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Labor—Picketing—When Enjoinable

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in future cases to ignore the "other factors" which the legislature included for consideration, as well as a tendency to decide the issue of good cause solely upon the basis of wage reductions.

Our court has said, in speaking about the department of social security, "This court has expressed the view that courts should let administrative boards and officers work out their problems with as little judicial interference as possible. One of the primary reasons for the creation of administrative agencies is to secure the benefit of special knowledge acquired through continuous experience in difficult and complicated fields. To unduly restrict the operations of administrative bureaus would defeat the very purpose for which they have been established." *Robinson v. Olzendam,* 38 Wn. 2d 30, 37, 227 P. 2d 732, 736 (1951). It must be recognized that the determination of "good cause" does not peculiarly require the mind of an expert. Neither does it require a "legal mind" for an accurate decision; yet, if this were a question wholly of law special legal training would be necessary. See Brown, *supra,* at 921.

If this case does decide a pure question of law, the holding must be that a wage reduction of slightly more than twelve per cent is, as a matter of law, not good cause for voluntary termination of employment so as to qualify a person for unemployment benefits. The holding of our court is not in terms of percentage of income which could have set a general standard and been a guide to a considerable body of future cases. To hold that a wage reduction of twenty (or perhaps thirty) cents per hour is not good cause for voluntary termination of employment in a particular fact situation, is neither decisive nor illuminating. Futhermore, the decision results in an invitation to a large body of litigation into already crowded courts. Perhaps a better solution would have been to remand and require the Commissioner to list the facts to which he gave weight and to state precisely the reasons for his decision. Then, in the event of court review, any issues wholly of law could be clearly segregated by the court. However, the court did hear and decide this case but gave no reasons for its holding. It appears that the court decided a question of fact while purporting to decide an issue of law.

THOMAS E. SMAIL, JR.

Labor—Picketing—When Enjoinable. At a previous trial *P* was granted an injunction against picketing by *D* union after it was found that a labor dispute existed but that one of the objectives of the union was unlawful. The decree was affirmed in *Ostroff v. Laundry & Dye Works Local 566,* 37 Wn. 2d 595, 225 P. 2d 419 (1950). The basis for the finding of a labor dispute was in the existence of an employer-employee relationship between *P* and one member of *D* union. The illegal objective was that *P* sign a contract with *D* that he employ only union members in his plant, and only members of *D* union in the pick-up and delivery of his work. The court said that if the illegal objective were eliminated the injunction would be dissolved. Subsequently, the union eliminated the illegal objective, but *K,* the only union employee working for *P* at the time the picketing began, discontinued his picketing duties against *P* over a year before the present action and has not been actively employed through *D* union since. *Held: K* is still to be regarded as an employee of *P* for the purposes of the case, and since a labor dispute therefore still exists, the injunction is dissolved. *Ostroff v. Laundry & Dye Works Local 566,* 39 Wn. 2d 693, 237 P. 2d 784 (1951).

In considering where this case fits into the picture of picketing in this state a number of problems in the field of picketing become evident. Peaceful picketing will not be enjoined if it is found that a labor dispute exists and the objectives are not unlawful. *Ostroff v. Laundry & Dye Works Local 566, supra* (1951); *Isthmian Steamship Com-*

pany v. National Marine Engineers' Beneficial Association, Brotherhood of Marine Engineers, 141 Wash. Dec. 95, 247 P. 2d 549 (1952); RCW 49.32.010 [RRS § 7612-13]. Conversely, peaceful picketing will be enjoined if a labor dispute does not exist, *Morris v. Local Union 494 of the Amalgamated Meat Cutters & Butcher Workmen of Spokane,* 39 Wn. 2d 33, 234 P. 2d 543 (1951), or if the objectives are unlawful, *Ostroff v. Laundry & Dye Works Local 566, supra* (1950).

