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By Tim L. Bornstein*

Introduction

"During a recent strike a small boy sat on a fence near the works concerned and ate chocolates, whistling in the gladness of his heart between each toothsome morsel. In reality he was a 'picket,' and was marking and counting the men who entered the works."[1] This late Nineteenth Century description of a trade union "picket" is a good example of picketing in its denotative sense.

The term "picket" is not a legal *mot d'art.* In its generic sense "to picket" means merely to patrol or guard a particular area.[2] Its origin in the law of labor relations lies in the violent strikes of Nineteenth Century England. Picketing then referred to the practice of striking workers who met at the gates of their employer and tried to induce other workmen—by word of mouth and sometimes by violence—not to enter the struck premises.

In modern America, picketing has acquired a different connotative meaning. As a familiar institution in the United States, picketing generally refers to the practice of walking before the premises of an employer with a placard which bears some legend. Because there are usually several workers who carry these placards, the term "picket line" has become rather widespread in the American, industrial relations vocabulary.

Picketing in France is almost unknown in this American sense. As in Nineteenth Century England, French workers on strike merely assemble before the gates of the struck plant, and French

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[1] W. J. Shaxby, The Case Against Picketing 11, London (1897).

[2] P. H. Casselman, The Labor Dictionary 362 (1949).

labor law does not govern picketing specifically as an industrial weapon. It is dealt with only as a matter of general police regulation.[3]

Until the 1940's, the picket line in America was used by trade unions primarily during strikes, and in such situations the picket line is best known. It has become an important symbol of organized labor, as well as an economic weapon. It has even been memorialized in folk songs and in rather bad proletarian literature.

Because of its primary identification with strikes, some students of the labor movement have speculated that the courts and the public have conceptual difficulty in understanding the role of picketing when used for other purposes. In the rapidly changing context of American industrial relations, however, the picket line has become a truly utilitarian labor weapon.

Although the picket line is today still used in strikes, it is employed by unions for many other purposes. Familiar examples include its use to demand recognition from a recalcitrant employer who refuses to deal with the union of his employees' choice; to protest the sale and use of non-union made or struck goods; to protest the introduction of job displacing automatic machinery; to protest racial discrimination; to protest arbitrary discharges, et cetera. It has even been alleged that a Teamsters' local in Portland, Oregon, has used a picket line to compel a tavern owner to install pinball machines in which certain union officials had a financial interest.[4]

During the past fifteen years, a new and highly controversial type of picketing has grown increasingly important in union organizing campaigns, so-called "organizational picketing." Employers detest it.[5] Relatively few of America's large unions ever

[3] V. R. Lorwin, The French Labor Movement 248 (1954).

[4] Testimony of James B. Elkins before the U.S. Senate Subcommittee on Improper Activities in the Labor or Management Field. The New York Times, March 1, 1957, p. 1.

[5] The National Association of Manufacturers has declared organizational picketing to be near the top of union practices which it would like most to have made illegal, second only to its desire for Right to Work laws. The New York Times, February 27, 1957, p. 18. See also, "Organizational Picketing in New York State: An Indefensible Union Weapon which Must Be Restricted by Law," an undated publication of the Commerce and Industry Association of New York, Inc., which advocates an amendment to sec. 876-a of the New York Civil Practice Act to redefine the phrase "labor dispute" so as to proscribe organizational picketing.

use it, and, therefore, it does not have the universal support of the trade union movement.

The state courts, on the balance, have not given their approval to organizational picketing, and, although hundreds of such cases have been litigated during the past five years, they have been decided with a veritable potpourri of legal reasoning.

Finding order and consistency in these cases is no easy undertaking. They are complicated by constitutional problems, state-federal jurisdictional problems and an extraordinary variety of fact situations, all in addition to social policy considerations.

Organizational Picketing and Related Types of Picketing

Stranger Picketing. When a business is picketed by a trade union which does not represent any of its employees, such picketing is known in industrial literature as stranger picketing. The union is a stranger to the particular business, although it ordinarily will have members in the same industry. Stranger picket lines may have many purposes.

Organizational Picketing. Stranger picketing which has for its purpose persuasion of employees to join the union is known as organizational picketing. It has the following distinguishing characteristics: 1) it is conducted peacefully; 2) no demand for recognition or for a contract has been made on the employer; 3) no other trade union has been chosen by the employees as their collective bargaining representative; and 4) none or fewer than a majority of the employees belong to the picketing union.

Violent and Mass Picketing. If there has been substantial physical violence or verbal abuse on the picket line, it becomes a violent picket line. If there are a great many pickets present so that a traffic hazard is created, it becomes mass picketing.

Post-Certification Picketing. If another union has been already certified or chosen as bargaining agent for the employees in a bona fide election, picketing of the employer's premises by a stranger union is known as post-certification or rival picketing.

Recognition Picketing. If an express demand for recognition or for a contract has been made on the employer, picketing by a stranger union is thereafter known as recognition picketing.

Summary of the Law

Under both state and federal law, it is perfectly clear that violent picketing and mass picketing are unlawful. State courts may enjoin violent or mass picketing even though the picketed business is engaged in interstate commerce.[6] Indeed, there is no real dispute that such picketing should be enjoinable. There is, however, some controversy as to what constitutes "violence" on the picket line. Some state courts have found that a "black look" from a picket is sufficient violence to justify an injunction. Other courts reason that industrial disputes are not garden parties and that a modicum of violence should not be the sole basis for an injunction.

Under both federal law[7] and the law of most states,[8] post-certification or rival picketing is also unlawful and enjoinable. Such picketing is viewed as immoral by responsible labor and business spokesmen. Some controversy lingers regarding picketing to protest the certification of a "company union" as bargaining representative, but this is not a significant problem as a practical matter. In terms of fundamental fairness, one union should not attempt to interfere with the bargaining relationship of another union which has been properly certified, and most unions adhere to this doctrine scrupulously.

The grave controversy in contemporary labor law concerns the legality of organizational and recognition picketing. They differ only because the latter involves the making of an express demand for recognition and for a contract on the employer, whereas the former does not. Otherwise, their objective is the same, i.e. to persuade the employees of the picketed business to join the union. Under federal law, organizational and recognition picketing are lawful, except in some secondary boycott cases involving construction projects. Under state law, there is considerable disagreement as to the legality of organizational picketing. Almost all the states, however, are agreed that recognition picketing is unlawful and enjoinable.

[6] Allen-Bradley Local v. WERB, 315 U.S. 740 (1942); UAW v. WERB, 351 U.S. 266 (1956).

[7] National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. sec. 158(b)(4)(C).

[8] Independent Dairy Workers v. Teamsters, 127 A. 2d 869 (N.J. 1956); Florsheim Shoe Store Co. v. Retail Shoe Salesmen's Union, 269 App. Div. 757, 54 N.Y.S. 2d 788 (1945).

The Current Use of Organizational Picketing in American Industry

According to figures compiled in 1955, seventeen to eighteen million of America's sixty-five million gainfully employer persons belong to trade unions.[9] Most of these employees are in the major manufacturing and processing industries. Left unorganized are millions of smaller businesses, particularly in the retail sales and retail services field.

Organizing workers in this field has been and plainly will be no easy chore. Statistically, this field is growing both literally in the number of persons employed and in terms of the percentage of all gainfully employed persons.[10] This growth is partly a consequence of increased automation in the production and processing fields.

Four main reasons explain why it is far more difficult to organize these retail sales and service employees than it has been to organize workers in the production field, and for these reasons organizational picketing has proved itself an important organizing method.

First, because so many of these employees are "white collar" workers, they normally associate themselves psychologically with the managerial class, rather than with the working class. They are, therefore, less inclined at the outset of an organizing campaign to feel any identification with the trade union movement.

Second, many of these workers are employed by relatively small businesses. To them the practice of collective bargaining is somewhat less attractive than it is to production workers. Especially is this true where their relations with their employers are so personal as to make "individual bargaining" practicable.[11]

Third, it is probably true that many of the employers whose businesses have not been unionized during the last twenty years are openly and uncompromisingly hostile to trade unions. The

[9] A. J. Goldberg, AFL-CIO: Labor United 220-221 (1956).

[10] In 1956, the number of employees engaged in all jobs, other than those related to the production of goods, exceeded the 50% mark for the first time in the nation's history. The New York Times, March 31, 1957, p. 1.

[11] A case in which a union tried to organize a self-employed embalmer and engaged in organizational picketing to further that purpose is Metropolitan Funeral Directors v. Zembrowski, 39 LRRM 2202 (N.Y. Sup. Ct. 1956). The decision does not relate the message of the placard, but the appropriate choice would have been: "Union Men—Dead or Alive—Do Not Patronize Non-Union Businesses."

employees of such "last hard core" employers might well fear the consequences of joining a union in terms of invoking their employers' wrath. Indeed, their jobs may depend on their attitudes towards unions.[12]

Fourth, most businesses in this field are not engaged in interstate commerce, within the meaning of Section 2(6) of the Labor Management Relations Act.[13] State law, therefore, governs organizing efforts in the retail sales and service field in the vast majority of cases.

Because very few states have elaborate labor codes and administrative agencies comparable to the federal Labor Management Relations Act and the National Labor Relations Board, with a few noticeable exceptions,[14] the guarantees and opportunities to present the union's point of view—available under federal law—are simply not available under the law of most of the states. Other organizational methods, often far less desirable than those available under federal law, have necessarily been developed. Among these methods, organizational picketing is of preeminent importance.

In the retail sales and service field, only a few unions have an immediate interest in organizing. The three most important—and most often involved in organizational picketing litigation—are the Hotel and Restaurant Employees' and Bartenders' International Union, the Retail Clerks International Association and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

The few unions which use organizational picketing defend it on the grounds that it is a necessary and peaceful means of persuading workers of the benefits of trade unionism. Its critics argue that it is primarily a weapon to put economic pressure on an employer to compel him to coerce his employees to join the union against their will. Between these two polar views of

[12] Illustrative cases in which employees were summarily discharged without legal recourse because of their union sympathies under state law are as follows: Blue Boar v. Hotel and Restaurant Employees, 254 S.W. 2d 335 (Ky. 1952), and Gilbertson v. Culinary Alliance, 204 Ore. 326, 282 P. 2d 632 (1955).

[13] 61 Stat. 136, 29 U.S.C. sec. 152(6).

