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The Status of the Right to Picket in Washington

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NOTES AND COMMENT

THE STATUS OF THE RIGHT TO PICKET IN WASHINGTON—The recent decision of the Washington Supreme Court in the case of *Sterling Chain Theatres, Incorporated, v. Central Labor Council of Seattle, et al.*,[1] as to the right to picket, constitutes such a radical departure from the heretofore well-established law of this state, that a retrospection and analysis is essential to a better understanding as to the future solution of this question. In the instant case, the plaintiff sought to restrain as unlawful the acts of members of defendant union of maintaining peaceful patrols marching to and fro with placards signed by the council of all the unions, informing the public that a strike was in progress and to "Stay Out." Such men approached no closer than 100 feet to the entrance of the theatre, and were out of the sight of such entrance most of the time. The trial court did not decide upon the limitations of defendants' activities, but rested its decree solely on the finding that *Danz v. American Federation of Musicians' Union*[2] was *res adjudicata* to this action. The Supreme Court in affirming the decision of the trial court held such acts are lawful and do not constitute picketing, when the pickets approach no closer than 100 feet, and are out of sight of the entrances most of the time. "But each case must turn on its own circumstances, and the limitations placed by the trial court on the activities of the respon-

[1] 55 Wash. Dec. 147, 283 Pac. 1047 (1930)
[2] 133 Wash. 186, 233 Pac. 630 (1925).

dents and their agents are, under the circumstances of this case and for whatever reason adopted by the trial court, reasonable."[3]

Without doubt there is a sharp conflict of authority as to what constitutes picketing, some courts holding that picketing is unlawful only when it leads to physical intimidation, other jurisdictions declare that only peaceful picketing is permissible, while others, including Washington (with the exception of the instant case and the *Adams*[4] and *Danz*[5] cases which apply the 100-foot rule) will not permit picketing under any circumstances. The reason for the latter rule is that picketing in and of itself constitutes intimidation to the mind and the body

The development of the law as to picketing in Washington is very interesting to observe. In 1905, all picketing was declared unlawful in Washington.[6] In 1915, the Washington Legislature defined picketing and placed a restriction of 500 feet on such activities.[7] But this was defeated in 1916 on referendum. In 1917, in the *St. Germain case,*[8] the Supreme Court of this state unequivocally reaffirmed the rule that all picketing is unlawful. This same view was reiterated in 1918.[9] In 1919, the Legislature enacted the Union Act, most of which with an important exception, was taken bodily from the Clayton Act, which authorized peaceful picketing.[10] With the language of the *Jensen* and *St. Germain cases* before it, which held that any form of picketing was unlawful, the Legislature expressly omitted the peaceful picketing clause of the Federal Clayton Act,[11] and thus committed itself definitely to the view that all picketing is unlawful. In 1922, the court expressed the view that peaceful picketing as authorized under the Clayton Act would be recognized in this jurisdiction as indicated in the *Pacific Coast Coal Company v. District No.* 10, *United Mine Workers of America, et al.*[12] In 1923, in *Adams et al. v. Local No.* 400 *of Cooks and Waiters and Waitresses of Spokane et al.,*[13] the Washington Court for the first time adopted the 100-foot rule, in which it declared that picketing within 100 feet was unlawful, but permitted picketing beyond that limit. By this decision the court apparently denied its former position that all picketing was illegal. An exhaustive research discloses no reason for the adoption of the 100-foot rule. The acts complained of in the *Adams* case were all committed within a short distance from

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[3] See note 1, *supra.*
[4] See note 13, *infra.*
[5] See note 14, *infra.*
[6] *Jensen v. Cooks' and Waiters Union,* 39 Wash. 531, 81 Pac. 1069, 4 L. R. A. (n.s.) 302 (1905).
[7] Laws of Wash. 1915, ch. 181.
[8] *St. Germain v. Bakery & Confect. W Union, No.* 9, 97 Wash. 282, 166 Pac. 665, L. R. A. 1917F 824 (1917).
[9] *Baasch v. Cooks' Union, Local* 33, 99 Wash. 378, 169 Pac. 843 (1918).
[10] Laws of Wash. 1919, ch. 185.
[11] 38 Stat. at L. Part I, 1914, sec 6, 20.
[12] 122 Wash. 423, 210 Pac. 953 (1922).
[13] 124 Wash. 64, 215 Pac. 19 (1923).

the places of business, and it may be concluded that restricting the acts of picketing outside of 100 feet was thought to be sufficient at that time. The *Adams* opinion holds "that this does not mean that the limit fixed in this case shall of itself be a standard in any future case where such a plan is adopted for 'each case must turn on its own circumstances' "

In 1925, in the decision of *Danz v. American Federation of Musicians, et al.*,[14] the court apparently reaffirms the doctrine that all picketing is unlawful in these terms

> "Support for this view (that picketing is unlawful only when coercive) may be found in the decisions of some courts, but this court has committed itself to a doctrine different than contended for by the respondents and has declared all picketing unlawful, announcing that the term sometimes used of 'peaceful picketing' is self-contradictory and meaningless, that picketing, in and of itself, is coercive and that that is its purpose and effect."

