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> It is by the goodness of God that in our country we have those three unspeakably precious things: Freedom of speech, freedom of conscience, and the prudence never to practice either of them. (MARK TWAIN, FOLLOWING THE EQUATOR, 1897, heading of ch. 20).

Harsh and intemperate language of striking union members directed toward nonstriking workers can be defamatory, emotionally damaging or even an instant inducement for retaliatory actions. To what extent should striking workers be able to besmear their replacements, with impunity from liability? It is indeed axiomatic that picket line activity will not generally be characterized by amicability and courtesy. A labor dispute which results in a strike often is the end product of acrimony and hostility between parties with diametrically opposed interests, and the union's decision to declare a work stoppage usually is made with the resolute determination to attain its announced goal—whether higher wages or improved working conditions. Consequently, the underlying animosity sets the stage for inevitable verbal abuse, if not outright violence.

Since 1935, the Congress has recognized the right of labor organizations to engage in strike activity in response to disputes with an employer over wages, hours or terms and conditions of employment.[1] In 1947, the National Labor Relations Act (hereinafter Taft-Hartley) was amended by the addition of the so-called "freedom of speech" provision, section 8(c),[2] which provides that the expression of opinion shall not be evidence of an unfair labor practice, provided there is no threat of reprisal or promise of benefit.

Verbal chastisement of nonstriking workers by strikers can give rise to common law slander actions or suits for intentional infliction of emotional distress. Too, many state legislatures have en-

1. 29 U.S.C. §§ 151-169 (1982).
2. 29 U.S.C. § 158(c).

acted "fighting words" statutes[3] which allow recovery to an individual who is the target of words so insulting as to be expected to provoke a reasonable person to engage in a breach of the peace.

When picketers' rights to employ constitutionally or statutorily protected speech in a labor context collide with nonstrikers' common law slander and state statutory "fighting words" rights, the appropriate balance is one with which the National Labor Relations Board (hereinafter NLRB or Board) and the courts, both federal and state, must grapple. Because of the possible discouraging effect on continued work efforts of nonstrikers when subjected to vituperative language from those on strike, management, too, clearly has a vested interest in the protection of the legal rights of strikers' replacements.

I. Picketers' Constitutional and Statutory Rights of Freedom of Speech

Picketing has been recognized as within the area of constitutionally protected free speech under the first and fourteenth amendments since 1940, when the United States Supreme Court held in *Thornhill v. Alabama*[4] that an Alabama statute which prohibited all picketing, whether or not violent in nature, was invalid on fourteenth amendment grounds. The Court in *Thornhill* did, however, acknowledge the interest of a state to "take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents."[5] Indeed, injunctions of picketing activity by state courts have been upheld by the United States Supreme Court when the purposes were to compel a business to cease selling its product to self-employed distributors in violation of a state antitrust law,[6] to force a racial quota in the hiring of workers,[7] to compel persons who are self-employed to observe union working hours,[8] and to force an employer in a right-to-work state to employ union labor.[9]

It is significant that the invoking of first and fourteenth amendment protections is limited to infringements on one's freedom of

3. *E.g.*, Va. Code Ann. § 8.01-45 (1977).
4. 310 U.S. 88 (1940).
5. *Id.* at 105.
6. Givoney v. Empire Storage & Ice Co., 336 U.S. 490 (1950).
7. Hughes v. Superior Court of California, 339 U.S. 460 (1950).
8. International Brotherhood of Teamsters, Local 309 v. Hanke, 339 U.S. 470 (1950).
9. Local 10, United Ass'n of Journeymen Plumbers & Steamfitters v. Graham, 345 U.S. 192 (1953).

speech by the government, respectively, the federal and state governments.[10] Consequently, picketing restricted to private property is not constitutionally protected activity, and strikers located on their employer's property must accede to his own right to prohibit trespassing. In *NLRB v. Babcock & Wilcox*,[11] the Supreme Court held that private property picketing must involve an accommodation and a balancing of the property rights of the employer with the statutory rights of the picketers under section 7 of Taft-Hartley,[12] and that a union might obtain entrance upon such premises when the owner has forbidden it to enter only if there is no other access to persons with whom the union is attempting to communicate, and then only to the extent necessary.[13] This section 7 right to engage in "concerted activity for mutual aid and benefit" was strengthened by the addition of the section 8(c) "free speech" provision, and this section provides the usual basis for justification of abusive picket line language, whether spoken or displayed on picket signs.

