A Timely Analysis of Legal Developments

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In a victory for employers seeking to enjoin trespassing by labor unions on private property, the California Court of Appeal declared unconstitutional state statutes that create barriers to injunctive relief and refused to follow earlier cases that exempted unions from trespassing laws.

California Court Restricts Trespassing by Labor Unions on Private Property

By William J. Emanuel

The California Legislature has enacted two statutes that create barriers to injunctive relief against trespassing by union agents on the private property of employers, and California courts have repeatedly sought to exempt labor unions from the intentional tort of trespass that applies to all other persons and organizations in this state.

In a recent decision, however, the California Court of Appeal for the Third Appellate District emphatically rejected this state-sponsored protection of union trespassing. The court ruled—in *Ralphs Grocery Company v. United Food & Commercial Workers Union Local 8*—that the statutes protecting union trespassers violate the free speech provisions of the U.S. Constitution, and that the decisions of the California courts that carve out trespassing by union agents for special protection no longer have viability as binding precedent.

If this important decision survives review by the California Supreme Court, the legal landscape will be dramatically altered for employers and labor unions in this state.

Facts of the *Ralphs* Case

The dispute in *Ralphs* arose when the company opened a new grocery store in Sacramento with a non-union workforce. The store was located in a retail development know as College Square, which included common areas and restaurants where outdoor seating was available. Ralphs, however, owned the sidewalk in front of the store, and that area was not designed or presented to the public as a public meeting place.

To protest the lack of union representation at the store, union agents picketed and passed out handbills on a privately-owned sidewalk within five feet of the store's entrance. About eight to ten union agents participated in this activity for eight hours a day, five days a week, on an ongoing basis.

Ralphs requested that the Sacramento Police Department remove the union

trespassers, but the police refused. Therefore, Ralphs sought injunctive relief from the Sacramento Superior Court. The court refused to provide such relief, however, because of a statute designed to protect unions from injunctions.

Appellate Court's Decision

This decision of the Court of Appeal includes several important rulings affecting the private property of employers and the expressive activities of labor unions.

Grocery Store's Private Property Not a "Public Forum"

Although the Ralphs grocery store was located in a retail development that included common areas and restaurants where outdoor seating was available, the court found that the privately-owned sidewalk in front of the store was not a "public forum" under the California Constitution because it was not designed and presented to the public as a public meeting place. Instead, the court found that this area was a "private forum."

The legal significance of this ruling is that the private sidewalk in front of the store was not subject to the California Supreme Court's *Pruneyard* doctrine, under which members of the public (including union agents) have a right to engage in expressive activities in a common area of a shopping center under the theory that the area has become a public forum. *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899 (1979).

Because the area in question was not a public forum, the court declared that Ralphs, as a private property owner, could limit the speech allowed and exclude anyone desiring to engage in prohibited speech. This remained true, the court explained, even though Ralphs had allowed other groups to use the same area for expressive activities. The court stated that a private property owner may selectively permit speech or prohibit speech in a private forum without affecting the private nature of the forum.

Furthermore, the court emphasized that "time, place and manner" regulations adopted by a property owner to regulate expressive activities by outside organizations on its property are not subject to legal scrutiny unless the property is a public forum. Thus, the court found that it was irrelevant whether regulations adopted by Ralphs to control such activities on its property were reasonable.

Two California Statutes Unconstitutional

Unions typically rely on two California state statutes to justify trespassing on the private property of employers—the Moscone Act, Code of Civil Procedure section 527.3, and an anti-injunction statute, Labor Code section 1138.1. The court in *Ralphs* held that both of these statutes are unconstitutional under the First and Fourteenth Amendments to the U.S. Constitution.

The court first explained that the Moscone Act, as construed by the California Supreme Court, favored speech related to labor disputes over speech related to other matters based on the content of the speech, and therefore it results in a free speech violation under the First and Fourteenth Amendments.

