' federal and state constitutional rights of free speech and was for the purpose of acquainting the public and all people who traveled along said highway that there was a labor dispute in existence at said mine, the facts and circumstances relative thereto, the issues involved and defendants' position in regard thereto, all in peaceful, orderly and lawful manner. Another objective of the pickets was to attempt to cause plaintiffs to reconsider the action of the three employees who abandoned their fellow employees in the midst of their efforts to secure the benefits of union organization at said mine, in direct violation of the agreement among the eight employees (227) and thus protect the jobs of the remaining five employees who had lost their jobs by reason of union activity.

Defendants' position is that the said picketing was for lawful purposes. Even in the absence of an employer-employee relationship or labor dispute, peaceful picketing for union purposes has been held lawful. See *Cafeteria Employees Union v. Angelos*, 320 U.S. 293, 64 S. Ct. 126, 88 L. Ed. 58; *Dummermuth v. Hykes*, 95 N.E. 2nd 32; *Journeyman Tailors' Union v. Miller's*, 312 U.S. 658, 61 S. Ct. 732, 85 L. Ed. 1106; *AFL v. Swing*, 312 U.S. 321, 61 S. Ct. 568, 85 L. Ed. 855; *Milk Wagon Drivers v. Meadowmoor Dairies*, 312 U.S. 287, 61 S. Ct. 552, 85 L. Ed. 836; *Bakery & Pastry Drivers' Local v. Wohl*, 315 U.S. 769, 62 S. Ct. 816, 86 L. Ed. 1178.

There is ample evidence supporting the position of the defendants that no one was compelled to stop on said highway and the traffic thereon was not blocked or impeded by said pickets and the latter did not interfere with anyone who wished to travel said highway (234); that said pickets did not intimidate, threaten or coerce in any manner, anyone who was traveling from said mine or otherwise (234). The evidence is also to the effect that plaintiffs were permitted to go through the picket line and were never compelled to turn back (234-5). Plaintiffs, however, did not cross the picket line on occasions because they did not choose to do so or due to apprehension on their part as to what might happen and not by reason of any conduct or acts on the part of the pickets (123).

There is no evidence that the pickets at any time carried or concealed any weapons of any nature (120) or that they stopped anyone from hauling coal from said

mine at any time. The said picketing took place for about 21½ hours from February 23, 1956 to March 1, 1956, a total period of six days (284). There is evidence that the pickets were at the side of the road and not on the highway and that they hailed passing motorists but did not compel any motorist to stop; that they engaged in peaceful and friendly conversation with those who did stop (273).

The evidence further supports the proposition that defendants Pecorelli and Sacco did not order, direct nor control in any manner the said persons engaged in said picketing, and did not aid nor abet nor ratify the same. The evidence does show, however, that those who established and maintained the picket line did from time to time seek information and advice from said two defendants (272), and in the course thereof defendants Pecorelli and Sacco cautioned representatives of the pickets that all picketing must be peaceful and orderly and there must be no violence, intimidation, threats or similar conduct, and that such precautionary measures are given to all members of the defendant Mine Workers who are engaged in picketing, regardless of whether the organization itself or individual members thereof established the picket line. It is given out of abundance of caution, generally.

The main issue in this case is whether or not the trial court had jurisdiction under the facts and circumstances herein to issue its permanent injunction and that even if such jurisdiction is assumed, whether or not the law and evidence herein warranted the granting thereof.

The said court's findings and permanent injunction indicate that the court believed and accepted all of the testimony of plaintiffs' witnesses, but that it arbitrarily rejected the testimony of defendants and their witnesses. It is very unusual for the truth to be all on one side and for the opposite side to be entirely unworthy of belief. The trial court was in error in issuing its permanent injunction herein for the reasons hereinabove and hereafter stated.

STATEMENT OF POINTS ON APPEAL

POINT I

THE TRIAL COURT DID NOT HAVE JURISDICTION TO ISSUE AN INJUNCTION IN THIS CASE UNDER FEDERAL LAW.

POINT II

THE TRIAL COURT DID NOT HAVE JURISDICTION TO ISSUE ITS PERMANENT INJUNCTION HEREIN UNDER STATE STATUTES.

POINT III

THE TRIAL COURT ERRED IN ENJOINING THE PICKETING HEREIN FOR THE REASON THAT THE SAME WAS NOT VIOLENT, BUT PEACEFUL AND FOR A LAWFUL PURPOSE.

POINT IV

PEACEFUL PICKETING IS THE LEGITIMATE EXERCISE OF FREE SPEECH, NOTWITHSTANDING THE PURPOSE THEREOF IS TO INDUCE PLAINTIFFS WHO OPERATE WITHOUT OUTSIDE HELP TO JOIN UNION.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT HAVE JURISDICTION TO ISSUE AN INJUNCTION IN THIS CASE UNDER FEDERAL LAW.

The U.S. Supreme Court has declared that with respect to conduct proscribed under the Taft-Hartley Act, this area is exclusively reserved to the Federal Board, in the first instance, and thereafter to the Federal Courts, and by reason thereof the area is closed to the States. See *Plankinton Packing Co. v. Wisconsin Employment Relations Board*, 338 U.S. 953, 70 S. Ct. 491 (1950), where the Court held in a per curiam opinion that proscriptions of the Wisconsin Labor Relations statute of the same tenor as those in the Taft-Hartley Act could not be enforced with reference to an employer over which the National Labor Relations Board customarily exercises jurisdiction.

The same principle thus enunciated with reference to employer unfair labor practices was carried over to union unfair labor practices in *Garner v. Teamsters Union*, 346 U.S. 485, 74 S. Ct. 161 (1953).

In the Garner case, *supra*, a labor union peacefully picketed the premises of an interstate trucking company in Pennsylvania. The picketing allegedly had for its purpose the unionization of the company's employees. There was no controversy, labor dispute or strike in progress, and the company had not objected to their employees joining the union. The employer brought the suit. The

State Court enjoined the picketing as being in violation of the state labor relations act. The State Supreme Court on appeal, although finding that the object of the picketing was to force the employer to coerce its employees to join the union, concluded that the "grievance fell within the jurisdiction of the National Labor Relations Board to prevent unfair labor practices" and therefore state remedies were precluded (373 Pa. 19, 94 A. 2d 893). The U.S. Supreme Court upheld the State Supreme Court, stating:

"Congress has taken in hand this particular type of controversy where it affects interstate commerce. In language almost identical to parts of the Pennsylvania statute, it has forbidden labor unions to exert certain types of coercion on employees through the medium of the employer (citing 8 (b) 2 and 8 (a) (3), Taft-Hartley Act (346 U.S. at 488). Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties.***Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies."

Therefore, the Supreme Court has held that although state regulation would merely duplicate federal regulation, it would constitute a source of conflict and diversity arising out of different procedures and attitudes. Although the conduct in question may be fitted into the category of an unfair labor practice, the State action

is not automatically precluded if the unfair labor practice may constitute conduct historically subject to state regulation and control.

