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January 11, 2013

California Supreme Court Permits Picketing on Private Property

By William Emanuel

In a split decision, the California Supreme Court has upheld the constitutionality of two statutes that restrict state court injunctions against picketing by labor unions on private property. *Ralphs Grocery Co. v. United Food and Comm. Workers Union Local 8*, No. S185544 (Cal. Dec. 27, 2012).[1] Although mass picketing and violence were not involved in this case, one of the two statutes also substantially limits the ability of employers to obtain injunctive relief against such picket line misconduct by labor unions.

The court's ruling reversed a decision by a state appellate court, which had concluded that the statutes are unconstitutional because they favor expressive activities by labor unions in violation of the U.S. Constitution. *Ralphs Grocery Co. v. United Food and Comm. Workers Union Local 8*, 113 Cal. Rptr. 3d 88 (2010). A second decision by another California appellate court involving the same parties had reached the same conclusion. That decision has now effectively also been overruled. *Ralphs Grocery Co. v. United Food and Comm. Workers Union Local 8*, 192 Cal. App. 4th 200 (2011).

The California Supreme Court's decision means that labor picketers, but no one else, will have the right to engage in speech activities on an employer's private property. Thus, as the dissent points out, the decision "places California on a collision course with the federal courts."

The California Anti-Injunction Statutes

One of the statutes at issue in the decision, the Moscone Act (California Code of Civil Procedure section 527.3), provides that picketing and related union activities during a labor dispute cannot be enjoined except in the case of certain "unlawful" conduct. This statutory restraint on state court power does not apply in the case of picket line misconduct by a labor union, such as mass picketing and violence, but it has prevented injunctions against union trespassing.

The second statute, California Labor Code section 1138.1, limits the authority of state courts to issue an injunction in a labor dispute and establishes several difficult requirements that an employer must overcome to obtain an injunction against union trespassing or picket line misconduct, such as mass picketing and violence. This statute has effectively prevented employers

1 William Emanuel and Littler Mendelson represented the Employers Group, the California Grocers Association, and the California Hospital Association in *Ralphs Grocery Co. v. United Food and Comm. Workers Union Local 8*, No. S185544 (Cal. Dec. 27, 2012).

from obtaining injunctions in labor disputes.

Because the Moscone Act favors union speech by allowing unions to engage in expressive activities on an employer's private property, the U.S. Court of Appeals for the D.C. Circuit had previously held that the state law results in unconstitutional content discrimination under the First Amendment and the Equal Protection Clause of the U.S. Constitution. *Waremart Foods v. NLRB*, 354 F.3d 870, 872 (D.C. Cir. 2004). In the new decision, however, the California Supreme Court rejected the D.C. Circuit's opinion, finding it "unpersuasive." It seems likely that the U.S. Supreme Court will resolve this conflict between the D.C. Circuit and California's highest court.

Scope of Free Speech Precedent in Labor Disputes

The disagreement between the D.C. Circuit and the California Supreme Court on this issue results primarily from opposing views of U.S. Supreme Court precedent involving "content discrimination" under the First Amendment and the Equal Protection Clause of the U.S. Constitution. Two U.S. Supreme Court decisions issued several decades ago are the focus of this debate.

In the first decision, *Police Department of the City of Chicago v. Mosely*, 408 U.S. 92 (1972), the U.S. Supreme Court declared that a law is unconstitutional if it: makes a distinction between labor picketing and other picketing; describes permissible picketing in terms of its subject matter; or grants the use of a forum to people whose views the government finds acceptable while denying use of the same forum to those wishing to express less favored or more controversial views.

In the second decision, *Carey v. Brown*, 447 U.S. 455 (1980), the U.S. Supreme Court declared that a government cannot discriminate between lawful and unlawful conduct based upon the content of a demonstrator's communication. The Court added that a government also cannot presuppose that labor picketing is more deserving of First Amendment protection than public protests over other economic, social, and political issues.

The D.C. Circuit followed the U.S. Supreme Court's precedent in these decisions in determining that the Moscone Act constituted a clear case of content discrimination under the U.S. Constitution. The California Supreme Court, however, distinguished those decisions, finding that the California statutes did not "restrict" anyone's speech, and noting that the *Mosely* and *Carey* decisions involved public forums, while the *Ralphs* case involved a private forum.

In doing so, the California court did not deal with U.S. Supreme Court precedent holding that favoritism for certain messages is just as unconstitutional as hostility toward other messages. In this regard, the U.S. Supreme Court has stated that "the government may not regulate use based on hostility—or favoritism—towards the underlying message expressed." *R.A.V. v. St. Paul*, 505 U.S. 377 (1992); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994).

Thus, unrestrained by its narrow reading of the U.S. Constitution, the court in *Ralphs* found in the Moscone Act a reaffirmation of several old California decisions that permitted labor unions to picket on the private property of retail stores. Those cases permitted trespassory picketing based primarily on the notion that the property rights of the store owners had been diluted by inviting the general public to patronize the stores, resulting in a "property right worn thin by public usage." *Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union*, 61 Cal. 2d 766 (1964); *In re Lane*, 7 Cal. 2d 872 (1969); *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 25 Cal. 2d 317 (1979). These earlier cases were deemed relevant by the California Supreme Court in construing the Moscone Act because that statute provided that its terms should be "strictly construed in accordance with existing law governing labor disputes," and the court concluded that the cases were "existing law" when the statute was enacted.

