THE GOOD OF THE WHOLE

A RECENT DECISION IN LABOR LAW

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IN his encyclical on the "Reconstruction of the Social Order," our Holy Father, Pope Pius XI, tells us that the aim of social legislation must be the re-establishment of vocational groups. True and genuine social order demands that various members of society be joined together by a common bond. Such a bond is provided on the one hand by the common effort of employers and employees of one and the same group joining forces to produce goods or give service, and, on the other hand, by the common good which all groups should unite to promote, each in its own sphere, with friendly harmony. Now this union will become powerful and efficacious in proportion to the fidelity with which the individuals and the groups strive to discharge their professional duties and to excel in them. Pius XI says, "We are content, therefore, to emphasize this one point: not only is man free to institute these unions which are of a private character, but he has the right to adopt such organization and such rules as may best conduce to the attainment of their respective objects."[1]

In the light of these principles, a recent decision of our Supreme Court should open the eyes of our rugged individualistic American citizens.[2] There was a man in Wisconsin trying to make a living for himself and family as a tile-laying contractor. He took what contracts he could, doing most of the work himself,[3] but occasionally employing his brother or one or two other tile-layers and helpers. Mr. Senn, the contractor, did not belong to the union nor could he join it, for he had not served the three years apprenticeship required for membership; neither were his helpers union men.

The union was endeavoring to make all contractors sign an agree-

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[1] Encycl., *Quadragesimo Anno,* May 15, 1931.

[2] *Senn vs. Tile Layers Protective Union,* 301 US 468; decided May 24, 1937.

[3] "In 1935 he had about 40 jobs, his net income was $1500 of which $750 was attributed to his own labor. The balance, constituting his profit as contractor, was not enough to support him and his family." Justice Butler, at page 484.

ment that they would employ only union men, pay union wages, work union hours; and, besides the ordinary union demands, there was a clause whereby the contractor agreed not to do any tile work himself.[4] Senn was neither a large scale contractor nor a corporation. He said that he would be glad to have the men join the union or employ union men—he would join himself if the rules permitted him—but he could not quit working at his trade and still expect to make a living. There was no argument between Senn and the few men he employed. The union proceeded to picket every job he took,[5] claiming he was unfair to organized labor.

Senn went as far as the Supreme Court with his difficulty, and to quote Mr. Justice Brandeis, the Court said, "The laws of Wisconsin, as declared by its highest court, permit unions to endeavor to induce an employer, when unionizing his shop, to agree to refrain from working in his business with his own hands—so to endeavor although none of his employes is a member of the union. Whether it was wise for the state to permit the unions to do so is a question of its public policy—not our concern. The Fourteenth Amendment does not prohibit it."[6]

II

When the Supreme Court issues a five to four decision there is always a decided difference of opinion in the majority and dissenting views. In this case the deciding opinion written by Mr. Justice Brandeis holds that the end sought by the union is a lawful end. There is a "labor dispute."[7] The union has the right to enhance its oppor-

[4] Article III. It is definitely understood that no individual, member of a partnership or corporation engaged in the Tile Contracting Business shall work with the tools or act as Helpers but that the installation of all materials claimed by the party of the second part or listed under the caption "classified work" in this agreement, shall be done by journeymen members of Tile Laying Protective Union Local No. 5.

[5] Pickets carried signs, "P. Senn Tile Company is unfair to Tile Layers Protective Union," or, "Let the Union tile layers install your tile work." Originally the union had followed Senn from his home by automobile to locate his contracts and also had written local architects and building contractors stating Senn was operating a non-union shop and threatening to picket them if he was patronized. Before trial the union agreed to desist auto-trailing and further letters.

[6] Justice Brandeis, at page 481, concurred in by Chief Justice Hughes, and Justices Stone, Roberts and Cardozo.

[7] "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the proximate relation of employer and employee." Wisc. Stat. Sec. 103, 62.

tunity to acquire work for itself and for those whom it represents. To quote Justice Brandeis, "The union acted, and had the right to act as they did, to protect the interests of their members against the harmful effects upon them of Senn's action." This opinion states that there was no malice in the union's act, no desire to injure Senn, no effort to induce him to do an unlawful thing. The sole purpose of the picketing was to acquaint the public with the facts and, by gaining its support, to induce Senn to unionize his shop.

