Buffalo Law Review

Volume 4 | Number 2 Article 6

1-1-1955

Jurisdiction and Free Speech Problems in Peaceful Picketing

John P. MacArthur

patibility" test in the Genocide opinion, the result may well be that discussions of the United States reservation will no longer deal with its wisdom or practicality, but rather, will be centered around the question whether the reservation itself is not legally invalid; or at least, whether the United States could not be open to serious attack on this score, should we at some future date attempt to invoke its protection.

Morton Mendelsohn

JURISDICTION AND FREE SPEECH PROBLEMS IN PEACEFUL PICKETING

The law of peaceful picketing, especially in view of the latest set of decisions handed down by the United States Supreme Court and the New York Court of Appeals, presents an unusual array of problems. The most important of these are the most basic: what can be done about peaceful picketing, and who can do it? An attempt will be made here to answer these questions, with special reference to the latest important cases: *Wood v. O'Grady*[1] for the "what", *Garner v. Teamsters*[2] and *Construction Workers v. Laburnum*[3] for the "by whom". By way of establishing landmarks, it can be said that the first problem is largely tied up with First and Fourteenth Amendment freedom of speech and Section 7 of the Taft-Hartley Act, while the second involves such concepts as federal pre-emption and the jurisdictional criteria of the National Labor Relations Board.

Concerning the conduct that may be restrained, the Supreme Court has defined its conception of picketing in about a dozen cases decided in the past fifteen years. After a few early cases in which picketing was thought to be equatable with speech,[4] it was decided that picketing was really a complex activity, and that speech was only one of numerous elements involved.[5] However, since speech is to a large extent a protected activity, it is necessary to treat picketing with some deference, usually by attempting in some way to balance the respective interests of management, labor and the general public. If, for example, a statute is so broadly drawn as to outlaw all picketing, thereby favoring management too highly over labor and the public, that statute is in-

1. *Wood v. O'Grady*, 307 N. Y. 532; 122 N. E. 2d 386 (1954).
2. *Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776*, 346 U. S. 485 (1953).
3. *United Construction Workers Affiliated with United Mine Workers of America v. Laburnum Construction Corporation*, 347 U. S. 656 (1954).
4. *Thornhill v. Alabama*, 310 U. S. 88 (1940); *Carlson v. California*, 310 U. S. 106 (1940).
5. *Infra* notes 8-26.

valid. This was decided in *Thornhill v. Alabama*[6] and *Carlson v. California*,[7] and it is about all that those cases stand for today; to this extent they are still perfectly good law.

For similar reasons, since freedom of speech is not restricted to any particular group of persons, the decision in *A. F. of L. v. Swing*,[8] that stranger picketing must be allowed, was on firm ground. The curious thing about this case is that both management and labor seem to look upon it as a victory for labor. Viewed from another standpoint it would seem to be actually a concession to management, because it narrowed rather than broadened the potential membership of a picket line. What the court said was that freedom of speech could not be denied to persons who had a common bond of economic interest with the picketed employer,[9] and that a union of beauty parlor workers might properly picket a beauty parlor. One may infer, however, that absent this common economic bond a picket line might be enjoined, and that if the picket line in the *Swing* case had been composed of musicians the Court might not have found the necessary bond. This sort of philosophy flowered into a general prohibition of secondary boycotts in the Taft-Hartley Act,[10] six years later.

In point of time, the next interesting development came in *Carpenters v. Ritter*,[11] wherein it was decreed that picketing might be confined within a certain locale, that of the business with which labor was having an argument. Thus picketing, which had apparently started out as pure speech, now found itself restricted both as to who could man the picket line and where the line could be set up. In addition, injunctions were freely granted where the picket signs were untruthful or misleading.[12] Coupled with the principle that the courts could enjoin mass[13] or violent[14] picket-