It is unfortunate that the question as to whether picketing would be allowed within 100 feet was not directly raised on the appeal of the *Danz* case, but it was not. The lower court enjoined the defendants, among other things, from carrying and displaying in front of the theatres or within 100 feet thereof, badges bearing the inscription that the theatres and owners were unfair to organized labor. But the lower court permitted observers to be stationed near the entrance to the theatres wearing a sash informing the public that a strike against the theatre was in progress. A general appeal was taken, but no question was raised as to what distance picketing could be maintained, the plaintiff contending that all picketing was unlawful, and the argument was directed against the permitting of the observers to be stationed in front of the theatre. The Supreme Court was asked to eliminate from the decree such provisions, which it did, and affirmed the decree as so modified. Therefore, there is room for the argument that the court approved picketing outside of the 100-foot limit, although in the opinion of the case, it expressly held that picketing in and of itself is unlawful. It seems from the language of the court that it would have denied picketing within a distance greater than 100 feet had that extension been asked. It is, therefore, unfortunate that the *Adams* case was not called to the attention of the court, for due to the strong language in the *Danz* case declaring all picketing to be unlawful, it seems that the *Adams* case would have been expressly overruled, especially in view of the fact that the *Adams* case was apparently based on a federal case which recognized peaceful picketing under the Clayton Act.[15]

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[14] 133 Wash. 186, 233 Pac. 630 (1925)

[15] *Tri-City Central Trades Council v. Am. Steel Foundries*, 151 C. C. A. 578 (1916) modified in 257 U. S. 184, 66 L. Ed. 189, 42 Sup. Ct. Rep. 72, 27 A. L. R. 360 (1921)

No further decision was rendered until the instant case was decided January 10, 1930. The court based its decision on the fact that the so-called patrols were out of the sight of the theatre entrances most of the time and were not closer than 100 feet. The court adroitly evaded the question through a matter of definition by holding that the acts complained of were not "picketing," but were the mere "dissemination of information," which is lawful. This is difficult to reconcile with the decision of Judge MacIntosh, who said, in the *Danz* case, "that the fact that picketing is carried on under some other name makes no difference as to its legal effect." Likewise the trial courts ruling of *res adjudicata* is ignored, and the upper court holds that the limitation placed on the activities were reasonable. The trial judge in the instant case did not decide upon the limitations of defendants' activities, but grounded his decree solely on the finding that the *Danz* case was *res adjudicata* to this action in these words

> " And all parties hereto are hereby enjoined from employing any threat, intimidation or violence or any libellous, slanderous, approbrius or insulting language or epithets against any of the other parties hereto for any purpose whatsoever.
>
> "The judgment of this court entered April 22, 1925 (*Danz* case, *supra*) is hereby vacated and this judgment entered *nunc pro tunc* as of the date of April 24, 1925.
>
> "And the court finding that defendants at all times consented to the re-entry of said decree (*Danz* case, *supra*) in this cause and the court further finding that said decree is *res adjudicata* and determinative of this action."

It is difficult to reconcile the holding of the Supreme Court in the instant case in light of these findings of the lower court.

By the effect of the instant case, Washington in reality has given effect, outside of the 100 feet, to the majority view that peaceful picketing is lawful, but within 100 feet, the minority rule that all picketing is unlawful, is still in effect.

It is interesting to note that in a case decided December, 1929, which has not been appealed, a restriction of 250 feet was placed on picketing in a suburban district.[16]

It is questionable what position the Supreme Court will take when the pickets are in sight of the entrances to the places of business, and adhering to the 100-foot rule. Will the court affirm the ruling of a trial chancellor, who upon the facts extends the 100-foot rule, or will the court strictly adhere to the 100-foot rule? Such an opportunity will be presented if the consolidated cases of the *Progressive Theatres Co. v. Central Labor Council of Seattle, et al.*,

[16] *Royal Theatre v. Central Labor Council, et al.*, King County Superior Court No. 225, 820 (1929).

and *Sterling Chain Theatres v. Central Labor Council of Seattle, et al.*,[17] are appealed. But there is a strong probability that due to the circumstances that these cases will not be appealed. Yet if they are appealed, the issue will be squarely before the court. These cases involving the picketing of the Winter Garden and Columbia Theatres in Seattle, were heard on show cause order July, 1929, and a restriction from 225 to 350 feet was imposed upon the activities of the pickets. These cases were tried on the merits, May 24, 1930, and the original order was modified to distances varying from 116.5 to 176.5 feet. The 100-foot rule was extended on the ground that according to the language of the instant case, the 100-foot rule was not binding upon the trial court, and that the acts complained of would constitute intimidation if the pickets were allowed to be within 100 feet. The court expressed the view of prohibiting the pickets from being within sight of the theatres entrances within the same block.

It is difficult to discern how the Supreme Court can refuse to affirm this ruling, especially in view of the language in the instant case, "that each case shall turn on its own circumstances." This phrase was borrowed by the Washington court from the *Tri-City* case, *supra*.

The present position of the court would indicate a repudiating of its former view that all picketing is unlawful and should not be allowed. Without adopting the peaceful picketing clause of the Clayton Act, which would prohibit picketing only when it is coercive, the court has tended in that direction. If it affirms the ruling as suggested *supra*, it is in effect applying the test of intimidation in placing a limitation upon the right to picket. In applying the test of intimidation it is humanly impossible for a trial chancellor to lay down any arbitrary rule, as such a rule must take into consideration the different classes of the public, the physical or mental courage or degrees of annoyance of those with whom the plaintiff deals, and the innumerable relationships that may exist between the public and the defendants, by affirming the latest trial court decision, each case would turn on its own circumstances and each case would be a question of fact according to the opinion of the trial chancellor. CHARLES R. CAREY.

[17] King County Superior Court causes, Nos. 221, 183 and 221, 342.