Activities protected by the Taft-Hartley Act are contained in Sec. 7 of the Act, and fall outside the area over which the State has authority to act. The U.S. Supreme Court, in *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, resting on the pre-emption postulate of the pre-Taft-Hartley decision in *Hill v. Florida*, 325 U.S. 538 (1945), has declared that a State may not prohibit or condition the exercise of rights which the federal act protects.

In *Hill v. Florida*, the state enjoined a labor union from functioning until it had complied with certain statutory requirements. The injunction was invalidated on the ground that the Wagner Act included a federally established right to collective bargaining with which the injunction conflicted. In *Bus Employees v. Wisconsin Board*, 340 U.S. 383 (1951), and *Automobile Workers v. O'Brien*, 339 U.S. 454 (1950), the Court invalidated state statutory strike procedures on this same general ground. The activities in said cases were held to be in conflict with, and a denial of, rights guaranteed under Sec. 7 of the Taft-Hartley Act.

The N.L.R.B. has found the following to constitute unfair labor practices within the meaning of Section 8 (b) (1) (A) of the Taft-Hartley Act: mass picketing, obstruction of streets and highways so as to prevent ingress to or egress from a plant, (*Sunset Line and Twine Co.*, 79 N.L.R.B. 487, *Smith Mfg. Co.*, 81 N.L.R.B. 886, *Colonial Hardwood Flooring Co.*, 84 N.L.R.B. 563, *Irwin*

Lyons Lumber Co., 57 N.L.R.B. 54). It will be noted that the court in its Findings in the case at bar has found that the picketing involved herein allegedly blocked the highway leading to the mine of the plaintiffs (69). Since the federal board has found that this constitutes an unfair labor practice under the Taft-Hartley Act in the cases cited immediately above, the same would preclude the trial court from awarding an injunction with respect to said conduct. In *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656 (1954), the Supreme Court "assumed" that the Union's use of threats of violence on a picket line to make employees join the union was a violation of Section 8 (b) (1) (A) of the Taft-Hartley Act.

In the case at bar if this Court finds that the picketing involved herein was violent, then the same would be a violation of Sec. 8 (b) (1) (A) of the Taft-Hartley Act and the trial court had no jurisdiction thereof.

In *Garner v. Teamsters Union*, supra, the U.S. Supreme Court expressed itself on pre-emption by saying that duplicatory state procedures would be stricken down, and then stated:

"The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the National Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise it is implicit in the act that the public interest is served by freedom of labor to use the weapon of picketing.

For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits." 346 U.S. at 499-500.

The Court also said:

"A state may not enjoin under its own labor statute conduct which has been made an unfair labor practice under Federal statutes."

In *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 481, the Supreme Court divides the field of pre-emption into two areas: proscribed and protected conduct. The Court concludes:

"*** where the conduct if not prohibited by the federal Act, may be reasonably deemed to come within the protection afforded by that Act, the state court must decline jurisdiction in deference to the tribunal which Congress has selected for determining such issues in the first instance."

The Court further held the pre-emption doctrine applies even where picketing violated the anti-trust law of Missouri. (This was in direct conflict with *Giboney v. Empire Storage & Ice Co.* (1949), 336 U.S. 490, 93 L. Ed. 834, 69 S. Ct. 684). The Court disposed of *Giboney* and all prior decisions limiting organizational picketing by saying:

"The Missouri court relied upon *Giboney* *** for the proposition that a State Court retains jurisdiction over this type of suit. But *Giboney* was concerned solely with whether the state's injunction against picketing violated the Fourteenth Amendment. No question of federal pre-emption

was before the court; accordingly it was not dealt with in the opinion."

The U.S. Supreme Court in *Capital Service, Inc. v. N.L.R.B.*, 347 U.S. 501, held the Labor Board could obtain injunctive relief from federal courts to prevent enforcement of state court's injunction barring picketing in a dispute involving unfair labor practices under the Taft-Hartley Act.

Since the five employees in the case at bar were exercising rights guaranteed to them under Sec. 7 of the Taft-Hartley Act, (F.C.A. Title 29, Sec. 156) to-wit: The right to self-organization to form, join or assist the labor organization involved herein and to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and said rights under the federal decisions above cited are protected activities; they are activities under the exclusive jurisdiction of the N.L.R.B., and state action to enjoin said activities is precluded by the federal Act, unless the picketing is violent. The defendants contend that said picketing was not violent and is, therefore, a protected activity under said Taft-Hartley Act. For this reason the trial court had no right to enjoin the same.

Moreover, the U.S. Supreme Court held in *N.L.R.B. v. Fainblatt*, 306 U.S. 601, that where any amount of goods crossed the state lines, whether directly or indirectly, interstate commerce is affected and the Board (N.L.R.B.) has jurisdiction.

In the case at bar it is admitted in the testimony of Mr. Odendahl that approximately 40% of the output of the coal at the mine involved herein found its way into interstate commerce (295). Mr. Sutton's testimony is substantially to the same effect (207), (208).

Defendants are aware that the Board itself ordinarily determines its own jurisdictional standards on a much more restrictive basis than the holding of this case and the Board can change those standards as it did during 1954. However, the court should determine whether or not the Board has jurisdiction and the Board itself should not be allowed to make this determination. In the case at bar evidence was introduced to the effect that the N.L.R.B. had declined jurisdiction (330, 331). Under the authority of the Fainblatt case, *supra*, the defendants are not bound by such determination by the Board itself and even though the Board declined jurisdiction herein under said authority, it would have jurisdiction, since 40% of the output of said mine went into interstate commerce.

In the event of doubt as to whether or not the N.L.R.B. would or would not have jurisdiction, it has been held that the State Courts should not enjoin. See *State Labor Board v. Wags Transportation Co.*, 26 L.C. 68, 754.

In *Universal Car and Service Co. v. I.A.M.*, 27 L.C. 68, 825, the Michigan Court held that the N.L.R.B. had jurisdiction whether it accepted it or not and that the state court, therefore, could not enjoin even though

stranger picketing was involved and the stranger picketing was against the public policy of the state. Thereafter, the Court of Appeals for the Tenth Circuit took the same position as the Michigan Court in the Universal Car case, *supra*, citing with approval the Michigan Court's statement that jurisdiction must be based on "actual jurisdiction" of the Board, not on "day to day, or month to month, discretionary exercise of jurisdiction by the Board." The Tenth Circuit Court further held that where the Labor Board has jurisdiction, such jurisdiction cannot be vested or revested in a state court by the Board's refusal to act. It can only be done by the Board's formally ceding jurisdiction pursuant to the requisite provisions of the Taft-Hartley Act. See *Retail Clerks v. Your Food Stores*, 225 F. 2nd 659, and *Food Basket, Inc. v. Amalgamated Meat Cutters*, Kentucky Circuit Court, 29 L.C. 69, 561.

It is, therefore, submitted that under the pre-emption doctrine and also under the interstate commerce doctrine, the trial court did not have jurisdiction to issue the injunction in this case and that jurisdiction herein was vested in the National Labor Relations Board under the Taft-Hartley Act and the federal decisions cited above.