6. *Supra* note 4.
7. *Ibid.*
8. *American Federation of Labor v. Swing*, 312 U. S. 321 (1941).
9. "A State cannot exclude working men from peacefully exercising the right of free communication by drawing the circle of economic competition . . . so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace." *Id.* at 326.
10. Section 8 (b) (4) (A); 61 STAT. 141 (1947), 29 U. S. C. § 158 (b) (4) (A), (Supp. 1952).
11. *Carpenters and Joiners Union of America, Local No. 213 v. Ritter's Cafe*, 315 U. S. 722 (1942).
12. *Parkinson Company v. Building Trades Council*, 154 Cal. 581; 98 Pac. 1027 (1908); *Hotel and Railroad News Co. v. Clark*, 243 Mass. 317, 137 N. E. 534 (1922); *Nann v. Raimist*, 255 N. Y. 307, 174 N. E. 690 (1931). For perhaps the most extreme case, see *Saperstein v. Rich*, 202 Misc. 923, 114 N. Y. S. 2d (Sup. Ct. 1952).
13. *N. L. R. B. v. Indiana Desk Co.*, 149 F. 2d 987 (7th Cir. 1945); *W. T. Rawleigh Co. v. N. L. R. B.*, 190 F. 2d 832 (7th Cir. 1951); *N. L. R. B. v. Perfect Circle Co.*, 162 F. 2d 566 (7th Cir. 1947).
14. *N. L. R. B. v. Fansteel Metallurgical Corp.*, 306 U. S. 240 (1939); *N. L. R. B. v. Stackpole Carbon Co.*, 105 F. 2d 167 (3d Cir. 1939).

ing, including picketing which was now peaceful but which had been violent in the past,[15] the idea began to emerge that perhaps the speech factor in picketing was not quite so important as had been supposed. This would seem to date the swing away from a *carte blanche* to labor somewhere in the early '40's, a little earlier than most observers tend to place it. *Teamsters v. Wohl*[16] and *Union v. Angelos*[17] camouflaged the trend to some extent, but actually they come to no more than an affirmance of the basic doctrine in *Thornhill v. Alabama*:[18] states may not outlaw all picketing, especially not that particular kind which is entitled to constitutional protection.[19]

The trend toward a freer injunction policy was strongly spotlighted by *Giboney v. Empire*[20] in 1949, in which a group of union ice peddlers was enjoined from picketing a wholesaler in an attempt to stop him from selling to non-union peddlers. This conduct was held to violate the anti-trade-restraint statute of Missouri, and the court said that there was no constitutional right in picketers to utilize freedom of speech to violate valid state laws. This conception was quickly confirmed (though there was a further suggestion in the *Giboney* opinion which has apparently not been fully explored)[21] by *Hughes v. Superior Court*[22] which sustained an injunction based on a state policy against racial dis-

15. *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U. S. 287 (1941).

16. *Bakery and Pastry Drivers and Helpers Local 802 of International Brotherhood of Teamsters v. Wohl*, 315 U. S. 769 (1942).

17. *Cafeteria Employees Union, Local No. 302 v. Angelos*, 320 U. S. 293 (1943).

18. *Supra* note 4.

19. In the *Wohl* and *Angelos* cases, the lower court enjoined after dispensing with Section 876-a of the Civil Practice Act on the customary ground that no "labor dispute" was involved. The Supreme Court held that the C. P. A. was not the only hurdle in the way of a free granting of injunctions by the State courts.

20. *Giboney v. Empire Storage and Ice Company*, 336 U. S. 490 (1949).

21. What the *Giboney* opinion solidified in the law was the conception of picketing as a congeries of activities, rather than as a homogenious phenomenon. Considerable stress is placed upon the fact that carrying the placards was only part of a whole, other parts of which included marching with the placards, being a union, and so on. In essence, the entire course of conduct was nothing more than a normal case of picketing, and the conclusion seems almost unavoidable that a court could enjoin nearly all picket lines on the basis used for enjoining this one. The following quotations are typical.

"But the record here does not permit this publicizing to be treated in isolation . . .. [T]he sole immediate object . . . was to compel Empire to agree to stop selling ice to nonunion peddlers. Thus all of appellants' activities [four are listed, common to all picket lines] . . . constituted a single and integrated course of conduct, which was in violation of Missouri's valid law. . . ."

