

# SECONDARY BOYCOTTS IN LABOR DISPUTES\*

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AMERICAN legislation and judicial decision for the past fifty years disclose a gradual trend toward the recognition of the wisdom and necessity of unionizing American workers and of fixing wages, hours and working conditions through collective agreements.<sup>1</sup> Typical of this development are the Wagner Labor Relations Act and the state labor relations acts which are based upon the philosophy of the need for unionization.<sup>2</sup> The implications of this philosophy require a revision by the courts of a nineteenth century hostility toward the activities of labor unions essential to the organization of American workers.<sup>3</sup> Presenting forcefully the collision of the point of view expressed in current legislation and modern judicial thought with outmoded judicial attitudes in the field of labor law is the treatment by the courts of the so-called secondary boycott in labor disputes. The entire question has been raised by the recent decision of the New York Court of Appeals in *Goldfinger v. Feintuch*.<sup>4</sup>

The word "boycott" is "a term of vague signification, of which no accurate and exhaustive definition has ever been given."<sup>5</sup> "Secondary boycott" is an equally loose and uncertain label used by courts indis-

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1. See Magruder, *A Half Century of Legal Influence Upon the Development of Collective Bargaining* (1937) 50 HARV. L. REV. 1071; WITT, SUPPLEMENT TO LANDIS, CASES ON LABOR LAW (1937) cc. 2, 3.

2. See preambles to the Wagner Act, 49 STAT. 449 (1935), 29 U. S. C. 151 (1936) and the state statutes cited in note 70, *infra*. See also *State Labor Relations Acts* (1938) 6 I. J. A. BULL. 7.

3. See Sayre, *Labor and the Courts* (1930) 39 YALE L. J. 682; BERMAN, LABOR AND THE SHERMAN ACT (1930); WITTE, THE GOVERNMENT IN LABOR DISPUTES (1932) *passim*.

4. New York Ct. of App., Dec. 7, 1937. 98 N. Y. L. J., Dec. 24, 1937, p. 2341, col. 1.

5. Hough, J., in *Gill Engraving Co. v. Doerr*, 214 Fed. 111, 118 (S. D. N. Y. 1914). "The most casual observation will disclose that scarcely any two courts treating of the subject formulate the same definition." *Lindsay & Co. v. Montana Federation of Labor*, 37 Mont. 264, 96 Pac. 127 (1908). Numerous definitions of "boycott" are collected in OAKES, ORGANIZED LABOR AND INDUSTRIAL CONFLICTS (1927) 602 *et seq.*; see FRANKFURTER & GREENE, THE LABOR INJUNCTION (1930) 42 *et seq.*

criminally to condemn a wide variety of labor's activities.<sup>6</sup> It is particularly important in the field of labor law, charged as it is with prejudice and economic bias, that such loose terminology be abandoned and that the activities coming before the courts in the so-called secondary boycott cases be carefully analyzed.<sup>7</sup>

Our starting point is either: (1) a dispute between an employer and workers in a plant or their union demanding higher wages, shorter hours, or better working conditions, or (2) a dispute between an employer and a union seeking to organize his plant. Negotiations are undertaken, but the employer refuses to grant the employees' or the union's demands. The workers or the union turn to their own devices to bring pressure upon the employer in order to force him to grant their demands. Aside from resort to the administrative agencies set up by the federal and state governments to protect and enforce labor's rights,<sup>8</sup> labor's principal means of forcing employers to grant demands are to deprive employers of workers and to prevent employers from selling or receiving goods, materials or services. To achieve these results workers and unions employ three principal devices: (1) the strike, (2) picketing, (3) unfair lists and circulars.<sup>9</sup>

Although the formation of a union and a strike to secure higher wages were condemned as illegal conspiracies at the opening of the nineteenth century, the economic changes which transformed this nation from one of farmers, artisans and merchants into a great industrial country, with millions of unskilled and semi-skilled workers employed by large and powerful corporations, have brought in their wake legislative and judicial

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6. OAKES, *op. cit. supra* note 5, at 654 *et seq.*; LANDIS, CASES ON LABOR LAW (1934) 408 n.; COMMONS AND ANDREWS, PRINCIPLES OF LABOR LEGISLATION (3d ed. 1927) 107-108. Thus, in *Goldfinger v. Feintuch* [see text p. 351 *infra*], Judge Lehman, who concurred in holding the picketing involved in the suit lawful, declared it "is not a 'secondary boycott'"; Judge Rippey concurred in the result only because there was a finding of "unity of interest" of the parties, without which "the facts would establish a secondary boycott and would be illegal"; and Judge Hubbs dissented because he found "a secondary boycott and I think it is illegal." See also *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 475 *et seq.* (1921).

7. For studies of the law of "boycott" generally, see Wigmore, *Boycott and Kindred Practices As Ground for Damages* (1887) 21 AM. L. REV. 509; Reed, *Peaceable Boycotting* (1894) 5 AM. AC. POL. & SOC. SCI. 28; Cooke, *Solidarity of Interest as Basis of Legality of Boycotting* (1902) 11 YALE L. J. 153; Wyman, *The Law as to the Boycott* (1903) 15 GREEN BAG 208; McWilliams, *Evolution of the Law Relating to Boycotts* (1907) 41 AM. L. REV. 336; LAIDLER, *BOYCOTTS AND THE LABOR STRUGGLE* (1913); Feinberg, *New York Law of Secondary Boycott* (1936) 6 BROOKLYN L. REV. 209; *Legality of Picketing Against a Product* (1936) 14 N. Y. U. L. Q. REV. 83; WOLMAN, *THE BOYCOTT IN AMERICAN TRADE UNIONS* (1916).

8. See WITT, *op. cit. supra* note 1, at c. 2.

9. Although public meetings, parades, demonstrations, radio broadcasts and other forms of appeal are employed, the three devices mentioned are the principal pressures employed by labor.

sanction of the privilege of organizing unions and of the strike.<sup>10</sup> It is lawful in every state to strike against an employer to secure higher wages, shorter hours, and better working conditions.<sup>11</sup> With the march of economic and social events, our courts have come to recognize the importance to the nation's welfare of union organization. They have generally sanctioned strikes to secure union recognition,<sup>12</sup> and a number of courts in leading industrial states have legalized the strike for a closed shop.<sup>13</sup>

The history of judicial approval of picketing an employer against whom the employees have a grievance, whether to induce other persons not to work for the employer or to induce consumers not to trade with the employer, has paralleled that of the strike, but the development of the legality of picketing has been somewhat arrested in the courts.<sup>14</sup> If the purpose is to secure higher wages, better conditions, unionization of the plant or in some states, the closed shop, most courts hold the picketing legal so long as it is carried on in a peaceable manner, without fraud or violence or undue obstruction.<sup>15</sup>

If the strike or unionization campaign is permitted by the laws of the state, workers may bring pressure upon the employer by resorting to persuasion and advertisement of their grievances through devices other than picketing, such as meetings, parades, distribution of leaflets, and similar devices.<sup>16</sup> The Supreme Court of the United States has recently intimated its sympathy for the view which is gradually being recognized, that peaceable picketing is a form of persuasion which comes within the guaranty of the constitutional right of freedom of speech.<sup>17</sup>

10. COMMONS AND ANDREWS, *op. cit. supra* note 6, at 106 *et seq.*; Sayre, *Criminal Conspiracy* (1922) 35 HARV. L. REV. 393.

11. COMMONS AND ANDREWS, *op. cit. supra* note 6, at 115; WITTE, *op. cit. supra* note 3, at 20.

12. In some states picketing is unlawful in the absence of a strike; such decisions forbid picketing to unionize a plant unless some employees have gone out on strike. *Feller v. Local 144, Int'l Ladies Garment Workers Union*, 121 N. J. Eq. 452, 191 Atl. 111 (1936); see cases collected in LANDIS, *op. cit. supra* note 6, at 244 n. However, the tendency of the courts is to permit such picketing. *Music Hall Theatre v. Moving Picture M. O.*, 249 Ky. 639, 61 S. W. (2d) 283 (1933); *Exchange Bakery & Restaurant, Inc. v. Rifkin*, 245 N. Y. 260, 157 N. E. 130 (1927).

13. *National Protective Association v. Cumming*, 170 N. Y. 315, 63 N. E. 369 (1902); *Kemp v. Division No. 241*, 255 Ill. 213, 99 N. E. 389 (1912); see LANDIS, *op. cit. supra* note 6, 310 n., 327 n. A recent summary of cases holding a strike for a closed shop illegal is to be found in *Keith Theatre, Inc. v. Vachon*, 134 Me. 392, 187 Atl. 692 (1936).

14. See Hellerstein, *Picketing Legislation and the Courts* (1932) 10 No. CAR. L. REV. 158.

15. WITTE, *op. cit. supra* note 3, at 31.

16. See note 57, *infra*.

17. *Senn v. Tile Layers Protective Union*, 301 U. S. 468 (1937), commented on in *State Anti-Injunction Law Sustained by Supreme Court* (1937) 6 I. J. A. BULL. 1.

So far, then, the courts have generally gone in cases where the controversy before the court is confined to the employer and his employees or a union seeking to organize the employees. Upon this background of judicial decision, we come to a consideration of our present problems, raised by the extension of the strike, picketing, unfair lists and other forms of persuasion to persons other than the immediate employer.

### STRIKES

Where workers in a plant have gone out on strike and pickets have been posted at the factory gates, or an organizing campaign to unionize a non-union shop is in progress, in some industries the union is able to call upon its members or unions in allied crafts either to strike against employers who use the materials produced by the "unfair" employer, or to refuse to work on jobs in which the "unfair" employer participates, or to work for employers who deal with the "unfair" employer.<sup>18</sup> The carpenters union, for example, has fought non-union manufacturers of wood trim and other wood products for over thirty years, through strikes against building owners and contractors who use the non-union materials.<sup>19</sup> Unionization of the manufacturer's wood-workers was deemed imperative to the existence of the carpenters union since those workers later displaced union men in the building trades, and as a result this competition threatened wage standards in the building trades.

Strikes against intermediate employers to compel the unfair employer to deal with the union have arisen in three general type-situations.

*Non-union Materials in the Same or Related Crafts.* A number of courts have refused to permit the union or workers in the same or related crafts to protect the standards of their organizations by striking against "unfair" materials.<sup>20</sup> Most of the cases so holding, however, except in

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18. For purposes of this article the term "unfair employer" is used to refer to an employer whose employees are on strike or who operates a non-union plant which a union is attempting to organize. The goods produced or the services rendered by such a manufacturer are designated "unfair". The use of these terms is not intended to categorize the employer, the goods or the services, but merely to identify them with brevity.