[14] Although other states have labor relations agencies of various types and of various statutory powers, the following states have laws which guarantee rights comparable to those guaranteed under federal law: Massachusetts, New York, Pennsylvania and Wisconsin.

organizational picketing, the courts have found no single, satisfactory *ratio decidendi.* The cases have predicated results on a multitude of reasons, all of which have tried to resolve the question of whether such picketing is merely persuasive of the desirability of union membership or economically coercive of the employer and his employees.

An examination of the state court decisions governing organizational picketing and its related types reveals substantial disparity in the thinking (and non-thinking) of the courts.

Organizational Picketing and State Law

That organizational and recognition picketing constitute one of the most controversial problems in contemporary labor law is demonstrated by the fact that some twenty seven states have litigated such cases in their appellate courts during the past five years. The period 1953-1957 is significant because during this time the states have reconsidered their picketing decisions in the wake of the Supreme Court's changing views of the requirements of the First and Fourteenth Amendments regarding picketing. Moreover, this has also been a period of unprecedented efforts by unions to organize the retail sales and services field.

The law of the states cannot be characterized with ease, because varying fact situations have evoked different judicial responses. There are, nevertheless, some few clear patterns among the state cases.

Generally the remedy sought in these cases has been the extraordinary, equitable writ of injunction. Damages have been sought in only a few cases by the picketed employer. In one unique case, a Michigan court awarded damages to an employee against a union, because he was discharged by his employer in the face of the union's bare threat to establish an organizational picket line.[15] This case, however, is unprecedented.

Since 1953, only one state high court has refused to enjoin organizational picketing principally on the ground that the federal constitution prohibits such result.[16] This case, however, is clearly out of the main stream of the state decisions, and it is based on a

[15] Edwards v. Carpenters, 64 N.W. 2d 715 (Mich. 1954).

[16] Pueblo Building Trades Council v. Harper Construction Co., 307 P. 2d 468 (Colo. 1957).

very doubtful reading of the Supreme Court's recent picketing decisions.

Several state courts have reasoned that their anti-injunction statutes per se prohibit enjoining such picketing.[17] These anti-injunction statutes generally bar injunctions where there is a "labor dispute," and the courts of some of the states have found a "labor dispute" when a stranger union pickets for organizational purposes. These courts, therefore, had no reason to pursue the social and economic considerations of organizational picketing.

Although the cases and treatises talk of the distinction between organizational and recognition picketing, a survey of all the state decisions during the past five years definitively reveals that the distinction is not reflected in the courts' holdings. Professor Archibald Cox of the Harvard Law School has termed it a "silly judicial distinction."[18] Another writer has suggested that the "distinction has arisen largely by way of rationalization by judges of their opinions; when they wish to enjoin picketing it is labeled 'recognition'; when they feel it should not be enjoined it becomes 'organizational.'"[19]

Of the states which have concluded decisionally that organizational picketing is lawful as a method of persuading non-union employees to join the union, only New York appears to recognize the distinction between picketing in which demands are made on the employer expressly and in which no demands are made on the employer. Only the latter, organizational picketing, is lawful in New York, under the well known decision in *Wood* v. *O'Grady*.[20] This result has been so distressing to New York employers that they have tried several times to amend Section 876-a of the New York Civil Practice Act to make organizational picketing unlawful by statute. These efforts have been unsuccessful, however, for the New York legislature in the spring of 1957 refused for the fourth time to enact such legislation.

An intermediate court in Illinois has indicated its approval of the distinction, holding picketing lawful specifically because no

[17] Pomonis v. Hotel and Restaurant Employees, 56 N.M. 56, 239 P. 2d 1003 (1952); Lindsey Tavern v. Hotel and Restaurant Employees, 125 A. 2d 207 (R.I. 1956).

[18] A. Cox, "Some Current Problems in Labor Law," 35 LRRM 48, 57 (1954).

[19] S. C. Vladeck, 8 N.Y.U. Conference on Labor 207 (1955).

[20] 307 N.Y. 532, 122 N.E. 2d 386 (1954), cert. denied, 349 U.S. 939 (1955).

demands had been made on the employer.[21] The Supreme Court of Illinois has not yet approved the distinction, however.

Pennsylvania courts permit peaceful picketing—whether organizational or recognition—without giving attention to the distinction that a demand on the employer has been made.[22] The Supreme Court of Pennsylvania, however, looks to the duration of the picketing. In one case, it held that, after five years of continual picketing, the purpose could no longer be organizational, for during this period the union had been unsuccessful in persuading a majority of the employees to join. An injunction, therefore, was allowed.[23] It reached the same conclusion when recognition picketing had been conducted unsuccessfully for a three year period.[24]

In three recent cases, courts have recognized the right to picket for organizational purposes when the unions argued principally that they were protesting substandard wages, and when they demonstrated with clear evidence that the competitive wage differential was substantial.[25] Most state courts, however, have ignored this aspect of organizational picketing, perhaps because the unions failed to emphasize it.

Several courts have looked specifically to the question of whether the union, in addition to picketing, had made any other efforts to organize the employees. Finding none, they concluded that the absence of such other efforts indicated that the union was not sincerely interested in persuading the employees, but solely with coercing the employer to compel his employees to join the union.[26] These cases are few, however.

Fifteen state courts, most of them appellate courts, have decided during the past five years that picketing by a stranger

[21] Simmons v. Retail Clerks, 125 N.E. 2d 700 (Ill. App. Ct. 1955).

[22] E.g., Amore v. Building and Trades Council, 39 LRRM 2152 (Pa. Ct. Com. Pl. 1956).

[23] Anchorage v. Waiters and Waitresses, 383 Pa. 577, 119 A. 2d 199 (1956).

[24] Sansom House v. Waiters and Waitresses, 382 Pa. 476, 115 A. 2d 746 (1955), cert. denied 350 U.S. 896 (1955).

[25] Self v. Wisener, 287 S.W. 2d 890 (Ark. 1956); Pueblo Building Trades Council v. Harper Construction Co., 307 P. 2d 468 (Colo. 1957); and Slosberg v. Money, 33 LRRM 2256 (Mich. Cir. Ct. 1953).

[26] Teamsters v. Merchandise Warehouse Co., 132 N.E. 2d 715 (Ind. App. Ct. 1956); Way Baking Co. v. Teamsters, 335 Mich. 478, 56 N.W. 2d 357 (1953), cert. denied 345 U.S. 957; Postma Gravel Co. v. Teamsters, 334 Mich. 347, 54 N.W. 2d 681 (1952), cert. denied 345 U.S. 922; Tallman Co. v. Teamsters, 284 S.W. 2d 547 (Mo. 1955); Bellerive Country Club v. Hotel and Restaurant Employees, 284 S.W. 2d 492 (Mo. 1955).

union is violative of their statutory policies favoring employees' free choice in the selection of a collective bargaining agent.[27] In none of these did the court or the employer demand a secret ballot to determine the employees' true choice, but in most of these cases the employer requested his employees to testify in open court to the conclusion that they did not favor the picketing union.

These courts all reasoned implicitly or explicitly that picketing by a union which does not represent a majority of the employees is "coercive of the employer to coerce his employees to join the union." This very phrase has been repeated innumerable times in these decisions. Although these cases sometimes refer to the fact that a demand for recognition or for a contract was made on the employer, this seems in most cases to have been merely an evidentiary hook on which to rest their decisions, for there were no dicta which might reasonably be interpreted to mean that the absence of such demands would have produced a different result. Indeed, many of the courts expressly stated their disbelief in the validity of the distinction between organizational and recognition picketing.

Most of these courts cloaked their decisions in the rationale that, because the employer was financially injured during the course of the picketing, the only purpose of the picketing was to coerce him to compel his employees to join the union. And, because their state policies favored employees' free choice, they concluded in good syllogistic form that the picketing was unlawful and enjoinable. Beyond this primitive logic, these courts have not explored the economic interests which the union has in soliciting employees' memberships through the picketing route. These

[27] Kenmike Theatre v. Motion Picture Operators, 139 Conn. 95, 90 A. 2d 881 (1952); Fountainebleau Hotel v. Hotel and Restaurant Employees, 92 So. 2d 415 (Fla. 1957); Powers v. Hod Carriers, 96 S.E. 2d 577 (Ga. 1957); Newberry Co. v. Retail Clerks, 298 P. 2d 375 (Idaho 1956); Blue Boar v. Hotel and Restaurant Employees, 254 S.W. 2d 355 (Ky. 1952); Pappas v. Hotel and Restaurant Employees, 151 Me. 36, 116 A. 2d 497 (1955); Olen Department Stores v. Retail Clerks, 39 LRRM 2112 (Miss. Chan. Ct. 1956); American Hotel Co. v. Bartenders' International, 297 S.W. 2d 411 (Mo. 1957); Chucales v. Royalty, 164 Ohio St. 214, 129 N.E. 2d 823 (1955); Gilbertson v. Culinary Alliance, 204 Ore. 326, 282 P. 2d 632 (1955); Electrical Workers v. O'Brien, 40 LRRM 2196 (Tenn. Sup. Ct. 1957); Audubon Homes v. Spokane Building Council, 149 Wash. Dec. 144, 298 P. 2d 1112 (1956); Vogt v. Teamsters, 270 Wis. 315, 74 N.W. 2d 749 (1956); Hagen v. Culinary Alliance, 70 Wyo. 165, 246 P. 2d 778 (1952); and Sutton v. Marvidikis, 40 LRRM 2232 (Utah Sup. Ct. 1957).

courts accept an unspoken assumption that the employer's economic interests are paramount to the union's.

Only one court, the Supreme Court of Florida, in a startlingly innocent statement, revealed that it disapproves of any picketing, unless a majority of the employees already belong to the picketing union. This is undoubtedly the attitude of most of the state courts, but only the Florida court has flirted with this notion so openly. In *Sax Enterprises, Inc.* v. *Hotel and Restaurant Employees*,[28] arising out of the famous Miami Beach hotel strikes, the Florida Supreme Court stated its views explicitly:

> Without doubt, a labor organization has the right to engage in peaceful picketing on the employer's premises when predicated on the refusal of the employer to recognize and negotiate with the union as the representative of such employer's employees. In order for such picketing to be lawful, the union must establish that the employees have chosen it as their representative. . . .

It is this writer's opinion that the courts of the states have dealt with organizational picketing too summarily. Moreover, at best, the rationale that such picketing is "coercive of the employer to coerce his employees" is a superficial and unsatisfactory one.