"But placards used as an essential and inseparable part of a grave offense against an important public law cannot immunize that unlawful conduct from state control. . . ."

Since the test of a "clear and present danger of a substantial evil" test may be used as a basis for the denial of such constitutional rights as those of free speech and press, the Court worried its way around the problem as follows:

"There was a clear danger, imminent and immediate, that unless restrained, appellants would succeed in making that policy a dead letter . . .".

22. *Hughes v. Superior Court of California*, 339 U. S. 460 (1950).

crimination, and *Teamsters v. Hanke*[23] which sustained an injunction based on a state policy that a single proprietor without employees need not be forced into operating as a union shop. These two cases also stand for the proposition that the public policy of the state may be announced by the courts as well as by the legislature, at least so long as it is not so inconsistent with tradition as to be patently illegal.[24] *Union v. Gazzam*[25] and *A. F. of L. v. Graham*[26] followed these leads, the statute in the *Gazzam* case being one which made it illegal to coerce an employer to force his employees to join a union, and that in the *Graham* case a state right-to-work law.

So far as New York is concerned, *Goodwins v. Hagedorn*[27] follows the logic of the *Gazzam* case as does *Metropolis v. Lewis*,[28] the first *Chic Maid*[29] case, and others. In view of this history, *Wood v. O'Grady*[30] need come as no surprise. There the union had been picketing a retail liquor store for two years, in an effort to induce the three employees to join. The Court of Appeals, in a 4 to 3 decision, refused an injunction. This would seem to establish organizational picketing as a legal operation no matter how long it has been carried on at one place of business or how many employees are involved. However, this particular case seems not to be as decisive as would first appear. The first problem as to the opinion of the court is that it speaks for only two judges; Judge Desmond concurred in a separate opinion, and Judge Fuld agreed with the result in still another opinion. The three dissenters united in one opinion. In the second place, the case is seriously weakened by the fact that the employer alleged no damages,[31] much less the irreparable damages that are usually reckoned a *sine qua non* in injunction cases. Finally, the employer threatened to fire his employees if they joined the union, made numerous disparaging remarks in public about the union, and engaged in similar forms of conduct to the extent that he

23. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local 309 v. Hanke*, 339 U. S. 470 (1950).

24. ". . . we cannot conclude that Washington . . . has struck a balance so inconsistent with rooted traditions of a free people that it must be found an unconstitutional choice." *Id.* at 478-9.

25. *Building Service Employees International Union, Local 262 v. Gazzam*, 339 U. S. 532 (1950).

26. *Local Union No. 10, United Ass'n of Journeymen, Plumbers and Steamfitters of U. S. and Canada of A. F. of L. v. Graham*, 345 U. S. 192 (1953).

27. *Goodwins, Inc. v. Hagedorn*, 303 N. Y. 300, 101 N. E. 2d 697 (1951).

28. *Metropolis Country Club Inc. v. Lewis*, 202 Misc. 624, 114 N. Y. S. 2d 620 (Sup. Ct.); *aff'd* 280 App. Div. 816, 113 N. Y. S. 2d 923 (2d Dep't 1952).

29. *Chic Maid Hat Manufacturing Co. v. Korba*, 281 App. Div. 1004, 121 N. Y. S. 2d 354 (4th Dep't 1953).

30. *Supra* note 1.

31. 307 N. Y. at 537, 541, 122 N. E. 2d at 388, 390.

was guilty of at least one unfair labor practice himself, and thus could not be said to have presented himself before the court with clean hands[32]. Had any damages been alleged, or had the employer come into court with clean hands, the tenor of *all* the majority opinions suggests that the result might have been different, and that the court might have looked a little harder to find recognitional picketing if no other method for allowing the injunction had offered itself. It is true that the union won this case, but it is also strongly urged that management visions of a return to the unhappy *Thornhill* days are unduly pessimistic.