19. See cases cited in OAKES, *op. cit. supra* note 5, at 673-682.

20. Anderson & Lind Mfg. Co. v. Carpenters District Council, 308 Ill. 488, 139 N. E. 887 (1922); Means Slayton Lumber Co. v. United Brotherhood Carpenters, 156 Ill. App. 327 (1910); Steam Lumber Co. v. Howlett, 260 Mass. 45, 157 N. E. 82 (1927); Armstrong Cork Insulation Co. v. Walsh, 177 N. E. 2 (Mass. 1931); Service Wood Heel Co. v. Mackesy, 199 N. E. 400 (Mass. 1936); Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 114 S. W. 997 (1908); Booth & Bros. v. Burgess, 72 N. J. Eq. 181, 65 Atl. 226 (1906); Moores v. Bricklayers' Union, 10 Ohio Dec. 645 (1889); Purvis v. Local No. 500, United Brotherhood of Carpenters & Joiners, 214 Pa. St. 348, 63 Atl. 585 (1906); Pacific Typesetting Co. v. Int'l Typographical Union, 125 Wash. 273, 216 Pac. 358 (1923); Huttig v. Fuelle, 143 Fed. 363 (1906); Shine v. Fox Bros.

Massachusetts, are rather old, and might not be followed today. These courts concluded that the strike against the purchaser-employer was not a strike against the non-union materials, but rather a strike against a neutral by third parties only remotely concerned with the original controversy. But the "neutral" seldom complained in court, and the courts permitted the initial employer to avail himself of the injury to the purchaser of his materials. The decisions talk in terms of interference with the "freedom of action" and "right of trade" of the unfair employer,<sup>21</sup> as well as alleged "coercion" and "intimidation" of the purchaser, terms used opprobriously to describe the union's notice to the purchaser that it will not work on non-union materials.<sup>22</sup>

Other courts, however, have seen fit to classify this type of pressure against the intermediate employer as legal.<sup>23</sup> These courts have appre-

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Mfg. Co., 156 Fed. 357 (1907); *cf.* U. S. v. Raish, 163 Fed. 911 (1908). Irving v. Joint District Council, 180 Fed. 896 (C. C. S. D. N. Y. 1910) and Irving v. Neal, 209 Fed. 471 (S. D. N. Y. 1913) applying the New York law, are overruled by Bossert v. Dhuy, 221 N. Y. 342, 117 N. E. 582 (1917).

A number of the cases holding strikes against non-union materials illegal were decided under the Sherman Anti-Trust Act. Duplex Printing Co. v. Deering, 254 U. S. 444 (1921); Bedford Cut Stone Co. v. Journeymen Stone Association, 274 U. S. 37 (1927); Decorative Stone Co. v. Building Trade Council, 18 F. (2d) 333 (S. D. N. Y. 1927), 23 F. (2d) 426 (C. C. A. 2d, 1928), and 60 F. (2d) 247 (C. C. A. 2d, 1932); Columbus Heating and Ventilating Co. v. Pittsburgh Bed Trades Council, 17 F. (2d) 806 (W. D. Pa. 1927); Roe Kwodd Corp. v. Bricklayers' Local Union, 33 F. (2d) 225 (C. C. A. 8th, 1929); Aeolian Co. v. Fischer, 40 F. (2d) 189 (C. C. A. 2d, 1930); Int'l Brotherhood Electrical Workers Local No. 134 v. Western Union, 6 F. (2d) 444 (C. C. A. 7th, 1927), *aff'd*, 46 F. (2d) 736 (C. C. A. 7th, 1931). BERMAN, *op. cit. supra* note 3, contains an exhaustive study of labor cases arising under the Sherman Act.

21. Patterson & Co. v. Building Trades Council, 11 Pa. Dist. 500 (1902); Lohse Patent Door Co. v. Fuelle, 215 Mo. 421, 114 S. W. 997 (1908); Booth & Bros. v. Burgess, 72 N. J. Eq. 181, 65 Atl. 226 (1906).

22. Where a strike is effective enough to stop a manufacturer's operations, he will often attempt to transfer his work to another manufacturer in order to carry on his business. The latter's employees, who may be in the same union as the worker on strike, refuse to aid in breaking the strike at the other plant and to act as "scabs" to their own union. Although an injunction against refusal to work on such goods in effect requires members of a union to break the strike of their fellow union members, some courts have granted injunctions in such cases. Piano & Organ Workers v. Piano Co., 128 Ill. App. 353 (1906); Schlang v. Ladies Waist Makers Union, 67 Misc. 221, 124 N. Y. Supp. 289 (Sup. Ct. 1910); Barnes v. Chicago Typographical Union, 232 Ill. 424, 83 N. E. 940 (1908). Other courts recognized that to restrain such a strike is to force workers to become strike breakers, taking over the jobs of members of their own union or occupation. Iron Molders Union v. Allis Chalmers Co., 166 Fed. 45 (C. C. A. 7th, 1908); Searle Mfg. Co. v. Terry, 56 Misc. 265, 106 N. Y. Supp. 438 (Sup. Ct. 1905).

23. Meier v. Spear, 96 Ark. 618, 132 S. W. 988 (1910); Parkinson v. Bldg. Trades Council, 154 Calif. 581, 98 Pac. 1027 (1908); Bossert v. Dhuy, 221 N. Y. 342, 117 N. E. 582 (1917); Willson & Adams v. Pearce, 264 N. Y. 521, 191 N. E. 545 (1934); State

ciated the fact that the close intertwinings of economic relations in modern industry have created an intimate unity of interest between members of the same union or of different unions in the same or related crafts which was unknown to the small, self-contained units of an earlier economy. Mr. Justice Brandeis stated the proposition in his dissenting opinion in *Bedford Cut Stone Company v. Journeymen Stone Cutters Association*:

"Members of the Journeymen Stone Cutters' Association could not work anywhere on stone which had been cut at the quarries by 'men working in opposition' to it without aiding and abetting the enemy. Observance by each member of the provision of their constitution which forbids such action was essential to his own self protection."<sup>24</sup>

*Strikes Against Intermediate Employer Because of the Presence of Non-union Contractor on the Job.* In an industrial union, such as the United Mine Workers of America, composed of all workers in the industry regardless of craft, it is not uncommon for the entire membership of the union employed on the job to strike because one specific craft has a grievance with the employer. In this situation the right to strike is not even questioned. But when the industry is divided into labor groups on a craft basis, as in the building trades, intercraft cooperation encounters the symbol of the "sympathetic strike", from which many courts have recoiled. The painters, for example, may have a grievance against their subcontractor. Bricklayers and other craftsmen employed on the same building strike against the general contractor and the owner to induce them to bring pressure upon the subcontractor-master-painter to settle the dispute. The division of workers into craft unions should not obscure the direct interest which each craft has in the unionization of other employees, working by its side on the same job. A practice permitted in an industrial union should not be condemned simply because of a different form of union organization of the employees.<sup>25</sup> A majority of the courts faced with this problem have permitted such strikes.<sup>26</sup>

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v. Van Pelt, 136 N. C. 633, 49 S. E. 177 (1904); Gill Engraving Co. v. Doerr, 214 Fed. 111 (S. D. N. Y. 1914); National Fireproofing Co. v. Mason Builders' Ass'n, 169 Fed. 259 (C. C. A. 2d, 1909); Aeolian Co. v. Fischer, 27 F. (2d) 560 (1928), *aff'd*, 29 F. (2d) 679 (C. C. A. 2d, 1928), but after hearing final injunction ordered in 40 F. (2d) 189 (C. C. A. 2d, 1930).

24. 274 U. S. 37, at 64-65 (1927).

25. *Cf.* In Matter of Allis-Chalmers Manufacturing Company, National Labor Relations Board, November 22, 1937.

26. Grant Constr. Co. v. St. Paul Bldg. Trades Council, 136 Minn. 167, 161 N. W. 520 (1917); Cohn & Roth Electric Co. v. Bricklayers, etc., Local, 92 Conn. 161, 101 Atl. 659 (1917); Jetton-Delke Lumber Co. v. Mather, 53 Fla. 969, 43 So. 590 (1907); Meier v. Speer, 96 Ark. 618, 132 S. W. 988 (1910); Seymour Ruff & Sons, Inc. v. Brick-

The degree of alliance between unions in different crafts necessary to justify cooperation in aid of a specific craft has not been authoritatively spelled out in those jurisdictions sanctioning intercraft cooperation. Undoubtedly, with due recognition of the inter-relationships and increasing inter-dependence of the units in a highly industrialized economy, there is a growing tendency to broaden the conception of the interest sufficient to justify collective action by labor unions. The New York courts have been in the vanguard in permitting increasingly expansive cooperative activity. In *Willson & Adams Co. v. Pearce*,<sup>27</sup> building trades unions joined with teamsters unions in refusing to work on materials transported to the job by non-union teamsters. In sanctioning the strikes of the building trades unions the court found loading in the supply yard and unloading at the point where the building was being constructed must be held to be "a necessary part of the construction"<sup>28</sup> work. Dock workers on the piers of New York City, organized in craft unions of longshoremen, checkers, weighers, clerks and others, and federated in the Transportation Trades Council, have from time to time united to aid the truck drivers' and teamsters' unions by refusing to handle goods delivered to the piers by non-union truckmen. In 1935, the Court of Appeals upheld the refusal to handle goods delivered by non-union trucks as far as New York law was concerned, and referred the case to the United States Shipping Board to determine whether any Federal statute had been violated.<sup>29</sup>

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layers, etc., Union, 163 Md. 587, 164 Atl. 752 (1933); *Levering & Garrigues Co. v. Morrin*, 71 F. (2d) 284 (C. C. A. 2d, 1934) (involving Norris-LaGuardia Act).

Other courts have held strikes because of the presence of a non-union contractor on the job illegal. *Blandford v. Duthie*, 147 Md. 388, 128 Atl. 138 (1925); *Lehigh Structural Steel Co. v. Atlantic Smelting & Refining Works*, 92 N. J. Eq. 131, 111 Atl. 376 (1920); *Snow Iron Works v. Chadwick*, 227 Mass. 382, 116 N. E. 801 (1917); *Central Metal Products v. O'Brien*, 278 Fed. 827 (N. D. Ohio 1922); cf. *McFarland Co. v. O'Brien*, 6 F. (2d) 1016 (D. C. N. D. Ohio, 1925); *R. R. Kitchen & Co. v. Local Union*, 91 W. Va. 65, 112 S. E. 198 (1922). Many of these cases turn on inducing breach of contract.

27. 240 App. Div. 718, 265 N. Y. Supp. 624 (2d Dep't 1933), *aff'd*, 264 N. Y. 521, 191 N. E. 545 (1934).

28. 240 App. Div., at 719, 265 N. Y. Supp. at 625.

29. *New York Lumber Trade Ass'n v. Lacey*, 269 N. Y. 595, 199 N. E. 683 (1935), *cert. denied*, 298 U. S. 684 (1936). Previously two Appellate Division decisions [*Reardon v. Caton*, 189 App. Div. 501, 178 N. Y. Supp. 713 (2d Dep't 1919) and *Reardon v. International Mercantile*, 189 App. Div. 515, 178 N. Y. Supp. 722 (2d Dep't 1919)] relied on *Bossert v. Dhuy* [221 N. Y. 342, 117 N. E. 582 (1917)] to sustain the refusal to handle goods delivered by non-union trucks. In the following year, such a boycott was enjoined in another Appellate Division decision as a violation of the United States Shipping Act and the common law obligation of a carrier to serve the public without discrimination. *Burgess Bros. v. Stewart*, 112 Misc. 347, 184 N. Y. Supp. 199 (Sup. Ct. 1920), *aff'd*, 194 App. Div. 913, 185 N. Y. Supp. 85 (2d Dep't 1920). In *Buyer v. Guillan*, 271 Fed. 65 (C. C. A. 2d, 1921), arising out of the same activities, an injunction was issued on the basis of a violation of the Sherman Act.

