

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

Board of Education, Liberty Local School District,

Charging Party,

v.

Liberty Education Association,

Charged Party.

CASE NUMBER: 84-UU-10-2242

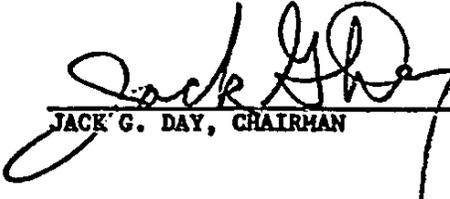
FINDING OF PROBABLE CAUSE
(Opinion Attached)

Before Chairman Day, Vice Chairman Sheehan, and Board Member Fix; December 5, 1985.

On October 24, 1984, the Liberty Local School District Board of Education filed an unfair labor practice charge alleging that the Liberty Education Association had violated Ohio Revised Code 4117.11(B)(8) by picketing without giving prior notice. An investigation was conducted pursuant to Ohio Revised Code 4117.12. This investigation reveals that the facts are not in dispute. And the parties have filed position statements. For the reasons stated in the attached opinion, incorporated by reference, the Board would find probable cause and issue a complaint if the issue had not been vitiated by the passage of time. Because a complaint issuance would be a futile act at this late date, the charge is dismissed.

It is so directed.

DAY, Chairman; SHEEHAN, Vice Chairman; and FIX, Board Member, concur.


JACK G. DAY, CHAIRMAN

I certify that this document was filed and a copy served upon each party on this 6th day of December, 1985.


KENNETH W. BARRETT, EXECUTIVE DIRECTOR

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OPINION

Day, Chairman:

The Board of Education for Liberty Local School District (Employer or School District) has filed an unfair labor practice charge against Liberty Education Association (Union or LEA). Taking the charge as true for the purposes of this opinion, these are the facts: the LEA through its members and agents engaged in sympathy picketing to aid the cause of a strike conducted by the Ohio Association of Public School Employees (OAPSE) on behalf of non-teaching employees; OAPSE had given the notice to strike pursuant to Ohio Revised Code, Section 4117.11(B)(8) [Statute or Act]; the LEA sympathy picketers were teachers who patrolled the struck facilities on their own time during non-working hours. Sympathy picketers carried signs encouraging students to "stay home." LEA did not give the notice contemplated by the Act.

I

Several issues are immanent in these facts.¹ Arguably none of them are moot under the mootness doctrine in the Nebraska Press Association case.² However, one is more directly related than the others to the authority of the State Employment Relations Board (SERB or Board) and its obligation to interpret and apply the statute. Resolution of that one will suffice for decision in the present case. That resolving issue is this:

Is it an unfair labor practice to engage in sympathy picketing without the prior written notice requisite under Ohio Revised Code, Section 4117.11(B)(8)?

For reasons adduced below the answer is "Yes." There is probable cause to issue a complaint. However, the sympathy picketing is no longer a fact. If it were, a complaint would issue. Any future sympathy picketing under similar circumstances may be expected to warrant the issuance of a complaint.

¹The employer claims that the "stay home" encouragement resulted in reducing school attendance and, in effect, constituted an indirect concerted refusal to work. If the claimed causation could be proven and linked to shortened work for teachers, the picketing might fall outside "informational" status. However, it lasted only two days (September 17-18, 1984) and the correlations between non-attendance and the respective picketing efforts of LEA and OAPSE, may be impossible to demonstrate. The demonstration, if achieved, would raise interesting questions of concerted activity. There is also the possible question whether the "speech" used was protected since it may implicate the licitness of expression which advocates violation of law (i.e., the law compelling school attendance; see R.C. 3321.03, 3321.04, 3321.38 and R.C. 3321.99). This problem is complicated by such concerns as whether the advocacy is merely theoretical or philosophic or is intended to induce immediate illegal action [cf. Justice Brandeis concurring opinion in Whitney v. California, 274 U.S. 357, 374-378 (1927)]. The disposition adopted to dispose of this case renders decisions on these serious questions unnecessary.

