

1957

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

Utah Supreme Court

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Case No. 8587

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IN THE SUPREME COURT
of the
STATE OF UTAH

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

Plaintiffs and Respondents,

—VS.—

NICK MARVIDIKIS, FAYE OL-
SEN, CLARON GODLING, MALIO
PECORELLI, FRANK SACCO, and
all others engaged in the picketing of
the coal mine of the Blue Flame Coal
Co., & UNITED MINE WORKERS
OF AMERICA,

Defendants and Appellants.

FILED
MAR 14 1957
Clerk, Supreme Court

**REPLY BRIEF OF DEFENDANTS
AND APPELLANTS**

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Counsel for Appellants
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Price, Utah

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LLOYD D. SUTTON, HARVEY L.
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ship, doing business under the name
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Defendants and Appellants.

Case No. 8587

REPLY BRIEF OF DEFENDANTS AND APPELLANTS

Defendants will reply to the arguments and observa-
tions made by plaintiffs under the heading "Statement,"
commencing on page 2 of their Brief, and will then reply
to each point set forth in their Argument in the order in
which said points appear in said Brief. The figures in
parentheses refer to the page number of the Record.

Since this is an equity case, and the Supreme Court may examine the evidence and make its own findings and render judgment in accordance therewith, defendants do not deem it necessary to comment further on the trial court's evaluation thereof.

Plaintiffs urge that Walter Odendahl shut the mine down not because of antagonism to unions in general, or the United Mine Workers of America in particular, but because of financial inability to meet the terms of the union contract. The evidence discloses that on numerous occasions Mr. Odendahl had stated that if the mine was unionized he would close it down (255, 269); the evidence also shows that before hiring some of the employees involved, they were specifically asked as to their attitude about unionizing the mine, and were cautioned that if the mine was unionized, it would be shut down (270). There is reason, therefore, to suspect that the mine was shut down, not for the reason given, but antagonism to unions in general on the part of Odendahl. He had never tried to work under union contract. Defendants offered to show that other mines in this area comparable to that of Odendahl, with similar haulage and other problems were operating profitably under union contract, but were precluded from making such a showing over plaintiffs' objection (192-3-4). The evidence indicates that financial inability to meet a proposed union contract is a common excuse used against union organization (189).

Plaintiffs cite *Tarr V. Amalgamated Ass'n of St. Elect. Ry, etc.* 250 P. 2d 904, to the effect that it is the prerogative and constitutional right of any businessman to continue or discontinue in business as he sees fit. However, this right like so many others, is not absolute. It is subject to the qualification that it must be exercised in such a manner as not to encroach upon the lawful rights of others.

In the Tarr case, *supra*, the court laid considerable stress upon the proposition that plaintiff had started a new city bus service under a new franchise with his own equipment, and was not a successor of the defunct company. Therefore he was not bound by the union contract, and the dispute which existed on March 9, 1951 did not therefore survive as a labor dispute against plaintiff. It was implied that if the plaintiff had been a successor of the defunct company, which formerly operated the buses, the situation might be different. The Court further found there was no labor dispute involved. This was a 3 to 2 decision, indicating considerable doubt about the correctness thereof.

From the dissenting opinion of Justice Porter, we quote:

“Respondent was a successor to the Pocatello transit company with full knowledge of the existence of the labor dispute. By his acquisition of the business enterprise employing the involved employees, he should not be permitted to extinguish the rights of such employees. *Sutter V. Amalgamated Ass'n, etc.* 252 Ala. 364, 41 So. 2d 190.

“The dispute between the Pocatello Transfer Company and Appellants was a labor dispute within the meaning of Section 44-712, I.C. Boise Street Car Company, V. Van Avery, 61 Ida. 502, 103 P. 2d 1107 . . .”

In the case at bar, Mr. Odendahl retained substantial financial benefits from the terms and provisions of the Lease to plaintiffs (Exh. B). He was to receive a commission from the sale of coal mined, and was therefore certainly interested in it being operated. Odendahl also has large sums owing him for the equipment and machinery set forth in said lease. He was present with his counsel during the entire trial of this case below, and was one of the principal witnesses for plaintiffs. In view of all these circumstances, it is questionable that plaintiffs are starting an entirely new enterprise or are the sole parties concerned with this labor dispute. It has been held frequently that to move a plant or discontinue operations when there is a labor dispute is an unfair labor practice. *Browning King Co. V. Local* 195, etc., 111 A. 2nd 415.

Regarding the question as to whether Walter Odendahl coerced 3 employees into terminating their employment, defendants do not rely entirely upon Pecorelli's testimony as plaintiffs try to make it appear. The evidence shows Odendahl's employees were told from time to time that if the mine was unionized he would shut it down and that there would be no work for them; that he could not operate it as a union mine (255, 269). As aforesaid, when the employees were hired, they were

cautioned that unions were not wanted at the mine and that the mine would be shut down if unionized. After the men voted to join the union, they did not know whether there was further work for them at the mine in view of said repeated statements made by Mr. Odendahl and his son, Theron Odendahl. Odendahl refused to operate the mine even though he was requested to do so by a union official pending negotiations for a contract (186). In view of all of said repeated warnings of imminent shut down and loss of jobs in the event of unionization, can it be truthfully urged that there was no coercion on the part of Mr. Odendahl causing the men to terminate their employment? It is all of these repeated threats rather than Pecorelli's testimony alone which should be considered on the question of coercion.

As to whether or not the partnership was bona fide or sham, plaintiffs state on page 3 and 4 of their Brief that there is no evidence in the Record to controvert the existence of the partnership or establish that the lease was not bona fide. Of course, it is difficult to read a lease and discern whether it is bona fide or sham. We must examine all the facts and circumstances leading up to its execution. The fact that the partners other than Lloyd Sutton, put up no capital investment whatsoever and are drawing about the same wage as coal miners are paid in Carbon County, and are doing the same work as they did before the labor dispute at the mine, and that Mr. Sutton was evasive when asked whether or not he was going to hire additional employees at a

later date, (128-9), all cast doubt on the good faith of the entire transaction. See *Saito V. Waiters & Waitresses Union* 12 N.Y.S. 2d 283.