One final problem along this general line arises in businesses which come under the Taft-Hartley Act. It has been suggested that perhaps Section 7 of the Act should be read to mean that at least organizational picketing is to be regarded as specifically protected. The theory is that Section 7 states certain rights of unions, and Section 8 implemented by Section 10 protects them. Stated another way, there are certain practises for the commission of which an employer may discharge an employee with impunity. Since peaceful picketing is not one of them, it should follow that the employer may not accomplish by one method that which he is not allowed to do by another, and enjoin conduct for which he would not be allowed to discharge an employee. By this last phrase, the criterion may be applied to cases of stranger picketing; if the conduct involved is not such as would permit an employer to discharge an employee, then regardless of whether it is committed by an employee or a non-employed union member the issuance of an injunction is impliedly forbidden.

While the argument is ingenious, it seems to come perilously close to begging the question. Parenthetically, the Section refers to *self*-organization, and underscores the employee's right to remain aloof from all union activity. Apart from this, presumably Section 7 means simply that otherwise legal acts will not be viewed as illegal because they are concerted. On the other hand, it seems equally true that acts otherwise illegal will not be made legal by concert. Thus Section 7 protects nothing but "legal" picketing, and the question of what sort of conduct this embraces still remains to be answered.

To summarize, then, it would seem that picketing is subject to injunction any time that either the method or the motive of the picketing interfere with a valid state law or policy. The next question is that of which fora have jurisdiction to issue the injunction. We are faced at the outset with the necessity of deciding

32. *Ibid.*

what interstate commerce may mean in this field, since by its terms the Taft-Hartley Act applies only to businesses in interstate commerce[33]. Ever since *Wickard v. Filburn*[34], the answer has seemed to be that interstate commerce embraces a large number of businesses, down to and including a local box manufacturer[35], and potentially the N. L. R. B. can exert its jurisdiction over the entire field. Actually, the Board is declining jurisdiction over an increasing number of cases, and thereby creating an important question: do the states have authority to step into the gap, or do they not? Even more important, in view of the comparative difficulty in obtaining Board injunctions *vis a vis* state court injunctions, is the question whether the Board must be offered first chance at labor cases, allowing the state courts to take only what is left, if, indeed, they may do even that. These are both questions of what is loosely called federal pre-emption, which finds its mainspring in the Supremacy clause of the Constitution[36]. Since it is here suggested that state courts may not only step into the gap but may even precede the Board, it will be necessary to look into this matter with some care.

Federal pre-emption is really not one doctrine but three[37], and the confusion of these three has produced some curious decisions. The first phase of pre-emption is illustrated when a state statute or policy conflicts with a federal statute or policy. This was the situation in *Bethlehem v. N. Y. S. L. R. B.*[38], *La Crosse v. W. E. R. B.*[39], *Hill v. Florida*[40], and *International Union v. O'Brien*[41], all of which are widely cited as illustrative of federal pre-emption. Here of course the state statute must fall.

The second phase of pre-emption occurs when a state statute duplicates a federal statute; when it outlaws the same conduct *for the same reason* that the federal statute proscribes. As Mr. Justice Holmes said,

---

33. Section 1 (b).

34. *Wickard v. Filburn*, 317 U. S. 111 (1942).

35. *Westport Moving and Storage Company*, 91 N. L. R. B. 902, 26 L. R. R. M. 1581 (1950), in which the Board took jurisdiction over an individual proprietorship in Kansas City, Missouri, which had two employees engaged in making packing boxes for Fifth Army Headquarters to use in shipping the personal effects of military personnel. The employer's gross annual receipts during 1949 amounted to about $21,000.

36. U. S. CONST. Art. 6.

37. See Note, 60 HARV. L. REV. 262 (1946).

38. *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U. S. 767 (1947).

39. *La Crosse Telephone Corp. v. Wisconsin Employment Relations Board*, 336 U. S. 18 (1949).

40. *Hill v. Florida*, 325 U. S. 538 (1945).

41. *International Union v. O'Brien*, 339 U. S. 454 (1949).