This ruling was based on two decisions in which the U.S. Supreme Court declared that state-sponsored favoritism with respect to speech is unconstitutional content discrimination—*Police Department v. Mosley*, 408 U.S. 92 (1972), and *Carey v. Brown*, 447 U.S. 455 (1980). In addition, the court relied on a more recent decision of the U.S. Court of Appeals for the District of Columbia—*Waremart Foods v. NLRB*, 354 F.3d 870 (2004)—in which the federal court found the Moscone Act to be unconstitutional in light of these Supreme Court decisions.

The court in *Ralphs* also concluded that the state anti-injunction statute suffers from the same constitutional defect as the Moscone Act—the statute favors speech relating to labor disputes over speech relating to other matters by establishing several barriers that make it virtually impossible to obtain an injunction against trespassing by a union on an employer's private property. The court explained that this statute is not just a procedural prerequisite, but instead is an impediment designed to prevent an

owner or possessor of real property from obtaining an injunction in a labor dispute even though injunctive relief would otherwise be available.

Moreover, the court emphasized that forcing a speaker to host or accommodate another speaker's message violates the host's free speech rights, and therefore it was an abridgement of Ralphs' free speech rights to force it to provide a forum on its private property for speech with which it disagrees. Thus, the rationale of the *Ralphs* decision is not only that the Moscone Act and the anti-injunction statute result in unconstitutional content discrimination by favoring union speech over other speech, but also that Ralphs' free speech rights were directly violated by the preference created by those statutes. This ruling was based on Supreme Court precedent established in *Hurley v. Irish-American Gay Group*, 515 U.S. 557 (1995); and *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1 (1986).

California Case Law No Longer Viable

Unions routinely rely on several decisions of the California courts to justify trespassing on an employer's private property. The court in Ralphs concluded that these decisions are no longer viable as binding precedent. The decisions in question and the rulings of the court in the *Ralphs* case are as follows:

***In re Lane*, 71 Cal. 2d 872** (1969). The California Supreme Court held in this case that union agents had a right under the First Amendment to the U.S. Constitution to distribute handbills on a private sidewalk just outside an entrance to a grocery store that was not part of a shopping center. The court in *Ralphs* found that this decision is no longer viable, explaining that:

- The decision was based on the now-discredited notion that the First Amendment may prohibit private property owners from restricting expressive activities on their properties;
- The decision's only continuing vitality lies in the liberty of speech clause in the California Constitution; and
- The decision cannot be read to expand the rights of individuals engaging in speech on private property beyond the analysis in *Pruneyard* and in a more recent decision reaffirming the *Pruneyard* doctrine, *Fashion Valley Mall, LLC v. NLRB*, 42 Cal. 4th 850 (2007).

Schwartz-Torrance Investment Corp. v. Bakery & Confectionary Workers Union, Local 31, 61 Cal. 2d 766 (1964). The California Supreme Court held in this case that union agents had a right to picket in front of a retail store leased by an employer at a shopping center. The court in *Ralphs* found that this decision is likewise no longer viable, for the reasons discussed above with respect to the *Lane* decision.

Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 25 Cal. 3d 317 (1979). In this case—which is generally known as *Sears II*—a plurality of the California Supreme Court relied on the Moscone Act to hold that union agents had a right to picket on a privately-owned sidewalk surrounding a stand-alone department store. The court in *Ralphs* held that this decision is neither binding nor persuasive precedent because:

- The Supreme Court did not consider the First and Fourteenth Amendment implications of its decision;
- *Sears II* was only a plurality opinion signed by three members of the court, and thus it lacked authority as precedent and the doctrine of *stare decisis* did not require deference; and
- In the *Fashion Valley* decision cited above, the state Supreme Court omitted any reference to *Sears II* or the Moscone Act, impliedly recognizing that *Sears II* was wrongly decided and that the Moscone Act is unconstitutional because it results in content discrimination.