Arguments Not Considered by the Court

The *Ralphs* decision is silent on two compelling arguments. First, a constitutional doctrine known as Machinists Preemption prohibits state governments from providing assistance to a union in a labor dispute because their doing so would interfere with the free play of economic forces between labor and management under the National Labor Relations Act (NLRA). Under the doctrine, the inconsistent application of state laws is necessarily outside the power of the state.

According to this argument, when the State of California adopts statutes that interfere with the free play of economic forces by denying employers the benefit of the trespass laws—as it has done in the statutes discussed above—such statutes are preempted and invalid. *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353 (4th Cir. 1991) ("Rum Creek I"), 971 F.2d 1148 (4th Cir. 1992) ("Rum Creek II"), 31 F.3d 169 (4th Cir. 1994) ("Rum Creek III"). The U.S. Supreme Court has expressly stated that a state may not, consistent with the NLRA, withhold the protections of a state anti-trespass law from an employer involved in a labor dispute. *Livadis v. Bradshaw*, 512 U.S. 107, 119 n. 13 (1994).

The second argument is that the state statutes involved here are unconstitutional because they infringe on property rights protected by the Fifth and Fourteenth Amendments to the U.S. Constitution. Although constitutional property rights are not absolute, U.S. Supreme Court precedent protecting such rights extends to an employer's private property if it does not constitute a "public forum"—such as the common areas of a shopping center under the *Pruneyard* doctrine discussed below. *Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

Because the *Ralphs* decision makes it clear that the private sidewalk in front of a retail store is not a public forum, the property rights protected by the U.S. Constitution therefore should apply to that area of a store's private property.

Narrowing of California's Pruneyard Doctrine

Although the California statutes at issue in this case were not invalidated by the California Supreme Court, the decision might contain a "silver lining" for employers in some respects. Most notably, the decision sharply limits California's *Pruneyard* doctrine, which treats certain private shopping center property as a "public forum" open to expressive activities by labor unions and other advocacy groups under the California Constitution. *Robins v. Pruneyard Shopping Center*, 23 Cal.3d 899 (1979); *Fashion Valley Mall, LLC v. NLRB*, 42 Cal. 4th 850 (2007).

The union contended in the *Ralphs* case that the private sidewalk in front of the store was a public forum because the store was located at a shopping center. However, the California Supreme Court unanimously declared that a private sidewalk in front of a customer entrance to a retail store in a shopping center is *not* a public forum under the *Pruneyard* doctrine. Instead, the court held that the public forum portion of a shopping center's private property is limited to areas that are designed to permit and encourage the public to congregate and socialize.

This limitation on the *Pruneyard* doctrine will necessarily extend to freestanding retail stores not located at shopping centers, as there has always been even less justification for application of the doctrine to such establishments because its rationale was predicated on the special nature of shopping centers.

The narrowing of *Pruneyard* might seem like a hollow victory for employers, of course, because what the court gives to them with one hand it takes away with the other by its preservation of the Moscone Act and section 1138.1. However, if the U.S. Supreme Court ultimately overturns the Ralphs decision, the absence of the *Pruneyard* precedent will become meaningful for employers.

Retail companies should also find the narrowing of *Pruneyard* to be significant in preventing other types of demonstrators and solicitors, unrelated to labor causes, from engaging in expressive activities on private store property. The state statutes protected by the court in the *Ralphs* decision have no application outside of the labor arena. These companies should be aware, however, of a risk under the NLRA if they do not fully enforce this right, as the U.S. Supreme Court has held that employers cannot discriminate against union agents with respect to access to private property. *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

It appears that shopping center owners will also find the clarification of *Pruneyard* to be a favorable development in controlling expressive activities by various groups on their private property, and that a revision of "time, place and manner" regulations for such activities will be advisable in light of this decision.

Application to Facilities Other than Retail Stores

As noted above, the *Ralphs* decision salvaged the Moscone Act by relying on several old California decisions permitting labor union picketing on private property, which were found to be "existing law" at the time that statute was enacted. The main rationale underlying those earlier decisions, however, was the notion that retail stores have diluted their private property rights by inviting the general public to patronize their stores. Of course, this rationale would not apply to employers that do not operate retail establishments, such as manufacturing companies.

Thus, it appears that non-retail employers will have a persuasive argument that the right to picket on private property under the Moscone Act is limited to retail stores and does not apply to manufacturing and other non-retail facilities because their property right has not been "worn thin by public usage." The same argument can be made by employers, such as hospitals and other health care institutions, as well as private educational institutions, that invite only certain members of the public onto their premises for a limited purpose, and not the general public.

Injunctive Relief from Picket Line Misconduct

Another potential "silver lining" in the *Ralphs* decision is found in a concurring opinion by the Chief Justice, which was joined by two other members of the court, and also approved by the dissenting justice, thus comprising a majority of the court. This opinion should facilitate obtaining injunctive relief against union interference with a business by picket line misconduct, including the mass picketing and violence that often occurs during a labor dispute.

The Chief Justice's concurring opinion declares that:

- The only legitimate objective of picketing is to transmit information to the public;
- Any interference with the employer's business by other means is legally unprotected;
- The employer can adopt rules to prevent such interference and unions must follow them to the extent required to achieve that objective; and
- A union that fails to do so will be guilty of an "unlawful trespass" and may be excluded by the employer.

This pronouncement, approved by the court's majority, can only be construed as authorizing California trial courts to grant injunctive relief to employers if a union's activity goes beyond peacefully informing the public about a labor dispute. Thus, while the statutory hurdles in Labor Code section 1138.1 remain intact, trial courts now appear to have judicial marching orders from the state's high court to construe that statute in a more reasonable way than in the past and therefore grant the type of relief that was commonly available before it was adopted.

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