² Nebraska Press Association v. Stuart (1976) 427 U.S. 539, 546-49 LED 3d 683, 690 (Jurisdiction not defeated "simply because the order has expired, if the underlying dispute ... is one 'capable of repetition, yet evading review.'")

II

The issue concerns an application of the statute in terms which limit expression. It is SERB's duty to interpret, but it is not within SERB's competence to declare any portion of its statutory charter unconstitutional.³ Therefore, the interpretive program must be to try in this case to apply the statutory requirements in a way which will meet constitutional standards.⁴ This approach attempts to conform SERB conduct to the statutory mandate establishing a presumption of legislative intent to legislate constitutionally.⁵

III

Those who search for legislative intent seldom give its will-o-the-wisp quality sufficient recognition. Certain facts are overlooked and certain presumptions indulged. These include the facts that legislators are transient, act by majority rule and support legislation with varying degrees of enthusiasm. Yet interpreters tend to deal with legislative intent as though it were a discoverable entity, frozen in time and declared by an

³City of Dayton (1985) 84-UR-05-1211.

⁴Cf. "Where two constructions of a statute are available, it is the time-honored and logical rule to give such construction as will maintain the constitutionality of the act." City of Youngstown v. Fishel, 89 Ohio St. 247, 255 (1914). "One of the cardinal rules of construction is that a strong presumption exists in favor of the validity of legislative acts, and that a construction will be given them, when possible, to sustain their constitutionality." State ex. rel. City of Columbus v. Ketterer, 127 Ohio St. 483, 495 (1934).

⁵R.C. 1.47: "In enacting a statute, it is presumed that: (A) Compliance with the constitutions of the state and of the United States is intended;

* * *

The presumption does supplant SERB's obligation to provide a constitutional interpretation for an ambiguous statute.

unchanging majority possessed of equal conviction in the matter intended.⁶ And, when a court declares meaning and the legislature does not respond, it is presumed that the legislature agrees with the judicial interpretation. However, the interpreters hardly have a choice. They must adopt the interpretive theory with all its mythical fixities. For when an adjudicating body is called upon to decide a case turning on a statute, meanings are not always clear. Still a decision must be reached. Since this is so, legislative intent must be determined according to the tenets of statutory construction. Ambiguity and imprecision do not forfeit the necessity for the search (and the find), necessary to decide. Against this backdrop, SERB is required, in this case, to assess the intent in the words in R.C. 4117.11 (B)(8):

"It is an unfair labor practice for an employee organization, its agents or representatives, or public employees to:

(8) engage in any picketing, striking, or other concerted refusal to work without giving written notice to the public employer and to the State Employment Relations Board not less than ten days prior to the action. The notice shall state the date and time that the action will commence ..."

The interpretive options available under this deceptively simple language include these:

- a. The word "picketing" is qualified by "any". Therefore, statutory notice is required for all picketing, including sympathy picketing.
- b. "Picketing" must be coupled with, and qualified by, the phrase "or other concerted refusal to work." So qualified, sympathy picketing is not a concerted refusal to work requiring notice under the statute.

⁶Cynics have even suggested that partisans induce individual legislators to take positions in debate designed to support the partisan view of what the legislation should mean when passed.

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- c. If "picketing" alone does not activate the notice requirement, picketing accompanied by a work stoppage does. Sympathy picketing linked to a direct job action withholding work requires the statutory notice to legalize it. Whether there was (or was not) a withholding is dependent on the facts.
- d. The phrase "or other concerted refusal to work" must be read as nothing more significant than a catch-all expanding out the concept of "striking". Thus, it can be argued that legal notice under the statute is required only when some variety of concerted work abstention is involved. Under this view, unless sympathy picketing is tied to a collective refusal to work, statutory notice is unnecessary.
- e. The insertion of commas between "picketing, striking, or other concerted refusal to work" indicates a legislative intent to create discrete categories of action - each requiring notice under R.C. 4117.12(B)(8).⁷
- f. The General Assembly did not intend to restrict sympathy picketing by any requirement other than notice.