II. Non-union Replacements' Countervailing Rights

Efforts to enjoin picket activity generally are initiated by the employer. The protagonists and their conflicting rights become more numerous when he responds to a union's work stoppage by hiring nonstriking replacements. This right of an employer permanently to replace economic strikers has been recognized since 1938, when the Supreme Court held in *NLRB v. Mackay Radio & Telegraph Co.*[14] that such replaced strikers were not entitled to reinstatement after the conclusion of the strike. Even strikes not economic in nature might give rise to a justified discharge of a striker who engages in illegal acts during the labor dispute.[15] This threat of the ultimate loss of the striker's job typically is no serious deterrent to abusive language directed toward the replacements who are realistically diminishing the impact of the union's efforts toward resolving the dispute in its favor. The purpose of the strike, to put

10. These two constitutional amendments prohibit the Congress and the states from infringing upon one's right of free speech.

11. 351 U.S. 105 (1956).

12. 29 U.S.C. § 157, which gives employees the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.

13. It should be mentioned that the picketing in *Babcock & Wilcox* was organizational in nature, rather than the informational picketing which usually accompanies a strike.

14. 304 U.S. 333 (1938).

15. *See, e.g.*, Ohio Power Co. v. NLRB, 539 F.2d 575 (6th Cir. 1976).

the employer at an economic disadvantage, has thereby been aborted, and its effect might appear minimized.

A. *Possible Unfair Labor Practice Charge by Nonstriking Employee*

Any action by the union which is coercive or restraining is an unfair labor practice which the NLRB might order must cease and desist.[16] Thus, attempts physically to prevent a replacement from working are prohibited, since section 7 assures employees not only the right to engage in union activity, but also the right to refrain from such activity.[17] Unlawful coercion or restraint includes not only actual violence, but also threats of violence.[18] The Board formerly held that, in order for language to constitute such a "threat" as would deprive a striker from the statutory protection in section 8(c), there must be accompanying physical acts or gestures to add emphasis to the words.[19] This strict rule that words *per se* can never amount to unlawful coercion or restraint was abandoned by the Board in *Clear Pine Mouldings*,[20] when a more liberal construction of "threat" was adopted. The Board quoted from the First Circuit Court of Appeals in *Associated Grocers v. New England*,[21] which held that "[a] serious threat may draw its credibility from the surrounding circumstances and not from the physical gestures of the speaker."[22] The *Clear Pine Mouldings* Board adopted the earlier test of the Third Circuit[23] in *NLRB v. W.C. McQuaide*,[24] where it was held that language would constitute illegal coercion or restraint if the "misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act."[25] The strikers in *Clear Pine Mouldings* who were held to have relinquished their rights under the statute had carried a two-foot long

16. 29 U.S.C. § 158(b)(1).
17. 29 U.S.C. § 157 (as amended 1947).
18. *See, e.g.*, Perry Norvell Co., 80 NLRB 225 (1948).
19. Coronet Casuals, 207 NLRB 304, 305 (1973).
20. 268 NLRB No. 173 (1984).
21. 562 F.2d 1333 (1st Cir. 1977).
22. *Id.* at 1336.
23. The somewhat unique relationship between the Board and the courts should be clarified. The Board, although bound by Supreme Court interpretations of the statute, is bound by a circuit court of appeals decision only in the case at bar. That is, the Board subsequently might continue to interpret Taft-Hartley differently from a circuit court of appeals' decision. *See* B. FELDACKER, LABOR GUIDE TO LABOR LAW 28 (Reston Pub. 1983).
24. 552 F.2d 519 (3d Cir. 1977), *denying enforcement in part to* 220 NLRB 593 (1975).
25. 552 F.2d at 527.

club with which they swung at replacements and beat on vehicles belonging to nonstriking employees, carried tire irons, baseball bats and ax handles, and were accompanied by dogs. Although there was no actual attendant physical injury or property damage, this conduct was regarded by the Board as being "inherently coercive and intimidating,"[26] as was the strikers' verbal threat to kill a nonstriking employee. Another picketer held to have been guilty of coercion and restraint had advised a nonstriker that she was "taking her life in her own hands by crossing the picket line and would live to regret it"[27] and had threatened to burn the house of another nonstriker. He had also told another employee that the hands of one of her colleagues "would be broken."[28] Recognizing that the presence of physical gestures which accompany verbal threats may in fact increase the severity of verbal conduct, the Board held that the absence of such gestures will not necessarily negate the coercive effect of the language.[29]

Despite the express rejection by the *Clear Pine Mouldings* Board of the previous rule that words *per se* can never constitute coercion or restraint, there remains the requirement that the language contain an element of threat. The mere calling nonstrikers obscene and profane names, without the accompanying threat of impending personal harm or property damage, is protected speech under section 8(c).[30] Similarly, namecalling amounting to racial slurs is not coercive.[31]

There evidently is a greater tendency of the courts to find such misconduct on the part of strikers by reason of their language to nonstrikers as will justify a denial of reinstatement than there is for the Board to hold that such conduct is tantamount to coercion. Picketers' profane and insulting language directed toward persons attempting to work was held by the Fourth Circuit Court of Appeals in *NLRB v. Longview Furniture Co.*[32] to have denied them reinstatement rights.