The organizational picket line is a far more complex institution than the state courts which so easily enjoin it have recognized. Because it is not now likely that organizational picketing is constitutionally protected as free expression under the First and Fourteenth Amendments of the U. S. Constitution,[29] the following analysis proceeds on the assumption that there is no *general* constitutional immunity for such picketing and that public policy considerations alone govern.

As part of a trade union's campaign to organize the employees of a business, the organizational picket line may influence the behavior of four economically distinct groups: 1) the employees whom the union desires to organize; 2) their employer; 3) the general, consuming public, including union and non-union consumers; and 4) the Teamsters who deal with the picketed employer.

[28] 80 So. 2d 602, 603 (Fla. 1955).

[29] The constitutional aspects of organizational picketing are discussed at p. 53, infra.

Each of these groups may be affected quite differently by the picket line. In exploring the social and economic utility of organizational picketing, the impact on these groups must be carefully examined.

The Impact of Organizational Picketing on Employees

It is the declared public policy of the United States[30] and of all the states[31] that employees should be free to select agents of their own choosing for purposes of collective bargaining. This is a right without meaning unless trade unions are able to communicate with unorganized workers to explain the benefits of membership. Unions argue, therefore, that a grave injustice is done them when they are deprived of the right to communicate to other workers by way of the picket line.

Historically, the denial of free communication to workers has resulted in great social disorder. After the general strike and workers' rebellion in Russia in 1905, when the Czarist government reneged on its promises to allow workers to organize freely, Leon Trotsky wrote dramatically that "to the workers the free word is bread and air."[32] Perhaps it is a fair generalization of Western political history that, when a society imposes undue restrictions on the right of expression, the price of such restrictions ultimately proves to be far dearer than allowing the expression. How important, therefore, is the organizational picket line for purposes of communicating the message of trade unionism?

As a means of carrying their message, the unions insist that the picket line is vital, not merely desirable. To be sure, there are other media of communication, but the picket line in America has become the most important symbol of the organized movement. Many other types of persuasion have been employed in American industrial history, including religious exhortations,[33]

[30] National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. sec. 151, *et seq.*

[31] Either by statute, e.g., Kentucky Revised Statutes 336.130(1), or by state constitutions, e.g., 1945 Constitution of Missouri, Article 1, Section 29.

[32] Russkaya Gazeta, November 17, 1950, cited in I. Deutscher, The Prophet Armed 139.

[33] An unusual case in which prayers were substituted for pickets at the employer's gates is related in E. T. Hiller, The Strike, 110-121.

but the picket line alone has emerged as the universally understood symbol of labor's cause.

Employers, however, argue that organizational picketing is not a mere symbol and medium of communication but that it is a device to coerce the employer and his employees. Professor Sylvester Petro of the Law School of New York University is the most prolific and persistent critic of organizational picketing. He states his position unequivocally:

> [Organizational] picketing is designed to disrupt and disorganize business to the point where both the employer and employees, who would otherwise resist the unions, give in simply in order to continue their work—not because they wish to deal with or through the union.[34]

His thesis, accepted by most of the state courts, is that organizational picketing is designed to put so much economic pressure on the employer that, despite the wishes of his employees, he will compel them to join the union rather than endure injury to his profits. Professor Petro and the state courts do not, by this reasoning, credit employers either with self-restraint or nobility of purpose.

Without pausing at this point to examine the "coercion" concept in greater detail, it is plain that Professor Petro's logic is not wholly sound, for he ignores those cases in which the organizational picket line was so situated that only the employees could see it and be influenced by it, and where neither the general consuming public nor the Teamsters could see it.[35]

Unions retort further that organizational picketing has the practical advantage that it may be seen and read by a number of people simultaneously, which is of substantial importance in communicating to workers as they enter and leave their employer's premises at the same time.

Critics of organizational picketing, however, argue that unions ought to use other media which are directed only to the employees and which will not cause economic injury to the employer. Unions retort again that the suggested, alternative media are either ineffective, too expensive or in some instances totally un-

[34] S. Petro, "Free Speech and Organizational Picketing in 1952," 4 Lab. L.J. 3, 4 (1953).

[35] Douds v. Bakery Workers, 224 F. 2d 49 (2d Cir. 1955); Porrata v. Gross, 38 LRRM 2011 (N.Y. Sup. Ct. 1956).

available to them for organizing purposes. Small unions argue this point persuasively.

Discussing the constitutional aspects of organizational picketing, Professor Morris Forkosch of Brooklyn Law School makes the following observations about the inadequacy of alternative media for small, independent unions:

> Numerous alternatives [to organizational picketing] are found, for example, newspaper advertising, radio and television, but if a small group seeks to obtain votes, where can it get the funds? The real question is not whether any alternative exists, but whether an effective and available alternative is found. For example, even if financially available, a newspaper may be published outside the locality involved and not be read by many of the workers, so that it is not an effective alternative to disseminating information at the plant. . . . Picketing, therefore, may be the very lifeblood of a small group of workers, and the Constitution must protect them if the law denies them all other effective means of obtaining bargaining status.[36]

It is a curious irony that employers' associations, which ordinarily champion the rights of independent, local unions against wealthier, national unions, would deny to small unions the medium of communication best suited to their organizational needs.

However, even wealthier, national unions cannot always use other media effectively. It is self-evident that metropolitan daily newspapers, radio and television are too expensive and impractical to reach the employees of small businesses. Moreover, in some small, anti-union Southern communities, access to these media—totally aside from questions of cost—has been categorically denied to unions.[37]

Professor Petro has generalized that "there is no state in the Union which has not, in one form or another, accepted wholeheartedly the right of employees to form and join unions of their choosing."[38] Therefore, he concludes, there is no "rational ground

[36] M. Forkosch, "Informational, Representational and Organizational Picketing," 6 Lab. L.J. 843, 861 (1955).

[37] See "All Rights Denied," by the Textile Workers Union of America (1955), which describes an organizational campaign in Elkin, N.C., in which the union was denied the right to use any of the media of communication in the town.

[38] S. Petro, "Free Speech and Organizational Picketing in 1952," 4 Lab. L.J. 4, 8 (1953).

for challenging the *general* reasonableness of a state policy which would condemn coercive types of organizational activities by unions," i.e. organizational picketing. Although all states have adopted statutory policies purporting to favor collective bargaining and the right of employees' self-organization, most of these statues are mere policy declarations, providing no substantive legal rights and duties.[39] It is unfortunate that the most outspoken critics of organizational picketing in the legal journals write with specific reference to the statutes and cases of their own states, most of which are industrially advanced and which do provide elaborate protections to workers in the exercise of their right to organize.[40]

Some courts, failing to realize that Professor Petro's analysis is predicated largely on New York labor relations law, which is highly developed, have specifically relied on his logic, even though their own states offered none of the protections guaranteed to workers by the law of New York. The Kentucky Court of Appeals is one such court.[41]

Under federal law a reasonable right to communicate to other workers has been clearly and positively guaranteed, as an indispensable feature of the right of self-organization.[42] Aside from the few exceptional and highly industrialized states, the right of unions to communicate to workers is not guaranteed by the law of the states in any significant sense.

Moreover, because a worker may be discharged summarily by his employer in most states if he attempts to organize his fellow employees, the burden of organizing falls necessarily on outside unions, which are free of the employer's immediate economic power.

[39] Sandt v. Mason, 208 Ga. 541, 67 S.E. 2d 767 (1951); and Quinn v. Buchanan, 298 S.W. 2d 413 (Mo. 1957).

[40] Professor Petro writes primarily of the law of New York, which has both a well established labor code and a vigorous administrative board to implement it. Mr. David L. Brenetar, another critical writer on organizational picketing, is also a member of the New York bar. Mr. I. Herbert Rothenberg, whose views are much akin to Mr. Petro's, is a member of the Pennsylvania bar.

[41] The following cases specifically cite Professor Petro's articles with approval and quote from them: Blue Boar v. Hotel and Restaurant Employees, 254 S.W. 2d 335 (Ky. 1952); Gilbertson v. Culinary Alliance, 204 Ore. 326, 282 P. 2d 632 (1955); and Audubon Homes v. Spokane Building Council, 149 Wash. Dec. 144, 298 P. 2d 1112 (1956).

[42] National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. sec. 157 and 158(a).

Most states offer unions no right to enter the premises of the employer to urge union membership. In order to reach the employees' ears at all, therefore, unions must wait outside the employer's door to communicate their messages. When radio, newspaper and television media are either too expensive, ineffective or unavailable to unions dealing with small businesses, the picket placard is resorted to as the suitable and effective means of communication. Certainly unions can spread their messages by word of mouth in many cases. In other cases, however, the number of employees may be too large or the employees may fear invoking their employer's disfavor by being seen talking to union organizers. Denial of the right to picket in such cases is a significant barrier to the right of self-organization.

In terms of its specific impact on employees, the organizational picket line may be persuasive in several respects: 1) it points out to workers that joining a union means positive benefits economically; 2) it appeals to the employees' social consciousness through the suggestion that, by accepting substandard wages, they endanger the standards of other workers throughout the same industry; and 3) it suggests to them that by joining the organized labor movement they need not fear their employer's economic power.

Through the picket line, the employees who see its message may be made conscious that their wages and conditions are substandard, if such is the fact. Typical appeals are made with placards which bear legends such as this: "Workers Organize for Security—Better Wages—Hours and Conditions." Although such a message itself can hardly be convincing, it may be a timely and pointed reminder of the advantages of union membership, which in the long run may be a weighty factor in that complex of psychological and economic influences which causes workers to join a union. This is the "conscious self-advantage" purpose of organizational picketing.

Second, the picket line, by the very physical presence of the pickets, suggests to employees that in some respects their employment relationship is adversely different from that of unionized employees in the same industry. Where the union particularly urges on them that their wages are "substandard" (meaning below the union scale), they might be struck by the obvious eco-

nomic fact that low wages drive out high wages and that accepting non-union wages and conditions tends to injure unionized, fellow workers in the same industry. This is the "social consciousness" purpose of organizational picketing.