Objectives that have been held not to be unlawful include demands for higher wages, *Kimbel v. Lumber & Sawmill Workers Union No. 2575,* 189 Wash. 416, 65 P. 2d 1066 (1937); demands for agreement of employer as to hours of business, *Wright v. Teamsters' Union Local No. 690,* 33 Wn. 2d 905, 207 P. 2d 662 (1949); a demand for a union delegate to appraise conditions and practices of employment to assure a reasonable standard of pay, *Berger v. Sailors Union of the Pacific,* 29 Wn. 2d 810, 189 P. 2d 473 (1948); a demand for a union security agreement that is not forced on the employees by the employer, *Isthmian Steamship Company v. National Marine Engineers' Beneficial Association, supra; cf. Berger v. Sailors Union of the Pacific, supra,* at 813, 189 P. 2d at 475; and demands to abide by provisions of a contract between the employer and the union for clear and definite wages, *Edwards v. Teamsters Local Union No. 313,* 8 Wn. 2d 392, 113 P. 2d 28 (1941); or adherence to provisions of a contract not to deliver to "unfair" customers, *Marvel Baking Co. v. Teamsters' Union No. 524,* 5 Wn. 2d 346, 105 P. 2d 46 (1940).

A labor dispute does not exist when no member of the picketing union is an "employee" of the picketed employer. When a union worker is originally hired, it usually is a simple matter to determine whether an employer-employee relationship is created. However, difficulties do arise in certain circumstances in determining when a person is an employee.

In the case of the self-employer, the court favors the interests of the self-employer rather than the interests of the union. *Morris v. Local Union 494 of the Amalgamated Meat Cutters & Butcher Workmen of Spokane, supra.* Even though the self-employer had been a member of the union the day before the picketing began, the court has found no basis for a labor dispute. *Cline v. Automobile Drivers and Demonstrators Local Union No. 882,* 33 Wn. 2d 666, 207 P. 2d 616 (1949), *aff'd,* 339 U.S. 470 (1950). Thus it seems that unless there is an existing contract between the union and the self-employer or unless the self-employer is a union member, the court will enjoin any picketing by the union. The self-employer can end any union membership at will by terminating his membership and this will be sufficient for the court to declare the union membership ended.

In *Berger v. Sailors Union of the Pacific, supra,* the court held that the relationship of ordinary employment existed even though the "employees" were limited partners and shared in the profits according to their terms of membership in the partnership. Two of the judges felt that the relationship was not distinguishable from that of the usual employment in that the "employees" exchanged their labor for compensation and performed their duties under the supervision of a man who possessed and exercised the power to direct them, as well as to discharge them. Four of the judges thought that the limited partnership was a mere sham to avoid the existence of an employer-employee relationship. One judge dissented on the ground that even though the partnership was organized to avoid the employer-employee relationship, this did not make it a sham.

Another type of arrangement that has failed to prevent the existence of a labor dispute is a leasing agreement between an owner of a business and the operator of a part of the business, even though attended by separate bookkeeping and other such formalities. *Wright v. Teamsters' Union Local No. 690, supra.* In *Fornili v. Auto Mechanics Local No. 297,* 200 Wash. 283, 93 P. 2d 422 (1939), such an arrangement

was held to be a mere subterfuge to avoid a contract with the union.

It still remains to be decided whether an employee who belongs to one union but is hired for a job not covered by the union is in a position such that a labor dispute could exist. For example, if a union truck driver were hired as a clerk in a retail clothing store which had its own non-union delivery service, could the truck drivers' union picket the store demanding that the employer sign a contract not to deliver on certain days or after certain hours?

If it is conceded or established that the worker in question is an employee, and has appropriate union membership, the question then arises, what acts prior to the controversy may prevent the future existence of a labor dispute? Thus, if the only union members employed withdraw from employment or are discharged before the controversy in question has arisen, they are considered by the court to be no longer connected with the establishment for the purpose of ascertaining the existence of a labor dispute. *Morris v. Local Union 494 of the Amalgamated Meat Cutters & Butcher Workmen of Spokane, supra; Fornili v. Auto Mechanics' Union Local No. 297, supra.*

It is conceivable that the relationship of union employee-employer might be changed, so that no labor dispute could thereafter exist, by a promotion or other change in status of the employee. For example, the employer might take the only union-employee into partnership, might promote him to a manager, or might change his capacity so that his job is entirely different. This question has not as yet been considered by the court.

The relationship of union employee-employer may cease for the purposes of determining the existence of a labor dispute if the employee terminates his union membership. When the employee does not take positive acts to disaffiliate but merely discontinues to work through the union or pay dues, the court is reluctant to say that the employee is no longer a union employee. In *Wright v. Teamsters' Union Local No. 690, supra,* the employee, under union by-laws, had been suspended for almost a month for non-payment of dues when the dispute arose. The court held that the suspension was not equivalent to loss of union membership, and that a labor dispute therefore existed. However, in *Cline v. Auto Drivers and Demonstrators Local No. 882, supra,* a self-employed proprietor of a car lot paid his initiation fee and one year's dues to a union association in April, 1946. The court said that he "was not a member of the association, and had not been since April, 1947."