Plaintiffs assert defendants apparently have lost sight of their antagonist. We are informed it is plaintiffs with whom defendants have their quarrel. Plaintiffs say they have no employees; that Odendahls who formerly operated the mine with employees are no longer involved. It is plaintiffs who have missed the point. In *Diamond Full-Fashioned Hosiery Company V. Leader* (1937 D.C. Pa.) 20 F. Supp. 467, App. Dismd without op (C.A. 3d, 99 F. 2nd 1001), the employer (The Vogue Co.) had laid off his employees and had determined to go out of business. The employees were advised it was being sold. Thereafter the employees and members of the union began to picket the mill. Their purpose was to inform the public that the employees had been locked out and thereby deprived of their employment and that the company's machinery was being sold and moved. Plaintiff purchased the machinery and applied for an injunction against the defendants, restraining them from interfering with the moving thereof.

The court said the employees' position was that they had been locked out by The Vogue Company and that the court was satisfied from the evidence that the sole purpose of the employees in picketing was to get their jobs back; that all the elements of a labor dispute were present. The court also said,

"Whether the defendants' position was justified or had any real basis is beside the point and is not for this court to pass upon."

The court held that there was a dispute between defendants and The Vogue Company and that it was a labor dispute under the Norris LaGuardia Act. Quoting further from the opinion,

"The further question arises whether a case must involve or grow out of a labor dispute between the plaintiff and defendants to come within the provisions of the Norris-LaGuardia Act, which provides in Section 13 (a) 29 U.S.C. Sec. 113 (a), 29 U.S.C.A. Sec. 113 (a) that 'A case shall be held to involve or grow out of a labor dispute when the case involves persons who are engaged in the same industry, craft or occupation . . . whether such dispute is (1) between one or more employers or associations of employers, and one or more employees or associations of employees.' (This language is almost identical with 34-1-34 U.C.A. 1953 (a).

"It will be seen that the act includes any case where the parties are all engaged in the same industry and the dispute is between an employer and employees. It is therefore not restricted to cases where the dispute is between the plaintiff (the buyer of the machinery) and the defendants but includes a case where one employer in an industry seeks an injunction against the employees of another employer in the same industry who are engaged in a labor dispute with their own employer. In this case, the plaintiff is engaged in the hosiery industry as are the defendants and their employer, The Vogue Co. The case, therefore, comes within the express definition of the Act and the terms thereof apply to it."

The Court ruled that under the terms of the Norris-LaGuardia Act, the court had no jurisdiction to issue a temporary injunction to restrain the defendants from 'Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence.' See *Potdevin Mach. Co. V. Cicala* (1952) 115 N.Y.S. 2d 108; *Dwight's Coffee Shop V. Davis*, 206 Misc. 662, 134 N.Y.S. 2d 847.

Therefore, under the Norris-LaGuardia Act and also under Sec. 34-1-34 U.C.A. 1953, and by the authority of the cases last quoted and cited, since the plaintiffs and defendants are engaged in the same industry, to-wit: the coal industry, and the dispute arose between an employer, to-wit: the Odendahls, and the employees (some of the defendants), the federal or state anti-injunction act applies. It is not restricted to a dispute between the plaintiffs and the defendants only. A labor dispute exists whenever the employer in an industry seeks an injunction against employees of another employer in the same industry who are engaged in a labor dispute with their own employer. This language would mean that if Odendahl and his employees, some of the defendants herein, are engaged in a labor dispute and the plaintiffs herein, to-wit: Lloyd Sutton, et al, seek to enjoin the said defendants, there is a labor dispute within the meaning of the Norris-LaGuardia Act and the Utah Act. It is understandable that the plaintiffs would like to narrow the issues as being entirely between the plaintiffs and defendants. However, to do so would

be to miss the point entirely, (to borrow plaintiffs' phrase). Our labor laws are not that simple to evade and circumvent. The Odendahls had a labor dispute with their employees, who wanted to negotiate a union contract in order to improve their wages and working conditions, receive medical and hospital benefits, etc. In order to evade this labor dispute, Odendahls shut the mine down and executed a lease with Sutton and three of Odendahl's employees (plaintiffs). Now the plaintiffs have obtained a permanent injunction against the picketing herein by the defendants. Clearly, under the Leader case, *supra*, a labor dispute existed under the Norris-LaGuardia Act, and 34-1-34 U.C.A. 1953. Both said Federal and State Acts apply in this situation and an injunction cannot be granted.

Plaintiffs argue that there is no labor dispute involved in the case at bar and cite the definition contained in Section 34-1-2 U.C.A. 1953. However, we call the court's attention to a much more complete definition of a labor dispute contained in Sec. 34-1-34 U.C.A. 1953, which reads as follows:

"34-1-34. Cases held to involve labor disputes—"Labor dispute," "persons participating or interested" defined. — When used in this act, and for the purposes of this act.

"(a) A case shall be held to involve or grow out of a labor dispute when the case involves persons who are engaged in a single industry, trade, craft, or occupation; or who are employees of one employer; or who are members of the same

or an affiliated organization of employers or employees *whether such dispute is* (1) *between one or more employers or associations of employers and one or more employees or associations of employees;* (2) *between one or more employers or associations of employers and one or more employers or associations of employees;* or (3) *between one or more employees or association of employees and one or more employees or associations of employees;* or *when the case involves any conflicting or competing interests in a 'labor dispute' (as hereinafter defined) of 'persons participating or interested' therein (as hereinafter defined).*

(Emphasis mine).

