N.D.A.G. Letter to Hagen (Oct. 29, 1991)

October 29, 1991

Honorable Craig Hagen
Commissioner of Labor
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

Dear Commissioner Hagen:

Thank you for your August 16, 1991, letter concerning what constitutes lawful picketing under North Dakota statutes. Please excuse the delay in responding.

Your question relates to N.D.C.C. § 34-09-12 which provides:

> 34-09-12. Unlawful picketing - Violation. In any strike in this state it is illegal for any person other than an employee of the particular establishment against which such strike is called or a local resident member of the union representing the employees of such establishment to picket in aid of such strike. Picketing in violation of this section is hereby declared to be unlawful and against the peace and dignity of the state and is subject to restraint by the district court of the county where such picketing occurs.

The above statute makes it lawful for employees of a company to picket that company during a strike. It is also lawful for individuals who are not employees of the company being struck, but who are local resident members of the union that represents employees of that company, to picket during a strike. Under N.D.C.C. § 34-09-12, it is unlawful for any other person to picket in aid of a strike.

Your question is asked in the context of unions that may be associated with the AFL-CIO. The AFL-CIO (American Federation of Labor-Congress of Industrial Organizations) is United States Federation of Labor Unions. Encyclopedia Britannica (1973). As such, it is not itself a union, but is made of member unions. Under N.D.C.C. § 34-09-12, affiliation with the AFL-CIO is not sufficient to allow persons to picket. To picket, persons must be members in the union to which employees of the company being struck belong.

Although N.D.C.C. § 34-09-12 provides that violations of this section are unlawful and against the peace and dignity of the state, North Dakota courts lack jurisdiction to enforce the statute if the action is preempted by the National Labor Relations Act (NLRA). Northern Improvement Co. v. St. Peter, 74 N.W.2d 100, 103 (1955). Federal preemption of state jurisdiction is based on the supremacy clause of the federal constitution. U.S. Const. art. VI.

In labor relations, the United States Supreme Court has ruled state court actions are preempted when the conduct in question is clearly protected or clearly prohibited by section 7 or 8 of the National Labor Relations Act. The court has also ruled that state jurisdiction is preempted when the conduct is even arguably protected or prohibited by those sections. San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244-45 (1959).

To determine whether a state statute is preempted, "[t]he critical inquiry . . . is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been, but was not, presented to the [National Labor Relations] Board." Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180, 197 (1978). If the controversy presented is identical, then state jurisdiction could interfere with federal jurisdiction.

The NLRA allows employees the right to picket. 29 U.S.C. §§ 157, 163. This right, however, is limited by other provisions of the Act. For example, picketing to force recognition of an uncertified union is prohibited. 29 U.S.C. § 158(b)(-7). See also 29 U.S.C. 158(b)(4)(B) (prohibits forcing a secondary employer to recognize an uncertified union); 29 U.S.C. § 158(b)(4)(C) (prohibits forcing any employer to recognize a union in defiance of another union's certification). Courts have found violent or mass picketing to be unlawful under the Act. Any picketing used to accomplish any of the acts declared by the NLRA to be unfair labor practices on the part of a union also violates the Act. See 29 U.S.C. § 158.

The NLRA's protection of the right to picket extends to all employees as defined under the Act. The NLRA states that "employee" includes any employee, and is not limited to employees of a particular employer, unless the Act explicitly states otherwise. 29 U.S.C. § 152(3). This "[t]erm includes members of the working class generally, as well as those in particular employer-employee relationship." Moore Dry Dock Co., 81 NLRB 1108 (1949). This broad definition of employee expresses the conviction "that disputes may arise regardless of whether the disputants stand in the proximate relation of employer and employee . . . ." Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 177, 192 (1941) (quoting H.R. Rep. No. 1147, 74th Cong., 1st Sess., p. 9.) The National Labor Relation Board has held that picketers who were not employed by an employer were employees within the meaning of the Act. Consolidated Coal Co. & Int'l Union, United Mine Workers of America, 266 NLRB 670 (1984) (unemployed individual asked to assist in picketing found to be employee under the Act). Therefore, it is likely that individuals prohibited from picketing under section 34-09-12 would be found to be employees under the NLRA.

Because the controversy presented under the NLRA and N.D.C.C. § 34-09-12 is the same -- what are the picketing rights of individuals without a direct employer-employee relationship -- the NLRA preempts N.D.C.C. § 34-09-12.

N.D.C.C. § 34-09-12's prohibition of picketing by individuals without an immediate

employer-employee relationship with the picketed establishment also raises first amendment concerns. In American Federation of Labor v. Swing, 312 U.S. 321 (1940), the Court addressed the constitutionality of a law very similar to § 34-09-12. Illinois common law made it unlawful for a stranger of an employer to picket, that is, picketing was prohibited if no employee-employer relationship existed. The court held that such a law was violative of first amendment free speech rights. It stated:

> A state cannot exclude working men from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. . . . The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ.

The Supreme Court's decision in Swing provides strong support for the conclusion that N.D.C.C. § 34-09-12 is violative of the first amendment.

In conclusion, N.D.C.C. § 34-09-12's prohibition of picketing by non-employee/local resident union members is preempted by the NLRA and is probably constitutionally infirm. Consequently, picketing is unlawful in North Dakota if its method or purpose is unlawful. Minor, 75 N.W.2d at 150. For example, picketing accompanied by violence or threat of violence would be unlawful, even though a right to picket may exist.

I trust this responds to your question.

Sincerely,

Nicholas J. Spaeth

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