POINT II

THE TRIAL COURT DID NOT HAVE JURISDICTION TO ISSUE ITS PERMANENT INJUNCTION HEREIN UNDER STATE STATUTES.

The permanent injunction granted by the trial court under the facts and circumstances of this case is pro-

hibited under the statutes of the State of Utah. The trial court did not have jurisdiction to grant the same thereunder.

Sec. 34-1-25, U.C.A. 1953, provides, as far as applicable herein, as follows:

“No Court, nor any judge or judges thereof, shall have jurisdiction to issue any *** permanent injunction which in specific or in general terms prohibits any person or persons from doing, whether singly or in concert, any of the following acts: *** (b) becoming or remaining a member of any labor organization or any employer organization, *** (e) Giving publicity to and obtaining or communicating information regarding the existence of, or the fact involved in, any dispute, whether by advertising, speaking, patrolling any public street or any place where any person or persons may lawfully be, without intimidation or coercion, or by any other method not involving fraud, violence, breach of the peace, or threat thereof, *** (k) Doing in concert any or all of the acts heretofore specified on the ground that the persons engaged therein constitute an unlawful combination or conspiracy.”

The Court's injunction in the case at bar does violence to said statute. Under said Section the defendants had a right to be upon said highway leading to plaintiffs' mine, to give publicity to and to communicate information regarding the existence of or the fact involved in the labor dispute herein, and could patrol said highway and engage in peaceful conversation with passers-by thereon. The sweeping terms of the Court's injunction prohibited them from exercising these rights, since it restrained

all picketing, which would include peaceful picketing which would prevent defendants from giving publicity to and obtaining or communicating information regarding the existence of, or the fact involved in, any dispute by advertising, speaking, patrolling the public highway involved herein, etc. The trial court's injunction issued herein was therefore contrary to the rights granted by the provisions of this section which is one of the labor laws of the State of Utah.

Section 34-1-28, U.C.A. 1953, provides, as far as applicable herein, as follows:

“No court nor any judge or judges thereof shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court ***, and except after findings of *all* the following facts by the court or judge or judges thereof: (a) that unlawful acts have been threatened or committed and will be executed or continued unless restrained; (b) that substantial and irreparable injury to complainants' property will follow unless the relief requested is granted; (c) that as to each item of relief granted greater injury will be inflicted upon complainant by the denial thereof than will be inflicted upon defendants by the granting thereof; (d) that no item of relief granted is relief that a court or judge thereof has no jurisdiction to restrain or enjoin under Section 34-1-25; (e) that complainant has no adequate remedy at law; (f) that the public officers charged with the duty to protect complainant's property have failed or are unable to furnish adequate protection.” (My emphasis.)

I emphasize that said section provides that *all* of the facts therein enumerated must be found by the court before it has jurisdiction to issue an injunction. One of the facts enumerated is in subdivision (c) of said section, which provides that the court must find before granting the injunction that as to each item of relief granted, greater injury will be inflicted upon complainant by the denial thereof than will be inflicted upon defendants by the granting thereof. The court made no such finding prior to granting the permanent injunction. Another fact enumerated is in subdivision (f) which reads: "that the public officers charged with the duty to protect complainant's property have failed or are unable to furnish adequate protection." The court did not make such a finding herein, and under the evidence it could not have done so. The testimony of Deputy Sheriff Charles Semken is to the effect that the Sheriff's Office of Carbon County was able to give such protection and that Mr. Sutton, one of the plaintiffs, was to notify said Sheriff's Office if any trouble developed (289). His testimony is that no call was received by him or to his knowledge at said Sheriff's Office of any trouble at said picket line (290). No testimony was offered by the plaintiffs upon which the court could base a finding as required by subdivision (f).

The Court, having failed to find on two of the grounds set forth in said section, and since by the express provisions thereof, it must find all of the said facts in said section or is prohibited from issuing an injunction in the case, it is respectfully submitted the court

by reason of its failure to so find committed error in issuing the permanent injunction.

The defendants submit further that the plaintiffs failed to make a reasonable effort to settle the labor dispute involved herein either by negotiation or otherwise, and for this reason the court was not authorized pursuant to section 34-1-29, U.C.A. 1953, from granting plaintiffs' injunctive relief.

Section 34-1-30 U.C.A. 1953, provides, in part, as follows:

“*** and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and expressly included in said findings of fact made and filed by the court as provided herein; ***”

The trial court's permanent injunction herein provided, among other things:

“It is hereby ordered, adjudged and decreed that the defendants, ***, and all persons in active concert or participation with them, be, and they are hereby, permanently restrained and enjoined, *from all picketing* of said coal mine on what is commonly known as the ‘Air Port Road,’ or the approaches thereto, leading to plaintiffs’ mine in what is commonly known as ‘Dead Man Canyon’ (75). ****” (My emphasis.)

Thereafter certain specific acts are enjoined (75).

We submit that when the court restrains “all picketing,” the enjoining of other specific acts thereafter is

mere surplusage. The forbidding of "all picketing," of necessity, includes the forbidding of peaceful picketing, which the court has no right to restrain. We do not know of any statute or decision of this court authorizing the prohibition of peaceful picketing.

Section 34-1-34 U.C.A. 1953, defines a labor dispute.

Section 34-2-5 U.C.A. 1953 provides in part, as follows:

"No such restraining order or injunction shall prohibit any person or persons whether acting singly or in concert, *** from attending at any place where such a person or persons may lawfully be for the purpose of peaceably obtaining or communicating information, or from peaceably persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute; *** or from peaceably assembling in a lawful manner and for lawful purposes; ***"

Section 34-16-6 U.C.A. 1953, which is a provision of the Utah Right to Work Law, provides as follows:

"Any person, firm, association, corporation, labor union, labor organization or any other type of association engaging in lockouts, layoffs, boycotts, picketing, work stoppages, or other conduct, a purpose of which is to compel or force any other person, firm, association, corporation, labor union, labor organization or any other type of association to violate any provision of this act shall be guilty of illegal conduct contrary to public policy; provided that nothing herein contained shall be construed to prevent or make illegal the peaceful and orderly solicitation and persuasion by members of a labor union, labor organization or any

other type of association of others to join a labor union, labor organization or any other type of association, unaccompanied by any intimidation, use of force, threat of use of force, reprisal, or threat of reprisal."

It will be noted that the provision cited from the Utah Right to Work Act (34-16-6) expressly states that nothing in said provision shall be construed to prevent or make illegal the peaceful and orderly solicitation and persuasion by members of a labor union, labor organization or any other type of association of others, to join a labor union, labor organization or any other type of association, unaccompanied by any intimidation, use of force, etc. Therefore, even the Utah Right to Work Act upon which plaintiff's action is allegedly predicated, expressly exempts peaceful and orderly solicitation and persuasion by members of a labor union to induce others to join a labor union or similar organization. However, the forbidding of all picketing, which of necessity would include peaceful persuasion or solicitation, by the trial court in his injunction in the case at bar, is in direct conflict with the Utah Right to Work Act, and the express provision cited above, and is therefore contrary to this statute of the State of Utah.