“(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it and if he or it is engaged in the industry, trade, craft, or occupation in which such dispute occurs, or is a member, officer, or agent of any association of employers or employees engaged in such industry, trade, craft, or occupation.

“(c) The term ‘labor dispute’ includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, or concerning employment relations, *or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the proximate relation of employer and employee.*” (Emphasis mine).

In *Mighty Knitting Mills V. Sinensky* 151 N.Y.S. 2d 158 (1956), the court said,

“Certainly organizational picketing is warranted if it consists of truthful announcements by a labor union whose members are engaged in the same trade or occupation as those employed in the picketed shop. Such identity of interest gives rise to a labor dispute. (Citing cases.)”

The court in the case immediately above cited also said that apart from the protection of Sec. 876-a of the Civil Practice Act (of New York) (which is similar to Title 34 U.C.A. 1953), peaceful picketing for organizational purposes is protected by both federal and state constitutions and cites cases in support of this proposition. See *Lauf V. E. G. Shinner and Co.* (1938) 303 U.S. 323, 82 L. Ed. 872, 58 S. Ct. 578. The U.S. District Court held no labor dispute existed under the federal or state law. The injunction granted by the District Court was affirmed by the Circuit Court of Appeals. The U.S. Supreme Court held that the District Court erred in holding that no dispute existed under the laws of Wisconsin (which gives a similar definition of a labor dispute as contained in Sec. 34-1-34 U.C.A. 1953). The court also held the District Court erred in granting the injunction in the absence of findings which the Norris-LaGuardia Act makes prerequisite to the exercise of jurisdiction. See *United Mine Workers V. Arkansas Oak Flooring Co.* 351 U. S. 62, 100 L. Ed. 941, 76 S. Ct. 1024.

Where the owners of a theatre were operating the theatre without the aid of employees, having discharged their sole employee after demand by a labor union that he be paid according to the union scale, a labor dispute

was held to exist within the meaning of the Norris-LaGuardia Act in *Rhode v. Dighton* (1939) 27 F. Supp. 149. See also *Fur Workers Union V. Fur Workers Union* (1939) 70 App. D.C. 122, 105 F. 2d 1.

Although it appeared no labor dispute existed between the manufacturer of steel products and its employees, it was held in *Bent Steel Sections V. Doe* (1939) 170 Misc. 736, 10 N.Y.S. 2d 920 that a labor dispute existed within the meaning of Sec. 876-a of the N.Y. Civil Practice Act where the labor union was engaged in the same "industry, trade, craft, or occupation" as that of the manufacturers employees sought by picketing to unionize such manufacturer's shop, although said employees were alleged not to be desirous of joining the union. See also *Boro Park Sanitary Live Poultry Market v. Heller* (1939) 280 N.Y. 481, 21 N.E. 2d 687.

On p. 6 of Plaintiffs' Brief, it is alleged that the picketing herein was coercive in that it was conducted on a highway traveled by scarcely anyone other than plaintiffs and the independent truckers hauling coal from plaintiffs' mine. *Vogt, Inc., Respondent, V. International Brotherhood, etc.* 74 N.W. 2d 749, is cited to the effect that picketing under such circumstances is not the exercise of free speech but coercion. The picketing involved in the Vogt case was for the purpose of bringing pressure upon the employer to induce it to coerce its employees to join the union. A Wisconsin Statute forbade an employer to coerce an employee to join the union. Therefore, the object of the picketing was to induce the employ-

er to violate the state law. However, in the case at bar, the situation is reversed. All employees of Odendahls joined the union and selected defendant union as their bargaining agent, and notified the employer of their action. The employer objected and would not bargain collectively. It was within the employees' rights under the Federal and State Constitutions to join the defendant labor organization, as well as under Federal and State Laws, particularly Sec. 7 of the Taft-Hartley Act and Sec. 34-1-7 U.C.A. 1953. The employer shut the mine down rather than to have his employees join the union, and made the announcement that he could not operate as a union mine. If there was any coercion herein, it was on the employer's part and not the employees. The latter were willing to bargain collectively with the employer but the employer was unwilling. There is no analogy between the situation in the Vogt case and the case at bar. Furthermore, the picketing involved in the present case was on the only highway or road leading to the mine. It was a public highway. It was not upon a rural road where an exceedingly small number of possible patrons of the owners' might pass as in Vogt. All patrons of plaintiffs had to pass this highway in order to get to the plaintiffs' mine, since it was the only road leading thereto, as alleged in the complaint and found by the trial court. This road leads to the only airport in the county and to other mines in the vicinity. It was often traveled by people testing out cars as mentioned in the Record.

Plaintiffs on p. 7 argue that the picketing herein was enmeshed in violence—the blowing up of the bridge and the spreading of roofing nails on the only road to plaintiffs' mine. Plaintiffs admit there is no direct proof as to who was responsible for said conduct. We pointed out in our first Brief that the court made no finding as to who was responsible for this conduct and could not do so, as there was no evidence on this point. *Adamson v. U.M.W.A.* (Ut.) 277 P. 2d 972. Injunction is a harsh and drastic remedy. It can not be based upon presumption nor suspicion. We may theorize plaintiffs committed these acts as a foundation for injunctive proceedings. We do not wish to engage in a guessing game with the plaintiffs as to who committed the wrongful acts. Suffice it to say that mere speculation, conjecture, suspicion, and presumption, are not the proper bases upon which to predicate such a harsh and drastic remedy as injunction. There must be competent proof of continuing and violent acts on the part of the defendants in order to justify any injunction whatsoever. There is no such proof in this case. Any alleged violent acts must be committed in the course of the picketing. The act of a lone defendant Faye Olsen 19 days after the picketing had entirely terminated was not in the course of the picketing, is not chargeable to the other defendants herein, and has no connection with the picketing. We have dwelt upon these matters in our first Brief and direct the court's attention thereto. (Brief p. 33 et seq.).

