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July 15, 2013

# U.S. Supreme Court Denies Review of Union Trespassing Case in California

**By William Emanuel, Michael Lotito, and Elizabeth Parry**

Labor unions recently won a victory over employers in California when the U.S. Supreme Court denied review of the California Supreme Court's decision in *Ralphs Grocery Co. v. UFCW*. The California court had upheld two state statutes that restrict the availability of injunctions against picketing by labor unions on private property. *Ralphs Grocery Co. v. United Food and Commercial Workers Local 8*, 55 Cal.4th 1083 (2012).

Ralphs and several trade associations urged the U.S. Supreme Court to grant review of the California decision, arguing that (1) the state laws in question are discriminatory because they sanction trespassing on private property by labor unions to engage in expressive activities such as picketing, but not by any other organizations, and (2) the state laws result in a violation of constitutional property rights.

The Supreme Court's denial of review is not a decision on the merits of these arguments. Nevertheless, at least for the foreseeable future, the denial means labor unions—but no other organizations—will have the right to engage in picketing and other expressive activities on an employer's private property.

As a dissent in the *Ralphs* case pointed out, the decision "places California on a collision course with the federal courts." This was a reference to an earlier decision by the U.S. Court of Appeals for the D.C. Circuit holding that one of the California statutes at issue in this case results in unconstitutional content discrimination. *Waremart Foods v. NLRB*, 354 F.3d 870, 872 (D.C. Cir. 2004). While it seems that this conflict between the California high court and the D.C. Circuit must be resolved at some point, the timing of such a resolution is now uncertain.

## The California Anti-Injunction Statutes

One of the statutes at issue in the *Ralphs* 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 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.

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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 from obtaining injunctions in labor disputes.

## Free Speech Precedent in Labor Disputes

The disagreement between the D.C. Circuit and the California Supreme Court 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 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 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 Supreme Court declared that a government cannot discriminate between lawful and unlawful conduct based upon the content of a demonstrator's communication. The Court also held that the government 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 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 the decisions, finding that the California statutes did not restrict anyone's speech, and noting that *Mosely* and *Carey* involved public forums, while the *Ralphs* case involved a private forum.

In addition, the California Supreme Court interpreted the Moscone Act to include a reaffirmation of several older California decisions that permitted labor unions to picket on the private property of retail stores. Those cases permitted 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*, 71 Cal. 2d 872 (1969); *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 25 Cal. 3d 317 (1979).

## Arguments Not Considered

The California Supreme Court's decision in *Ralphs* was 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 doing so would interfere with the free play of economic forces between labor and management under the National Labor Relations Act (NLRA). Under this doctrine, favoring union activity through selective application of state laws, such as a trespass law, is outside the power of the state. *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"). In fact, the U.S. Supreme Court has expressly stated that a state may not withhold the protection of an 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).

## Application to Facilities Other than Retail Stores

As noted above, the *Ralphs* decision upheld the Moscone Act by relying on several older California decisions permitting labor union picketing on the private property of retail stores. The main rationale underlying those decisions, however, was the notion that retail stores had diluted their private property rights by inviting the general public to patronize their stores. This rationale would not apply to employers that do not operate retail establishments, such as manufacturing companies.

Thus, non-retail employers should 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 where property rights have not been "worn thin by public usage." The same argument can be made with slightly less force by other employers, such as hospitals and educational institutions, that invite only certain members of the public onto their premises for a limited purpose, and not the general public.

## Relief from Picket Line Misconduct and Union-Led "Flash Mobs"

A 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 approved by a dissenting justice, thus composing a majority of the Court. The opinion declares that the only legitimate objective of picketing is to transmit information to the public, and any interference with an employer's business by other means is legally unprotected. In addition, the opinion states that an employer can adopt rules to prevent such interference and unions must follow them, and a union that fails to do so will be guilty of an "unlawful trespass" and may be excluded.

The Chief Justice's concurring opinion also emphatically rejects picketing by labor unions inside an employer's premises, explaining that such conduct "would invariably interfere with the business activities being conducted inside and annoy and harass patrons." The Chief Justice stated further that "although labor may conduct its activities at the entrance of the business, it may not enter the business to do so."