Mr. Justice Butler, writing the views of the dissenting members of the bench, says the union's object is an unlawful one. "Admittedly, it is to compel plaintiff (Senn) to quit work as a helper or tile layer. Their purpose is not to establish on his job better wages, hours, or conditions. If permitted, plaintiff would employ union men and adhere to union requirements as to pay and hours. But, solely because he works, the union refuses to allow him to unionize and carry on his business. By picketing, the unions would prevent him working on jobs he obtained from others and so destroy that business. Then, by enforcement of their rules they would prevent him from working as a journeyman for employers approved by the union, or upon any job employing union men. Adhering to the thought that there is not enough work to go around, unquestionably the union's purpose is to eliminate him from all tile laying work."[8]

A secondary purpose seems to resolve itself into a question of competition and publicity, the majority opinion holding that, "There is nothing in the Federal Constitution which forbids unions from competing with non-union concerns for customers by means of picketing as freely as one merchant competes with another by means of advertisements in the press, by circulars, or by his window display. Each member of the unions, as well as Senn, has the right to strive to earn his living. Senn seeks to do so through his individual skill and planning. The union through combination. Earning a living is dependent upon securing work; and securing work is dependent upon public favor. To win the patronage of the public each may strive by legal means."

The dissenting justices write on this point, "The principles governing competition between rival individuals seeking contracts or opportunity to work as journeymen cannot reasonably be applied in this case. . . . The contest is not between unionized and other contractors or between one employer and another. The immediate issue is

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[8] Justice Butler, at pages 489-490, concurred in by Justices Van Devanter, McReynolds and Sutherland.

between the unions and plaintiff in respect to his right to work in the performance of his own jobs."

When the Court considers the means used to accomplish the end, both opinions are agreed that peaceful picketing is legal where there is a lawful purpose to be attained. Conforming with its view as to the end, the controlling opinion declares the union had the right to acquaint the public with the facts. The minority opinion holds the signs to be misrepresentations with no foundation in fact but implying something or inequitable in Senn's attitude toward the union.

III

The historical jurist will take this situation and explain how contracts originated; how man in the earliest periods of history was not free, as an individual, to make his own contracts; how all transactions were carried on in the name of the tribe or family by the head of it. The individual had only a status. Then came the emancipation from the tribe. The individual secured his freedom to contract and to live a life free from the domination of the status concept. The first stage returned when men were forced to follow in the footsteps and trade of their fathers; then came another period of freedom when the opening of the new world gave men an opportunity to go westward and be what they desired. Today the trend is back to status: the contractor is a contractor, the tile layer is a tile layer.

The sociological jurist will say that this situation marks another step in the advance of social demands. Senn's right to work is dependent upon the social needs of the community as a whole. The members of the union have an interest in every tile laying job and they have a right to use lawful means to protect that interest. The fact that Senn loses his job or is annoyed is incidental to the greater social need.

There is much to be said on both sides of this question, but the decision itself tends to call to one's mind how different our economic structure is today from that obtaining some years ago. The basis of the majority opinion rests upon the condition of the union. The organization had lost almost two-thirds of its enrollment in seven years, a decline from 112 to 41 members. About half of the tile contractors are not unionized, and sixty percent of the tile layers are non-union men. The building trades within their jurisdiction have been depressed. Under such conditions the union adopted a means which was not arbitrary or capricious, but "a reasonable rule 'adopted by the defendants (unions) out of the necessities of em-

ployment within the industry and for the protection of themselves as workers and craftsmen in the industry.' That finding is amply supported by the evidence."[9]

There are two aspects to the demand of the union that the contractor cease laying tile on his own job: whether it is taking away his right to work, or whether it is simply depriving him of the privilege of being a tile layer.