In *Exchange Bakery and Restaurant* v. *Waiters and Waitresses, Local 1*,[43] one of the earliest organizational picketing cases, the New York Court of Appeals stated the rationale for organizational picketing in terms of wage competition in the same industry and in terms of workers' unity of interest:

> The purpose of a labor union to improve the conditions under which its members work; to increase their wages; to assist them in other ways may justify what would otherwise be a wrong. So would an effort to increase its numbers and to unionize an entire trade or business. It may be as interested in the wages of those not members, or in the conditions under which they work as in their own members, because of the influence of one upon the other. All by the principle of collective bargaining. Economic organization today is not based on the single shop.

Demonstrative of the fact that organizational picketing is often conducted to protect the prevailing wage and other standards of a union, rather than for mere purposes of membership aggrandizement, are the cases in which the unions indicated their willingness to withdraw the picket line if wages were raised, making no demands whatsoever that the employees should join.[44]

Finally, the presence of the organizational picket line—unlike any other media of communication—can demonstrate to employees that, by joining the union, they need not fear their employer's economic power. This factor is important, perhaps above all others. Professor Cox has stated this rationale of the organizational picket line as follows:

> Concerted activities which demonstrate the power of the union may be an important part of the electioneering not so much because of economic coercion but because the publicity and demonstration of the union's power go far to offset hitherto unorganized employees' fear of running counter to the employer's wishes, a fear kept alive and strengthened by the artful use of his freedom of expression.

[43] 245 N.Y. 260, 263 (1927).
[44] Self v. Wisener, 287 S.W. 2d 890 (Ark. 1956); and Slosberg v. Money, 33 LRRM 2256 (Mich. Cir. Ct. 1953).

> In other words, the expression of opinion [by employees] which follows a campaign in which unions are free to picket may be more reliable than a poll without competing pressures.[45]

Although Professor Cox's context was that of an election under federal law, his logic would seem applicable *a fortiori* to organizing campaigns and elections under state law.

The Impact of Organizational Picketing on Employers

In their public utterances on the subject of organizational picketing, employers' associations state solicitude for the "right of employees freely to choose their bargaining agents."[46] This solicitude, out of character with the traditional attitude of business groups towards trade unions, suggests that it may be lost profits, not alone concern for employees' wishes, which provokes employers' resentment of organizational picketing.

Nevertheless, as discussed above, many state courts have been persuaded to enjoin picketing for organizational purposes on the sole theory that it has the effect of "coercing the employer to coerce his employees" to join the union.

If a demand of any sort has been made on the employer, most state courts grasp at the notion that the picketing is overtly designed to compel the employer to recognize the union, which these courts hold violative of their public policies.[47]

Some courts, faced with situations of organizational picketing in which no demands had been made on the employer, have reasoned that the picketing constituted an *implied* demand for

[45] A. Cox, "Some Current Problems in Labor Law," 35 LRRM 48, 56 (1954).

[46] R. Abelow, "Statement of the Commerce and Industry Association of New York, Inc., Regarding Organizational Picketing," (1954) before the New York State Joint Legislative Committee on Industrial and Labor Conditions.

[47] Klibanoff v. Retail Clerks, 258 Ala. 479, 64 So. 2d 673 (1953); Burgess v. Daniel Plumbing Co., 285 S.W. 2d 517 (Ark. 1956); Kenmike Theatre v. Motion Picture Operators, 139 Conn. 95, 90 A. 2d 881 (1952); Sax Enterprises v. Hotel and Restaurant Employees, 80 So. 2d 602 (Fla. 1954); Powers v. Hod Carriers, 96 S.E. 2d 577 (Ga. 1957); Blue Boar v. Hotel and Restaurant Employees, 254 S.W. 2d 335 (Ky. 1952); Postma Gravel Co. v. Teamsters, 334 Mich. 347, 54 N.W. 2d 681 (1952); Olen Department Stores v. Retail Clerks, 39 LRRM 2112 (Miss. Chan. Ct. 1956); American Hotel Co. v. Bartenders' International, 297 S.W. 2d 411 (Mo. 1957); Chucales v. Royalty, 164 Ohio St. 214, 129 N.E. 2d 823 (1955); Gilbertson v. Culinary Alliance, 204 Ore. 326, 282 P. 2d 632 (1955); Thurman v. Hotel and Restaurant Employees, 37 LRRM 2579 (Tenn. Chan. Ct. 1956); Plumbers v. Graham, 345 U.S. 192 (1953); and Hagen v. Culinary Alliance, 70 Wyo. 165, 246 P. 2d 778 (1952).

recognition, which therein was held to be unlawful.[48] Indeed, finding no other basis to grant an injunction, the Supreme Court of Idaho enjoined organizational picketing in one case because the union *failed* to make a contract demand on the employer![49]

Only a few state courts, as discussed above, have held that unions may lawfully organize by way of the picket line. These few courts, which recognized that the employer might be financially injured, reasoned that such injuries are merely incidental to the risk of conducting a business in the Mid-Twentieth Century and are *damnum absque injuria.*[50]

In the wake of an overwhelmingly hostile attitude of the state courts towards organizational picketing, and their concern to protect the employer from being influenced to coerce his employees against their wishes, one would logically assume that in these cases the employees had expressed their desire not to join the picketing union. In such cases, if expression of their choice was a free and genuine one, there could be little point in allowing the union to continue picketing. Although the state courts always assume the employees' choice in these cases is against the union, this assumption—in the light of contemporary knowledge of labor relations—is often extraordinarily doubtful.

There are two fundamental inconsistencies in the reasoning of almost all the cases which enjoin picketing because it is said that it is designed to coerce the employer to coerce his employees to join the union: 1) most of these courts do not enjoin employers from coercing their employees directly to join the union;[51] therefore, such courts enjoin a union from influencing the employer when they would not enjoin an employer from doing the same acts on his own initiative; and 2) in most of these cases the em-

[48] Teamsters v. Merchandise Warehouse Co., 132 N.E. 2d 715 (Ind. App. Ct. 1956); Pappas v. Hotel and Restaurant Employees, 151 Me. 36, 116 A. 2d 497 (1955); Way Baking Co. v. Teamsters, 335 Mich. 478, 56 N.W. 2d 357 (1953); Audubon Homes v. Spokane Building Council, 149 Wash. Dec. 144, 298 P. 2d 1112 (1956); and Vogt v. Teamsters, 270 Wis. 315, 74 N.W. 2d 749 (1956).

[49] Newberry Co. v. Retail Clerks, 298 P. 2d 375 (Idaho 1956); c.f. Fountainebleau Hotel v. Hotel and Restaurant Employees, 92 So. 2d 415 (Fla. 1957).

[50] Skinner v. Carpenters, 36 LRRM 2468 (Colo. Dist. Ct. 1955); Simmons v. Retail Clerks, 125 N.E. 2d 700 (Ill. App. Ct. 1955); Wood v. O'Grady, 307 N.Y. 532, 122 N.E. 2d 386 (1954); Amore v. Building and Trades Council, 39 LRRM 2152 (Pa. Ct. Com. Pl. 1956); and Anchorage v. Waiters and Waitresses Union, 383 Pa. 547, 119 A. 2d 199 (1955) (Dictum).

[51] E.g., Sandt v. Mason, 208 Ga. 541, 67 S.E. 2d 767 (1951); Quinn v. Buchanan, 298 S.W. 2d 413 (Mo. 1957).

ployer did not even request that his employees be given a secret ballot to determine whether they really desired to be represented by the picketing union; even more alarming, *not one* of the state high courts required that a secret vote be conducted before enjoining the picketing.

Professor Petro, the employer's champion, has stated the position of the majority of the state courts as follows:

> Where a union pickets in order to organize the employees, there is nothing the employer can lawfully do to extricate himself from the harm he is suffering. Organizational picketing implies a dispute, not between the union and the employer but between the union and the unorganized employees; if the employees would join, the dispute would end. The employer would violate the law if he induced the employees to join. Yet the harm done by the organizational picketing is done primarily to the employer.[52]

In most of the states in which organizational picketing has been enjoined on the basis of this logic, the employer would violate no "law," if he interceded in his employees' choice, whether for *or* against the union. At most, he would violate a "declared public policy." The declared public policy of a state that employees shall be free to select the bargaining agent of their choice generally has only two legal effects: to make "yellow dog" contracts invalid and to legalize the right to strike. Such policies simply do not impose any sanctions of law on the employer if he coerces or discharges his employees for pro-union activities. The logic of most of these cases, therefore, at best seems fundamentally unsound and unfair.

Professor Petro's logic seems faulty again when he asserts that there is nothing the employer can do to extricate himself from the position of middle man in an organizing campaign in which picketing is used. He may lawfully, in most states under state law, coerce his employees to join the union, without any possible legal consequences to himself. More morally, however, the employer could demand that the union agree to a secret ballot election in which his employees could make their choice, free from pressure of the union or himself. After such an election, if

[52] S. Petro, "Recognition and Organizational Picketing in 1952," 3 Lab. L.J. 819, 821 (1953).

the employees by their ballots have decided to have no dealings with the union, the employer— in good faith—could move to enjoin the picketing. This is the rational approach which essentially is required by federal law.[53]

Why employers in organizational picketing cases have not demanded secret ballot elections does not appear in the opinions of the state courts. However, that such a secret ballot election did not suggest itself to employers raises the negative inference that they were indifferent to their employees' choice and that they were determined to defeat the union despite their employees' choice.[54]

Would it be unreasonable judicial legislation for the courts of equity to require a secret ballot election before enjoining organizational picketing? Such an election would certainly effectuate more truly the declared policies of the states. A court should not be satisfied with the employer's bare assertion that the picketing union does not represent a majority of his employees. Neither should a petition solicited by the employer from his employees be satisfactory either, for the employer's power in such cases is too blatant. A secret ballot election, conducted by an independent agency or by a commissioner of the court, seems the only fair prerequisite for an injunction in such cases.

The rationale that organizational picketing is "coercive" is too often just a matter of words, not logic. Professor Edgar Jones, in an analysis of the "coercion" concept in picketing cases, concludes that coercion is primarily a judicial epithet, not a substantive, economic reality. In response to the judicial assertion that financial injury to the employer "coerces" him, Professor Jones makes this reply:

> It is true enough that the businessman has an acute ache in the region of his cash register when the picket succeeds. But that ache is chronic. He gets it when he has to lower his prices or watch customers go to competitors. He gets it when his landlord demands an increase in rent and he must choose between moving elsewhere or paying the

[53] Federal law on this point is discussed at p. 60, infra.