> When Congress has taken the particular subject in hand, coincidence is as ineffective as opposition . . .[42]

Here again the state statute falls. The latest important example of the operation of this theory can be found in the frequently cited case of *Building Trades v. Kinard.*[43]

The third, and most dramatic, phase of the pre-emption doctrine occurs when the federal government "occupies a field". What this means is that if the federal government has legislated extensively in some particular field, but a kind of activity later arises which the government has neither protected nor proscribed, the states are nevertheless barred from taking any action on the matter themselves. The general rationale is that the federal government has done such an exhaustive legislative job that any conduct they have not prohibited must be deemed to be impliedly protected. This is of course a very sweeping doctrine, and courts are generally reluctant to apply it unless Congress has clearly indicated that occupation was what it had in mind[44]; this is particularly true in matters which are essentially local (as opposed to national) in nature, as *Cooley v. Port Wardens*[45] indicated some time ago. Occupation necessarily implies a no-man's-land in the law, conduct which can be regulated on neither a state nor a federal level, and gaps of this nature should not be presumed to exist without clear Congressional direction.

As applied to labor cases, no one will be disposed to deny the doctrine of pre-emption as far as the first phase is concerned, or even the second, but this leaves the occupation theory open to question. For a while it seemed that the late Mr. Justice Jackson had resolved this question in favor of occupation, in his famous dictum in the *Garner* case:

> The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the National Labor Management Relations Act is not to condemn all picketing, but only that ascertained by it prescribed process to fall within its prohibitions. Otherwise, it is

---

42. *Charleston R. Co. v. Varnville Co.*, 237 U. S. 597, 604 (1914); quoted in *Bethlehem v. N. Y. S. L. R. B.* at 775-6, *supra* note 38.

43. *Building Trades Council v. Kinard Construction Co.*, 346 U. S. 933 (1954), *reversing* 258 Ala. 500, 64 So. 2d 400 (1953).

44. The case of *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148 (1942), illustrates the outer limits which this theory may attain. Even as to this case it can be said that occupation would probably not have been found if the conduct which the state sought to prevent was not already subject to prevention at a different stage by the federal government.

45. *Cooley v. Port Wardens of Philadelphia*, 12 How. 299 (U. S. 1851).

> implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal act prohibits.[46]

Here seemed to be almost a classic statement of the occupation theory, to the great discomfort of management. The concomitant rejoicing of the Unions, however, lasted only a few months. In the interim the Supreme Court had time to consider this pronouncement, and to cast its eye over a rather respectable series of decisions in which state court injunctions had been sustained, among them *Allen Bradley v. W. E. R. B.*[47], *Algoma v. W. E. R. B.*[48], and the *Briggs-Stratton*[49] case. Re-examination of the *Garner* case itself also produced the following:

> This is not an instance of injurious conduct which the National Labor Relations Board is without express power to prevent and which therefore either is "governable by the State or it is entirely ungoverned". In such cases we have declined to find an implied exclusion of state powers.[50]

The stage was thus set for some "clarification" when the opportunity presented itself in *Construction Workers v. Laburnum*[51], and essentially the same Court which had concurred unanimously in the *Garner* case came forth with the following:

> The care we took in the *Garner* case to demonstrate the existing conflict between state and federal administrative remedies in that case was itself a recognition that if no conflict had existed, the state procedure would have survived . . .[52]
>
> The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together.[53]

This reduced the doctrine of federal pre-emption to its first and second phases at most, and expressly denied the doctrine of federal pre-emption as far as occupation of the field of labor law

---

46. 346 U. S. at 499-500.
47. *Allen Bradley Local No. 111 v. Wisconsin Employment Relations Board,* 315 U. S. 740 (1942).
48. *Algoma Plywood and Veneer Co. v. Wisconsin Employment Relations Board,* 336 U. S. 301 (1949).
49. *International Union U. A. W. A., A. F. of L. v. Wisconsin Employment Relations Board,* 336 U. S. 245 (1949).
50. 346 U. S. at 488.
51. *Supra* note 3.
52. 347 U. S. at 663.
53. *Id.* at 663.

is concerned. Thus it would seem that a cogent argument could be made, when the N.L.R.B. has declined jurisdiction over a case, that the state is in no way precluded from stepping into the breach if the only bar to such action would be the existence of federal occupation of the field, a doctrine which apparently does not exist in labor law.