There is no showing that the language used by the pickets threatened any violence whatsoever to anyone.

We have argued this matter in our first Brief. We simply call attention here to the testimony of Mr. Sutton wherein he stated he was never threatened with bodily injury by the pickets (122) and also that he “wasn’t going to take the chance” (of going through the picket line) (122).

The purpose of the picketing was not to deny the plaintiffs the right to work on account of their non-membership in a labor union. The evidence discloses that neither Odendahls nor the plaintiffs were ever requested to cease operating their mine during the picketing. In fact, Mr. Odendahl was specifically requested by Pecorelli to continue his operations pending a union contract. Plaintiffs were likewise never asked to cease operations. The purpose of the picketing was to protect the jobs of the 5 employees who did not join with Sutton in the partnership. They were the ones who were denied the right to work because they wanted to join the union, for the purpose of improved wages, working conditions, and other union benefits. It is the employees who have the right to work whether or not they belong to a labor union. These employees signed up to belong to said union and consequently lost their jobs because of union activity.

The defendants have replied to the matters alleged under the title “Statement” in Plaintiffs’ Brief. We now address ourselves to replying to the Argument of Plaintiffs and the points discussed thereunder, in the order the same appear in Plaintiffs’ Brief.

PLAINTIFF'S ARGUMENT

POINT I

THE TRIAL COURT HAD JURISDICTION TO ISSUE AN INJUNCTION IN THIS CASE REGARDLESS OF THE FEDERAL LAW.

Under sub point I it is alleged that a state court has jurisdiction in labor cases involving interstate commerce notwithstanding the Federal Labor Relations Management Act when either of the following situations prevail: (1) whenever the picketing or labor dispute involves or results in violation of local matters of public safety and order such as violence, threats, blocking of highways or violations of declared public policy, or (2) whenever the National Labor Relations Board under its "yard stick" jurisdiction promulgation of 1954 refuses to take jurisdiction.

Replying to Point I, we point out that some courts have denied injunctive relief under an anti-injunction statute, such as Title 34, Ch. 1, U.C.A. 1953 and others have held injunctions to be barred under such circumstances except upon compliance with all of the procedural provisions relative to the issuance of injunctions in labor disputes, thereby recognizing the applicability of anti-injunction acts even in cases which involve violence. 29 A.L.R. 2d p. 381, et seq, Sec. 28. *Lauf v. E. G. Shinner and Co.* (1938), 303 U.S. 323, 82 L. Ed. 872, 58 S. Ct. 578. The U. S. Supreme Court held in the Lauf case that a labor dispute existed barring the issuance of an injunction, although it appeared that the union by molestation,

annoyance, threats, and intimidation had prevented patrons from entering the plaintiffs' market. See *Grace Co. V. Williams* 96 F. 2d 478, affirming 20 F. Supp. 263; *Dean V. Mayo* 8 F. Supp. 73.

29 A.L.R. 2nd p. 381, Sec. 28 states,

“It has been held in other cases that while the violence may be restrained an anti-injunction act will preclude an injunction against all picketing.”

Cases cited to support the quoted text are *May's Fur & Ready-To-Wear V. Bauer* 282 N.Y. 331, 26 N.E. 2d 279 modifying 255 App. Div. 643, 8 N.Y.S. 2d 819, rehearing denied 282 N.Y. 804, 27 N.E. 2d 210; *Baillis V. Fuchs* 283 N.Y. 133, 27 N.E. 2d 812, modifying 258 App. Div. 919, 16 N.Y.S. 2d 724.

In *Baillis V. Fuchs*, *supra*, an injunction was ordered modified so as to strike out all provisions except those restraining violence and breach of the peace. The court held that while the power of the courts to enjoin the violence in a labor dispute existed, even under the anti-injunction Act, this power could not be used to authorize a prohibition of all picketing, except upon a specific finding that peaceful picketing was impossible.

In the case at bar, the trial court's permanent injunction restrained and enjoined “all picketing,” without finding that peaceful picketing was impossible. Peaceful, as well as, violent picketing is thereby restrained. Defendants have consistently taken the position that if the picketing involved herein was found to

be violent the court should have enjoined only the violent acts and not in sweeping terms prohibited all picketing. See *Lilly-Dache, Inc. V. Rose* 28 N.Y.S. 2d 303; *Weyerhaeuser Timber Co. V. Everett Dist. Council, etc.* 11 Wash. 2d 503, 119 P. 2d 643.

We direct the court's attention to the dissenting opinion in *Busch Jewelry Co. v. United Retail Employees Union* (N.Y.) 22 N.E. 2d 320, wherein Judge Lehman argued that while the majority had stated that the effect of the anti-injunction statute was to prevent courts from enjoining peaceful picketing, they had failed, by their affirmance of the decree barring all picketing, to give effect to the statute, and he contended that in the absence of a definite finding that the violence had been so great that peaceful picketing was entirely out of the question, the decree should have been modified to permit peaceful picketing. This is consistent with the cases heretofore cited and, in our opinion, is the better rule. The other cases cited in 29 A.L.R. 2d pages 382 and 383, wherein injunctions were granted, appear to us to be distinguishable on the ground that there was mass picketing involved, or peaceful picketing was impossible, or the acts of the union may have had an unlawful objective, none of which are present in the case at bar.

Plaintiffs allege the picketing herein was in violation of the declared public policy of the State of Utah as expressed by its legislature in the Utah Right to Work Law. We find nothing in said statute which deprives employees of their right to picket for organizational pur-

poses or to protect their jobs when the employer shuts a mine down to keep it from being organized, and refuses to bargain with the employees or their representatives. The public policy expressed in Section 34-16-2 (Utah Right To Work Law) reads:

“It is hereby declared to be the public policy of the state of Utah that the right of persons to work, whether in private employment or for the state of Utah . . . shall not be denied or abridged on account of membership or non-membership in any labor union . . . ; further, that the right to live includes the right to work. The exercise of the right to work must be protected and maintained free from *undue* restraints and coercion.” (My emphasis.)