[54] Thomas Jefferson, Inc. v. Hotel and Restaurant Employees, 84 So. 2d 583 (Fla. 1956). In this case, the trial court appointed a commissioner to conduct an election among the employees, but the Florida Supreme Court reversed, reasoning that this procedure exceeded the trial court's powers and also that it denied the employer the right of cross-examination and confrontation.

> higher rent. He gets it when his wholesaler notifies him of an increase in price and he knows his local market will not permit him to pass the price increase on to his customers....
>
> The result may indeed appear to be harsh for the individual business concern which is subjected to the societal pressure stimulated by peacefully conducted picketing. But the same pressure, raised by other stimuli, is present so frequently in our industrial society as hardly to be thought novel, however one may philosophize about the morality of a society which willingly encourages it. ... It is enough to recognize that the pressure brought to bear on him is not coercion but is instead a societal pressure to be seen in operation under countless circumstances every day. It exists as a norm of our society because we believe it is wiser to let public opinion shift about as it will and be subject to the sway of reason or the emotion of the special pleader who seeks to advance his cause by gaining the support of public opinion.[55]

If the employer is injured financially in the course of a union's organizational campaign involving picketing, he should not have to be subjected to it indefinitely.

Secret ballot elections would serve to reflect the true wishes of the employees and also as a cut-off period for the picketing. To be sure, if the employees choose the picketing union as their bargaining representative in a fairly conducted election, and the employer refuses thereafter to bargain with the union, the picketing should not be enjoined. If, however, the union has had a reasonable time in which to organize the employees through the use of the picket line, and the employees decide that they do not desire to be represented by that union, picketing for organizational purposes thereafter should be enjoined.

In a free society, the employer's loss of profits ought not to be the sole criterion of the legality of union activity.

The Impact of Organizational Picketing on the General Public

In addition to its impact on the employees and the employer, organizational picketing may also have effect on individual third parties who see the picket placards. This group may be divided into three principal subgroups: 1) the non-union consuming

[55] E. Jones, "Picketing and Coercion: A Jurisprudence of Epithets," 39 Va. L.R. 1023 (1953).

public; 2) the union consuming public; and 3) the Teamsters in the course of their employment.

So far as the general, non-union consuming public is concerned, the organizational picket line may or may not induce abstention from dealing with the picketed business. Some individual members of this group may be persuaded on the basis of whether it is a strike line or a stranger picket line. Although there undoubtedly are members of the general public who, as a matter of principle, will cross no picket lines, there are far more who are totally indifferent to picket lines and who cross them regardless of their purpose, even gleefully.

There is little likelihood in this third quarter of the Twentieth Century that many people fear to cross stranger picket lines before retail stores because of anticipated harm to themselves. Of the tremendous number of picketing cases decided each year by the state courts, only an infinitesimal number involve any physical violence. The courts have no reluctance to enjoin picketing on the slightest showing of violence. Indeed, the Supreme Court of Florida has practically enjoined the "black look."[56]

As to members of the non-union consuming public, therefore, the organizational picket line is purely persuasive, not coercive.

More disputed is the impact of the organizational picket line on the union consuming public. Because most organizational picketing cases involve retail sales and service businesses, union members of the consuming public—if they refuse to cross such lines—might cause losses to the picketed employer. Indeed, part of the purpose of the organizational picket line is to persuade the public not to deal with the employer on the theory that such a demonstration of union solidarity and strength will persuade employees that they have much economic strength to gain by joining the picketing union.

The critics of organizational picketing, however, assert that picketing per se involves a blind obedience from union members of the consuming public. Perhaps this position is best stated by I. H. Rothenberg as follows:

> Anyone who has ever interested himself in the history, operations and tactics of labor unions is fully aware

[56] Fountainebleau Hotel v. Hotel and Restaurant Employees, 92 So. 2d 415 (Fla. 1957).

> that at the very base of the labor movement, and forming its tissue and marrow, is the injunction: 'Do not cross a picket line.' Without this basic rule and practice of unionism, the entire movement would collapse. It is on this keystone of keeping picket lines inviolate that the whole theory of reciprocal unionist [sic.] is founded. . . .
>
> Even if some individual characteristics were patent to the *disinterested* observer, there is nothing in the dogma which exempts the 'organizational' picket line, any more than any other variety, from the basic injunction to unionists against crossing picket lines.[57]

Although most students of labor relations would doubt Mr. Rothenberg's assertion that the trade union movement would go up in smoke if the right to picket were totally denied, it is clearly true that union members are urged to respect picket lines, as a matter of principle. But there are union members and union members! Obviously all union members are not zealous about or even fond of the labor movement. Union members cannot be penalized by the union if they refuse to respect a picket line under federal law.[58] Under the law of most states there is nothing which prohibits penalizing a member who crosses a picket line in violation of his union's recommendation. However, as a practical matter, and there is nothing in the cases which points to the contrary, most unions simply are too indifferent to the organizational picket lines of other unions to make particular efforts to exhort their members to respect them. This is true because organizational picket lines are usually used with small, retail businesses.

For constitutional purposes, Professor Cox suggests that a sharp distinction be drawn between such a picket line, which he characterizes as a "publicity" picket line, and the so-called "signal" picket line:

> Quite different [from signal picketing] is the peaceful picketing which is directed primarily to the general public. Familiar illustrations may be found outside motion picture theatres, restaurants and beauty parlors where none of the employees are on strike. Theoretically such a picket line is entitled to the same respect from union members as any other picket line, but as a practical matter the same economic sanctions play little part.[59]

[57] I. H. Rothenberg, "Organizational Picketing," 5 Lab. L.J. 689, 693 (1954).
[58] National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. sec. 158(a) (3) and sec. 158(b) (2).

If a union member in the course of his employment refuses to cross the picket line of another union, he may be discharged by his employer under federal law,[60] as well as under the law of the states. Moreover, if the union member cannot reach his job because of the presence of a picket line of another union which he chooses not to cross, he will be denied unemployment compensation benefits by those few states which have decided this issue.[61]

Therefore, as to both the non-union and the union consuming public, the impact of organizational picketing seems to be primarily persuasive, not coercive.

Organizational Picketing and the Teamsters

All industries have important contacts with truck transportation, and some are vitally dependent on trucking services. It is a modern industrial truism that the economic impact of picket lines in many industries will vary in direct proportion to the degree of respect accorded them by the million and a half member Teamsters' union.[62]

In the retail field, the power of the Teamsters is great. Goods to be sold must be delivered to the retail seller; when sold, such goods must often be delivered to the buyer. When such deliveries can be made efficiently only by the trucks of independent carriers, the power of the Teamsters is greatest.[63] The relationship of the Teamsters to the organizational and other picket lines, therefore, deserves close examination.

Fully aware of the magnitude of their power, the Teamsters sometimes confess that they exercise this power according to the Gompers' notion of expediency, i.e. to help their friends and to

[59] A. Cox, "Strikes, Picketing and the Constitution," 4 Vand. L.R. 574, 594 (1951).

[60] N.L.R.B. v. Rockaway, 345 U.S. 71 (1953).

[61] Beaman v. Safeway Stores, 277 P. 2d 1010 (Ariz. 1954); Bodinson Manufacturing Co. v. Calif. Employment Commission, 17 Cal. 2d 321, 109 P. 2d 935 (1941); American Brake Shoe Co. v. Annunzio, 405 Ill. 44, 90 N.E. 2d 83 (1950); Industrial Commission v. Mayer, 240 Mo. App. 1022, 223 S.W. 2d 835 (St. Louis Ct. of App. 1949); Franke v. Unemployment Compensation Review Board, 166 Pa. Super 251, 70 A. 2d 461 (1950); and Lexes v. Industrial Commission, 243 P. 2d 964 (Utah 1952).

[62] The other unions in the trucking industry, such as the Transport Workers Union of America, are of relatively negligible size and importance in most regions of the country.

[63] This section deals essentially with those Teamsters who are employed by independent carriers.

hurt their enemies. To reason, therefore, as some courts have, that the picket line is a signal which sets off an automatic and irrational response in union workers is a myth so far as the Teamsters are concerned.[64] Teamsters read picket placards, want to know who is picketing, why the picketing is being conducted, and how long it will continue.

In response to an inquiry from this writer, a member of the Teamsters' international research staff explained the Teamsters' picketing policies as follows:

> I have tried to ascertain whether a formalized policy on [organizational picketing] does exist. I have been unable to locate anything in writing on this point. However, after discussing the problem with a number of our officials at International headquarters, I have reached the conclusion that it is International policy to allow each local Teamster union to decide whether or not it will observe an organizational picket line. I think you can readily understand the basis for such a pragmatic policy. Truck transportation impinges upon every industry. Blind and automatic observance of organizational as well as other picket lines would involve loss of work for our members in many, many cases. It does not seem logical nor sensible to honor such lines without knowledge of the facts involved on the equity of the picketing.[65]

The discriminating willingness of Teamsters to cross picket lines has been a matter of public record for many years. The late Daniel J. Toben, former Teamsters' president, stated his views with alacrity in 1945: "Most of those fellows who refuse to go through a picket line are just yellow. It takes a real man to go through a picket line when he is ordered to do so by his International Union."[66]

Perpetually warring with other affiliates of the AFL-CIO, the Teamsters' Union has sometimes used its strategic economic power to disrupt the organizational efforts of those unions with which it has bitter vendettas. Incensed at recent attacks on its racket-ridden elements by members of the Executive Council of

[64] Winkelman Bros. v. Teamsters, 31 LRRM 2016 (Mich. Cir. Ct. 1952), is illustrative of such cases.

[65] Letter from Abraham Weiss, staff economist of the Teamsters' International offices in Washington, to this writer, October 3, 1956.

[66] D. J. Toben, 42 International Teamster No. 7, p. 5, June 1945. Quoted in C. Gregory and H. Katz, Labor Law Cases, 309 (1948).

the AFL-CIO, Messrs. James Hoffa, Chairman of the Central Conference of Teamsters, and John J. O'Rourke, President of the Teamsters' Joint Council of New York, informed the press that anti-Teamster unions could expect retaliation in the future when Teamsters' members deliberately cross their picket lines.

Reporting in the New York Times of February 2, 1957, Abe Raskin quotes Mr. O'Rourke as having said that he would order the 125,000 members of the Teamsters' in metropolitan New York to cross the picket lines of those unions which spend "all their time kicking our brains out."[67] Mr. Hoffa indicated that he intended to adopt the same policy in the Central Conference states, which, incidentally, includes Kentucky.