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26. 268 NLRB No. 173, 1983-CCH NLRB ¶ 16,083, at 27, 419.

27. *Id.*

28. *Id.*

29. *Id.* at 27,417.

30. *See* Longshoreman's & Warehouseman's Union (CIO), 79 NLRB 1487 (1948) and Perry Norvell Co., 80 NLRB 225 (1948).

31. *See* Hotel, Motel & Restaurant Employees & Bartenders Union Local 466, 191 NLRB No. 81 (1971). Here, the strikers referred to nonstrikers as "Uncle Toms" and "dagos."

32. 206 F.2d 274 (4th Cir. 1953).

B. *Nonstriking Employees' Possible State Court Rights of Action*

Unlike the aggressive connotation in Taft-Hartley's "coercion" and "restraint" which will constitute illegal speech, the common law torts of defamation and intentional infliction of mental distress require no proof of physical harm or property damage, or fear of such. Implicit in an allegation of slander, the verbal form of defamation, is damage to one's reputation and the obvious requirement that the utterance, in order to be actionable, be communicated ("published") to a third person. Further, in order for a statement to be defamatory, it must be one which a reasonable person would tend to believe as factual. Absent either of these two elements, there could be no conceivable loss of reputation. Frequently, a plaintiff will file a lawsuit and seek monetary damages by reason of the simultaneous commission of both torts by a single statement or publication. A recent example of a plaintiff's successful suit on one theory and failure to prove the other is *Falwell v. Flynt*,[33] in which the well-known Virginia clergyman filed suit against the magazine and its publisher, which had printed a statement to the effect that the plaintiff had engaged in sexual relations with his mother and had consistently and purposely become drunk prior to preaching sermons. The jury awarded him $100,000.00 in actual damages and $50,000.00 in punitive damages against Flynt, the individual defendant, and $50,000.00 in punitive damages against *Hustler*, the corporate defendant, by reason of his resulting emotional distress, but denied his recovery on the libel charge, since the finding was that no reasonable man would believe that the parody was a description of actual facts about the plaintiff.[34]

In addition to the possibility of a slander or mental distress action filed by a nonstriking employee against a picketer and/or his union, many states have statutes making illegal those words which directly tend to induce acts of violence by those to whom they are addressed. The landmark case upholding the constitutionality of such a statute is *Chaplinsky v. New Hampshire*,[35] in which the United States Supreme Court held valid a New Hampshire law penalizing "offensive, derisive and annoying words."[36] The New

33. 797 F.2d 1270 (4th Cir. 1986).

34. *Id.* at 1273. The publication was an advertisement for Campari liqueur, footnoted by the defendant as a "parody," which portrayed Falwell as a "hypocrite and habitual drunkard," and his mother as a "drunken and immoral woman." *Id.* at 1272.

35. 315 U.S. 568 (1942).

36. *Id.* at 573.

Hampshire Supreme Court had construed the statute to apply only to those words which "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed."[37] (The underlying rationale for such legislation is the encouragement of persons to endure provocative language and to refrain from actual physical retaliation, exercising instead the statutory right to seek damages. Presumably the idea originated during the era when dueling as a method of dispute settlement was prevalent.[38]) The inducement-to-violence characteristic provided the basis for the state's interest in preventing such language. States in which the highest courts had not limited the application of such statutes to true "fighting words," but included by implication also words which were merely insulting, did not fare so well as had New Hampshire and were struck down by the Supreme Court as overly broad and vague.[39] The range of perceivable theories for state lawsuits a nonstriking employee might file against a verbally abusive picketer, then, contains three causes of action: slander, intentional infliction of mental distress and violation of a state's "fighting words" statute.