If affirmative action is taken by the union employee to disaffiliate from the union, he will most likely be considered by the court to be no longer a union member. Thus in *Hanke v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 309,* 33 Wn. 2d 646, 207 P. 2d 206 (1949), *aff'd,* 339 U. S. 470 (1950), where a union member had notified the union that he had no intention of seeking reinstatement and the union ceased to regard him as a member, the court said that no member of the union was involved.

Once it is determined that a labor dispute exists, may it be ended by acts of the employee, the employer, or the union? If, after the dispute has arisen, the employee is discharged or voluntarily leaves the employment, the court is clear in the second *Ostroff* case that the relationship will still exist as a basis of determining a labor dispute. The court stated that to hold that the relationship *could* be terminated by such acts would mean "that an employer, by many conceivable acts, such as the prompt discharge of an employee or the prolongation of the dispute until economic necessity forced the employee to seek work elsewhere, could place himself in the position of having no union employees; consequently, no labor dispute. This does not appear to us to be equitable."

Assuming that a promotion or a change in the union employee's status before the controversy arises could change the relationship enough so that a labor dispute could

not be found, it hardly seems that this should also be true if the change occurs after a dispute arises. If such were the case, an employer could terminate the basis of a labor dispute at his discretion, as the court intimates, without complying with any of the union's demands.

Although, after the dispute arises, the union employee fails to pay dues or actively participate through the union, according to the second *Ostroff* case he will still be considered a member of the union, so long as he has not attempted to withdraw from the union. There the union employee had discontinued any active employment through the union and had taken up employment in another field of work.

One final question is raised by the second *Ostroff* case with regard to the possible termination of a labor dispute. In that case, since the only union employee had left *P*'s employment, it seems that if the union had ended its controversy with *P*, it would not be able to resume picketing at a later date unless the basis for a labor dispute could be found, i.e., unless one of its members had been hired by *P* or unless one of *P's* employees had joined the union. The question is then, how far may a union go in changing or altering its demands before the original controversy will be considered at an end? In the first *Ostroff* case, the court seemed to invite the change in demands and this was done all to the satisfaction of the court in the second *Ostroff* case. Assuming that the changes affected all of the union demands and all new demands were subsequently made, would not the time for determining the labor dispute then be at the time the new demands were made rather than at the time of the original demands? If the changes made in the demands did not completely replace the old demands, when will the court consider the time for determining the basis of a labor dispute to have shifted from the original time to the time the new demands are made?

As may be seen from the cases here presented, there are a number of questions that the court, or the legislature if it chooses, may answer for us at a future date. The rule that peaceful picketing will not be enjoined if a labor dispute exists and the objectives are not unlawful seems fairly stable and not likely to be changed except by statute. From the list of objectives that have been declared unlawful and the ones that have been held lawful, the union and the employer have a fair idea of how their relations should be guided. Similarly, there seems to be a fair criterion for establishing when a person is an employee. But much speculation begins to arise in the inception and termination of that status. Also, it is not clear how changes in demands will affect the existence of a labor dispute if all of the union employees had left their employment after the dispute arose. Clarification of these matters will probably await case-by-case determination in the courts, but a replacement or remodeling of the twenty-year-old labor disputes act, RCW 49.32.010 *et seq.* [RRS § 7612 *et seq.*], would be a great contribution to clarification of the labor picture in Washington.

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Evidence—Admissibility of Related Offenses. *D* was charged with sodomy and rape. A confession of a prior similar assault and attempted rape was admitted with the instruction that the confession should be used only for whatever bearing it might have upon common scheme or plan in connection with the rape charges. *D* was acquitted of rape and convicted of sodomy. Appeal. *Held:* Affirmed. Evidence of other crimes may not be admitted unless the evidence is relevant and necessary to prove an essential ingredient of the crime charged. This confession was not sufficiently related to show a common scheme or plan. However, *D* was not prejudiced as to the rape charges because he was acquitted of rape, nor did the evidence prejudice him on the sodomy counts because the confession could have been properly admitted to establish identity