The permanent injunction of the trial court in the case at bar makes no distinction between peaceful picketing, peaceful persuasion, lawful patrolling of the highway, and unlawful conduct. It prohibits all peaceful, as well as, unlawful conduct. It cannot be sustained under the express provisions of the labor statutes of this state heretofore cited. Therefore, under said statutes,

the trial court committed error in issuing the permanent injunction herein prohibiting all picketing, peaceful or otherwise.

POINT III

THE TRIAL COURT ERRED IN ENJOINING THE PICKETING HEREIN FOR THE REASON THAT THE SAME WAS NOT VIOLENT, BUT PEACEFUL AND FOR A LAWFUL PURPOSE.

The defendants submit that under the evidence the picketing conducted by them was not violent, but was peaceful and lawful. Of course, the trial court, following its usual pattern in this case, disregarded all of the evidence of the defendants and gave credence to the plaintiffs' testimony in toto. However, even under the plaintiffs' testimony, the picketing herein was not of the type which should have been enjoined.

The specific acts found by the court upon which it is sought to justify the injunction appear to the defendants to be as follows:

1. That said pickets came out across the road leading to plaintiffs' coal mine and that plaintiff Sutton and Frank Steininger, an independent truck driver, either had to stop their respective vehicles or run over said pickets (69).

2. That said pickets informed said Steininger as follows: "You hadn't better go up there," (from which language the court permitted himself to jump to the far fetched conclusion that if said truck driver did proceed the pickets would inflict or cause to be inflicted on said

driver, or his vehicle, great and serious damage) (69, 70).

3. That a picket informed Lloyd Sutton, one of the plaintiffs, as follows: "We had orders to come up here and stop you," and that when Sutton told the picket that if it was necessary he would get the Sheriff to come up to the mine, the picket said: "Well, you better go get him" (70).

4. That a bridge across the only road leading to plaintiffs' mine was blown out during the picketing, and the road strewn with roofing nails (70). (It is significant that the court did not find who was responsible for this conduct.)

5. That on March 19, 1956 (19 days after the picketing wholly ceased), Faye Olsen, one of the above named defendants, shot and damaged the truck of Harvey L. Randall, one of the plaintiffs, and the truck of said Steininger (70). I will treat these findings in the same order as they appear above.

1. As to the blocking of the highway by the pickets, plaintiff Sutton himself testified that on February 23rd, the pickets had their cars parked to the side of the road and had a fire going there (101). He later stated that they came out across the road and "we either had to stop or run over them" (102). Mr. Sutton testified that he was preceded by a trucker, to-wit: Frank Steininger, on this particular occasion (103). Mr. Steininger testified he went up to the picket line on the 22nd day of February (215), but later testified that he did not know whether it was the 22nd or 23rd of February (219). He further

stated that when he first saw the pickets as he proceeded toward the mine, they were right along the side of the road (215), and that the road was clear (219). He was not even hailed by the pickets (219). Both Mr. Sutton and Mr. Steininger were apparently talking about the same day.

Claron Golding, one of the defendants who had initiated the picketing and who was at the picket line every day while the same was in progress, stated that he did not observe any of the pickets getting into the road and stopping trucks or other vehicles (231). As to February 23, 1956, he testified that the plaintiffs came up in two separate trucks about 7:30 A.M. and that the pickets were all on the side of the road by the fire and the plaintiffs just pulled up. He stated they pulled right over within three feet of the edge of that road and the pickets talked to them opposite the driver's side (231).

Defendant Nick Marvidikis was on the picket line on February 24th and also February 27th (249). He was asked if on the days he was on the picket line whether he got out in the road to stop any cars or trucks or otherwise and stated that he did not. He further testified that he did not see anyone else do so; that he did not see anybody stand in the road and that he saw vehicles pass up and down the road without being stopped; that the pickets were right at the edge of the pavement (251).

Clayton Worthen, an impartial witness, who happened to pass on the highway during the picketing, but could not give the exact date, stated that he observed a

group of fellows who had a bonfire at the end of the oil road and that these men were to the side of the road, the east side. They were standing around talking as far as he could see, standing around the fire (324). He further testified he did not observe any men on the highway. On his way back, he stopped of his own accord and made some remark to the men that it was pretty cold weather to be out "picnicing" (325).

Joe C. Lopez, one of the pickets, also testified that the men were by the fire and that nobody was on the highway at any time when he was there (343). Mr. Lopez further testified that the pickets did not stop Mr. Steininger, but that he stopped by himself (343). He further stated that when Mr. Steininger stopped, two of the men, he and Mr. Marvidikis, went over to the truck. The other men stayed by the fire (344).

William Beveridge, who was on the picket line February 23rd about 8:00 A.M. testified that no one stopped either Mr. Steininger on February 23rd or Jack (Lloyd) Sutton, (one of the plaintiffs). He stated the latter stopped himself (365).

William R. Ward, another member of the picket line, testified that he was on the picket line February 23rd and February 24th and that when Sutton came up on February 23rd the pickets were not on the highway and that no one flagged Mr. Sutton; that Sutton stopped (368).

In view of the conflict in the testimony of Mr. Sutton and Mr. Steininger regarding where the pickets were

on February 23rd, Mr. Sutton stating they came on the road and Mr. Steininger stating that they were along the side of the road and the overwhelming evidence on the part of the defendants' witnesses to the effect that the pickets did not stand on the road or block the traffic but came over after Mr. Sutton stopped voluntarily, it is defendants' contention that the court should have found that the said pickets did not block or impede traffic on said highway but that they were around the bonfire on the east side of the road. The evidence does not sustain the finding of the court and he had no reason whatsoever to disbelieve the numerous witnesses produced by the defendants, since their testimony was not broken down and there was no evidence assailing their veracity; under the circumstances the court's finding that the pickets were on the highway was arbitrary and unjustified.

2. Although plaintiff Sutton testified that he sent Mr. Steininger to the mine on February 23rd but told him if there was a picket line that he was to turn back and Mr. Steininger admitted on cross-examination that Mr. Sutton had requested that he go to the mine on said occasion, the court found that the pickets informed Mr. Steininger, "You hadn't better go up there." The court was not justified in finding that these words, standing alone, meant that if the truck driver did proceed the pickets would inflict, or cause to be inflicted, upon said driver or his vehicle, great and serious damage (69-70). The said truck driver was already under orders from plaintiff Sutton to turn back if there was a picket line

at the road. There is no evidence that said words allegedly spoken by the pickets were spoken in anger, or in a threatening manner, or that they carried the threat of imminent danger if the truck driver proceeded. If spoken, they could well have meant that it would be better for all concerned if the truck driver did not proceed to the mine. The evidence does not disclose the tone of voice in which the words were uttered, if at all, or whether they were accompanied by any overt act, indicating that force would be used if the trucker proceeded.

An attorney may advise his client that he had not better engage in certain conduct. This does not imply necessarily that force or violence will be visited upon the client if he acts contrary to the advice of his attorney.

Of course, defendants' evidence gives a different version of the words spoken to the truck driver on said occasion.