Plaintiffs have not shown there was *undue* restraint and coercion present in the case at bar, but have apparently taken the attitude that any coercion or restraint whatsoever is subject to an injunction. As aforesaid, it was defendant employees who were deprived of their right to work because of union activities. They were picketing to get their jobs back and for their right to belong to the union, to work as union men at the mine and for mutual aid and protection, etc. Sec. 34-16-6, U.C.A. 1953 (Utah Right to Work Law) exempts “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 . . . unaccompanied by any intimidation, use of force . . . etc.” From the above language, there is nothing denying peaceful picketing for lawful labor objectives. The situation

in the case at bar is the employer did not want his employees to belong to a labor union and did not want the mine unionized. In our opinion, the Record clearly establishes this fact. When Odendahl shut the mine down, to prevent unionization thereof, under the theory of some of the courts and authorities we have examined, said action was similar to a lockout. See *Diamond Full Fashioned Hosiery Co. v. Leader*, supra.

The public policy of this State regarding labor disputes is set forth in Sec. 34-1-23 U.C.A. 1953 as follows:

“Public Policy declared. In the interpretation and application of this act, the public policy of this state is declared as follows:

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

The plaintiffs have taken the position that if there is a conflict between Title 34 U.C.A. 1953 and the Utah Right To Work Law, the latter should prevail because it is the latest pronouncement of the legislative policy of this State. We find no such conflict between the two acts. Title 34 contains, among other things, certain rules to be followed in labor disputes, and the Utah Right To Work Act provides that no one shall be compelled to belong or not to belong to a labor union as a condition of employment, or continuation of employment.

The employees in the case at bar had a right to belong to a union and the Utah Right To Work Law does not take away this right. They had a right to lawfully picket an employer who refused to permit them to work because of union activities.

Violence on a picket line which is isolated or episodic does not warrant an injunction. See *Milk Wagon Drivers v. Meadowmoor Dairies*, 312 U.S. 287, 61 S. Ct. 522, 85 L. Ed. 836; *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468.

Plaintiffs cite *United Automobile, etc. Workers v. Wisconsin E.R.B.*, 351 U.S. 266, 76 S. Ct. 794 to the effect that the general rule that a state may not, in the furtherance of its public policy, enjoin conduct which has been made an unfair labor practice under the federal statutes, did not take from the states power to prevent mass picketing, violence, and overt threats of violence.

It is still axiomatic that each case must be decided upon its own peculiar facts and circumstances. This is

perhaps the reason that some decisions of the various courts appear to be in conflict with other decisions of the same courts. In the United Automobile Workers case, the State Board of Wisconsin found that the appellants' members had engaged in mass picketing, thereby obstructing ingress to and egress from the Kohler plant; interfered with the free and uninterrupted use of public ways; prevented persons desiring to be employed by Kohler from entering the plant; and coerced employees who desired to work, and threatened them and their families with physical injury. The State Board issued an order directing the union to cease the said unlawful activities. The Board also ordered that the number of pickets be limited.

It will be noted that the order of the State Board which was sustained by the U.S. Supreme Court did not forbid nor prohibit "all picketing," but only the specific violent acts of which complaint was made and which were found to exist. The U.S. Supreme Court said,

"We hold that Wisconsin may enjoin the violent union conduct here involved." (Not all picketing.)

This case is not authority for the proposition advanced by the plaintiffs that the trial court should have enjoined all picketing or had the right to do so. The conduct in the case just cited was certainly extreme violence and was found to be such, but the State Board and United States Supreme Court saw fit to restrain only the violent acts and threats involved and did not lay down a

rule that all picketing must cease, such as the trial court ordered in the case at bar in its permanent injunction from which this appeal is taken. The authority cited upholds defendants' contention that the injunction in the case at bar is too sweeping and too broad in that it enjoins "all picketing," and not merely the violent conduct, if such there was. See *Safeway Stores v. Retail Clerks, etc.*, 234 P. 2d 678, hear gr by sup ct modg (Cal. Super ct) 18 CCH Lab Cas 65, 735.

Under situation no. (2), plaintiffs argue that if federal jurisdiction exists, and if the N.L.R.B. refuses to exercise jurisdiction in a labor dispute, state jurisdiction is proper in a case effecting interstate commerce. *Lee Mark Metal Mfg. Co. v. Local No. 596*, 30 Lab. Cas. 69, 968 is cited. In the Lee Mark case, it should be noted that the stated objective of the pickets was to close down the plant even though it meant causing the employees to be thrown out of work. The pickets are quoted as saying "We don't give a damn about them (employees). We are after you (the employer). We want to close your place." One employee was informed by the pickets that a truck would be blown up and several employees were warned by the pickets to stay off the trucks or they would be injured. Police protection had to be invoked by the plaintiff, but apparently to no avail. The facts of the Lee Mark case are in marked contrast with the facts in the case at bar. In the present case, the pickets were trying to protect their jobs, not to close down the plant and throw the employees out of work. No threats were made of blowing up any facilities. In fact, defendants wanted

the employer to continue operating, not to close down. No police protection was found necessary in the case at bar, because there was no violence or threats requiring the same. The Record discloses that plaintiff Sutton told Deputy Sheriff Semken that if any trouble arose he would notify the Sheriff's Office thereof (290). No such notification to his knowledge was ever received (290). Furthermore, the threats and violence in the Lee Mark case were continuing rather than isolated and episodic.