*Strikes Against Intermediate Employer By Workers in Unrelated Crafts.* The outside limit of inter-union cooperation permitted by the New York Courts is indicated by *Auburn Draying Co. v. Wardell*.<sup>30</sup> After the Auburn Draying Company of Auburn, New York, had refused to accept the closed shop, the Teamster's Union placed it on the "unfair" list of the city's Central Labor Union. The Central Labor Union adopted an aggressive policy of inducing the Draying Company's customers to withdraw their patronage by threatening strikes of union employees and loss of patronage. The customers included such diverse groups as meat packers, butchers, bakers, ice dealers, lumber dealers, contractors, and plumbers. The Court of Appeals condemned the broad scope of the union's actions:

" . . . the contest did not arise because members of Union No. 679, or members of the same occupation and of other unions, chose not to work for the plaintiff or for or with men who did engage in business with it, or sought to persuade, in an orderly and proper manner, persons, generally, to abstain from business with it . . . It arose because the defendants, constituting the entire union population of the City of Auburn, inaugurated and carried on, affirmatively and aggressively, through the agencies of fear and coercion, a comprehensive exclusion of the plaintiff from the business of the community, in order to compel it to unionize its business."<sup>31</sup>

Subsequent decisions, sanctioning dockworkers and building trade unions' cooperation in aid of teamsters, have regarded transportation workers as a part of the industries they serve.<sup>32</sup> Whatever vitality the *Auburn* decision retains, rests not upon any industrial distinction between transportation workers and those receiving their products, but upon the comprehensiveness of the exclusion in that case. The decision stands as a warning that a united front of various labor unions will not be tolerated unless there is a nexus between the unions; and the advantage to all unions of strong, well organized unions in other industries is an insufficient link. A more immediate connection, such as direct dealings with employees of the unfair manufacturer or contractor, or the use

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The Interstate Commerce Act and the Sherman Act were both employed as the basis of injunctions in the Pullman Strike of 1893 to restrain members of the American Railway Union from striking against railroads which used Pullman cars. *Thomas v. Cinn., etc., Ry. Co.*, 62 Fed. 803 (C. C. S. D. Ohio 1894); *In re Debs*, 158 U. S. 564 (1895); *cf. Chicago, B. & Q. Ry. Co. v. Burlington, C. R. & N. Ry. Co.*, 34 Fed. 481 (C. C. S. D. Iowa 1888). Under the Sherman Act the Supreme Court sharply restricted interstate cooperation even among members of the same union. See *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n*, 274 U. S. 37 (1927); *Duplex Printing Press Co. v. Deering*, 254 U. S. 443 (1921).

30. 227 N. Y. 1, 124 N. E. 97 (1919).

31. *Id.*, at 11, 124 N. E. at 100.

32. *Willson and Adams v. Pearce*, 240 App. Div. 718, 265 N. Y. Supp. 624 (2d Dep't 1933); *N. Y. Lumber Trade Ass'n v. Lacey*, 227 N. Y. 1, 124 N. E. 97 (1919).



on the job of the products of the unfair employer, which makes workers in different occupations involuntary allies of the unfair employer in fighting the strikers or the union, warrants the strike of the employees of the intermediate employer.

#### PICKETING UNFAIR EMPLOYER'S CUSTOMERS OR SUPPLIERS

We now turn to the use of picketing to induce persons not to buy or use the products or services of an employer with whom workers or a union are engaged in a labor dispute, or to induce persons not to supply goods or services to such an employer.

Only four cases of picketing a distributor of the "unfair" manufacturer's products have been found in the reported cases outside of New York.<sup>33</sup> These cases condemn such picketing, but they are rather old and two of them were decided by *nisi prius* courts. In view of the rapid changes which labor law is undergoing, they may be misleading in reflecting the particular jurisdiction's views today. All the relatively recent decisions come from New York where the courts have been much more hospitable to picketing. Most of the lower New York decisions have turned on variations in the scope of the picket's appeal to the public; if the banners are considered to be directed merely against the unfair product, the picketing will be permitted, but if the retailer himself is called "unfair," and the public is asked not to patronize him, the courts generally have enjoined the picketing.

*Pickets Carrying Banners Asking Consumers Not to Buy Unfair Products or Use Unfair Services.* In this group of cases the pickets' banners request potential purchasers not to buy the products of the offending employer; no mention is made of the retailer. The union is merely following the employer's goods to the place of sale and is there appealing to consumers not to buy the products of the "unfair" employer. The New York courts have consistently held this type of picketing lawful.<sup>34</sup>

33. Meyer Packing Co. v. Butchers' Union, 18 Ohio N. P. (N.S.) 457 (1917); Brace Bros. v. Evans, 5 Pa. Co. 163 (1888); Fink & Son v. Butchers Union No. 422, 84 N. J. Eq. 638, 95 Atl. 182 (1915); Parker Paint & Wall Paper Co. v. Local Union No. 813, 87 W. Va. 631, 105 S. E. 911 (1921).

34. Public Baking Co. v. Stern, 127 Misc. 229, 215 N. Y. Supp. 537 (Sup. Ct. 1926), *aff'd*, 216 App. Div. 831, 215 N. Y. Supp. 908 (1st Dep't 1926); Engelmeyer v. Simon, 148 Misc. 621, 265 N. Y. Supp. 636 (Sup. Ct. 1933); Pechter Baking Co., Inc. v. Raimist, N. Y. L. J. June 29, 1927; Kronowitz v. Schlansky, 92 N. Y. L. J., July 13, 1934; Abbott Bread Co., Inc. v. Schlansky, 92 N. Y. L. J., Aug. 28, 1934; Harry's Foods, Inc. v. Schlansky, 92 N. Y. L. J., Nov. 8, 1934. But see Seubert v. Reiff, 98 Misc. 402, 164 N. Y. Supp. 522 (Sup. Ct. 1917).

There is another group of cases involving banners which vary somewhat from those under discussion. They generally specifically name the retailer or refer to the store (whereas the first type does not mention the retailer's name) and they usually state that the store sells non-union goods. Frequently the plea to "buy union made goods" is added. Prior to the *Goldfinger* case, some courts held such picketing illegal. Spanier Window

These decisions are sound. Admittedly, workers have a right to tell the story of their strike and working conditions to fellow workers and the public, and unions have a right to publicize their organizing campaign. The retail store or other point of distribution of goods or services is a logical and effective place to appeal to consumers because there the consumers are to be found. The retailer cannot properly object on the ground that his sales of unfair goods are being curtailed, because the workers through various other advertising devices may undoubtedly seek to induce customers not to buy these goods.

The objection of the retailer is that consumers may refuse to buy other goods or services from him because of the presence of the picket. There is a likelihood that some consumers sympathetic to labor will refuse to patronize a retailer who is known to sell some non-union goods. That is true whether the consumers learn of this fact through a sign carried by a picket in front of the store or through an announcement made at a public meeting, which is clearly legal. If consumers who knew that a retailer sells unfair goods would refuse to patronize him, is there any justification for interfering with the consumers' being told the truth?

The direction of the law is to widen the opportunity for consumers to secure the true facts about goods they buy. Pure food and drug legislation increasingly requires disclosure of facts which may be harmful to the vendor.<sup>35</sup> Advertisers are required to disclose more and more facts to avoid unfair trade practice proceedings by the Federal Trade Commission.<sup>36</sup> The Securities Act of 1933 and the Securities Exchange Act of 1934 require publication of elaborate data, which seriously interferes with the cavalier fashion of selling securities in vogue prior to the securities legislation.<sup>37</sup> Why then should a disclosure of the industrial conditions under which goods are manufactured be prohibited because it may result in inducing consumers not to deal with a vendor of such goods? A consumer's guide publication which gives information concerning the labor conditions under which goods are produced has obtained 50,000 subscribers in the first year and a half of its existence.<sup>38</sup> Apparently some consumers are affected in their purchases by such facts. To deprive workers of the opportunity to appeal to consumers at the most effective locus of persuasion, the retail outlet, would be a severe blow to labor. There appears to be no justification for cutting off this

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Cleaning Co. v. Awerkin, 228 App. Div. 617, 232 N. Y. Supp. 886 (1928). Such a banner was used and held permissible in the *Goldfinger* case. There is no proper basis for distinguishing between this type of banner and the banner which does not mention the retailer's name. In both cases some consumers may refuse to buy any goods from the retailer, but no appeal for general withdrawal of patronage is made in either case.

35. See BLANCK, *FOODS AND THE LAW* (1935).

36. HENDERSON, *THE FEDERAL TRADE COMMISSION* (1924).

37. 48 STAT. 74 (1933), 15 U. S. C. §§ 77-78 (1936).

38. 2 *Consumers Union Reports* (1937) no. 10, at 2.

important type of appeal to consumers. That is the view adopted by the New York Court of Appeals in *Goldfinger v. Feintuch*.<sup>39</sup>

In that case the Butchers' Union, Local 174, which had contracts with every other manufacturer of kosher meat products in New York City, attempted to obtain a union agreement from W. & I. Blumenthal, manufacturers of Ukor products. The Blumenthals paid wages ranging from 50 to 75 cents an hour, while the union scale was from 95 cents to \$1.25 an hour. The union sought to bring pressure on the Blumenthals by placing pickets in front of retail stores selling the manufacturers' products, including among these the plaintiff's delicatessen store. These pickets carried signs which read: "This store sells delicatessen that is made in a non-union factory" and "Ukor provision company is unfair to union labor. Please buy union-made delicatessen only."

W. & I. Blumenthal at first brought suit to enjoin the picketing, but its application was denied on the ground that the union had "a right to appeal to the public not to buy non-union goods."<sup>40</sup> The Blumenthals thereupon changed their attorneys and brought another suit to enjoin the picketing.<sup>41</sup> Again the injunction was denied. Justice McGeehan wrote:

"Picketing is not illegal because of the place where it is carried on. Where can the union better urge people not to buy non-union goods than the place where non-union goods are sold? There is nothing illegal in that. If the consumer draws the inference that the seller of non-union goods is either hostile or indifferent to the objects of the union, why is not that a true inference?"<sup>42</sup>

Undaunted by these rebuffs, the Blumenthals induced Goldfinger, a delicatessen store proprietor who sold Ukor as well as other meat products, to bring suit in his name. The injunction was denied in a notable opinion by Justice Collins.<sup>43</sup> The Appellate Division reversed the decision without opinion and ordered the issuance of an injunction.<sup>44</sup> The Court of Appeals modified the Appellate Division's order by limiting the injunction to restraints of violence and intimidation but permitting the picketing.<sup>45</sup>

39. 98 N. Y. L. J., Dec. 24, 1937, p. 2341, col. 1.

40. Blumenthal v. Feintuch, 153 Misc. 40, 273 N. Y. Supp. 660 (Sup. Ct. 1934).

41. See brief for defendant in *Goldfinger* case, *supra*, note 39.

42. Blumenthal v. Weikman, 154 Misc. 684, 277 N. Y. Supp. 895 (Sup. Ct. 1935).

43. *Goldfinger v. Feintuch*, 159 Misc. 806, 288 N. Y. Supp. 855 (Sup. Ct. 1935).