Joe C. Lopez, one of the pickets, testified that the conversation with the said truck driver was as follows:

"A. Well, all he said, that he wanted to go up. That that was the way he was making his living. And our answer was that we was making our living by joining the union. That's all we said. But we didn't stop him. So he turned back." (345).

Mr. Lopez testified further:

"Q. Did either you or Mr. Marvidikis say anything to him about not being able to go up to the mine or where he was going?

A. We never did." (345).

Of course, since Mr. Steininger was told by Sutton to

return if there was a picket line. He could well have turned back by reason thereof. The record shows that only Mr. Lopez and Mr. Marvidikis spoke to Mr. Steinger and that the other pickets remained by the fire (344).

3. As to the court's finding that a picket informed Lloyd Sutton, one of the plaintiffs, as follows: "We had orders to come up here and stop you," and that when Sutton told the picket that if it was necessary he would get the Sheriff to come up to the mine, the picket said: "Well, you better go get him" (70). This language was allegedly spoken to Mr. Sutton on February 27 (110-111-112). Later that day plaintiff Sutton and other plaintiffs proceeded to said mine (112). Again the alleged statements above, if spoken, do not necessarily mean that force and violence would be inflicted upon Mr. Sutton or any of the other plaintiffs if the picket line were crossed. There was no threat that Mr. Sutton was to be stopped by the use of force or violence. The pickets could well have meant by said words, standing alone, that they had orders to stop Mr. Sutton by use of lawful means, to-wit: peaceful persuasion. Mr. Sutton was told he could get the Sheriff which is not consistent with the theory that force was to be inflicted upon him.

Again, we direct this Court's attention to defendants' evidence as to the said conversation with Mr. Sutton. Joe C. Lopez testified as follows:

"Q. Did you have a conversation with these two men in the pick-up? (Sutton was one of the men in the pick-up.)

- A. Well he came up to us and he said, 'Are you going to let me through?' He said.
- Q. Now who said that?
- A. That second fellow, what's his name?
- Q. Mr. Sutton?
- A. Yes. And right away he said 'If you don't I will just go get the law and go up.' We said 'Suit yourself.' He turned back. I don't know whether he came back all the way down to Price or not but he turned right back, I believe in about 20 minutes. He said, 'This time I got orders to go up.'
- Q. Now just a minute. He went down, you don't know where, but he came back, you say, in about 20 minutes?
- A. Yes. And he said he had orders to go up and see the property. Our answer was, 'You could have went up in the first place.' We didn't stop nobody. See. That's all that was said.
- Q. And what did he do then?
- A. He went right up." (347-348).

Lopez' testimony seems fair and logical and the evidence shows Mr. Sutton did go up to the mine without getting the sheriff and without any violence when he returned within about 20 minutes after the first conversation. If the pickets really said they had orders to stop him, why would they let him go through after he turned back and then returned? Is it not more logical to believe that because of Mr. Sutton's apprehension of picketing in general, (hereafter discussed), he was simply taking extra precautions by stating that he would get the sheriff? It is not clear where he went but he returned in 20

minutes and said that he had orders to go through. He did not say from whom he received said orders and it does not appear that he was fearful of not being let through because he could have brought the sheriff to the picket line but did not do so and yet he was allowed to go through without any threats or violence of any kind.

I cannot refrain from pointing out, however that the trial court, following its usual pattern throughout this case, accepts fully the testimony of the plaintiffs and without any cogent reason, rejects arbitrarily all of the testimony of the defendants. In the opinion of the defendants, the three findings set forth above were the only findings upon which the injunction could possibly be based, because they are the only occurrences which plaintiffs allege and which the court found occurred at the picket line. The other two findings did not occur at the picket line.

4. The fourth specific finding was that a bridge across the only road leading to plaintiffs' mine was blown out during the picketing, and the road strewn with roofing nails. It will be noted that the court did not make any finding as to who was responsible for said acts. There was evidence to the effect that a bridge on the road leading to plaintiffs' mine was partially damaged and someone had put roofing nails on the road (104). No one knows who committed these acts. No proof whatsoever was submitted which connected or tended to connect the defendants, or either of them, with the commission thereof. Deputy Sheriff Semken testified he made a thorough investigation in an effort to determine who the guilty

person, or persons, were, but was unable to do so (292). Mr. Sutton testified that if he knew who the persons where who committed said acts he would have them prosecuted (130). Moreover, the pleadings of plaintiffs indicate they do not know who committed said acts. In the first complaint they were content to allege that "Plaintiffs *believe*, and therefore allege, that the Defendants are responsible for said destruction and malicious conduct ****" (2). (My emphasis). After the court ordered said allegation stricken (45-46), the plaintiffs in their amended complaint allege "That a bridge across the only road leading to plaintiffs' mine was blown out and the road strewn with tacks and nails and that plaintiffs are informed and believe and upon such information and belief, allege that the defendants are responsible for said destruction, malicious conduct and intimidation." (49). No proof was introduced whatsoever to show the responsibility for said acts. The defendants allege that said finding should not have been made because it does not connect the defendants with the acts alleged and it is highly prejudicial and unfair to the defendants. It is irrelevant because it is not and cannot be connected with the defendants, or any of them. If we wish to indulge in theory it is equally plausible to charge that the plaintiffs committed said acts in order to be able to make a showing for an injunction — an injunction which they desperately wanted. There is evidence that Mr. Sutton was at the mine at about 10:00 P.M. the evening before the said tacks were found and said bridge partially damaged (288). However, courts are not interested in theory

but in competent proof. Since there is no proof whatsoever in the record that defendants were responsible for said acts, the trial court should not have considered the same as constituting any basis upon which an injunction should have been issued and said finding is immaterial in this case. The presumption of innocence, we take it, still prevails in this jurisdiction.

5. The court found that on March 19, 1956 (19 days after the picketing wholly ceased), Faye Olsen, one of the above named defedants, shot and damaged the truck of Harvey L. Randall, one of the plaintiffs, and the truck of Mr. Steininger. In desperation to show some act of violence upon which to base the injunction herein, the plaintiffs offered and the court received, over the objection of the defendants, evidence to the effect that on March 19, 1956, Faye Olsen, one of the defendants shot and damaged the truck of Harvey L. Randall, one of the plaintiffs and the truck of Mr. Steininger. This event occurred 19 days after the picketing had wholly terminated and 7 days after the court granted the preliminary injunction herein. The evidence concerning Mr. Olsen was to the effect that he had been drinking considerably; that he was angry about the loss of his job; and that he committed this act without any suggestion from the other defendants. In otherwords, he was on a "lark" of his own, although he had defendant Golding take him to where the trucks were (388-9).