In *Mighty Knitting Mills v. Sinensky*, supra, the court said after the argument of the motion for a temporary injunction, it became known that the N.L.R.B. declined to take action of defendants charge of unfair labor practice. The Court said,

"It is not for this court to speculate that the declination was due to rejection of the claim of unfair labor practice or to a finding that plaintiff's newly formed business has not yet developed a sufficient 'jurisdictional yard stick' or an interstate character. *Unquestionably, the Board's rejection of the charge does not conclusively negate its own jurisdiction.* (Emphasis mine.) *Retail Clerks Local v. Your Food Stores*, 10 Cir., 225 F. 2d 659 . . ."

From the cited portion of the courts opinion above, it would appear that merely because the N.L.R.B. declines to act on an unfair labor practice charge, does not conclusively oust the board of jurisdiction or confer jurisdiction upon the state courts. The *Mighty Knitting Mills* case, supra, was decided in 1956.

In *Garner v. Teamsters Union*, 346 U.S. 485, 74 S. Ct. 161 and *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, both cited by the plaintiffs on page 13, we point out that in neither case was there any mention made of any specific amount of interstate commerce which was necessary to be involved before the N.L.R.B. had jurisdiction. It is defendants' position that if an act effects interstate commerce, this is sufficient to invoke the jurisdiction of the federal Board and the States do not have jurisdiction. In the *Garner* case, *supra*, the court simply stated the trucking operations of the employer formed a link to an interstate railroad. No controversy, labor dispute, or strike was in progress, and at no time had petitioners objected to their employees joining the union. The union was picketing to induce the employees of the trucking company to join them to gain union wages, hours and working conditions. Even though the courts below found that respondents' purpose in picketing was to coerce petitioners into compelling or influencing their employees to join the union and the equity court below held that respondents' conduct violated the Penn. Labor Relations Act, Sec. 6 (1) (c), providing that it was an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization, yet it was held by the U.S. Supreme Court in *Garner* that state remedies were precluded, because the federal board had exclusive jurisdiction in the matter. (Note that the Penn. Statute allegedly violated by the union contains almost the same

wording as the Utah Right To Work Law). The U.S. Supreme Court, as well as the Pennsylvania Court held that the grievance was not subject to litigation in the state's tribunals.

The power of the legislature to limit district courts in the issuing of injunctions as it has done in Sec. 34-1-34 U.C.A. 1953, is constitutional. The legislature has simply stated that a court must find certain facts to exist before an injunction can be issued. It does not take away any right to issue an injunction where the proper requirements are met. We have other rules or statutes which state conditions or grounds which must exist before an injunction may be granted, to-wit: Rule 65 (A) U.R.C.P. Are these rules or statutes void, simply because the constitution mentions the right of the District Courts to issue writs of injunction?

Plaintiffs cite *Hanson v. International Union of Operating Engineers, etc.* 79 So. 2d 199 to the effect that peaceful picketing, for an unlawful purpose, that is, in contravention of the right to work policy of the State, can be legally enjoined. Also *Woodard et al. v. Collier, et al.*, 78 S.E. 2d 526.

In the Hanson case, *supra*, a road contractor brought suit against the union for injunction where the road contractor had all jobs filled, and it was impossible for him to hire local residents, who were members of the labor union, as desired by the union, unless the contractor either violated the Right To Work Bill by discharging his non-union employees or hired local residents, who

were members of the union, when the contractor had no need for additional employees; the picketing by the union to compel the contractor to hire local residents was held by the court to be for an unlawful purpose and would be enjoined. There is no such unlawful purpose in the case at bar. The defendants did not picket in the present case in order to cause the discharge of any employees of the Odendahls or plaintiffs. They picketed to protect their own jobs and for organizational purposes. There was no violation of the Utah Right to Work Law involved.

It is interesting to note that in the Hanson case, the defendant therein complained of the broad extent of the injunction, as the defendants have done herein. The defendant in Hanson claimed that the injunction should have been limited to picketing "which has for its purpose to force the employer to discharge non-union men or to require him to employ only and exclusively union men." The court, after citing *Milk Wagon Drivers Union, etc. v. Meadowmoor Dairies, Inc.*, supra, and *Building Service Employees, etc. v. Gazzam*, 339 U.S. 532, 70 S. Ct. 784, 788, 94 L. Ed. 1045, and Justice Douglas' dissenting opinion in *Local Union, etc. v. Graham*, 345 U.S. 192, 73 S. Ct. 585, concluded,

"We believe that there is merit in defendant's complaint as to the breadth and scope of the injunction decree in this case and that it should be limited to the specific violation of the State law. Of course, this would still allow picketing for the purposes enumerated in (a), (b), (c), (Stipulation of fact) and even though peaceful, might have the same effect insofar as economic pressure on the plaintiff is concerned.

“It might be argued that the practical effect of this decision is to void the injunction. May we again reiterate that it must be remembered that courts are bound by the law and in such a case as the one at bar *only such picketing as has for its object an unlawful purpose may be enjoined and such an injunction under the jurisprudence must be ‘tailored to prevent a specific violation of the State law and cannot be so broad as to prevent all picketing and particularly that which is done for a lawful purpose.’*” (Emphasis mine.)

In accordance with the above, the court enjoined only the picketing which was in specific violation of the state law. This is what defendants have been contending for in the case at bar, to-wit: that all picketing should not have been enjoined herein and if there is found to be picketing in violation of any statute or for any particular illegal purpose, only the illegal picketing should be enjoined.

POINT III

THE PICKETING HEREIN WAS NOT PEACEFUL, AND WAS FOR AN UNLAWFUL PURPOSE.

It is defendants’ position that whether or not the picketing was peaceful or violent has been adequately argued in defendants’ first Brief. We shall not burden the court with further argument on this point. We believe the same is true as to the isolated act of defendant Faye Olsen, which is again mentioned under Point III of plaintiffs’ brief.