When, therefore, the Teamsters are feuding with a union which is picketing, there is little likelihood that such union's picket lines will be respected. At the moment, the number of unions in this category is large.

Even when not feuding with the picketing union, in some instances it has been alleged that Teamsters' locals feel more kinship for the picketed employer than for the picketing union. In such cases, the picket line is not likely to be respected. Some such "pro-employer" sentiment has been very carefully cultivated by employers in the retail sales and services field.[68] Therefore, pro-employer feelings are a second reason why Teamsters do not respect all picket lines.

In other instances, the evidence seems clear that Teamster drivers are left quite free to decide individually whether *vel non* to cross a particular picket line. Although when not instructed some Teamsters do respect picket lines either as a matter of principle or habit,[69] it is evident that other unions do not "coerce" the Teamsters.

Some Teamsters work partially on a commission basis. This arrangement is especially common in the Milk and Ice Cream Drivers and Dairy Workers Division of the Teamsters'. Such

[67] The New York Times, February 2, 1957, pp. 1, 9.

[68] For incredible testimony of the relationship between some Teamsters' officials and an industrial relations consultant for two hundred retail department stores, see the testimony of Nathan Shefferman before the Senate Subcommittee on Improper Activities in the Labor or Management Field on March 27, 1957. His testimony is reported in the New York Times, March 28, 1957.

[69] An interesting example of a case in which Teamsters were left on their own, see the reported cross-examination of several truck drivers in Bellerive Country Club v. Hotel and Restaurant Employees, 36 LRRM 2282, 2285 (1955).

local unions have financial reasons for crossing picket lines, although of course many will not do so as a matter of principle.

When the Teamsters' in a community are competing with other unions to organize the same industries, it is self-evident that the Teamsters' will not respect organizational picket lines of such competitive unions at the very businesses which the Teamsters' themselves want to organize. And, because the Teamsters' have jurisdictional disputes with many unions, the cases are probably many in which such lines are crossed. There are no available figures on such disputes in their relationship to organizational picketing, but these jurisdictional battles are daily in the headlines. The Teamsters' concept of their unlimited jurisdiction to organize has produced the aphorism that "if the job involves movement or is near something which moves, it falls within the Teamsters' jurisdiction." Moreover, the Teamsters' have bitterly opposed the "no raiding" agreements, proposed so enthusiastically by the new AFL-CIO. It has been argued that this attitude of the Teamsters' contributes to the workers' freedom of choice between unions and therein lends to more democratic trade unionism, but this argument is far beyond the scope of this article.

Of course, when the Teamsters' themselves are picketing, it is obvious that such picket lines will be supported by all Teamsters' locals.

In most states, if an employee refuses to cross the picket line of any union and thereby cannot perform his own job, he cannot receive state unemployment compensation.[70] This is an additional reason why organizational picket lines are not always respected by the Teamsters!

Certainly the Teamsters' are aware of the economic dangers to their employers when they refuse to cross picket lines. Indeed, in some very few jurisdictions, carriers have been held liable in damages when their drivers refused to transport goods across picket lines.[71] Aside from possible liability in damages for his employees' refusal to carry, there are many so-called "marginal"

[70] See the cases cited in footnote 61, supra.

[71] The presence of a picket line was held to be no defense in a shipper's action for damages against a carrier for violating his strict common law duty to carry. Montgomery-Ward v. Northern Pacific Terminal Co., 128 F. Supp. 520 (D. Ore. 1954). For a comprehensive analysis of the carrier's duty under such circumstances, see H. I. Elbert and G. H. Rebman, "Common Carriers and Picket Lines," 1955 Wash. U. L. Q. 232.

carriers, frequently one man operators, which simply cannot absorb the business losses inherent in respecting all picket lines. Such self-employed Teamsters are obviously hostile to organizational picket lines.

Finally, the Supreme Court has held that an employer may, without violating federal law, discharge an employee who, in the course of his employment, refuses to cross the picket line before a consignee's business.[72] As a practical matter, most Teamsters' locals protect themselves from this dilemma by contracting with their employers for the right to refuse to cross picket lines.

There are, therefore, these eight reasons why Teamsters' locals do not respect all picket lines, *a fortiori* organizational picket lines, which are far less respected than strike lines. For these reasons it seems irrational to assert that an organizational picket line will necessarily isolate a picketed employer from truck transportation.

Unfortunately, these factors are extremely variable, and from community to community the Teamsters' relationship with other unions is likely to be quite different. What percentage of organizational picket lines are respected by the Teamsters' is not publicly available.

Organizational Picketing and the Federal Constitution

The United States Supreme Court's decisions concerning picketing and the First and Fourteenth Amendments have something of the character of the famous shell game: "now you see it; now you don't."

The states were constitutionally free to do with picketing as they liked until *Thornhill* v. *Alabama*[73] in 1940 declared that a state cannot, consistently with the First and Fourteenth Amendments, prohibit all peaceful picketing per se. Very shortly thereafter came *AFL* v. *Swing*[74] which in 1941 held that states cannot prohibit all stranger picketing per se. *Swing* seemed to assure that organizational picketing was immune from state court injunctions, when it was peacefully conducted.

In 1949, however, the Supreme Court decided in *Giboney* v. *Empire Storage & Ice Co.*[75] that a state could constitutionally

[72] N.L.R.B. v. Rockaway, 345 U.S. 71 (1953).
[73] 310 U.S. 88 (1940).
[74] 312 U.S. 321 (1941).
[75] 336 U.S. 490 (1949).

enjoin stranger picketing which attempted to compel an employer to stop dealing with non-union milk peddlers. At this point the state courts became confused and began to reexamine their picketing decisions decided in the light of *Thornhill* and *Swing*.

By 1950, it had become perfectly apparent that the Court was disenchanted with its equation of peaceful, stranger picketing with free speech. In that year, the Court decided *Building Service Employees* v. *Gazzam*,[76] *Hughes* v. *Superior Court*,[77] and *Teamsters'* v. *Hanke*.[78]

Gazzam held that a state could enjoin picketing by a union which had lost a representation election, to which it had consented, and which picketed notwithstanding its losing.

Hughes held that a judicially declared state policy against racially discriminatory employment practices was an adequate constitutional basis on which to enjoin Negroes who were picketing to compel a store in a Negro neighborhood to hire a greater, proportional number of Negro employees.

In *Hanke*, the Court held that a state's public policy favoring self-employers was a valid basis on which to enjoin picketing which attempted to put economic pressure on a business which was operated by its owners and which had no employees.

These cases, plus the later case of *Plumbers'* v. *Graham*,[79] which held that picketing to secure a closed shop in violation of Virginia's Right to Work law was constitutionally enjoinable, indicated to many state courts that *Swing* had been overruled in effect and that *Thornhill* was of doubtful potency.

Although these cases made clear that picketing and free speech no longer constituted a perfect constitutional equation, there was some reason to believe that they were all distinguishable from the ordinary organizational picketing situation. Moreover, a dictum[80] in Justice Minton's *Gazzam* decision suggested to some that organizational picketing was still fully protected under *Swing*.

Most state courts, however, found enough encouragement in the new cases to conclude that organizational picketing had been stripped of all constitutional protection. They were justified in

[76] 339 U.S. 532 (1950).
[77] 339 U.S. 460 (1950).
[78] 339 U.S. 470 (1950).
[79] 345 U.S. 192 (1953).
[80] 339 U.S. 532, 539 (1950).

this reasoning because of the Supreme Court's refusal for four years to review any organizational picketing cases arising from the state courts. Certiorari was denied in *Blue Boar* v. *Hotel and Restaurant Employees,*[81] *Way Baking Co.* v. *Teamsters,*[82] and *Postma Gravel Co.* v. *Teamsters.*[83] Appeal was denied in *Pappal* v. *Hotel and Restaurant Employees.*[84]

In 1956, however, the Supreme Court granted certiorari to the Supreme Court of Wisconsin in *Vogt* v. *Teamsters,*[85] to review the following question:

> Whether peaceful picketing, having as its purpose the publication of the facts of a labor dispute and the organization of non-union employees, preceded by solicitation of non-union employees, and conducted on a town road bordering the situs of the dispute, and which is unaccompanied by demands of any kind upon the employer, is constitutionally protected under the First and Fourteenth Amendments to the Constitution of the United States.[86]

This question placed squarely before the Court the typical organizational picketing case, except for the fact that the picketing in *Vogt* was conducted on an isolated country road, rather than before a retail establishment which might have appealed to the consuming public.

Vogt arose under a Wisconsin statute which prohibits all picketing unless a majority of the employees of the employer have selected the union as bargaining agent.[87] The union first approached the employees and solicited their membership unsuccessfully. No secret ballot election was conducted, however. No express demands were made on the employer. Thereafter, the picketing on an isolated country road was undertaken.

The trial court issued a permanent injunction on the employer's suit, relying on the Wisconsin statute. The Supreme Court of Wisconsin thereupon reversed the trial court, holding that *Swing* protected the picketing constitutionally.[88] However,

[81] 346 U.S. 834 (1953).
[82] 345 U.S. 957 (1953).
[83] 345 U.S. 922 (1953).
[84] 350 U.S. 870 (1955).
[85] 77 S.Ct. 31 (1956).
[86] Brief in support of union's petition to the Supreme Court for a writ of certiorari, p. 2.
[87] Wisconsin statutes, sec. 103.535 prohibits picketing unless there is a "labor dispute," and sec. 103.62(3) defines a "labor dispute" as one between an employer and a majority of *his* employees.
[88] 270 Wis. 315, 71 N.W. 2d 359 (1955).

on rehearing, the Wisconsin Supreme Court, with one dissent, reversed itself and affirmed the trial court's injunction. In its second opinion, the Wisconsin court said that the modifications of the *Swing* doctrine had been so substantial that granting an injunction would not violate the federal constitution.[89] It did not rest its decision on the statute requiring that a majority of the employees approve the union before it may picket, but rather it invoked the coercion doctrine, i.e. that the picketing was coercive of the employer to coerce his employees to join the union against their will.

In its brief on the merits, the union argued essentially that the *Swing* case prohibited this result, and it also attacked the constitutionality of the statute.[90]

In June of 1957, the U.S. Supreme Court affirmed the *Vogt* decision and held that the state court's injunction was constitutional.[91] Speaking for a majority of the Court, Justice Frankfurter said explicitly that picketing is fully subject to the right of the states to balance the social interests between employers and unions, provided only that the states' policies are rational.