M Restaurants, Inc v. San Francisco Local Joint Executive Board of Culinary Workers, 124 Cal. App. 3d 666 (1981). In this case, the California Court of Appeal stated that the Moscone Act was constitutional, although it upheld an injunction against

union picketers who were blocking the doorways to a restaurant, harassing employees and customers, and lying about sanitary conditions in the restaurant. The court in *Ralphs* dismissed this decision as unpersuasive because: (1) it did not consider picketing on private property; and (2) any pronouncements in the decision about the constitutionality of denying injunctive relief based on the Moscone Act were dicta—discussion unnecessary to the decision—because injunctive relief was granted.

Waremart Foods v. United Food & Commercial Workers Union, Local 588, 87 Cal. App. 4th 145 (2001). This decision was issued by the Third Appellate District—the same court that issued the *Ralphs* decision. The court had concluded in the earlier case that the state anti-injunction statute was not unconstitutional because it was merely a rule of procedure and did not address speech. But in *Ralphs*, the court effectively overruled *Waremart Foods*, explaining that the decision in that case did not consider the effect of the rule of procedure established by the statute, which differentiates speech based on its content and imposes prerequisites that make it virtually impossible for a property owner to obtain injunctive relief.

Injunction as a Remedy Against Union Trespassing

Besides holding the statutes to be unconstitutional and the foregoing decisions to be no longer viable, the court in *Ralphs* also clarified the showing needed to justify issuance of an injunction as a remedy against union trespassing. The court held that:

- There is no requirement that an unlawful act beyond the trespass be committed. A continuing trespass is, for purposes of injunctive relief, an unlawful act, and a party seeking an injunction need not establish an unlawful act beyond the trespass.
- A continuing trespass constitutes, as a matter of law, irreparable harm for which damages are not adequate because the continuing trespass itself causes irreparable harm. Thus, an injunction is a proper remedy against threatened repeated acts of trespass, particularly where the probable injury resulting from such acts will be beyond any method of pecuniary estimation, and for this reason is irreparable.
- When a trespasser engages in activities to discourage the public from patronizing a business, the effect of the activity cannot be quantified because there is no way of knowing who would have patronized the business but for the trespasser's activities. Therefore, the unquantifiable loss of business caused by the trespasser on the owner's property constitutes irreparable harm as a matter of law.
- There is no additional requirement that the property owner show that there would be an injury to its property without injunctive relief.

Remaining Issues

The *Ralphs* decision is one of the most significant to be decided by a California court in the area of traditional labor law in many years. However, employers should keep in mind the following:

First, the principles of property and constitutional law discussed in the decision coexist with principles of statutory law under the National Labor Relations Act. In most cases, labor unions do not have a right of access to an employer's private property under that statute, but this is a complex subject that can have serious ramifications for employers.

Second, any employer that has a collective bargaining agreement should be aware that contractual obligations involving union access can override property rights under state law.

Third, the *Ralphs* decision involved the intentional tort of trespass, and it did not address exemptions for union trespassing in criminal trespass statutes, or the refusal by police agencies to remove union trespassers because of these exemptions. The exemptions under the criminal statutes are subject to attack on the same grounds as those on which the *Ralphs* decision was premised, but additional litigation will be required to accomplish a similar result.

Fourth, the *Ralphs* decision does not affect the Pruneyard doctrine, which permits expressive activities in the common areas of shopping centers. This doctrine was recently reaffirmed by a slim 4-3 majority in the *Fashion Valley Mall* decision cited above.

Finally, the *Ralphs* decision involved private property. Enjoining unlawful union activity on *public* property—such as violence and mass picketing—should continue to be possible under the Moscone Act, as that statute has been construed as authorizing injunctive relief against such activity. However, labor unions might contend that this decision does not invalidate the state anti-injunction statute in the event of unlawful activity on public property.

Possible Review by Supreme Court

The union in the *Ralphs* case has an opportunity to seek review of the court's decision by the California Supreme Court. If it does so and the California Supreme Court grants review, the ultimate outcome of the issues in this case will not be definitively known until that court issues a decision many months in the future.

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