Plaintiffs’ argument that the picketing was illegal conduct under the Utah Right To Work Law can not be

sustained. The picketing herein was for organizational purposes, to protect the jobs of the defendants, and was an exercise of the rights of the defendants under Sec. 7 of the Taft-Hartley Act, and Title 34 U.C.A. 1953. No one was denying or abridging plaintiffs right to work on account of membership or non-membership in any labor union, etc. There were no undue restraints and coercion. The right to work, is subject always to economic pressures on the part of unions for better wages and working conditions. See *Bautista v. Jones*, 25 Cal. 2d 746, 155 P. 2d 343.

In *Building Service Employees Int. Union v. Gazzam*, 339 U.S. 532, 70 S. Ct. 784, cited by plaintiffs for the proposition that a state is permitted to enjoin peaceful picketing which is in violation of the states public policy, the picketing was carried on for the purpose of compelling an employer to sign a contract with a labor union which coerced his employees choice of a bargaining representative. This is exactly the reverse of the situation presented in the case at bar, where the employees had voluntarily and freely selected the United Mine Workers of America as its bargaining agent and had so notified the employer, who refused to bargain with or to recognize the collective bargaining agent so chosen by his employees. Defendants did not coerce the employees' choice of a bargaining agent as was the case in *Gazzam*. The U.S. Supreme Court said that picketing of an employer to compel him to coerce his employees' choice of a bargaining representative is an attempt to induce transgression of the states policy, and it was not for that

tribunal to judge the wisdom of such state policy. Quoting further from Gazzam:

“The Washington Statute has not been construed by the Washington courts in this case to prohibit picketing of workers by other workers. The construction of the statute which we are reviewing only prohibits coercion of workers by employers. We can not agree with petitioners’ reading of this injunction that ‘whatever types of picketing were to be carried out by the union would be in violation of the decree.’ Respondent does not contend that picketing *per se* has been enjoined but only that picketing which has as its purpose violation of the policy of the State. *There is no contention that picketing directed at employees for organization purposes would be violative of that policy. The decree does not have that effect.*” (Emphasis mine.)

And further:

“... We therefore find no unwarranted restraint of picketing here. The injunction granted was tailored to prevent a specific violation of an important state law. The decree was limited to the wrong being perpetrated, namely, ‘an abusive exercise of the right to picket.’ Cafeteria Employees Union v. Angelos, 320 U.S. at page 295, 64 S. Ct. at page 127, 88 L. Ed. 58. . . .”

Note that in the Gazzam case, the injunction was to forbid the act of an employer to coerce his employees into joining the union. It did not prohibit “all picketing” such as was done by the trial court in the case at bar. The U.S. Supreme Court calls attention to the fact that the picketing “was tailored to meet the specific” situation in Gazzam. That is all defendants are asking in this

case in the event it should be found that any injunction was warranted, rather than prohibition of all picketing. The Marcus Heath case cited by plaintiffs appears to be the wrong citation. We have not as yet been able to locate this case.

The last case cited by plaintiffs under Point III is *Local Union No. 10 et al., v. Graham, et al.*, supra. The facts in Graham are at great variance with the facts herein. The complaint in Graham alleged that respondents had begun work under their contract with the City to build a school; that early completion thereof was urgent; that respondents had made contracts with all necessary subcontractors; that some of the subcontractors employed only union labor while others employed non-union as well as union labor; that in July certain of the defendants had requested that all non-union labor on the project be laid off and had said that, unless that was done 'every effort would be made to prevent any union labor employed . . . on that project from continuing work thereon'; that certain defendants had picketed the project and as a result thereof union members on the job had refused to continue work there and that therefore the project had "slowed to a standstill." It was alleged that the objectives of the defendants in making such demands and conducting such picketing were to prevent non-union employees from working on the project. The Court found that the picketing was for aims, purposes and objectives in conflict with the provisions of the Right To Work Laws of the State of Virginia and therefore illegal, and a permanent injunction was issued. In the case at bar the

mine was voluntarily shut down by the employer, then leased to the plaintiffs, even though both were told that the defendants would prefer to have the mine continue to operate pending negotiations for a union contract. None of the defendants was trying to have any non-union members discharged from employment or to cause the mine to be shut down. While the conduct in the Graham case violated Virginia's Right To Work Act, the organizational picketing of the defendants in the case at bar was legal and not in conflict with the Right to Work Law of Utah.

Mr. Justice Douglas in his dissenting opinion points out there were no specific findings by the Virginia Court and stated he believed the case should be remanded to make specific findings. Justice Douglas further said,

"If Virginia is to enjoin this form of free speech, I would require her to show precisely the reasons for it. Unless we are meticulous in that regard, great rights will be lost by the absence of findings, by the generality of findings, or by the vagueness of decrees. There is more than suspicion that that has happened here. For the decree permanently enjoins defendants 'from carrying on their picketing or other activities in front of or around' the construction site. *This decree was not 'tailored to prevent a specific violation' of state law.* Building Service Union v. Gazzam, supra, 339 U.S. at page 541, 70 S. Ct. at page 789, 94 L. Ed. 1045. *It is a broadside against all picketing, the kind of general assault condemned by Thornhill v. State of Alabama, supra. It illustrates the evil consequences that flow from a failure to be utterly painstaking in isolating the*

precise evils in picketing which the state may regulate.” (My emphasis.)

Justice Douglas lends additional strength to the validity of defendants’ argument in the case at bar that the decree herein prohibiting “all picketing” was entirely too broad and sweeping, and should be reversed.

POINT IV

NOT ALL PEACEFUL PICKETING IS THE LEGITIMATE EXERCISE OF FREE SPEECH, AND PEACEFUL PICKETING TO INDUCE PLAINTIFFS, WHO OPERATE WITHOUT OUTSIDE HELP, TO JOIN UNION WAS ILLEGAL, CONTRARY TO PUBLIC POLICY OF THE STATE OF UTAH, AND COULD BE ENJOINED.