SERB adopts options a., and f., for the disposition of the probable cause question in the present case. Whether other readings under the statute (e.g., b., c., d., and e.) are relevant may depend upon factual considerations developed by the proofs in future cases.

IV

The statute has a history which may illuminate, perhaps only dimly, the

⁷Option d. would be more persuasive if the comma after "striking" were not there. If this seems to be "nit picking," the statute provides the nits and one or the other of the parties is virtually certain to do the picking sooner or later.

legislative intent. That history stems from Senate versions of the bill which restricted picketing at health institutions.⁸ The House version changed the coverage substantially. It broadened the part relevant here to the language eventually adopted in the bill which became law.⁹ The changes may indicate that the General Assembly intended not to limit picketing at health institutions to "notice" picketing. This conclusion is highly unlikely given the critical nature of job actions at health institutions and the broadened language ultimately adopted. In any event, the legislative history is less than dispositive of the sympathy picketing question. Nor can that question be easily resolved by reference to the First Amendment, although it is clear that

⁸ As introduced Section (B)(8) of Senate Bill No. 133 provided that it was an unfair labor practice to:

"(8) ENGAGE IN ANY PICKETING, STRIKING OR OTHER CONCERTED REFUSAL TO WORK AT ANY PUBLIC HOSPITAL, CONVALESCENT HOSPITAL, HEALTH MAINTENANCE ORGANIZATION, HEALTH CLINIC, NURSING HOME, EXTENDED CARE FACILITY, OR OTHER INSTITUTION DEVOTED TO THE CARE OF THE SICK, INFIRM, OR AGED PERSONS WITHOUT GIVING WRITTEN NOTICE TO THE INSTITUTION AND TO THE STATE EMPLOYMENT RELATIONS BOARD NOT LESS THAN TEN DAYS PRIOR TO THE ACTION, PROVIDED THAT AS TO UNITS OF NURSES DIVISION (C)(1) OF SECTION 4117.14 OF THE REVISED CODE APPLIES. THE NOTICE SHALL STATE THE DATE AND TIME THAT THE ACTION WILL COMMENCE AND THE NOTICE, ONCE GIVEN, THE PARTIES MAY EXTEND IT BY THE WRITTEN AGREEMENT OF BOTH." (sic).

Subsequently, as amended by the Senate Subcommittee, Section (B)(8) provides:

"(8) ENGAGE IN ANY PICKETING, STRIKING, OR OTHER CONCERTED REFUSAL TO WORK AT ANY PUBLIC HOSPITAL, CONVALESCENT HOSPITAL, HEALTH MAINTENANCE ORGANIZATION, HEALTH CLINIC, NURSING HOME, EXTENDED CARE FACILITY, OR OTHER INSTITUTION DEVOTED TO THE CARE OF THE SICK, INFIRM, OR AGED PERSONS WITHOUT GIVING WRITTEN NOTICE TO THE INSTITUTION AND TO THE STATE EMPLOYMENT RELATIONS BOARD NOT LESS THAN TEN DAYS PRIOR TO THE ACTION. THE NOTICE SHALL STATE THE DATE AND TIME THAT THE ACTION WILL COMMENCE AND THE NOTICE, ONCE GIVEN, THE PARTIES MAY EXTEND IT BY THE WRITTEN AGREEMENT OF BOTH." (sic).

^{9A} A substantial change, however, appeared in the House Subcommittee version which read:

"(8) ENGAGE IN ANY PICKETING, STRIKING, OR OTHER CONCERTED REFUSAL TO WORK WITHOUT GIVING WRITTEN NOTICE TO THE PUBLIC EMPLOYER AND TO THE STATE EMPLOYMENT RELATIONS BOARD NOT LESS THAN TEN DAYS PRIOR TO THE ACTION. THE NOTICE SHALL STATE THE DATE AND TIME THAT THE ACTION WILL COMMENCE AND, ONCE THE NOTICE IS GIVEN, THE PARTIES MAY EXTEND IT BY THE WRITTEN AGREEMENT OF BOTH."

the right of free expression, and therefore the Amendment, is involved.

An early picketing case (Thornhill)¹⁰ spoke glowingly of free expression:

"First. The freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a State.