If this is true, then the following state of affairs becomes important. Soon after the "old" N.L.R.B. was formed it found itself buried under a staggering avalanche of cases. Since *ad hoc* declination of jurisdiction seemed inefficient, various memoranda were issued concerning the jurisdictional standards of the Board. Presumably these were for the benefit of potential litigants, but they soon lost most of their value as the Board overstepped its own bounds in both directions, declining cases which seemed to fall within its jurisdictional ambit[54] and asserting its power over cases which seemed to have been declined in the memoranda.[55] In addition to driving their own chief counsel to distraction,[56] this conduct gave the courts little reason to put much faith in the standards for purposes of their own guidance.

This situation has now changed, though to what extent remains a question. The three Eisenhower appointees who constitute a majority are apparently extremely interested in setting their jurisdictional standards high and keeping them there. The current set of memoranda certainly illustrate the former thesis, by almost uniformly doubling the monetary minima (which must be involved before the Board will accept a case) over the standards of the previous memoranda.[57] As to the second point, Board members have publicly declared their policy in various speeches.[58]

---

54. In *Hotel Association of St. Louis,* 92 N.L.R.B. 1388, 27 L.R.R.M. 1243 (1951), the Board refused to take jurisdiction over an association of hotels in a representation case despite the fact that the members of the association annually received $2,400,000 from out-of-state guests, annually bought over $800,000 in supplies shipped from points outside the state, and that several of the members were units of large multistate hotel chains.

55. *Supra* note 35.

56. *Taft-Hartley Act: Suggested Amendments,* 23 TENN. L. REV. 121 (1954), by former General Counsel Robert H. Denham.

57. Press Releases of National Labor Relations Board of June 30 and July 15, 1954. See 5 LABOR L. J. 571 *et seq.* (1954).

58. "Uncle Sam's long arm has reached out to assert itself over too many labor-management situations which ought to be resolved closer to their origin. For example, during the past fiscal year, more than 14,000 cases were filed with the Board. More than 10% of these cases involved retail establishments alone; and a very large proportion of the 14,000 cases involved businesses which employed fewer than twenty employees. This despite the fact that the Board has rightfully taken the position that, whatever may be the reach of its legal jurisdiction, it will refuse to exert jurisdiction in enterprises essentially local in character." *Address delivered at the Fourteenth Annual*

(Footnote continued on following page.)

It is still too early to know whether the Board will adhere to its new jurisdictional standards, though it seems that they have done so to date, and of course no one will claim that memoranda issued as press releases have the force or effect of law. On the other hand, courts will probably be reluctant to keep sending cases to the Board only to have them sent back some time later. If this is true, and if we grant the non-existence of federal occupation of the field, it would seem to follow that, at least as to cases in interstate commerce which patently do not measure up to the Board's published jurisdictional standards, there seems to be no reason at all why the state courts should not assert their powers even before the Board is offered the opportunity to decline jurisdiction, as well as afterwards.

Concerning the larger businesses, which come within the Board's jurisdiction, there is yet another theory which may allow them to invoke the jurisdiction of the state courts as well as that of the Board. In order to follow this line of argument, it would probably be well to examine the *Laburnum*[59] case a little more closely. The Laburnum Company recovered both compensatory and punitive damages from a state court, in spite of the fact that the company came within the jurisdiction of the Board. The reason, it seemed, was that the Board did not have the power to grant damages; therefore, since the Taft-Hartley Act did not abolish damage actions, the state court was the only forum that could properly exercise jurisdiction over the matter, though if the remedy sought had been an injunction the Board would have had exclusive jurisdiction. This is the usual interpretation of the case, and it may very well be correct, but one or two points arise which present rather thorny problems. Judging by Section 8 of the Act, the Union had committed an unfair labor practise; moreover, it seems to have been unfair under more than one subdivision of that Section. In fact, there is even a suggestion that there were aspects of secondary boycott involved, though the requirement that there need be "concerted" action in secondary boycotts is extremely difficult to prove under the current interpretation of the word. For the purpose of illustration, however, let us suppose

---

(Footnote continued from preceding page.)
Institute of the College of Law of the University of Tennessee, Nov. 6, 1953, by Chairman Guy Farmer of the N. L. R. B. Reprinted in 23 TENN. L. REV. 112 (1954).