44. 250 App. Div. 751, 295 N. Y. Supp. 753 (1st Dep't 1937) (Justices McAvoy and Glennon dissented).

45. Judge Finch's opinion for the Court of Appeals begins with a broadside against certain types of illegal picketing which were not involved in the case, but which have been much publicized recently by New York newspapers. This has already had repercussions in unusually severe sentences meted out to pickets by New York city magistrates. See N. Y. Times, December 18, 1937.

The court declared in its opinion that it is illegal to picket the place of business of a retailer "not himself a party to an industrial dispute" to persuade the public to withdraw its patronage generally from the business — an issue not, however, before the court on the facts of the case. The court proceeded :

"Within the limits of peaceful picketing, however, picketing may be carried on not only against the manufacturer, but against a non-union product sold by one in unity of interest with the manufacturer who is in the same business for profit.

"Where a manufacturer pays less than union wages, both it and the retailers who sell its products are in a position to undersell competitors who pay the higher scale and this may result in unfair reduction of the wages of union members. Concededly the defendant union would be entitled to picket peacefully the plant of the manufacturer.

"Where the manufacturer disposes of the product through retailers in unity of interest with it, unless the union may follow the product to the place where it is sold and peacefully ask the public to refrain from purchasing it, the union would be deprived of a fair and proper means of bringing its plea to the attention of the public."<sup>46</sup>

This result seems necessary for any court which gives more than lip service to the oft repeated judicial declaration that persons suffering as a result of the exercise by workers and labor unions of their privilege of appealing to the public for support have no recourse against labor. Any hurt thereby done to the retailer or other distributor must be marked off the legal balance sheet as *damnum absque injuria*.<sup>47</sup>

The question arises as to whether the result should be different in a case where the employer involved in the original controversy renders services or supplies goods or equipment which the retailer or other middle man uses in his business, instead of goods which the latter sells. For example, may the striking employees of a drug manufacturer or a union

46. The court relies upon the analogous cases holding strikes against non-union products by cooperating unions lawful. See *Bossert v. Dhuy*, 221 N. Y. 342, 117 N. E. 582 (1917); *Wilson & Adams v. Pearce*, 264 N. Y. 521, 191 N. E. 545 (1934); *New York Lumber Trade Association v. Lacey*, 269 N. Y. 595, 199 N. E. 688 (1935). The court also holds that the state anti-injunction act applies to the case, a feature of the opinion which is discussed on pp. 365, 367, *infra*. Judge Lehman concurred, taking the position that there was no basis for an injunction of any kind. Judge Rippey concurred in the result and wrote: "I concur in the result reached solely upon the ground that the trial court found upon sufficient evidence that there was complete unity of interest between the plaintiff and the manufacturer. Except for the finding of unity of interest, the facts would establish a secondary boycott and would be illegal. . . . I cannot agree that the plaintiff and the manufacturer were engaged in the same trade or industry." Judge Hubbs dissented on the ground that an illegal secondary boycott had been shown to exist.

47. See *Exchange Bakery v. Rifkin*, 245 N. Y. 260, 157 N. E. 130 (1927); *Perfect Laundry Co. v. Marsh*, 120 N. J. Eq. 508, 186 Atl. 470 (1936).

seeking to organize the employees of the manufacturer place pickets in front of a beauty parlor and urge consumers not to have their hair rinsed with Jones' non-union henna rinse? If the American Newspaper Guild has called a strike, or is seeking to organize a newspaper, may reporters picket an advertiser urging consumers not to buy goods advertised in the newspaper?<sup>48</sup> The union is asking consumers in the first case to refrain from accepting the use of materials provided by an unfair employer and, in the second case, to make valueless the services provided by an unfair employer. There is no sound reason for a distinction between an appeal to refuse to buy goods manufactured by the unfair employer and a refusal to use materials or equipment employed in services received by the consumer (*i.e.*, the henna in the rinse) or non-union services used in securing the consumer's trade (*i.e.*, the newspaper advertisement). In each case the consumer is requested not to purchase or make use of the products or services of the unfair employer; the strikers or union members are not urging a general withdrawal of trade from the vendor or user of the unfair employer's products or services. Picketing to accomplish such a refusal to use the materials, equipment, or services of an unfair employer falls within the principles of *Goldfinger v. Feintuch* and should be held legal.<sup>49</sup>

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48. See note 100, *infra*, for such cases arising under the New York anti-injunction act.

49. A number of cases have arisen as a result of the attempt of Window Cleaners Union Local No. 2 to unionize the window cleaning industry and to raise the level of wages of window cleaners working for about \$25.00 a week to the union scale of \$38.00 a week. In all of the following cases picketing at the store or other place where the window cleaning was being done was permitted, but only with banners which did not mention the retailer's name. *Spanier Window Cleaning Co. v. Awerkin*, 228 App. Div. 617, 232 N. Y. Supp. 886 (1st Dep't 1928); *Tri-Boro Window Cleaning Co., Inc. v. Krat*, 241 App. Div. 799, 270 N. Y. Supp. 921 (1934); *Witzer v. Window Cleaners Protective Union, Local No. 2*, N. Y. L. J., Jan. 10, 1934, p. 156, col. 2. In some cases the courts enjoined the use of banners which named or designated the retailer. *Spanier Window Cleaning Co. v. Awerkin*, *supra*. In other cases, where the retailer was named, the picketing was enjoined entirely. *Commercial House & Window Cleaning Co. v. Amerkin*, 138 Misc. 512, 240 N. Y. Supp. 797 (Sup. Ct. 1930), *aff'd*, 226 App. Div. 734 (1929); *National House Cleaning Contractors, Inc. v. Bobaluc*, 243 App. Div. 699, 277 N. Y. Supp. 966 (1st Dep't 1935) (the action was instituted before the anti-injunction act became effective and the court held it inapplicable for that reason); *cf. Picker v. Empire Individual Window Cleaning Contractors Union, Inc.*, N. Y. L. J., Oct. 9, 1937.

Insofar as the signs make no appeal to consumers not to patronize the retailer, there should be no doubt of the legality of the picketing. The window cleaners are picketing at the most effective and dramatic place of appeal, where the work is being done. The picketing may induce the non-union window cleaners to join the strike or the retailer to hire another window cleaner, wholly without reference to pressure of withdrawal of trade from the retailer which may incidentally result. Where the pickets ask consumers not to patronize the retailers or other distributors who use unfair services, the arguments made in favor of allowing picketing of a retailer who buys unfair goods are applicable.

*Pickets Requesting Consumers Not to Deal With the Unfair Employer's Customers.* In this group of cases the pickets and their banners ask consumers *not to buy any goods* from the person being picketed or not to employ *any* of his services because he deals in some particular with the unfair employer. The New York Court of Appeals condemned picketing of this nature in a strong *dictum* in the *Goldfinger* case. Is there any justification for this conclusion?

The retailer or other merchant being picketed usually pleads that he has no quarrel with his employees, that he is an innocent neutral being crushed in a labor dispute to which he is no party, and that he is powerless to control the action of the manufacturer or pickets. But a retailer who buys goods from a non-union manufacturer, whose employees are paid low wages, is likely to have an advantage of lower prices over his competitor who purchases from a union manufacturer operating and paying higher wages. To that extent the retailer is a party to the spoils of the working conditions against which the primary employer's workers are striking.<sup>50</sup> Retailers or other distributors who buy goods from an unfair employer or who avail themselves of services rendered by an unfair employer cannot be neutral. So long as the retailer continues to buy such unfair goods or to use such unfair services he is necessarily an ally of the unfair employer. If he stops buying the unfair goods or utilizing the unfair services of the employer, he becomes an ally of the strikers or the union. Neutrality is impossible. The bargaining power of the union or the strikers depends largely upon their ability to exert effective economic pressure. The strikers or the union, as the case may be, may therefore properly contend that they have a clear cut and serious grievance against the retailer or other person dealing with the unfair employer.

The retailer's plea that he is powerless to control the unfair manufacturer's conduct of his relations with his employees is not altogether sound. As a practical matter retailers exercise a very considerable degree of control over the granting or denying by the manufacturer of the strikers' or the union's demands. When the pressure of a withdrawal of patronage by consumers makes itself felt upon retailers, they in turn bring pressure upon the manufacturer to settle the strike. True, a particular retailer may be unable to induce the manufacturer to settle the strike, but strikers and the union picket numerous retailers, and if sufficient pressure can be brought to bear upon groups of retailers, the pressure on the employer will be great indeed and may be decisive.

The retailer's contention that as an individual he is helpless to satisfy demands made upon him by the strikers or the union is contrary to fact. If the retailer agrees to buy no more products or to avail himself of no

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50. The court recognizes this factor in its opinion in the *Goldfinger* case.

further services of the unfair employer until the strike has been settled, or the unionizing campaign is completed, the picket line around his store will be withdrawn at once. So long as the retailer, whether motivated by a desire for pecuniary profit, hostility to labor unions, or for any other reason, chooses to continue to buy the unfair goods or use the unfair services and thereby remain an ally of the unfair employer in the labor struggle, the strikers should be permitted to advertise that fact to the community and to urge consumers to cease dealing with him.

An important practical feature of the problem, which is ordinarily overlooked, is the fact that employers frequently exercise similar pressure in labor disputes. Although there are statutes in most states forbidding blacklisting of workers, students of the subject report that the statutes are a "dead letter" and that leaders in labor union activities frequently find themselves barred for life from an entire industry through the exchange of blacklists by employers.<sup>51</sup> Wholly apart from the question of whether it is lawful for a manufacturer to urge members of his trade association to refuse to sell goods to a retailer who cancels his orders when the manufacturer's employees are on strike or a union is seeking to organize the factory,<sup>52</sup> there are other highly important practical weapons in the employer's hands through which he may bring pressure on so-called "neutrals" to aid him in his attempts to break strikes or unionizing campaigns. A newspaper takes a position sympathetic to the strikers or the union. The employer not only cuts off his own advertising but urges other advertisers to withdraw their advertisements from the paper.<sup>53</sup> It is difficult to overestimate the highly important role of the press in strikes and in union organization drives, particularly where the strikers or the union must rely upon an appeal to consumers in order to affect the employer. Banks may be warned by employers that if they do not call demand loans made to persons sympathetic to the strikers, important accounts will be closed. Teachers who aid the strikers' cause may be dismissed through the efforts of the employer. These are daily practices in labor disputes, and the instances given are little more than a suggestion of the widespread and far reaching pressures upon persons not directly involved in the labor disputes which are exercised by em-

51. See *Magruder, supra* note 1, at 1084, n. 50; COMMONS & ANDREWS, *op. cit. supra* note 6, at 123-124; *Governmental Protection of Labor's Right to Organize*, N. L. R. B., DIV. OF ECON. RES. (1936) no. 1, at 13.