Defendants urge that this isolated act on the part of Faye Olsen, 19 days after the picketing had ceased, has no connection with the other defendants. See *N.L.R.B.*

v. Deena Artwear, 198 F. 2nd 645, which held that unauthorized acts of violence by some of the striking employees during picketing are not chargeable to the other members of the labor union representing the employees. Therefore, this act had nothing to do with the other members of the picket line and cannot be chargeable to them. Furthermore, this isolated act on the part of Mr. Olsen was entirely outside the issues of this case and, therefore, immaterial. The plaintiffs had the opportunity to amend their pleadings to include this matter but chose not to do so. It is outside the issues as framed. Defendants insist it was error on the part of the court to admit this evidence since it was not covered by the pleadings and defendants were not apprized of the same beforehand. Further, it had nothing to do with the picketing which had ended some 19 days before. It does not cast any light as to whether the picketing which took place from February 23, 1956 to March 1, 1956 was peaceful or otherwise. There was no picket line in existence at the time of this isolated act on the part of Mr. Olsen. He was acting entirely on his own initiative. Defendants direct the court's attention to the case entitled *Cafeteria Employees Union v. Angelos*, supra, in which the U. S. Supreme Court (after citing the *Meadowmoor* case, supra, to the effect that "****Right to free speech in the future cannot be forfeited because of dissociated acts of past violence"), said:

"Still less can the right to picket itself be taken away merely because there may have been isolated incidents of abuse falling far short of violence occurring in the course of that picketing."

Defendants take the position that all of the alleged words and acts specified above are isolated incidents and do not justify the injunction issued in this case. There is no causal connection between the isolated act of Faye Olsen and said picketing. Since it occurred after the preliminary injunction was granted the proper remedy for the court to have applied was a citation against Mr. Olsen for contempt. This would be consistent with the authorities cited. Said act cannot be chargeable to other members on the picket line. See *N.L.R.B. v. Deena Artwear*, *supra*.

The evidence shows that the real basis for this action was not the alleged abuses of the picketing herein, which are not sustained, but rather plaintiffs' and Odendahl's inherent fear of picketing in general, even though it was peaceful.

It is clear from the record that neither Walter Odendahl nor the plaintiffs intended to cross the picket line. Both intended to respect it (146, 380). Mr. Odendahl, when first advised by his employees that a picket line was established suggested, "that they do not attempt to go through the picket line. I told them that I wanted no trouble whatsoever." (146). Mr. Odendahl also testified that the mine would be shut down completely if the union engaged in picketing (156). Mr. Randall, one of the plaintiffs, called Walter Odendahl by telephone after first observing the picket line and before he went down to it. He told Mr. Odendahl "**** they had a picket line

out and we would not go through and he told us not to because he didn't want no trouble" (166).

Plaintiff Sutton testified that he intended to respect the picket line (380). He told Deputy Sheriff Semken that he was not going to run coal until the trouble was settled (289, 380). Sutton was also asked:

"Q. Regardless of the reason, again Mr. Sutton, you did not contemplate hauling any coal on that highway while the picket line was there? Yes or no.

A. No." (382).

Plaintiff Sutton further testified that none of the defendants made any threats against him of any kind (120). He was later asked:

"Q. Well, Lloyd, all I want to know is by either words or conduct did any of those pickets actually threaten you with any type of violence, bodily harm, reprisals, threat of reprisals or anything else if you went through?

A. They didn't threaten me bodily, no. But I didn't know if they would or if they wouldn't." (122).

Sutton further testified that his men (the other plaintiffs) had no trouble getting through the picket line to his knowledge (123). In fact, there is no evidence that the plaintiffs were ever deprived of the right of passage whether going to the mine or returning therefrom.

A fair interpretation of the above testimony in defendants' view is that the very presence of the picket line served as a restraint even though no threats of violence were made, but plaintiffs thought if they hauled coal there could be trouble. In other words, Odendahl and the plaintiffs assumed there could be violence if they hauled coal and their assumptions did not arise out of any words or conduct of the pickets, but because of some unpleasant experiences they had had in years past under unknown conditions with other persons. The evidence sustains this proposition. When Mr. Odendahl was asked if the plaintiffs could not continue to haul coal to the railroad cars (i.e., from the mine to the railroad cars at Price, Utah) under peaceful picketing, his answer was, "We never know when picketing is peaceful or unpeaceful" (155). He went on to say that trucks have been rocked until they have been upset (in the past) and if he was a truck driver he would hesitate before crossing a picket line (155). This testimony was concerning past experience with other pickets, under other circumstances. His fears did not grow out of any words or acts on the part of those defendants who served on the picket line, but rather out of acts of other people at different times and places and under circumstances with which we are not acquainted. It would be fair to say that he was apprehensive of picket lines in general. There is no evidence from Mr. Odendahl that this particular picket line threatened him or his employees in any manner whatsoever, or that the picketing herein was other than peaceful and orderly. He had instructed his men not to go

through this picket line when it was first discovered. Therefore, nothing which the pickets may have said or done caused him to lease his mine to the plaintiffs, but rather his inherent fear of picket lines in general. He does not make any distinction between peaceful picketing or violent picketing, contending that he does not know when picketing is peaceful or "unpeaceful." However, the law does take cognizance of and sanctions peaceful picketing.

Plaintiff Sutton testified that he was not threatened with bodily injury by the pickets as aforesaid (122). He added significantly that he "wasn't going to take the chance" (of going through the picket line) (122). When asked if he knew whether there would have been any threats of violence if he did go through the picket line, Mr. Sutton attempted to go into what had happened in the past (122) in dealing with others. This is not material here. He was basing his objection to the pickets, not because of what they had done or said, but upon his presumption of what *might* happen because of some unpleasant experiences in the past with others (122).

Mr. Sutton testified that each time he was stopped, he was told by the pickets that they thought it would be better if he joined the union and made it a union mine (123). He discussed this matter with the pickets at some length when he stopped (123). This evidence shows that the picketing had for its purpose peaceful persuasion. The men tried to persuade Mr. Sutton by orderly conversation that it would be to his advantage and to the advantage of the other plaintiffs if he unionized the

mine. Mr. Sutton testified that this was the general conversation each time he stopped and talked to the pickets. This fact, coupled with his testimony above to the effect that he was not threatened with bodily harm by the pickets, corroborate defendants' position that the picketing was peaceful and was formed to induce, by lawful persuasion, the unionization of said mine.

Mr. Sutton also testified to the effect that there was no use going up there (to the mine) after the first times as long as the picket line was there (123). Sutton told Frank Steiningar not to "buck" the picket line (382). Sutton sent Steiningar up in the first place (on February 23, 1956) because he thought there would be no picket line that day (382). Sutton stated he expected Steiningar to turn around and come back if there was a picket line (382). Sutton further stated that he did not intend to work the mine as long as there was a picket line, because of *anticipated* trouble based upon presumption and not upon anything which actually happened at the picket line (384, lines 1-8).

The above testimony of both Odendahl and plaintiff Sutton substantiates the proposition that neither had any intention of crossing the picket line from the very beginning; that they both feared picket lines generally. Both advised their employees and partners respectively not to cross or "buck" the picket line. It was not Sutton's intention to operate or haul coal while the picket line was on duty as aforesaid. The very existence of the picket

line was sufficient restraint as far as plaintiff Sutton and his associates were concerned.