The Court did not have to pass on the validity of the Wisconsin statute, because it held restrictively that a state may constitutionally enjoin picketing which has the effect of coercing the employer to coerce his employees. The Court did not explore this rationale, but it relied on the inferential findings of fact of the Wisconsin Supreme Court. In brief, therefore, Justice Frankfurter's opinion sounded the death bell for organizational picketing in intrastate commerce, so far as the federal constitution in concerned. Although he admonished the states that they cannot, under *Thornhill*, proscribe all picketing per se, he made clear that "state courts and legislatures are free to decide whether to permit or suppress any particular picket line for any reason other than a blanket policy against all picketing."

In a vigorous dissent, Justices Black and Douglas expressed their fear that the *Vogt* decision might unleash inhibitive state laws against picketing. Although blanket prohibitions are still unconstitutional, the states are free to shape policies which can

[89] 270 Wis. 321a, 74 N.W. 2d 749 (1956).
[90] Brief for the union on the merits, pp. 35-36.
[91] Teamsters v. Vogt, 354 U.S. — (1956 Term No. 79, 1957).

effectively—if not in terms—proscribe all organizational picketing. The rationale that organizational picketing coerces the employer to coerce his employees to join the union is the policy which many states have already adopted and which others are certain to adopt on the heels on the *Vogt* case.

That the Supreme Court did not examine the Wisconsin statute in *Vogt* is of no great practical importance, for giving its approval to the use of the coercion doctrine is enough to doom organizational picketing. Two other states which had statutes almost identical to the Wisconsin statute, Arizona[92] and Oregon[93] have declared their statutes unconstitutional, but in the cases holding the statutes unconstitutional the courts enjoined picketing by way of the coercion doctrine. Therefore, as a result of the *Vogt* decision, the states can proscribe all organizational picketing if they use the coercion doctrine.

Although the Hotel and Restaurant Employees Union has petitioned the Supreme Court to grant certiorari to review four Florida picketing decisions,[94] these cases are not organizational picketing cases in the usual sense, and it is not be expected that the Supreme Court, if it reviews the Florida cases, will soon renege on the *Vogt* doctrine.

Vogt has probably set to rest the Supreme Court's extremely nervous attitude towards picketing. Nevertheless, it is an inadequate decision because it relied on the coercion doctrine so unquestioningly. The state courts are now quite free to do indirectly what the Supreme Court forbids them to do directly.

Federal Regulation of Organizational Picketing

Organizational and recognition picketing were of course not subject to regulation by the National Labor Relations Board prior to the enactment of the Labor Management Relations Act (Taft-Hartley) in 1947. Despite the absence of federal regulation, such picketing was not of great practical importance to most industries in interstate commerce.

In the period 1935-1947, the organization of workers met with little resistance from workers. Employees generally welcomed

[92] Baldwin v. Arizona Flame Restaurant, 40 LRRM 2375 (Ariz. Sup. Ct. 1957).
[93] Gilbertson v. Culinary Alliance, 204 Ore. 326, 282 P. 2d 632 (1955).
[94] Sax v. Hotel and Restaurant Employees, 80 So. 2d 602 (Fla. 1955) *et seq.*

unions under Wagner Act protection, and methods more direct and effective than picketing were available to spread the gospel of unionism to the unorganized. Moreover, the industries organized in interstate commerce were principally in the manufacturing field rather than in the retail field.

When Congress enacted the Taft-Hartley amendments in 1947, therefore, organizational picketing was not prominently in the minds of most legislators.[95] Indeed, Section 8(b)(1)(A),[96] the section which would govern such picketing if it were governed under federal law at all, was not even part of the amendments recommended by the Senate subcommittee, but it was introduced on the Senate floor by Senator Ball, with Senator Taft's endorsement.[97] Although Senator Ball made several references to organizational picketing, it was far from the center of the heated debate over Section 8(b)(1)(A)'s adoption.

In the Senate floor debate on this section, Senators Taft and Ball were persistently questioned about its potential effect on organizing campaigns. When asked by Senator Saltonstall for the specific meaning of the phrase "to restrain or coerce," Senator Taft gave illustrations such as violent picketing, mass picketing, and threats.[98]

Although pre-enactment legislative debates are not always the wisest guides to Congress' meaning and intention, these debates were especially reliable because their participants were extremely knowledgeable on labor matters. Moreover, these debates were subjected to close public interest and scrutiny, and both the sponsors and critics of the Taft-Hartley amendments must have realized that their words would be used subsequently for purposes of interpretation.

The National Labor Relations Board and its General Counsel have since 1947 frequently alluded to these debates. As demonstrative of Congress' intent not to regulate organizational picketing, the following statement by Senator Taft, in response to a question from Senator Morse, has been cited as authoritative:

[95] 93 Cong. Rec., Part 4, pp. 4434-4437, May 2, 1947.
[96] National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. sec. 158(b)(1)(A).
[97] A. Cox, Labor Law Cases 873-876 (3rd Ed. 1954).
[98] Supra note 95.

> Mr. President, I can see nothing in the pending measure which . . . would in some way outlaw [organizational] strikes. It would outlaw threats against employees. It would not outlaw anybody striking who wants to strike. It would not prevent anyone using the strike in a legitimate way, conducting peaceful picketing, or employing persuasion. All it would do would be to outlaw such restraint and coercion as would prevent people going to work, if they wished to go to work.[99]

That Section 8(b)(1)(A) was not designed to preclude organizational picketing is further supported by the enactment of Section 8(c), the so-called free speech section.[100]

Another significant reason to interpret Section 8(b)(1)(A) so as not to proscribe organizational picketing is that, when it was enacted in 1947, the Supreme Court had not yet retreated from the forthright doctrine of free speech protection embodied in *Thornhill*[101] and *Swing*,[102] and such picketing may then have seemed constitutionally immune from Congressional regulation.

The National Labor Relations Board has dealt with only one recognition picketing case under Section 8(b)(1)(A). This was *Carpenters* (Watson's Specialty Store)[103] in which the union demanded that the employer sign a closed shop contract for its installers, none of whom belonged to the union. The employer refused this demand as well as a subsequent demand that his non-union installers be replaced with union men. These refusals were followed by picketing which stated merely that the employees were non-union. Although the General Counsel issued a complaint on the employer's charge that the union had violated Section 8(b)(1)(A), the trial examiner concluded from the Senate debates that such picketing was not proscribed by the scope of that section. Without discussion, the Board unanimously adopted the trial examiner's report, citing as further authority its decision in *National Maritime Union* (The Texas Co.).[104]

In this latter case, it was argued that the N.M.U.'s refusal to bargain in good faith also constituted restraint of employees in

[99] Supra note 95 at p. 4436.
[100] National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. sec. 158(c).
[101] 310 U.S. 88 (1940).
[102] 312 U.S. 321 (1941).
[103] 80 NLRB 533 (1948).
[104] 78 NLRB 971 (1948).

violation of Sec. 8(b)(1)(A). The Board rejected this argument, reasoning from the Senate debates that Sec. 8(b)(1)(A) was intended principally to prohibit violence and threats of violence. In its dicta, the Board also stated clearly that organizational picketing was not outlawed by this section.

Since 1948, the N.L.R.B. has not reexamined its interpretation of Sec. 8(b)(1)(A) so far as organizational and recognition picketing are concerned. Although the critics of this interpretation are many, there seems little likelihood that it will be overruled. The General Counsel has consistently issued administrative rulings refusing to seek injunctions against such picketing.[105]

Rumors that Congress will be asked to amend Taft-Hartley to outlaw organizational picketing are rife. The vigor with which business associations have urged such legislation before state legislatures lends substance to the rumor. Moreover, as the AFL-CIO comes closer to launching a full scale organizing campaign in the retail fields, the pressure on Congress from business groups will become progressively greater. Such a campaign has been in the drafting stages for several years.[106]

It is an interesting anomaly that the N.L.R.B. has interpreted the guarantee against restraints or coercion of employees in Sec. 8(b)(1)(A) so as to permit organizational picketing, whereas most of the states have interpreted comparable statutes so as to proscribe it.[107]

In one area of federal labor law, organizational picketing is proscribed. Where one union has been certified by the N.L.R.B., Section 8(b)(4)(C)[108] of Taft-Hartley prohibits picketing by a
158(b)(4)(C).
rival union.

The principal case decided by the Board under this section is *Teamsters* (Union Chevrolet Co.)[109] which enjoined the Teamsters from picketing after a rival union had been certified. The Board has reached the same result when an individual, rather

[105] Administrative rulings of the NLRB General Counsel: Case No. 1008, 34 LRRM 1512 (1954); Case No. 1069, 35 LRRM 1533 (1954).

[106] A. J. Goldberg, AFL-CIO: Labor United 221.

[107] In Blue Boar v. Hotel and Restaurant Employees, 254 S.W. 2d 335 (Ky. 1952), the Kentucky Court of Appeals held that minority organizational picketing violated KRS 336.130(1) and (2), which protect employees from "unfair or illegal acts or practices or resort to violence, intimidation, threats or coercion."

[108] National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. sec.

[109] 96 NLRB 957 (1951).

than a union, had been designated by the employees as their bargaining agent, and a rival union picketed the employer. *Bonnaz Workers* (Gemsco, Inc.)[110] The Board, however, reserved specifically the question of whether organizational picketing which had for its purpose the solicitation of members after the present union's certification had expired would be lawful.[111] In both the above cited cases, the Board found that the unions' purpose was to seek immediate, rather than future, recognition as exclusive bargaining agent.

When the employees in a representation election conducted by the N.L.R.B. have chosen "no union" in preference to a union, organizational picketing thereafter is lawful, for Sec. 8(b)(4)(C) by its terms prohibits rival picketing against another *union's* certification.

The Court of Appeals for the Second Circuit has held that, even where a rival union has been certified, Sec. 8(b)(4)(C) does not proscribe all organizational picketing per se. *Douds* v. *Bakery Workers*.[112] In this case, where the defendant union began organizational picketing after it lost an N.L.R.B. election to a rival union, the Court of Appeals affirmed the District Court's refusal to issue a preliminary injunction. The picketing in this case was conducted at the employer's isolated plant site, where no customers or delivery truck drivers were influenced by the picket placards. Such picketing, said the Court, was not violative of Sec. 8(b)(4)(C) because no employees of "any" employer had been induced to engage in a strike or in a concerted refusal to use the goods of the picketed employer. The Court held that this picketing might lawfully be conducted to encourage membership in the union so as to win the next certification election.