Member Rodgers, in a speech of his own which was of much the same tenor, spoke in favor of a policy of refusing to assert jurisdiction in those cases which do not have a "clear, substantial, and obvious impact on the national economy". *Address before the Retail Dry Goods Association*, New York, N. Y., Jan. 12, 1954. Reprinted in part 33 L. R. R. 207-9.

See Summers, *Politics, Policy Making and the N. L. R. B.*, 6 SYRACUSE L. REV. 93 (1954).

59. *Supra* note 3.

that a secondary boycott situation *was* present, along with several other unfair labor practises; the difficulty that arises is Section 303[60] of the Act, which specifically provides for damage suits for secondary boycotts. One of four plans must be adopted in such a situation. Either the Board has exclusive jurisdiction of the whole case, or the state court or district court may exert jurisdiction over the whole case, or the various bits and pieces of the case must be shared among the various courts. The first of these alternatives is manifestly unjust, since the Board has no jurisdiction to handle damage suits, and this is what was decided in the *Laburnum* case. The last alternative is burdensome and inequitable, though it might seem to follow necessarily from the idea that the Board has exclusive jurisdiction over the matters that it can handle, and other courts must be content with the remainder. Nor can the district courts invariably take the case, since the jurisdictional requirements are only waived in cases of secondary boycotts.[61] The only sensible course, it is suggested, is that the state court take jurisdiction over the entire matter. If a secondary boycott was in fact involved in the *Laburnum* case, that is what actually happened. Assuming that this is a reasonable way to dispose of the case, the next problem which arises is obvious. We have been speaking so far about cases which involve multiple unfair labor practises as defined by the Taft-Hartley Act; what of cases which involve one or more such practises, but also some other practises on the part of the defendant which, though not specifically unfair by Section 8, nor specifically protected by Section 7, are nonetheless *prima facie* undesirable and contrary to some policy of the state within which they are committed. Suppose, for example, that a union picketed a barrel maker to force him to:

1) Discharge the only non-union worker at the plant, who had been refused admission to the union because he was a Negro.

2) Refrain from buying barrel hoops from his usual supplier, because of a dispute between the supplier and the union.

3) Alternatively, to force the barrel maker out of business.

Picketing with these objectives would not be inconceivable, but it raises a series of questions. By reason of the first two

60. 29 U. S. C. § 187 (Supp. 1952).

61. "Whoever shall be injured . . . by . . . any violation of subsection (a) of this section may sue therefore . . . without respect to the amount in controversy . . ." Subsection (a) deals with various sorts of secondary boycott.

objectives, the matter comes within the jurisdiction of the Board, though it could not offer the remedy of damages for the first.[62] For the third the Board could offer no remedy, but a state court might well be interested in enjoining such action, on a *prima facie* tort basis if nothing else.[63] In addition, a state might not look kindly on the first motive.[64] The mere allegation that such practises were involved would not be enough to allow the state court to encroach on N.L.R.B. territory, and if the *Garner* case means anything at all it means that state courts can not take jurisdiction over disputes which could go to the Board *if their only reason for so exerting jurisdiction is the same reason that the Board has.* But if the reason is different, what then?

Let us consider an analogous problem in a more familiar field; suppose a mail truck were robbed. There is no question that the federal government could prosecute the offenders for interfering with the federal mails and their jurisdiction would be exclusive; the state could not prosecute for this reason. On the other hand, New York could prosecute for commission of the crime of robbery, and their jurisdiction over this matter is exclusive; the federal government clearly could not prosecute for such a crime. Is there any reason why a similar theory could not be applied in the case of a union peacefully picketing with the motives suggested above? The Board could enjoin the picketing because it constituted two unfair labor practises under the Act, and as to this their jurisdiction would be exclusive, as in the *Garner* case. But it is suggested that the state could enjoin if it wished to, on the basis of the other conduct, totally separate and irrelevant as far as the Act is concerned, which constitutes a *prima facie* tort or some recognizable flouting of state policy, so long as it was made clear that the injunction was grounded on these facts and not on those by reason of which the N. L. R. B. could have issued an injunction. Like the mail robbery, both injunctions depend on the same transaction and occurrence, but the facts are slightly differently arranged in each case, since one complex action runs afoul of the standards of the two distinct jurisdictions. The idea that it is necessary in all cases to exhaust the administrative remedies before going to the courts is irrelevant; there is no administrative remedy for picketing with the intent to force an employer out of business.