52. Cf. *Bowen v. Matheson*, 14 Allen 499 (Mass. 1867); *McCarter v. Baltimore Chamber of Commerce*, 126 Md. 131, 94 Atl. 541 (1915); *Bohn Mfg. Co. v. Hollis*, 54 Minn. 223, 55 N. W. 1119 (1893); see LANDIS, *op. cit. supra* note 6, at 418 n.; *Wigmore, loc. cit. supra* note 7.

53. Illustrations of control over intermediate parties by employers are cited by LAIDLER, *op. cit. supra* note 7, at 307 *et seq.* For cases of radio censorship of strike news and speeches favorable to labor unions, see KASSNER & ZACHAROFF, *RADIO IS CENSORED* (1936) 19, 53.

ployers.<sup>54</sup> If our purpose is to achieve collective bargaining upon anything like a basis of equality,<sup>55</sup> should not workers, in view of these powerful weapons available to employers, at least be permitted the entirely open and honest attempt to induce consumers not to deal with the employer who buys unfair goods or uses unfair services?<sup>56</sup>

*Effect of Contracts with Unfair Employer.* Retailers or other distributors sometimes have contracts requiring them to purchase goods from manufacturers. Should the legality of the picketing of the retailer or other distributor be affected by the existence of such contracts? The problem has arisen in the analogous case of picketing to secure union recognition where the employer is under contract to deal exclusively with a rival union. In *Stillwell Theatre v. Kaplan*<sup>57</sup> the New York Court of Appeals held such picketing lawful. The salutary philosophy of keeping judicial hands off labor disputes, so long as the parties conduct themselves peaceably, was expressed by the court as follows:

"The Court of Appeals has for many years been disposed to leave parties to peaceful labor disputes unmolested when economic rather than legal questions are involved . . . The collateral result of the attempted persuasion of the public not to patronize the theatre while it employed members of the rival union might make it unprofitable for the employer to go on with the contract, but to state

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54. Jersey City affords an illuminating example of cooperation between local officials and anti-union employers to keep out unions. Labor unions find difficulty in securing public halls in which to hold meetings; this is effected through the denial or threat of denial by police of permits for the meetings. See REPORT ON THE DENIAL OF LABOR AND CIVIL RIGHTS IN HUDSON COUNTY, NEW JERSEY, NATIONAL COMMITTEE FOR DEFENSE OF POLITICAL PRISONERS (1937). Attempts by representatives of the Committee for Industrial Organization to distribute leaflets have been met with arrests and expulsions from Jersey City, where Mayor Hague, who recently declared, "I am the law", reigns. See (1937) 93 NEW REPUBLIC 155. See also Comment (1938) 47 YALE L. J. 421, n. 102.

In company towns the indirect economic pressure is a particularly powerful weapon. since the employer controls virtually every part of the town's economic life. See Magruder, *supra* note 1, at 1077.

55. Writing in 1887, John H. Wigmore contended that boycotts by labor should stand upon the same footing as trade boycotts and be held lawful. He wrote: "All parties must stand as social units, and this peaceful coercion, if it be granted to one set of men, must be granted to all, and if it be refused to one class, must be refused to all." Wigmore, *supra* note 1, at 525.

56. A variation of the cases last discussed arises when the strikers seek to bring pressure upon persons selling to the employer or rendering services to him not to deal with him, rather than upon those buying from the manufacturer or using his services. If our views, that through picketing or unfair lists workers may appeal to customers of a retailer, who buys from an unfair manufacturer, to withdraw patronage, are sound, the same considerations would require a court to hold that the person who sells products or renders services to the unfair employer may be subjected to the same type of labor pressure.

57. 259 N. Y. 405, 182 N. E. 63 (1932); *The Enforcement of Closed Shop Contracts* (1934) 2 I. J. A. BULL. no. 12, p. 7.



fairly and truly to the public that the conduct of the employer is socially objectionable to a labor union is no persuasion to break a contract. This court has never undertaken to restrain such conduct, although it has had the opportunity."<sup>58</sup>

Similarly, in the case of a strike against an intermediate employer who purchases goods from an unfair employer or uses the services of an unfair employer, the fact that he is bound by contract with the manufacturer does not alter the legality of the strike.<sup>59</sup> Labor's privilege of informing consumers that unfair goods or services are being sold or used by a retailer and urging the public to support labor's attempts to win union conditions should not be destroyed by contracts made by employers.<sup>60</sup> Nor can the merchant being picketed complain that the law affords him no protection. Manufacturers generally protect themselves against the contingency of strikes by clauses in their contracts relieving them of their obligations in the event of strikes in their plants. The same safeguard is generally open to wholesalers, retailers, advertisers and others to relieve themselves of the obligation to purchase the manufacturers' products or to use the unfair employer's services when the latter's employees are on strike or a unionization campaign is in progress.

#### "UNFAIR LISTS" AND CIRCULARS TO RETAILERS OR OTHER DISTRIBUTORS

Unions are everywhere conceded the privilege of withholding the patronage of their members from an unfair employer and may generally appeal to the public to withhold its patronage by means of peaceful verbal appeals, banners, and circulars which do not carry an intimation that the recipient will likewise be subjected to loss of patronage if he disregards the appeal.<sup>61</sup> Some courts, however, have paid only lip service to this privilege and have construed every request "not to patronize" or every statement that an employer is "unfair" as an unlawful "threat."<sup>62</sup> In finding that unfair lists and circulars to retailers announcing the intention of union members not to patronize retailers who sell unfair goods or who use unfair services are illegal,<sup>63</sup> these courts have resorted to a

58. *Id.* at 408, 182 N. E. at 65.

59. *Cf.* note 57, *supra*.

60. See the discussion of the effects of contracts between an employer and his customers in *FRANKFURTER & GREENE, THE LABOR INJUNCTION* (1930) 35, *et seq.*

61. *Perfect Laundry Co. v. Marsh*, 120 N. J. Eq. 508, 186 Atl. 470 (1936) lists the authorities; see *OAKES, op. cit. supra* note 5, at 618, n. 33.

62. *Martin v. McFall*, 65 N. J. Eq. 91, 55 Atl. 465 (1903); *Wilson v. Hey*, 232 Ill. 389, 83 N. E. 928 (1908); *Seattle Brewing Co. v. Hansen*, 144 Fed. 1011 (C. C. N. D. Col. 1905).

63. *State v. Stockford*, 77 Conn. 227, 58 Atl. 769 (1904); *Wilson v. Hey*, 232 Ill. 389, 83 N. E. 928 (1908); *My Maryland Lodge v. Adt*, 100 Md. 238, 59 Atl. 721 (1905); *Beck v. Teamsters Union*, 118 Mich. 497, 77 N. W. 13 (1893); *A. Fink & Son v. Butchers Union*, 84 N. J. Eq. 638, 95 Atl. 182 (1915); *Branson v. I. W. W.*, 30 Nev.

procedure which should provide inviting material for the student of language and symbolism.<sup>64</sup> The "notice" of an intention not to use unfair goods or services or to refuse to patronize retailers who sell such goods or use such services is converted into "coercion," "threats," and "intimidation," catchwords in which courts condense, without twinges of the judicial conscience, their hostility to the strike or the unions' activity.<sup>65</sup> The most telling blow to such lists and circulars was struck by the United States Supreme Court in the famous *Danbury Hatters'* case, when it permitted a manufacturer to recover treble damages under the Sherman Act, a decision which led to the discontinuance of the American Federation of Labor's use of the "unfair list."<sup>66</sup> Other courts, however, have taken a more realistic view of these cases and have recognized that a "threat" to withdraw patronage of unfair goods or services<sup>67</sup> is no less proper than a withdrawal of the patronage,<sup>68</sup> the validity of which few

270, 95 Pac. 354 (1908); *Bellevue Brewing Co. v. United Brewery Workmen*, 12 Ohio N. P. (N. S.) 257 (1911); *Brace Bros. v. Evans*, 5 Pa. County Ct. Rep. 163 (1888); *Patch Mfg. Co. v. Protection Lodge*, No. 215, 77 Vt. 294, 60 Atl. 74 (1905); *Crupp v. Comm.*, 84 Va. 927, 6 S. E. 620 (1888); *Old Dominion Co. v. McKenna*, 30 Fed. 48 (C. C. S. D. N. Y. 1887); *Oxley Stave Co. v. Cooper's Int'l Union*, 72 Fed. 695 (C. C. Kans. 1896), *aff'd*, 83 Fed. 912 (C. C. A. 8th, 1897); *Seattle Brewing & Malting Co. v. Hansen*, 144 Fed. 1011 (C. C. N. D. Col., 1905); *Rocky Mountain Bell Tel. Co. v. Montana Fed. of Labor*, 156 Fed. 809 (C. C. D. Mont., 1907).

64. See the discussion of Symbolism in 14 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 492 (1934); ARNOLD, SYMBOLS OF GOVERNMENT (1935).

65. "I respectfully concur on this point with the admirable judgment of Holmes, J., in *Vegeahn v. Guntner* where he remarks that the unlawfulness of 'threats' depends on what you 'threaten' and of 'compulsion' on how you 'compel' . . . the discussion of this question would be much more lucid if the disputants would observe certain simple rules. First, to avoid question-begging epithets, such as 'boycotting', 'ostracism' . . . 'coercion', and the like. Secondly, when they use the word 'maliciously' to say in what sense they use it . . ." Lord Scrutton in *De Freville, Ltd., v. Motor Trade Assoc.* [1921] 3 K. B. 40, at 69. See also Caldwell, J., dissenting in *Hopkins v. Oxley Stave Co.*, 83 Fed. 912, 924 (C. C. A. 8th, 1897); FRANKFURTER & GREENE, *op. cit. supra* note 5, at 35; *cf.* Collins, J., in *Goldfinger v. Feintuch*, 159 Misc. 806, 810, 288 N. Y. S. 855, 860 (1937). "The plaintiff insists that the picketing of his store . . . constitutes coercion and intimidation. But if to picket a neutral is coercion or intimidation, the picketing the offending non-union employer would be equally coercive or intimidating."

66. See *Loewe v. Lawlor*, 208 U. S. 274 (1908); *Lawlor v. Loewe*, 235 U. S. 522 (1915); see also *Gompers v. Buck Stove and Range Co.*, 221 U. S. 418 (1911); *Loewe v. Calif. Fed. of Labor*, 189 Fed. 714 (C. C. N. D. Calif. 1911); *cf.* *U. S. Gypsum Co. v. Hyslop*, 39 F. (2d) 228 (N. D. Iowa, 1930).

67. "As a general rule, even if subject to some exception, what you may do in a certain event you may threaten to do—that is, give warning of your intention to do in that event, and thus allow the other person the chance of avoiding the consequence." Holmes, J., in *Vegeahn v. Guntner*, 167 Mass. 92, 107, 44 N. E. 1077, 1085 (1896). See also *Payne v. The Western & Atlantic R.R.*, 13 Lea 507 (Tenn. 1884); *National Protective Association v. Cumming*, 170 N. Y. 315, 63 N. E. 369 (1902); *cf.* LAIDLER, *op. cit. supra* note 7, at 230-5; FRANKFURTER & GREENE, *op. cit. supra* note 5, at 34-35.