"The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgment of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government. Compare United States v. Carolene Products Co., 304 U.S. 144, 152-153n. Mere legislative preference for one rather than another means for combating substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions. It is imperative that, when the effective exercise of these rights is claimed to be abridged, the courts should 'weigh the circumstances' and 'appraise the substantiality of the reasons advanced' in support of the challenged regulations. Schneider v. State, 308 U.S. 147, 161, 162."¹¹

This case may represent the highwater mark in picketing/free speech doctrine.¹² Still, Justice Murphy, for the majority, pointed out what was

not involved:

¹⁰Thornhill v. Alabama (1940) 310 U.S. 88. Accord: Carlson v. California (1940) 310 U.S. 106, 112-113.

¹¹Supra at 95-96.

¹²Since Thornhill, many cases have marked out contexts in which picketing has lost its free speech armor. See, for example, Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc. (1941) 312 U.S. 287, 294-295 (Context of violence); see also Westinghouse Electric Corp. v. United Electrical, Radio and Machine Workers of America, Local No. 410, (1946), 139 N.J. Eq. 97, 112-113 49 A. 2d: 896, 904-906; (Mass picketing) and Westinghouse Electric Corporation v. United Electrical, Radio and Machine Workers, (1955) 383 Pa. 297, 298-300, 302; 118 A. 2d: 180, 181, 182. (No violence but mass picketing enjoined.)

"We are not now concerned with picketing en masse or otherwise conducted which might occasion such imminent and aggravated danger ... as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger."¹³

The Meadowmoor Dairies case¹⁴ affirmed the Thornhill and Carlson principles but followed the Thornhill dictum¹⁵ and approved an injunctive formula devised by the Illinois courts for the regulation of strikers conduct. The injunction banned even peaceful picketing. The Meadowmoor ruling emerged from a context of extraordinary violence including arsons, bombings and beatings. In this setting, the Supreme Court of the United States said, "it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful."¹⁶

One need not analyze the total jurisprudence generated by the Thornhill/Meadowmoor problem to take the point that a state may be justified in crafting a narrow statute to cover precisely a danger which is both perceived and real.

In the statute under consideration here, the General Assembly has not attempted to regulate sympathy picketing by name; nor has it spelled out the specific dangers the regulation of picketing is designed to control. However, if it be conceded beyond cavil that the legislators intended to include sympathy picketing within the regulation exemplified by the notice requirements of R.C. 4117.11(B)(8), that requirement is so mild that one may

¹³Thornhill v. Alabama, supra, 310 U.S. at 105.

¹⁴Supra n. 12.

¹⁵Id. 297.

¹⁶Id. 294.

question whether it constitutes an impediment to free expression. But, if one were to conclude, arguendo, that the statutory notice does rise to the level creating a potential chill,¹⁷ it is clearly narrow and finds ample warrant from the fact that public employers perform functions of such importance to the public welfare that the required notice is justified to enable adjustment to the public's need.

This case presents a classic, specific illustration of a public need justifying the notice requirement for sympathetic picketing. From all that appears the school board was confronting a properly noticed strike by part of its employees when the sympathy picketing by other of its employees began. Without prior notice legitimate counter-measures¹⁸ could not be promptly undertaken. The original notice obviously is not sufficient to enable the necessary inquiries and preparations unless the sympathy action is notified at the same time.

V

Sympathy picketing without the prior written notice required by R.C. 4117.11(B)(8) constitutes a prima facie unfair labor practice. If issuance of a complaint could have any curative effect at this late date, a complaint would issue. Passage of time has made complaint process futile. However, the opinion presents a standard for future conduct.

Sheehan, Vice Chairman, and Fix, Board Member, concur.

¹⁷A person willing to engage in sympathy picketing is hardly chilled by an advance notice requirement. The act of picketing is very bold notice.

¹⁸Such a counter-measure could stem from an evaluation concluding that classes might be without teachers. The presence or absence of teachers determines, among other things, whether and what to notify parents; whether to cancel busing; and counter propaganda.