Plaintiffs, as did defendants, cite *International Union of Operating Engineers etc. v. Utah Labor Relations Board*, 115 Utah 183, 203 P. 2d 404. In our first Brief, defendants commented on this case. We see nothing in it which is contrary to our position herein. We believe the Utah case contains a good statement of the law and recognizes the right of free speech, with its proper limitations as well as the right of picketing as free speech, also with reasonable limitations.

Let us analyze *Hanke et al. v. International Brotherhood, etc.*, 207 P. 2d 206 cited by plaintiffs on page 26 of their brief. The facts are set forth briefly by plaintiffs. The real basis of the decision appears to be stated on page 213 of 207 P. 2d. After reviewing the facts in *Bakery and Pastry Driver and Helpers, etc. v. Wohl*, the Washington court states,

“The facts of the case at bar present no such appealing picture in favor of the appellants. Local

882, on whose behalf appellant Local 309 set up the picket line in front of the respondents' place of business, represents the used car salesmen in the Seattle area. Of 115 such concerns, only 10 employ any help at all, the remainder being operated exclusively by their proprietors. From this fact the conclusion seems irresistible that the unions interest in the welfare of a mere handful of members (of whose working conditions no complaint at all was made) is far outweighed by the interests of individual proprietors and the people of the community as a whole, to the end that little businessmen and property owners shall be free from dictation as to business policy by an outside group having but a relatively small and indirect interest in such policy."

Thus what the Washington Court did in the Hanke case was to try to balance respondents' right to do business, free from unreasonable interference, with appellants' rights to freedom of speech, recognizing that neither of said rights is absolute, in the sense that it may be exercised in utter disregard of the other. Because only 10 out of 115 automobile concerns in the area affected employed outside help, the court decided that the interests of the overwhelming majority of the dealers was of greater importance than to protect the handful of men who were employed.

The situation is exactly the reverse in Carbon County where the case at bar arose. The Record discloses that the overwhelming majority of the miners in Carbon County are affiliated with unions. By comparison to the total, the non-union men employed in the mines are a mere handful. Therefore, adopting the rea-

soning of the Hanke case, the interests of the overwhelming majority of the union men in the mines who are interested in maintaining decent wages and working conditions, medical and hospital benefits, should far outweigh the mere handful of said individuals not belonging to a union, who work for lower wages, longer hours and without medical and hospital benefits, all of which tend to lower the living standard of the workers.

Furthermore, the Hanke case does not present a situation such as this court has before it, where employees who were gainfully employed sought to organize a union and then were faced with a shutdown and then a lease of the mine, whereupon they picketed for organizational purposes and to exercise their rights under federal and state statutes.

The authorities cited by plaintiffs commencing with *Morris v. Local Union No. 494* on page 29 of plaintiffs' Brief and including page 31 thereof, have been cited in the forepart of plaintiffs' brief and, in our opinion, the same have been fully analyzed and distinguished.

In order to clarify defendants' position relative to the picketing herein, it is our contention (1) that the picketing herein grew out of a labor dispute under the definitions contained in the Norris-LaGuardia Act and also Sec. 34-1-34 U.C.A. 1953, in that the same arose after all of the employees of the Odendahls freely and voluntarily agreed to join the union, selected the defendant United Mine Workers of America as their bargaining agent, and so notified their employer. Under both Fed-

eral and State anti-injunction Acts, since the dispute involved was a labor dispute, the trial court did not have jurisdiction to issue an injunction at all; (2) that the picketing took place after the Odendahls shut the mine down, which action amounted to a lockout; that after the picketing started Odendahls, in order to circumvent and evade the labor dispute, leased the mine to plaintiff Sutton and three of their former employees; that all plaintiffs had full knowledge and notice of the labor dispute and by taking over the mine when said dispute was still unresolved and by continuing the same hostile, anti-union policy as their predecessors, assumed and adopted the said labor dispute; (3) that the picketing was to protect the jobs of said employees and to organize the mine and derive the benefits of higher wages, improved working conditions, etc., and not for the purpose of coercing the plaintiffs themselves into joining the union or to deny them the right to work; that there was no violence on the picket line and that if it can be said that any of the conduct or words used by the pickets were in the nature of threats, that the same were isolated and episodic and not continuous and therefore did not justify an injunction against all picketing; that the picketing was not enmeshed in violence to the extent required by the authorities to warrant restraining all picketing; that it cannot be said that peaceful picketing under the circumstances could not have continued; that under the authorities referred to in our first brief and herein, unless the violent conduct is so enmeshed in the picketing that peaceful picketing is impossible and unless the court finds that such is the case, the injunction should enjoin

only the unlawful and violent acts, if such there were, and not "all picketing."

We emphasize that injunction is a drastic and harsh remedy. In this case it involves the important constitutional right of free speech under both Federal and State Constitutions; that before a trial court is justified in permanently enjoining "all picketing," which of necessity includes peaceful picketing, it should find that peaceful picketing is impossible under the circumstances. We submit that under the Record the trial court in this case could not find and did not find that peaceful picketing was impossible. Therefore, it committed error in enjoining "all picketing."

CONCLUSION

We urge this court to find the facts against the plaintiffs and in favor of the defendants and to reverse the judgment of the trial court. If this court, after its usual careful and thorough consideration of the facts and the law herein is not disposed to completely reverse the trial court, then, in such event, defendants pray that this court modify the trial court's injunction by deciding that only the illegal conduct, if any has been shown, should have been enjoined, rather than "all picketing," which necessarily includes peaceful picketing. Peaceful picketing should not have been enjoined.

Respectfully submitted,

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