68. *Truax v. Bisbee Local*, 19 Ariz. 379, 171 Pac. 121 (1918); *Pierce v. Stablemen's Union*, 156 Calif. 70, 103 Pac. 324 (1909); *De Pear v. Cook's Union*, 27 CHICAGO LEGAL NEWS 785 (Colo. D. Ct. 1895); *Empire Theatre Co. v. Cloke*, 53 Mont. 183,

courts doubt. As for the notice that union men will not patronize the retailer if he continues to buy unfair goods or to use the services of the unfair employer, it should be borne in mind that the union is not appealing to the public generally to withdraw its patronage from the retailers. These are appeals solely to union men and, in some cases, announcements to retailers that union men will not patronize persons who sell unfair goods or who use the services of an unfair employer. Wholly without reference to the question whether strikers and unions should be permitted to ask the public generally not to patronize retailers who sell unfair goods or use unfair services, unions should be able to appeal to other union men, who have a vital interest in protecting union organizations and wage scales, not to spend their earnings with retailers who ally themselves with unfair employers. The decisions permitting unions to urge members of other crafts to strike on jobs where unfair materials are used afford a strong analogy for allowing the unfair lists and circulars in question.<sup>69</sup>

Nor do we believe the courts are justified in holding illegal notices appealing to the public generally, and not merely to other union men, to refuse to patronize merchants who deal in unfair goods or who use unfair services. The same considerations which justify the picketing of retailers with signs urging consumers not to patronize business men who handle unfair goods or who use unfair services should lead courts to refuse to interfere with similar appeals by means of circulars.<sup>70</sup>

#### EFFECT OF ANTI-INJUNCTION STATUTES

After Section 20 of the Clayton Act had been "construed" out of existence,<sup>71</sup> continued abuse by the courts of the power to enjoin labor's

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163 Pac. 107 (1917); *Marx & Haas Clothing Co. v. Watson*, 168 Mo. 133, 67 S. W. 391 (1902). But see *Lohse Patent Door Co. v. Fuelle*, 215 Mo. 421, 114 S. W. 997 (1903); see also *National Protective Ass'n v. Cumming*, 170 N. Y. 315, 63 N. E. 369 (1902).

69. See notes 23 and 24, *supra*. In many of these cases unfair lists were distributed to builders and contractors. See, *e.g.*, *Parkinson v. Building Trades Council*, 154 Calif. 581, 98 Pac. 1027 (1908); *Gill Engraving Co. v. Doerr*, 214 Fed. 111 (S. D. N. Y. 1914).

70. That a serious interference with freedom of speech and press is involved by the courts' curtailment of the distribution of these notices was recognized by several state courts in decisions refusing to prohibit the activity. *Lindsay v. Montana Federation of Labor*, 37 Mont. 264, 96 Pac. 127 (1908); *Marx & Haas Clothing Co. v. Watson*, 168 Mo. 133, 67 S. W. 391 (1902); *Riggs v. Cincinnati Waiter's Alliance*, 5 Ohio N. P. 386 (1898); *cf. Dailey v. Superior Court*, 12 Cal. 94, 44 Pac. 453 (1896). The Supreme Court in *Gompers v. Buck Stove & Range Co.*, 221 U. S. 418 (1911) rejected this view. In view of the broadened scope of the protection afforded freedom of speech since 1911, the *Buck Stove* case might not be followed by the Supreme Court today. See *The De Jonge Decision* (1937) 5 I. J. A. BULL. 86.

71. The first important attempt to limit the issuance of labor injunctions, through the enactment of Section 20 of the Clayton Act, proved abortive when the Supreme Court held that the statute merely reaffirmed existing equity practice, and that it applied

activities<sup>72</sup> led Congress in 1932 to enact the Norris-LaGuardia Injunction Act, by which the jurisdiction of the federal courts to issue injunctions in labor disputes was sharply limited and the procedure for issuing such injunctions was carefully regulated.<sup>73</sup> Since that date the legislatures of fourteen states have enacted statutes modelled after the federal act.<sup>74</sup>

How do these statutes affect strikes, picketing, unfair lists, and circulars directed against persons other than the immediate unfair employer? The Norris-LaGuardia Act provides:

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case *involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute* (as these terms are herein defined) from doing, whether singly or in concert" certain enumerated acts. The acts enumerated include:

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment."

"(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence."

"(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute."<sup>75</sup>

The state statutes contain similar provisions.<sup>76</sup> In some cases they specifically forbid injunctions restraining persons singly or in concert from "ceasing to patronize any person or persons"<sup>77</sup> and from "peaceful

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only to disputes in which the parties bore the relation of employer and employee. *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184 (1921); *Duplex Printing Press Co. v. Deering*, 254 U. S. 443 (1921). These decisions resulted in the emasculation of state statutes patterned after Section 20 of the Clayton Act. See FRANKFURTER & GREENE, *op. cit. supra* note 5, at 135 *et seq.*; BERMAN, *op. cit. supra* note 3, *passim*.

72. See WITTE, *op. cit. supra* note 3, at 122 *et seq.* for references to labor's fight against injunctions in labor disputes.

73. 47 STAT. 70 (1932), 29 U. S. C. § 101 *et seq.* (1936).

74. COLO. STAT. ANN. (Michie, 1935) c. 97, § 78; Idaho Laws 1933, 215; IND. STAT. ANN. (Burns, 1933) tit. 40, c. 5, §§ 501-514; KAN. GEN. STAT. (1935) c. 60, art. 11, § 60-1107; La. Laws 1934, no. 203; MINN. STAT. (Mason, Supp. 1936) c. 23, §§ 4260-67; N. Y. C. P. A. § 876-a; N. D. Laws 1935, c. 247; ORE. CODE ANN. (Supp. 1935) tit. 49, §§ 49-1904-06; Pa. Laws 1935, no. 308; UTAH REV. STAT. ANN. (1933) § 49-2-8; Wash. Laws 1937 Spec. Sess., c. 7, § 4; WIS. STAT. (1935) § 193. 60 *et seq.*; Wyo. Laws 1933, c. 37, § 3, as amended by Laws of 1937, c. 15. See WITT, *op. cit. supra* note 1, at 58-59 for references to the materials bearing upon these statutes; Fraenkel, *Recent Statutes Affecting Labor Injunctions and Yellow Dog Contracts* (1936) 30 ILL. L. REV. 854.

75. 47 STAT. 70 (1932) 29 U. S. C. § 104 (1936) (emphasis added).

76. See statutes, note 70, *supra*.

77. See Louisiana, New York, Pennsylvania, and Utah statutes, note 70, *supra*. The Wisconsin statute proscribes orders restraining "ceasing to patronize or employ

picketing.”<sup>78</sup> The Pennsylvania statute proscribes injunctions restraining “persuading by any lawful means other persons to cease patronizing or contracting or employing or leaving the employ of any person,” “ceasing or refusing to work with any person or group of persons” and “ceasing or refusing to work on any goods, materials, machines or other commodities.”<sup>79</sup> Although the language of the statutes varies somewhat, they all in effect prohibit injunctions restraining strikes, picketing, and other forms of persuasion, including distribution of notices and circulars, urging persons not to work for or patronize an employer in cases to which the statutes are applicable. These provisions make no distinction between the initial and intermediate employer, except for the Wisconsin statute which expressly declares that the act shall not “legalize a secondary boycott.” With this single exception, these provisions clearly forbid injunctions against all forms of strikes or peaceful picketing or other peaceful methods of seeking to withdraw workers, customers, materials or supplies from any employer, whether initial or intermediate, provided the statute is applicable to the facts of the case.<sup>80</sup>

The statutes are applicable only to cases in which a “labor dispute” exists, and their protection is confined to “persons participating or interested in a labor dispute.” Most of the cases decided under the statutes have centered around the definitions of a “case involving or growing out of a labor dispute” and “labor dispute.” The term “case involving or growing out of a labor dispute,” as defined by the Norris-LaGuardia Act and by the state statutes, includes a situation “when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein.”<sup>81</sup> A “person participating or interested in” a labor dispute includes a person or association “if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or

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any person, but nothing herein shall be construed to legalize a secondary boycott.” WIS. STAT. (1935) § 193.60.

78. *Ibid.* The Pennsylvania statute uses the word “picketing”. Pa. Laws 1935, no. 308.

79. See note 70, *supra*.

80. *Levering & Garrigues v. Morrin*, 71 F. (2d) 284 (C. C. A. 2d, 1934), *cert. denied*, 293 U. S. 594 (1934). In *Cinderella Theater Co. v. Sign Writers Local*, 6 F. Supp. 164 (E. D. Mich., 1934) the court held that subdivisions (e) and (f) of the Norris-LaGuardia Act, quoted in text at p. 360 *supra*, forbid issuance of orders restraining pickets from urging consumers not to patronize the employer. This interpretation is borne out by the Senate and House Committee Reports. See H. R. Rep. No. 669, 72nd Cong., 1st Sess. (1931); Sen. Rep. No. 163, quoted in the *Cinderella Theater Co. case, supra*.

81. 47 STAT. 73 (1932), 29 U. S. C. § 113 (1936). The New York statute does not contain the language “or have direct or indirect interests therein.” See N. Y. C. P. A. § 876-a.

agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft or occupation."<sup>82</sup> The statutes provide that "labor dispute" includes "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, *regardless of whether or not the disputants stand in the proximate relation of employer and employee.*"<sup>83</sup>

*Levering & Garrigues Co. v. Morrin* was the first case in which a Circuit Court of Appeals passed upon the scope of the Norris-LaGuardia Act.<sup>84</sup> A struggle had been going on for some years in New York between the open shop employers' Iron League and the International Association of Bridge, Structural & Ornamental Iron Workers, which was attempting to secure a closed shop in the industry. The union notified builders and contractors that if they employed or sublet work to members of the Iron League, the union would call strikes on all jobs being carried on by such builders or contractors and that it would urge other building trades unions to join in these strikes. The union sent circulars to builders and contractors and established picket lines announcing their plan of action. The trial court granted an injunction. The Circuit Court of Appeals reversed the order and held that a labor dispute existed between the union (an association of employees) and the members of the Iron League (an association of employers), which were engaged in the same industry within the meaning of the Norris-LaGuardia Act. The Court said:

"Now under the statute, a District Court cannot restrain the notifying of parties by interested individuals (Section 104(g)) of an intention to refuse to work; nor can the court prevent, in the absence of fraud or violence, the giving of publicity to the facts in the controversy (Section 104(e)) or encouraging others to refuse to work (Section 104(i)). The fact that the notification and the publicity will result in coercing the parties informed and cause them to refrain from contracting with the appellees cannot be taken into consideration, for the court is without the power to prevent such notification. The court has not the power or authority to issue an injunction against these appellants who are engaged in a controversy arising out of an attempt to establish a closed shop by notifying

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82. 47 STAT. 73 (1932), 29 U. S. C. § 113. The New York statute does not require that the persons involved in the litigation be "persons participating or interested in a labor dispute"; the tests are solely the definition of "labor dispute" and cases involving or growing out of a labor dispute. Section 876-a, N. Y. C. P. A. Nevertheless the statute is inapplicable unless the case involves persons who are "engaged in the same industry, trade, craft or occupation or who are employees of one employer." *Ibid.*

83. *Ibid.* (Emphasis added).