In *International Union of Operating Engineers, Local No. 3 v. Utah Labor Relations Board* (115 Utah 183), 203 P. 2d 404, this Court held that otherwise lawful picketing was not made unlawful in spite of the mental reactions laboring men generally have regarding picket lines and their tendency to respect it. The Court, after citation of numerous authorities, held the picketing involved was an exercise of constitutionally guaranteed free speech.

No threats or violence were necessary under the circumstances herein. No coal was hauled or was attempted to be hauled during the picketing. The mine was shut down from the commencement of the picketing pending settlement of the dispute. Plaintiffs made trips to the mine for the purpose of inspecting the property and not for producing coal (123). The mere presence of the pickets from the time the plaintiffs took over the mine was the reason for the shut down and not on account of any words or acts by the pickets.

Under the above circumstances the question arises what is the materiality of what the pickets said or did as long as plaintiffs did not intend to operate or cross the picket line in any event? Mr. Sutton has told us that he was not going to take the chance of crossing the picket line as long as the pickets were present.

The issue here is not whether the picketing was peaceful or otherwise. The real objection of the plaintiffs was to any picketing whatsoever. In all their pleadings they have asked the court to enjoin *all picketing*.

We submit that the evidence in this case does not support a finding that the picketing was unlawful. However, to reverse this case, this Court need not go this far. This is an equity case and on appeal the Supreme Court may examine the evidence and determine whether or not the findings and judgment are against the weight of the evidence. If this court should be of the opinion that the findings are against the weight of the evidence, it should then make findings of its own and enter a judgment in accordance therewith. Certainly the testimony in this case clearly preponderates in favor of the defendants. The evidence establishes by a preponderance that the defendants were engaged in exercising their right to picket, to inform the public of their position, and were attempting to persuade the plaintiffs to unionize their mine. Under the authorities this court in such a situation should make its own findings and enter a judgment in favor of the defendants herein.

Corey v. Roberts, 82 Utah 445, 25 P. 2d 940; *Transfer Realty Co. v. Litchfield*, 84 Utah 163, 33 P. 2d 179 (Rehearing denied 85 Utah 451, 39 P. 2d 752); *Greco v. Grako*, 85 Utah 241, 39 P. 2d 318; *Chapman v. Troy Laundry Co.*, 87 Utah 15, 47 P. 2d 1054; *Christenson v. Nielson*, 88 Utah 336, 54 P. 2d 430; *Skola v. Merrill*, 91 Utah 253, 64 P. 2d 185.

POINT IV

PEACEFUL PICKETING IS THE LEGITIMATE EXERCISE OF FREE SPEECH, NOTWITHSTANDING THE PURPOSE THEREOF IS TO INDUCE PLAINTIFFS WHO OPERATE WITHOUT OUTSIDE HELP TO JOIN UNION.

In *Cafeteria Employees Union v. Angelos*, supra, plaintiffs owned and operated a cafeteria as partners without the aid of any employees. The defendant labor union picketed the cafeteria in an attempt to organize it. A New York Court granted an injunction on the grounds there was no "labor dispute" within the meaning of the New York Anti-Injunction Act. The U.S. Supreme Court reversed the judgment, stating at page 127 of 64 S. Ct.:

"But, as we have heretofore decided, a state cannot exclude working men in a particular industry from putting their case to the public in a peaceful way 'by drawing the circle of economic competition . . . so small as to contain only an employer and those directly employed by him.' *American Federation of Labor v. Swing*, 312 U. S. at page 326, 61 S. Ct. at page 570, 85 L. Ed. 855, Cf. *Bakery & Pastry Drivers Local v. Wohl*, 315 U. S. 769, 62 S. Ct. 816, 86 L. Ed. 1178."

In *Senn v. Tile Layers Protective Union*, 301 U. S. 468, 57 S. Ct. 857, 81 L. Ed. 1229, an action was brought by Senn in the state court seeking an injunction to restrain picketing and particularly publishing that the plaintiff was unfair to organized labor and to the defendant unions, etc. Senn complained that the union picketed his place of business and also sent letters to architects and contractors requesting them not to patron-

ize him because he was conducting a nonunion shop and threatening to picket them if they did so. Senn was the proprietor of a small business and he and his employees declined to join the 'Tile Layers' Union. When he refused to sign a contract which barred him from working at his trade with his employees, the union peacefully picketed his place of business.

The state court denied an injunction under a Wisconsin statute allowing labor to use that form of economic pressure. He appealed to the U. S. Supreme Court upon a contention that the statute of Wisconsin abridged his right under the Fourteenth Amendment to work under conditions of his own choice. The U. S. Supreme Court affirmed the judgment.

The unions in the Senn case conceded that Senn, so long as he conducts a nonunion shop, has the right to work with his hands and tools, and that he may do so, as freely as he may work his employees longer hours and at lower wages than the union rules permit. But the unions contended that since Senn's exercise of the right to do so was harmful to the interest of their members, they may seek by legal means to induce him to agree to unionize his shop and to refrain from exercising his right to work with his own hands. The Supreme Court of Wisconsin held that both the means employed and the ends sought by the unions were legal under its law. The question the Supreme Court of the United States was asked to decide was whether either the means or the ends sought were forbidden by the federal constitution. The highest court in the land held that the means

which the state statute authorizes, to-wit: picketing and publicity, were not prohibited by the Fourteenth Amendment. The Court then stated:

“Members of a union might, without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution. The state may, in the exercise of its police power, regulate the methods and means of publicity as well as the use of public streets. If the end sought by the unions is not forbidden by the Federal Constitution, the state may authorize working men to seek to attain it by combining as pickets, just as it permits capitalists and employers to combine in other ways to attain their desired economic ends.”

The Supreme Court said further in the Senn case:

“There is nothing in the Federal Constitution which forbids unions from competing with non-union concerns for customers by means of picketing as freely as one merchant competes with another by means of advertisements in the press, by circulars, or by his window display. Each member of the unions, as well as Senn, has the right to strive to earn his living. Senn seeks to do so through exercise of his individual skill and planning. The union members seek to do so through combination. Earning a living is dependent upon securing work; and securing work is dependent upon public favor. To win the patronage of the public each may strive by legal means. Exercising its police power, Wisconsin has declared that in a labor dispute, peaceful picketing and truthful publicity are means legal for unions. It is true that disclosure of the facts of the labor dispute may be annoying to Senn

even if the method and means employed in giving the publicity are inherently unobjectionable. But such annoyance, like that often suffered from publicity and other connections, is not an invasion of the liberty guaranteed by the constitution. Compare *Pennsylvania Railroad Co. v. United States R. Labor Board*, 261 U.S. 72, 43 S. Ct. 278, 67 L. Ed. 536. It is true, also, that disclosure of the facts may prevent Senn from securing jobs which he hoped to get. But a hoped-for job is not property guaranteed by the Constitution. And the diversion of it to a competitor is not invasion of a constitutional right."