62. *Supra* note 60; *Construction Workers v. Laburnum, supra* note 3.

63. The customary phraseology is that "harm intentionally done is actionable if not justified". *American Guild of Musical Artists v. Petrillo,* 286 N. Y. 226, 231; 36 N. E. 2d 123, 125 (1941). For a more extended treatment of what seems to be the same philosophy, see *Opera on Tour, Inc. v. Weber,* 285 N. Y. 348, 355; 34 N. E. 2d 349, 352 (1941).

64. Cf. *Hughes v. Superior Court, supra* note 22.

All this is entirely consistent with the *Garner, Kinard,* and *Laburnum* cases. In the *Garner* case the only conduct with which the union was charged was violating a state statute, which was practically identical with the Taft-Hartley Act,[65] and was therefore void by the second phase of the pre-emption doctrine. In the *Kinard* case, the entire basis for the injunction was the Act itself, with the local courts usurping the function of the Board.[66] If some other motive had appeared in either of these cases, apart from those listed in the Act, the result might have been more along the lines of the *Laburnum* case. While there may have been no conduct in that case which was not covered by the Act, the remedy asked for was not available from the Board. There would seem to be no reason not to claim that in any picketing case where either the motives or the remedy are beyond the jurisdiction of the Board, then the state court may exert jurisdiction, even if the Board could hear the case because of other motives involved or alternative remedies requested.

On a practical level, if this general theory is at all tenable, the management lawyer is faced with the problem of proving a motive on the part of the union which is not one of those listed in Section 8 of the Taft-Hartley Act, and the union must picket in a manner which would make such proof impossible. In the past such items as the picket signs, letters, and other communications have been used to some effect.[67] If nothing else serves, counsel can, at least allege such motives; if the state court finds the allegations to be true it would seem that it could enjoin the picket line regardless of the interstate aspect of the business, because the N.L.R.B. has no control over picketing for motives not listed in the Taft-Hartley Act.

---

65. ". . . [T]he court reasoned that the union was attempting to force petitioners to violate Section 6 (c) of the [Pennsylvania] statute, which provides that 'It shall be an unfair labor practice for an employer . . . (c) By discrimination in regard to hire or tenure of employment, or any term or condition of employment to encourage or discourage membership in any labor organization . . .'" 346 U. S. 485, 487. *Compare* Section 8 of the Taft-Hartley Act: "It shall be an unfair labor practice for an employer . . .(3) by discrimination in regard to hire or tenure of employment, or any term or condition of employment to encourage or discourage membership in any labor organization . . ."

66. "The court finds that the picketing was peaceful. The conclusion of the court is not based on a holding that the objective of the pickets was unlawful under state law or that the objective ran counter to the established public policy of the state . . ."

"Our conclusion is grounded on the finding that the picketing labor organizations have committed an unfair labor practice under the N. L. R. A., as amended, and on the holding that a court of equity of this state has jurisdiction to enjoin such practice. There is no question here of a common law right . . ." *Supra* note 43.

67. Benetar and Isaacs, *Pickets or Ballots? The New Trend in Labor Law;* 40 A. B. A. J. 848, 852 (1954).

In conclusion, it should be pointed out that there are no decisions which specifically authorize the point of view as to state jurisdiction here proposed. On the other hand, there are no decisions which seem to deny it, and it would seem that unless a similar plan is adopted by the courts Congress will be forced to enact a statutory basis which would at least allow the state courts to take what the Board refuses. In any case, clarifying legislation in this field is badly needed, in view of the prevailing theory that the doctrine of federal pre-emption denies to the states any right at all over interstate businesses with labor problems.

John P. MacArthur