These pronouncements should be construed as authorizing California trial courts to grant injunctive relief against union interference with a business by mass picketing and violence during a labor dispute, as well as relief from a recent development in California involving store invasions by union-led "flash mobs." While the injunction hurdles in Labor Code section 1138.1 remain intact, trial courts now have direction from a majority of 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.

In addition, police officers—who usually provide minimal protection against union misconduct, including the recent "flash mob" invasions of retail stores—should be encouraged by the Chief Justice's instructions to provide protection from such unlawful conduct.

## NLRB Precedent on Union Access

It remains to be seen how the National Labor Relations Board will react to the denial of review by the Supreme Court in this case. In the landmark *Lechmere* decision, the Supreme Court held that an employer can lawfully bar union representatives from private property without violating the National Labor Relations Act (absent extraordinary circumstances that seldom exist). *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). The *Lechmere* precedent, however, does not apply in the absence of a private property right.

The NLRB has previously followed the lead of the D.C. Circuit in the *Waremart* decision in finding that California employers did not commit an unfair labor practice by barring unions from private property because state law, properly analyzed under the federal Constitution, did not permit access to such property. *Albertson's, Inc.*, 351 NLRB 254 (2007); *Southern Monterey County Hospital dba George Mee Memorial Hospital*, 348 NLRB 327 (2006). But now the California high court has held that, at least in the case of retail establishments, unions do have a right to such access.

This conflict may prompt the current NLRB to switch to the precedent of the California Supreme Court in *Ralphs* instead of the D.C. Circuit's precedent in *Waremart*. But if that happens, the D.C. Circuit might not acquiesce, given the strong constitutional rationale of its decision. This suggests that the issue decided in *Ralphs* may resurface in a confrontation between the NLRB and the D.C. Circuit—eventually leading to another opportunity for the Supreme Court to review the holding in the *Ralphs* decision. Hopefully for employers, that review would also include the issues of Machinists preemption and constitutional property rights discussed above.

## Narrowing of California's *Pruneyard* Doctrine

The U.S. Supreme Court was not asked to consider a separate part of the *Ralphs* decision that contains another silver lining for some companies, especially retailers. The decision sharply limits California's *Pruneyard* doctrine, which treats certain private shopping center property as a "public forum" open to expressive activities under the state constitution. *Robins v. Pruneyard Shopping Center*, 23 Cal.3d 899 (1979); *Fashion Valley Mall, LLC v. NLRB*, 42 Cal. 4th 850 (2007).

The California Supreme Court ruled in *Ralphs* 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 public forum portion of a shopping center is limited to areas that are designed to permit and encourage the public to congregate and socialize. This limitation on the *Pruneyard* doctrine should also extend to freestanding retail stores, because the rationale for the doctrine was predicated on the special nature of shopping centers.

The narrowing of *Pruneyard* might seem like a hollow victory for employers because what the court gives to them with one hand is taken away by the other through preserving the Moscone Act and section 1138.1. But retail companies should 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.

These companies should be aware, however, of a risk under the NLRA. If they do not fully enforce this right in non-labor contexts, they cannot discriminate against union agents with respect to access to private property. *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). This risk is a good reason not to grant such groups limited access subject to "time, place and manner" regulations.

## Potential for Future Litigation over Union Trespassing

It seems unlikely that the issue of union trespassing on private property in California has been settled by the denial of review in the *Ralphs* case. As noted above, an eventual resolution of the conflict between the state high court and the D.C. Circuit over this issue seems unavoidable, although such a confrontation may be years away because of the slow pace of NLRA litigation. A more timely prospect may be federal court litigation to invalidate the state laws that protect union trespassing under the legal theories discussed above.

William Emanuel is a Shareholder in Littler Mendelson's Los Angeles (Century City) office; Michael Lotito, Co-Chair of Littler's Workplace Policy Institute (WPI), is a Shareholder in the San Francisco office; and Elizabeth Parry is a Special Counsel in Littler's Walnut Creek office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or Mr. Emanuel at wemanuel@littler.com, Mr. Lotito at mlotito@littler.com, or Ms. Parry at mparry@littler.com.