This case has been followed in the Second Circuit even where a few truck drivers were influenced by the picketing.[113] In two recent decisions, however, the N.L.R.B. has said that it will not follow the Second Circuit's view of Sec. 8(b)(4)(C).[114]

[110] 111 NLRB 82 (1955).
[111] Id. at 83; supra note 2.
[112] 224 F. 2d 49 (2d Cir. 1955). The Second Circuit reiterated its position when the NLRB sought enforcement of its finding of a sec. 8 (b) (4) (C) unfair labor practice against the union in 40 LRRM 2107 (1957).
[113] Douds v. Knit Goods Workers, 147 F. Supp. 345 (E.D. N.Y. 1957).
[114] Knit Goods Workers (Packard Knitwear), 118 NLRB No. 71 (1957); Knit Good Workers (James Knitting Co.), 117 NLRB No. 196 (1957).

The Problems of Federal or State Jurisdiction

When a business is clearly engaged in intrastate commerce, state law governs organizational picketing in all aspects, except so far as the federal constitution may impose minimum requirements of due process. As to businesses which are engaged in interstate commerce, the question of whether state or federal law governs organizational picketing is far more complicated.

The states, under the direct conflict rule, cannot deny rights which are guaranteed by federal labor law[115] to employees engaged in interstate commerce, nor can the states regulate the same activity which might potentially result in a conflict with the regulation of the N.L.R.B.[116]

Some activities in the labor field, however, are reserved to the states as a matter of their general police powers, even though the same activities might be governed by federal law and even though the business is engaged in interstate commerce. The states are free, for example, to regulate mass picketing[117] and violent picketing,[118] although the N.L.R.B. may also regulate them.

In *Garner* v. *Teamsters,*[119] however, the states were held to have no jurisdiction to regulate activity which might constitute a union unfair labor practice, if the business is engaged in interstate commerce and therein subject to federal law. Such regulatory power, said the Supreme Court, has been preempted by federal law as part of a comprehensive and exclusive governing scheme, and such power is to be exercised only by the N.L.R.B.

Garner, which arose from Pennsylvania state courts, was an organizational picketing case. Although the Supreme Court said that the facts alleged in the trial court constituted a union unfair labor practice, Justice Jackson's opinion for the Court indicated in one dictum that, if the facts alleged did not constitute an unfair labor practice, the picketing might, nevertheless, be a protected activity under federal law, which would also have the effect of ousting the states of regulatory jurisdiction.

Soon after *Garner,* the Supreme Court held in *Weber* v. *An-*

[115] Hill v. Florida, 325 U.S. 538 (1945).
[116] LaCrosse Telephone Corp. v. WERB, 336 U.S. 18 (1949).
[117] Allen-Bradley v. WERB, 315 U.S. 740 (1942).
[118] UAW v. WERB, 351 U.S. 266 (1956). [119] 346 U.S. 495 (1953).

heuser-Busch[120] that Missouri courts could not enjoin conduct which was alleged to violate Missouri's anti-restraint of trade statute, because the facts alleged also constituted an unfair labor practice. The N.L.R.B. again was said to have exclusive jurisdiction over the activity. The statute of Missouri which allegedly had been violated, incidentally, was the same one which had been violated in *Giboney* v. *Empire Storage & Ice Co.*[121]

In other decisions, the Supreme Court—on a case by case basis—has held that the states may regulate acts which are neither protected nor proscribed by federal law, e.g. quickie-strikes.[122] It has also allowed the states to entertain damages actions for acts which constitute unfair labor practices, even though the business is engaged in interstate commerce.[123]

Although this case by case approach has defined some of the general limits on the right of the states to regulate union activities which may or may not also be governed by federal law, the problem of which law governs is complicated by the N.L.R.B.'s power to establish its own "commerce" standards in terms of the dollar volume of business.[124]

Until very recently, the courts were in wide disagreement over whether the state courts could act to regulate activities, including organizational picketing, where the N.L.R.B. had declined jurisdiction on the grounds that the particular business was in commerce but did not meet its dollar commerce standards.

Some courts reasoned that, if the N.L.R.B. declined jurisdiction, the states necessarily were free to apply their own laws, whereas other courts reasoned that the preemption doctrine of *Garner* and *Anheuser-Busch* excluded the operation of state law as to such businesses, despite the N.L.R.B.'s refusal to accept jurisdiction. A very few states very appropriately reasoned that, although the N.L.R.B. had declined jurisdiction in a particular case, if the business was engaged in interstate commerce, it was the duty of the state courts to provide a forum for the administration of federal law.

[120] 348 U.S. 468 (1955). [121] 336 U.S. 490 (1950).
[122] International Union v. WERB, 336 U.S. 245 (1949).
[123] Construction Workers v. Laburnum Construction Co., 347 U.S. 656 (1953).
[124] The Board's dollar jurisdictional commerce standards are reported in 1 CCH Labor Law Reporter (4th Ed.), sec. 1610 (1954).

In a rather surprising opinion, the Supreme Court resolved this dilemma in March of 1957 in *Guss* v. *Utah Labor Board.*[125] The Supreme Court held in this case that, if the business is engaged in interstate commerce but the N.L.R.B. declines to exercise jurisdiction under its own dollar commerce standards, the states are, nevertheless, deprived of all regulatory power under the preemption doctrine, unless they have been ceded jurisdiction by the N.L.R.B. The Board has never ceded its jurisdiction, because cession is permitted only when a state's labor relations laws are identical in text and in decisional interpretation to that of federal law.

Effectively, therefore, the Supreme Court's decision in *Guss* has created a legal "no man's land," where neither state nor federal law may be applied to businesses which are engaged in interstate commerce, but which fail to meet the N.L.R.B.'s dollar standards.

Until Congress acts to fill this void, organizational picketing in connection with such businesses is simply unregulated. This result seems jurisprudentially shocking, to say the least, but it is one of the problems which Congress has helped to create by failing to appropriate enough money to enable the N.L.R.B. to handle more cases. Of course, it may be expected that Congress will act soon to resolve this matter, either by way of giving such cases to the states to apply their own law, by requiring the N.L.R.B. to hear all such cases, or by requiring the states to provide a forum for this federal law.

As a matter of practice, the *Guss* case's result is not perfectly clear, for a union itself cannot seek an injunction in federal courts against state court proceedings against it;[126] only the N.L.R.B. has been held entitled to seek to enjoin state court proceedings which concern conduct which allegedly lies in the exclusive jurisdiction of the N.L.R.B.[127]

A Conclusion With Recommendations

As a matter of social morality, unions ought never to establish picket lines thoughtlessly. The potential economic consequences

[125] 353 U.S. — (1957).
[126] Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 511 (1955).
[127] Capital Service v. NLRB, 347 U.S. 501 (1954).

to the employer should be carefully balanced against the potential benefits of communication with the unorganized employees.

If establishing a picket line is the most certain method of reaching the attention of workers and of demonstrating union solidarity to workers who might otherwise fear their employer's economic power, it should be used. However, when a picket line appears without forewarning, when no other efforts have been made to reach the employees, and when a demand is then made on the employer for a contract, such use of the economic power of picketing can not easily be justified in terms of the free choice of unorganized employees.

Both the employer and the union have a serious interest in the wages and conditions of the employees of a non-union business. The employer is interested not only in keeping his labor costs low but also in avoiding all economic barriers to the operation of his business. The stranger union, however, is legitimately interested both in improving the wages and conditions of the non-union employees and in eliminating substandard wages and conditions which threaten the economic status of unionized employees throughout an industry. If these interests of both the employer and the union are bona fide, a legal balance should be drawn by way of rational regulation, not by a flat, legal rule of thumb.

The aphorism that the organizational picket line coerces the employer to coerce his employees is too glib and is often factually unsound. It may be the picket line alone which can prevent an employer's using his inherent economic power to coerce his employees to refrain from having any dealings at all with the union.

Moreover, the legal conclusion that picketing is coercive merely because a demand for recognition has been made on the employer is equally unsound. The same courts which employ this reasoning would not enjoin the employer's signing such a contract with a union voluntarily, nor would these courts enjoin an employer's discharging employees who join or who sympathize with the union.

As under federal law, the more rational, regulatory balance might be drawn in permitting organizational picketing for a reasonable time before a secret ballot election is conducted. If

the courts are genuinely concerned with the employees' free choice, it seems almost disingenuous to deny the union's right to picket unless there is some certainty that the employees—having been permitted to express their choice in secrecy—do not want the union to represent them.

The courts ought not be satisfied with a petition circulated by the employer and signed by his employees, nor should they be satisfied with testimony in open court to the same effect. Only the secret ballot is fairly calculated to reflect the true wishes of employees.

If the employer refuses to agree to a secret election, such refusal should be viewed as bad faith sufficient to deny the extraordinary writ of injunction. This requirement of a secret ballot should apply to unions as well, for they should be enjoined if they do not agree to an election after they have had a reasonable time in which to organize the employees with the aid of a picket line. Such a prerequisite to issuing an injunction would not be unwarranted judicial legislation, for the requirement may be stated in equity as a fundamental matter of good faith, i.e. he who seeks equity must do equity.

Too many state courts seem willing to enjoin picketing on the slightest legal pretexts when the union is a stranger to the picketed business. Freed now from the constitutional inhibitions of the *Swing* doctrine, the state courts should weigh the social interests more carefully in organizational picketing cases. There is substantial reason to believe that, unless the Supreme Court works a miracle by overcoming *Vogt*, organizational picketing is a dead device in most states, and its death was produced not by logic but by an epithet, "coercion."

The state courts would be well advised to consider the admonition of Pope Pius XII in his 1952 Christmas message:

> The right of association is a fundamental one for workers. It is given by nature itself. It is the duty of the state to protect this right and to facilitate the exercise thereof. No power may deny it to any group of workers whatever, provided that, in a given association, nothing is opposed to the common good and the security of the state.[128]

[128] Christmas Message of Pope Pius XII, December 24, 1952, paragraph 174. Quoted in Keller, The Case for Right to Work Laws 125.