84. 71 F. (2d) 284 (C. C. A. 2d, 1934), *cert. denied*, 293 U. S. 594 (1934).

general contractors and architects of an intention of members of a union to refuse to work, nor can these appellees prevent these appellants from refusing to work or inciting sympathetic strikes."<sup>85</sup>

Under this case, it is clear that no injunction may be issued by a federal court to restrain workers engaged in a labor dispute from:

- (1) Issuing circulars to other employers engaged in the same industry and otherwise appealing to them not to deal with the unfair employer.
- (2) Issuing circulars to other employers in the same industry and otherwise notifying them that if they deal with the unfair employer, the union will call strikes on all jobs of such employers.
- (3) Picketing to appeal to workers in other crafts in the industry to refuse to work on jobs on which the unfair employer is engaged.
- (4) Urging, and threatening to urge, other unions in the same industry, to refuse to work for an employer who deals with the unfair employer.

Not all the federal courts have followed the Second Circuit's sympathetic interpretation of the Norris-LaGuardia Act. The Circuit Court of Appeals for the Seventh Circuit has handed down a series of decisions which so narrows the definition of "labor dispute" that the effect has been virtual nullification of the Norris-LaGuardia Act.<sup>86</sup> These cases

85. 71 F. (2d) 284, 287 (C. C. A. 2d, 1934).

86. *United Electric Coal Co. v. Rice*, 80 F. (2d) 1 (C. C. A. 7th, 1935), *cert. denied*, 297 U. S. 714 (1935), in which the court held that no labor dispute existed because the relation of employer and employee did not exist between the disputants. This remarkable conclusion is in complete defiance of the express language of the statute [subsection (c)] and of the Senate and House Judiciary Committee Reports, which specifically declared that the definition of "labor dispute" was intended to "include others than the immediate disputants." See *Cinderella Theater Co. v. Sign Writers' Local Union*, 6 F. Supp. 164 (E. D. Mich. 1934). The Circuit Court in the *Rice* case had found that even if the Norris-LaGuardia Act did apply, its terms had been complied with by the plaintiff and the injunction issued restrained only acts and threats of violence. This ground of the opinion perhaps explains the denial of *certiorari*.

*Lauf v. E. G. Shinner & Co.*, 82 F. (2d) 68 (C. C. A. 7th, 1936), in which the court reaffirmed its rule enunciated in the *Rice* case by refusing to apply the statute and enjoining picketing of the plaintiff's premises because there was no strike in progress and none of the plaintiff's employees had joined the union.

*Scavenger Service Corp. v. Courtney*, 85 F. (2d) 825 (C. C. A. 7th, 1936), in which the court enjoined the picketing of buildings serviced by a scavenger who did not employ union labor. The District Court ruled that the statute applied and refused to enjoin the picketing, which it found was carried on because the scavenger did not employ union men. The Circuit Court, however, found that the purpose of the picketing was to induce the employer not to undercut prices charged by members of the scavenger's association and relied upon the *Lauf* and *Rice* cases for the conclusion that the Norris-LaGuardia Act was inapplicable.

These cases are criticized in recent comments: *Judicial Nullifications of Anti-Injunction Acts* (1936), 4 I. J. A. BULL. No. 11, p. 1; *Two Wisconsin Decisions on the*

have held that no labor dispute exists unless there is an employer-employee relation between the disputants. Several District Court judges have adopted this view and have enjoined picketing by a union seeking to organize the employees of a plant.<sup>87</sup> A Washington District Court has ruled that teamsters who refuse to handle beer transported by non-union truckmen in a campaign to secure closed shop contracts with brewers are not engaged in a labor dispute with the brewers. These decisions are contrary to the express language of the statute that the term "labor dispute" includes any "controversy . . . concerning the association or representation of persons in negotiating . . . changing, or seeking to arrange terms or conditions of employment *regardless of whether or not the disputants stand in the proximate relation of employer and employee.*"<sup>88</sup> The rulings violate the purpose of the enactment, as expressed in the Senate and House Committee Reports, to overrule cases which granted injunctions against union activities because the disputants did not stand in the relation of employer and employee.<sup>89</sup> Other courts have shown less of a tendency to consign the Norris-LaGuardia Act to the fate which the Clayton Act met by "interpretation," namely, that its purpose was merely to restate existing law.<sup>90</sup> A Georgia District Court has held that in a contest between two unions to win recognition by the employer, there is a "labor dispute,"<sup>91</sup> and a number of District Courts have rejected the view of the Seventh Circuit by ruling that the statute protects a union picketing an employer to unionize his plant.<sup>92</sup> The

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*Anti-Injunction Act* (1936), 5 *Id.* at 59; (1936) *Anti-Injunction—A Further Note*, 5 *Id.* at 113.

87. *Donnelly Garment Co. v. Int'l Ladies Garment Workers Union*, C. C. H. Labor Law. Serv. ¶ 18,012 (1937); *Colonial Baking Co. v. Hatembach*, *id.* at ¶ 16,400 (1934); *cf. New Negro Alliance v. Sanitary Grocery Co.*, *id.* at ¶ 16,400 (1937); *California State Brewers Institute v. Int'l Brotherhood of Teamsters*, *id.* at ¶ 18,030 (1937).

88. 47 STAT. 73 (1932), 29 U. S. C. § 113(c) (1936).

89. See Committee Reports, note 77, *supra*. These reports declare that one of the purposes of the measure was to correct the law as declared in *Duplex Printing Press Co. v. Deering*, 254 U. S. 443 (1921) and *American Steel Foundries Co. v. Tri-City Central Trades Council*, 257 U. S. 184 (1921), which held that benefits of the Clayton Act extended only to persons occupying the relation of employer and employee.

90. See *American Steel Foundries Co. v. Tri-City Central Trades Council*, 257 U. S. 184 (1921).

91. *Cole v. Atlanta Terminal Co.*, 15 F. Supp. 131 (N. D. Ga. 1936).

92. *Miller Parlor Furniture Co. v. Furniture Workers Industrial Union*, 8 F. Supp. 209 (D. C. N. J., 1934); see *Cinderella Theater Co. v. Sign Writers Local*, 6 F. Supp. 164 (E. D. Mich. 1934). Other cases holding that a case grows out of a labor dispute even though none of plaintiff's employees are members of the defendant union. *Dean v. Mayo*, 8 F. Supp. 73 (W. D. La. 1934), injunction granted after bill amended, 9 F. Supp. 459 (W. D. La. 1934), *aff'd sub. nomine*, *Mayo v. Dean*, 82 F. (2d) 554, (C. C. A. 5th, 1936); *S. S. Kresge Co. v. Amster*, C. C. H. Labor Law, ¶ 16,393 (1937). Where the issue is union recognition and one of the unions is a company union a labor dispute exists. *U. S. v. Weirton Steel Co.*, 7 F. Supp. 255 (Del. 1934); *Virginian Railway v. System Fed. No. 40*, 84 F. (2d) 641 (C. C. A. 4th, 1936), *aff'd on other grounds*, 300



denial of certiorari in the *Levering & Garrigues Co.* case, coupled with the recent sympathetic treatment by the Supreme Court of the United States of state anti-injunction legislation,<sup>93</sup> gives grounds for believing that the Supreme Court is likely to follow the lead of the Second Circuit, in giving effect to the broad definition of "labor dispute" contained in the statute.

Under state statutes modelled after the Norris-LaGuardia Act, the Supreme Courts of Wisconsin and of Oregon have held that a union seeking to organize a plant may not be enjoined from picketing the employer's premises, even though none of plaintiff's employees is a member of the union,<sup>94</sup> since a labor dispute exists. In the *Goldfinger* case the New York Court of Appeals adopted the view that a retailer of meat products is engaged in the same industry as the manufacturer of meat products and held the statute applicable.<sup>95</sup> This result recognizes the interdependence and interrelation of the manufacturer and the distributor, and treats the production and distribution of meat products as different stages in a single industry, thus executing the expressed purpose of the statute to overrule the narrow view of the Clayton Act adopted by the court in *Duplex Printing Press Co. v. Deering*.<sup>96</sup> In that case a strike had been called by the International Association of Machinists at the plaintiff's factory, where printing presses were manufactured. The machinists secured the cooperation of members of their union and of other unions to refuse to install or repair the plaintiff's presses; truckmen were urged not to haul the presses and strikes were called against employers to interfere with the hauling and installation of the presses. Customers of the plaintiff were urged not to use plaintiff's presses. The majority of the Supreme Court held that an injunction should have been issued restraining these activities and that the Clayton Act was inapplicable because it limited the issuance of injunctions only in cases where the parties stood in the relation of employer and employee. Mr. Justice Brandeis dissented in an opinion concurred in by Justices Holmes and Clarke. He declared that the conduct complained of was both lawful at common law and subject to the protection of the Clayton Act.

"When centralization in the control of business brought its corresponding centralization in the organization of workingmen, new

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U. S. 55 (1937); see generally on the definition of labor dispute, Note (1937) 50 HARV. L. REV. 1295.

93. *Senn v. Tile Layers Protective Association*, 301 U. S. 468 (1937).

94. *American Furniture Co. v. Int'l Brotherhood of T. C. & H. of A.*, 268 N. W. 250 (Wis. 1936); *Wallace v. International Association*, 155 Ore. 652, 63 P. (2d) 1090 (1936). This view has been adopted by *Lietzman v. Radio Broadcasting Station WCFL*, 282 Ill. App. 203 (1935); *Restful Slipper Co. v. United Shoe & Leather Union*, 116 N. J. Eq. 521, 174 Atl. 543 (1934).

95. See note 46, *supra*.

96. 254 U. S. 443 (1921).

facts had to be appraised. A single employer might, as in this case, threaten the standing of the whole organization and the standards of all its members; and when he did so, the union, in order to protect itself, would naturally refuse to work on his materials wherever found. When such a situation was first presented to the courts, judges concluded that the intervention of the purchaser of the materials established an insulation through which the direct relationship of the employer and the workingman did not penetrate; and the strike against the material was considered a strike against the purchaser by unaffected third parties . . . But other courts, with better appreciation of the facts of industry, recognized the unity of interest throughout the union, and that, in refusing to work on materials which threatened it, the union was only refusing to aid in destroying itself . . . So, in the case at bar, deciding a question of fact upon the evidence introduced and matters of common knowledge, I should say, as the two lower courts apparently have said, *that the defendants and those from whom they sought cooperation have a common interest which the plaintiff threatened.*"<sup>97</sup>

When Congress (and the states) used the terms "persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein" in a statute designed to overrule the *Duplex Printing Press Co.* case, it obviously intended to extend the act at least to persons who work on, deliver, repair or sell goods produced by an "unfair" manufacturer. Accordingly, the New York Court's ruling that a delicatessen store owner who sells the products of a meat manufacturer and the latter's employees are engaged in the same industry and therefore fall within the meaning of the statute is sound.