Any school of philosophy will concede that man has not only a right to work but also an obligation to provide a living for himself and family. In this particular case, to quote the majority opinion, "The unions concede that Senn, so long as he conducts a *non-union shop,* has the right to work with his hands and tools . . . . There is no basis for a suggestion that the union's request that Senn refrain from working with his own hands, or their employment of picketing and publicity, was malicious; or that there was a desire to injure Senn." [10]

There is little said in this decision on the second point, his right to be a tile layer. There are practically no vocations in this country today into which a man may enter without complying with some standard, whether that norm be set by government regulations or by the trade itself. Lawyers and doctors must meet standards of education, ability and character; and the professional trades add periods of training and technical proficiency. Today one cannot be even a peddler or junk-dealer without meeting the standards demanded for a license.

Trade unions and guilds have long been recognized as possessing the power of setting the standard in their line of work. To be a tile layer one must have served three years apprenticeship. This standard was not met by Senn; consequently, the professional pride of the tile layers was being injured and fellowcraftsmen, who had spent years as apprentices at low wages, were being deprived of work in their own craft. There is no intimation that Senn's years of experience did not entitle his work to equal merit with that of the union men, but until he had complied with the craft's norm, he was defeating one of the ends of the union.[11]

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[9] Justice Brandeis, at page 480, citing State Court opinion.

[10] Italics ours.

[11] "The object of this union is to encourage a higher standard of skill, to cultivate feelings of friendship among the men of our craft, to assist each other to procure employment, to reduce the hours of daily labor, to secure adequate pay for our work, and by legal and proper means, to elevate the legal, moral, intellectual, and social conditions of our members." Article III of the union's constitution.

Actually, the union is offering a choice of four things to the man who is claiming a share of the craft's work: he may become a member of the craft by measuring up to the standards; he may continue practicing the trade and fight the legal tactics employed against him; he may continue as a unionized *contractor,* not a tile layer; or he may go into some other line of work. In other words he can not be a tile layer and a contractor at the same time.

Thus we see the Court holding the end, the welfare of the union members, to be a lawful end; the means, picketing and the contract, to be legal means; and the fact that Senn is annoyed by the means and forced out of the craft, unless he complies with the standards, to be no denial of his liberty under our Constitution.

IV

While this particular case seems to be based ultimately on the fact that the contractor is a non-union man, the agreement offered him by the union does not appear to be limited only to non-union contractors. What the situation and result would have been had Senn been a union tile layer presents another problem. It may have indicated a step away from a unified craft or guild system and a deprivation of the right of a qualified to work in his own craft. To have denied him this privilege, without reasonable excuse on the part of the union, would mean the recognition of monopolistic tendencies in the craft itself.

The possibility that a union craftsman may operate as a contractor and employ a reasonable number of fellow craftsmen does not seem out of harmony with either the theory of unions or of democratic ideals of our country. What this reasonable number of fellow craftsmen may be before a contractor should cease working as a craftsman and become a contractor in the strict sense, could be determined by the facts in each particular locality, such as the conditions of the trade itself and the profits to be made in the capacity of a contractor. Yet the decision upholding the union demand in this case does not seem to favor such a possibility.

In the light of this tendency to draw a line between the journeyman and master, or employee and employer, it is interesting to quote Louis B. Wehle, "A study of American business leaders by Professor F. W. Taussig and an associate shows that the fathers of over 10% of a widely selected group of *chief executives* were laborers; although it is also shown that these percentages are now shrink-

ing and that the area of shrinkage is being largely occupied by sons of business men." [12]

As a matter of factual information, Mr. Senn left the tile laying and contracting business after this decision. He is endeavoring now to make a living for himself and family in another line of work.

V.

The decision is of particular interest inasmuch as it brings to mind the strong contrast of opinion in interpreting the purposes of union action. It shows a growing tendency toward the old system of keeping a man in one line of work. Whether such a procedure will stifle American ambition remains to be seen. It opens a wide field for thought, and gives one an opportunity to speculate on the future economic and social conditions of a country which no longer has a frontier of rugged individualism.

[12] Louis B. Wehle, in "Labor Laws of the United States of America" *American Bar Association Journal,* XXIII (Oct. 1937) 764 and 765. This is a report to the Second International Congress of Comparative Law at the Hague.