In *Bakery and P. Drivers Local v. Wohl* (1942), 315 U. S., 769 62 S. Ct. 816, 86 L. Ed. 1178, the Supreme Court held that to enjoin a labor union from peacefully picketing independent or "peddler" distributors of bakery products, who performed all their own work and have no employees, for the purpose of securing employment for union members, was to unconstitutionally infringe upon the right of free speech guaranteed by the Federal Constitution, and further:

"So far as we can ascertain from the opinions delivered from the state courts in this case, those courts were concerned only with the question whether there was involved a labor dispute within the meaning of the New York statutes and assumed the legality of the injunction followed from a determination that such a dispute was not involved. Of course, that does not follow: one need not be in a 'labor dispute' as defined by state law to have a right under the Fourteenth Amendment to express a grievance in a labor

matter by publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive."

See also *Angelos v. Mesevich*, 289 N. Y. 498, 46 N.E. 2d 903; *Naprawa v. Chicago Flat Janitors Union*, 315 Ill. App. 328, 43 N. E. 2d 198; *Coons v. Journeymen Barbers*, 222 Minn. 100, 23 N. W. 2d, 345; *Lo Bianco v. Holt*, 189 Misc. 113, 70 N.Y.S. 2d 33; *Kellar v. Sun*, 93 N. Y. 2d 165.

I also wish to direct the court's attention to the following authorities on the general status of peaceful picketing as related to the constitutional guarantee of free speech:

Thornhill v. Alabama, 310 U. S. 88; *Carlson v. California*, 310 U. S. 106; *State of Washington ex rel Lumber and Sawmill Workers v. Superior Court*, 164 P. 2d 662; *Milk Wagon Drivers Union v. Lake Valley Farm Products*, 311 U. S. 91, 61 S. Ct. 122, 85 L. Ed. 63; *U. S. v. Hutcheson*, 312 U. S. 219, 61 S. Ct. 463, 85 L. Ed. 788; *In re Blaney*, 30 Cal. 2d 643, 184 P. 2d 892.

Plaintiffs' ground this action upon the Utah Right to Work Act. Their position, in brief, is to the effect that said Act guarantees the plaintiffs the right to work without becoming members of any union and defendants by picketing are seeking to deny the plaintiffs their rights under said Act. However, the Utah Right to Work Act exempts peaceful persuasion, which according to the defendants, is what they were engaged in doing when enjoined by the trial court. The California Su-

preme Court, in *Bautista v. Jones*, 25 Cal. 2d 746, 155 P. 2d 343, stated as follows about the right to work:

“The right to work, either in employment or independent business, is fundamental and, no doubt, enjoys the protection of the personal liberty guarantee of the Fourteenth Amendment to the federal Constitution, as well as the more specific provisions of our state constitution. . . . but this right, like others equally fundamental, is not absolute. It is safeguarded from legislative action which discriminates against a person or class of persons in respect to opportunities to obtain work or enter into business. (Yick Wo Hopkins, 118 U. S. 356, 6 S.Ct. 1064, 30 L. Ed. 220; *Abe v. Fish and Game Commission*, 9 Cal. App. 2d 300, 49 P. 2d 608); and it is also protected in some degree against arbitrary action by private organizations, including employers and labor unions. *James v. Marinship Corp.*, supra. But it is subject to many legislative restrictions familiar to all, such as statutory limitations on working hours, minimum wages, age limits for employment, licensing acts, safety regulations, and a host of others. *It is equally subject to peaceful economic pressure by labor organizations seeking legitimate ends, such as conditions of work, collective rather than individual bargaining, seniority privileges and other methods of advancement, and the union or closed shop . . .*” (Citing cases). (My emphasis).

In connection with the Right to Work Act, defendants wish to point out that five of their members were denied the right to work when they were not permitted to return to their jobs by reason of their wish to organize the mine at which they had been employed and which

is involved herein and that they were repeatedly told that if they joined the union the mine would have to shut down and there would be no work for them.

The defendants herein sought legitimate ends in that they were picketing for recognition of the union to which they wished to attach themselves and were exercising the rights guaranteed to them under Section 7 of the Taft Hartley Act and Utah Labor Statutes as aforesaid. They had a right even under the Utah Right to Work Act to use peaceful persuasion to accomplish these ends. We have heretofore noted that their conduct was not violent and, therefore, they were acting within their rights under the Utah Right to Work Act.

Defendants firmly believe that the court erred in restraining all picketing and that the court should not have restrained picketing which was lawful and peaceful. Of necessity, by restraining all picketing, the Court did restrain peaceful and lawful picketing, which are included in the term *all* picketing. If in fact the picketing herein was violent, the Court should have restrained those specific acts constituting the violence rather than in sweeping terms enjoining all picketing. See *Weber v. Anheuser-Busch* 348 U. S. 480; *Milk Wagon Drivers' Union etc. v. Meadowmoor Dairies*, supra.

Note that in the Meadowmoor case the acts of violence were of great magnitude and continuing. The master who investigated for the Court found that there had been violence on a considerable scale. Witnesses testified to more than fifty instances of window smash-

ing; explosive bombs causing substantial injury to plants; stench bombs dropped in five stores; three trucks of vendors were wrecked; and a store was set on fire. In the course of its opinion, the Court said, "These acts of violence are not episodic nor isolated." The Court also said: "And so the right of free speech cannot be denied by drawing from a trivial rough incident or a moment of animal exuberance the conclusion that otherwise peaceful picketing has the taint of force."

In the Anheuser-Busch case, *supra*, the U.S. Supreme Court said that the picketing involved therein did not preclude the conclusion that the transportation was stopped for fear of crossing an otherwise peaceful picket line and that in any event the state court enjoined all picketing. The case was reversed and remanded and we feel that the conclusions hereinabove cited from said case apply with equal force to the case at bar.

Defendants are firmly of the opinion that the Court in this case, even if it disregarded the proposition that the plaintiffs did not cross the picket line because of fear of what might or could happen rather than any conduct on the part of the pickets, still should have enjoined only such acts as it found from the evidence to be violent or in the nature of threats and should not have enjoined in its permanent injunction all picketing which prevented the defendants from exercising their right under the Taft Hartley Act, the Utah Labor Statutes above cited, including the Utah Right to Work Act, to engage in peaceful picketing for organizational and other lawful labor purposes.

CONCLUSION

Peaceful and lawful picketing is a right which is secured to citizens of this country by the constitutional provisions protecting freedom of speech. We believe that the findings and judgment of the trial court have denied to defendants this very important right. These defendants have been prohibited by the trial court from engaging in any type of picketing. On the very face of the judgment it appears that the court has violated defendants' rights. It enjoins the defendants from "all picketing."

In the first place this case should not have been considered by the courts of this state. Plaintiffs are engaged in interstate commerce and Congress has created a tribunal to take care of labor disputes such as the present. The National Labor Relations Board is the tribunal before which plaintiffs should have submitted their cause, if any. Whether or not the National Labor Relations Board would take cognizance of this case is of no concern to the courts of the State of Utah.

We submit that this court should reverse the judgment of the trial court and direct that a judgment be entered in favor of the defendants, thereby assuring defendants of their right to peacefully picket, to inform the public of their cause and to persuade the plaintiffs to unionize their mine.

Respectfully submitted,

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