How far are the courts likely to go in defining the scope of the statute, beyond the cases involving strikers and retailers who handle or deal in unfair goods? The purpose of both federal and state statutes was to widen and not to narrow the protection given to labor. Wherever, therefore, prior to the passage of the act, conduct was not enjoined, it seems reasonably likely that the statute will be held to apply. Thus, the New York courts will probably hold that where members of a union have a grievance against their employer, other members of the same union who are engaged in the same craft, although their work may be entirely different, are in the same occupation or industry as the employer of their aggrieved brethren and are protected by the statute.<sup>98</sup> Where the workers involved in the primary labor dispute are in a different occupation but provide services for or deal with other employees, *e. g.*, longshoremen and truckmen, the two groups of workmen are integral parts of a single industry for purposes of a labor dispute.<sup>99</sup> Where goods are manufac-

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97. 254 U. S. at 482 (1921) (emphasis added).

98. See note 23, *supra*.

99. See note 29, *supra*.

tured by one group of employees, other workers engaged in a different occupation but who are obliged as a part of their work to utilize the goods so produced belong to the same industry within the meaning of the act as the employees who produce the goods.<sup>100</sup> Workers will be treated as belonging to the same industry as employees who deliver materials to their employer, even though the materials are not used on the particular job upon which the workers in question are employed.<sup>101</sup> No decree could properly issue in any of these cases to enjoin strikes or picketing or circulars urging persons not to work for the intermediate employer.

When the issue arises as a result of a picket line in front of the intermediate employer's premises, urging consumers not to buy the unfair products or not to patronize the retailer or distributor, should the results vary? Upon the basis of the cases discussed above, persons employed by Goldfinger may call a strike at Goldfinger's delicatessen store because Goldfinger sells "Ukor" meats and may establish a picket line, urging others not to work for Goldfinger. Would the employees of W. & I. Blumenthal, manufacturer of "Ukor" products, who are on strike for a closed shop at the Blumenthal plant, be permitted to picket Goldfinger's and ask that the public refuse to buy any goods from Goldfinger because he sells "Ukor" products? If Goldfinger and the employees of W. & I. Blumenthal are persons engaged in the same industry, there is no doubt that the picketing is permissible. Yet, there is a strong intimation in Judge Finch's opinion in the *Goldfinger* case that such picketing would not be protected by the statute, although the issue was not involved in that case. The court's position is an anomalous one since it expressly holds that W. & I. Blumenthal's employees and Goldfinger are within the same industry for purposes of determining whether pickets may urge consumers not to buy "Ukor" products and at the same time by *dictum* indicates that if the pickets asked the public to buy no goods of any kind from Goldfinger, they would not be protected by the act. Certainly, the character of the signs carried by the pickets cannot change their status as persons engaged in the same industry.

These views should also prevail when the picketing or circulars are directed against an intermediate party who utilizes the services of the unfair employer rather than his goods.<sup>102</sup> To illustrate by a variation of the example suggested in an earlier portion of this discussion; if a department store advertises in a newspaper whose employees are on

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100. See note 23, *supra*.

101. See note 29, *supra*.

102. Some of the decisions of the New York courts prior to the *Goldfinger* case permitted such picketing. *Hydrox Ice Cream Co., Inc. v. Doe*, 159 Misc. 642, 289 N. Y. Supp. 683 (Sup. Ct. 1936), *affirmed in memorandum opinion*, 293 N. Y. Supp. 1013 (1937), *cf.* cases cited in note 29 *supra*.

strike, or whose plant is being organized by a union, may the strikers or the union picket the advertiser's store? The department store is employing the services of the newspaper. Whether the signs merely request the consumer not to buy goods advertised in the newspaper or not to have dealings with a store which uses an unfair newspaper as a medium of advertising, the newspaper is an integral part of the retail selling industry.<sup>103</sup> In the same way a window cleaning contractor and an electrical contractor who services Neon signs perform essential functions in the industries which hire window cleaners and electric sign servicers.<sup>104</sup> The employees of the newspaper, the window cleaners, and the electrical workers have a vital interest in and are intimately connected with the businesses of the advertisers, stores and buildings which they service. Just as teamsters have a unity of interest with longshoremens, which warrants inter-craft strikes by members of the two trades, and just as the manufacturer's employees are so bound by economic ties and physical dealings with the distributor of the manufactured products as to permit picketing of the distributor, so persons who perform services for various

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103. This situation arose in the strike of the American Newspaper Guild against the *Brooklyn Daily Eagle*. Justice Faber held that the statute applied and that no injunction could issue. *Davega-City Radio, Inc. v. Randau*, N. Y. L. J., Oct. 20, 1937, p. 1251, col. 1. Justice Steinbrink ruled that there was no "labor dispute" and issued an injunction which, however, permitted picketing provided no reference was made to the plaintiff. *Mlle. Reif, Inc. v. Randau*, N. Y. L. J., Dec. 4, 1937, p. 1994, col. 3.

104. See window cleaning cases cited in note 49, *supra*, decided prior to the effective date of the statute. The Sheet Metal Workers International Association has picketed retailers purchasing Neon signs, the Neon Sign Corporation having refused to employ union labor. The union demands that the retailer use union labor to service the signs and in some cases has withdrawn the pickets when the retailer has agreed to this demand and to buy no further unfair signs. In *American Gas Stations v. Doe*, 250 App. Div. 227, 293 N. Y. Supp. 1019 (1937) the court held that no labor dispute existed between the gas station owners, the sheet metal workers, and that they were not engaged in the same industry and enjoined the picketing. In a case in which a retailer sued, an injunction was granted by the court, which declared that no labor dispute existed. *Scharf v. Doe*, N. Y. L. J., Nov. 26, 1935, p. 2077, col. 2, affirmed by the Appellate Division on April 25, 1936. In a subsequent case the Neon Sign Corporation itself sued and the complaint was dismissed because of the failure to comply with the anti-injunction statute. *Nat. Neon Sign Co. v. Doe*, N. Y. L. J., Jan. 17, 1936, p. 303, col. 4. When the complaint was amended so as to bring in the purchaser of the sign, the complaint was again dismissed because of improper joinder of parties. N. Y. L. J., Feb. 6, 1936, p. 676, col. 3. Certainly the determination of whether the picketing is within the protection of the statute should not be affected by the nominal plaintiff, whether the retailer or the manufacturer. In both cases the providing and servicing of the signs is a service employed in the sale of retailers' goods and as such the employees of the sign corporation and the retailer are within the same industry within the meaning of the statute. These cases are discussed in the *New York Anti-Injunction Law in Operation* (1935) 4 I. J. A. BULL. 1 and *Recent Limitations Upon the New York Anti-Injunction Law*, (1936) 5 I. J. A. BULL. 3.

industries are engaged in those industries, and have an "interest" in them, within the meaning of state and federal anti-injunction statutes.<sup>105</sup>

It is too early in the experience of courts, employers, and labor unions with these statutes to be able to draw a nice line around the area of industrial conflict covered by the enactments. Already, some courts have indicated that they will follow the traditional method employed by courts hostile to the extension of labor's rights and emasculate the statutes by interpretation. But for judges who approach the legislation without predilections, it is not too much to hope that the courts will hold that injunctions may not be issued to restrain strikes, picketing, the distribution of circulars and related activities, directed against any person who buys from, sells to, renders services to, receives services from, or deals with an employer with whom his employees or their representatives or any union are engaged in a dispute concerning the controversies enumerated in the statutes, which include wages, working conditions, collective bargaining, union recognition and efforts to unionize a plant. Such a view of the statutes would eliminate the issuance of injunctions against peaceable attempts to deprive an employer of workers, customers, or suppliers of goods or services, whether through strikes, picketing, or circulars directed against any person having business dealings with the initial employer, and would be in harmony with the aims of the statute to eliminate the injunction from labor disputes.<sup>106</sup>

### CONCLUSION

In considering the various pressures exerted by labor to win higher wages and better working conditions or to organize union shops, we start with the premise, now enunciated by both the courts and the legislatures, that unionization of workers bargaining collectively with employers is desirable. Collective bargaining is not a process of matching wits or of

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105. In *Grandview Dairy, Inc. v. O'Leary*, 158 Misc. 791, 285 N. Y. Supp. 841 (Sup. Ct. 1936), the court held that picketing by teamsters of retailers buying milk from a dairy whose teamsters were on strike was an illegal secondary boycott and that the statute was not intended to prevent injunctions against such boycotts. The court relied upon *Stuhmer v. Korman*, 241 App. Div. 702, 269 N. Y. Supp. 788 (1934) *aff'd without opinion*, 265 N. Y. 481, 190 N. E. 281 (1934), which is limited to cases involving "intimidation" and "truculence" by the *Goldfinger* case. The *Grandview Dairy* case is doubtless overruled by the *Goldfinger* case to the extent that it holds that picketing with banners requesting consumers not to buy unfair milk is outside the scope of the statute.

106. *Frankfurter & Greene* [*op. cit. supra* note 5, at 205] have well expressed the attitude toward union pressures which a modern court should adopt in their statement that:

"To count the cost of union weapons is to count the cost of free competition in industrial controversy. Without breeding other ills and, above all, without hurting the prestige of law, that cost is not to be diminished by curtailing in the name of law the most effective union tactics."

marshalling economic data. The power of a union's argument at the conference table depends principally upon the union's ability to exert economic pressure upon the employer in the industrial and business arena. Labor's weapons in industrial struggles are the strike, picketing, unfair lists and similar appeals. The use of these instruments is held within peaceable bounds by the courts through the ever present requirement that the activities must be carried on without violence or fraud. There are also limitations upon the specific goals which may be sought. In some states no pressure may be brought to bear upon the employer to obtain a closed shop; and the anti-trust laws stand as a barrier to all embracing or too widespread activities of labor.<sup>107</sup>

To achieve a goal not proscribed by law, how far may labor strike, picket, or organize a refusal to patronize, when carried on peaceably and without violence or fraud? Where there is no immediate commercial intercourse or economic interrelation between the primary object of labor's campaign and the intermediate employer who is the object of labor's pressure, there is no indication in the cases that the strike, picketing or unfair lists will be permitted. Our inquiry has been confined to the narrower field in which the unfair employer and the intermediate employer are related by direct economic dealings. Within this area, the strike cases go furthest, and in New York, the pioneer state in labor law, broad cooperation among employees in crafts interrelated by business dealings is permitted. Just as the development of the privilege of striking against employers for higher wages preceded the judicial sanction of picketing, so the legality of picketing the intermediate is finding slower but increasing acceptance in the courts. The modern tendency to strip words of their emotional aura and to attempt to consider activities with judicial calm bids fair to speed up the recognition by the courts of the unfair list and similar circulars. The anti-injunction statutes are a highly significant step forward, not only in limiting injunctions in labor disputes, but in clearing the way for acceptance by the courts of the legality of acts which are not enjoined. A final hopeful factor — hopeful because the economic condition of a large part of the nation depends upon labor's ability to organize and to use economic pressures to increase wages and improve working conditions — is the recent intimation by the Supreme Court in the *Senn* case that peaceful picketing is protected by the constitutional guaranty of freedom of speech.<sup>108</sup>

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107. For illustrations of cases in which statutes exempting labor unions and workers from prosecution for criminal conspiracy resulted in rulings that such activities could not give rise to civil liability, see Hellerstein, *loc. cit. supra* note 14.

108. *Senn v. Tile Layers Protective Association*, 301 U. S. 468 (1937).