The most patent impediment to any such right of action is a court's position that federal law preempts state jurisdiction. Congress' having provided comprehensive legislation applicable to disputes arising out of the labor relationship, the United States Supreme Court held in *San Diego Building Trades Council v. Garmon*[40] that state intrusion in the field is preempted absent a compelling state interest. The reasoning of the *Garmon* Court was the "primary jurisdiction of the Board" view[41] that the federal government's interest in enforcing its labor policy must be balanced against a state's interest in regulating matters traditionally left to state jurisdiction. Another school of judicial thought favoring preemption developed in *Lodge 76, International Association of Machinists v. Wisconsin Employment Commission*,[42] in which the Court held that a state law cause of action that interferes with the economic weapon intended by Taft-Hartley to be left free clearly is

37. *Id.*

38. *See* Crawford v. United Steelworkers, *infra* note 68, 335 S.E.2d at 840-41 (Cochran, J., concurring), describing the "fighting words" statute as a "useless apendage to the common law, an obsolete vestige of the proclivity for dueling."

39. *See* Gooding v. Wilson, 405 U.S. 518 (1972), *and* Lewis v. City of New Orleans, 415 U.S. 130 (1974).

40. 359 U.S. 236 (1959).

41. *Id.* at 245.

42. 427 U.S. 132 (1976).

a frustration to the federal labor relations system,[43] this latter view indicating a more inflexible application of the preemption doctrine than that expressed in *Garmon*. Indeed, the Court has limited the applicability of *Garmon* to those factual situations which were "arguably—but not definitely—prohibited or protected"[44] by Taft-Hartley. In other words, under this theory, unless one attempting to file suit in a state court had rights which were at least "arguably" redressable under Taft-Hartley, they were not preempted. This view assures a plaintiff a forum for his action, if the Board cannot possibly afford him relief. It is instructive to look chronologically at the preemption doctrine in the field of labor-management relations and how it has been applied by the courts to lawsuits based upon the three legal theories.

In spite of the *Garmon* Court's express allowance for the states to "grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order,"[45] Taft-Hartley has nonetheless frequently been held to preempt the states in these very areas. The Supreme Court itself has not been consistent in its treatment of whether state courts are preempted from dealing with picket line vulgar and intimidating language. In *Youngdahl v. Rainfair*,[46] although the portion of an Arkansas state court's injunction of all picketing, including that peaceful in nature, was reversed as an impermissible intrusion into preempted activity, the state court's injunction of those acts reasonably likely to provoke violence was affirmed. Citing *Chaplinsky*, the Court found a state interest in enjoining recognitional picketing combined with continuous ridiculing and annoying language, the effect of which would "cease to be persuasion and become intimidation and incitement to violence."[47] The state court was considered to be in a better position to assess the local situation as to whether violence would likely result. Actions enjoined included masses of strikers congregating along the edge of the employer's lot, engaging in singing humiliating songs at workers, sticking out their tongues and making obscene gestures, shouting such names as "fat scab," "cotton pickin' fools" and "cotton patch scabs" (some directed toward individual

43. *Id.* at 144.

44. *See* Sears Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180 (1978).

45. 359 U.S. at 247.

46. 355 U.S. 131 (1957).

47. *Id.* at 138.

workers).[48] Picketers also yelled insulting remarks toward one pregnant worker ("Get the hot water ready")[49] and derided one worker's clothing and "low-cut dresses and earrings."[50]

It is perhaps significant that the approved state court action in *Youngdahl* was injunctive and, as such, was deemed to prevent future violence. Preemption appears to be more readily applied when the action is one at law where a worker is seeking damages for strikers' past verbal abuse. In *Letter Carriers v. Austin*,[51] a Virginia state court award of damages to a non-union employee who had sued the union for libel was reversed by the Supreme Court. The union had placed the plaintiff's name on a published "List of Scabs" in a circulated newsletter, accompanied by a definition of "scab."[52] The Supreme Court held this not to be actionable as defamatory under state law because such would "undermin[e] the freedom of speech which long has been a tenet of federal labor policy"[53] in which Congress and the Board had expressly authorized the "freewheeling use of the written and spoken word . . . favoring uninhibited, robust and wide-open debate in labor disputes."[54]

A somewhat contradictory opinion had preceded *Letter Carriers* by some eight years, *Linn v. Plant Guardworkers*,[55] in which the Supreme Court reversed the lower courts' holdings that federal law

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48. *Id.* at 134.
49. *Id.* at 135.
50. *Id.*
51. 418 U.S. 264 (1974).
52. The definition of "scab" printed in the newsletter was as follows:

> After God had finished the rattlesnake, the toad, and the vampire, He had some awful substance left with which He made a scab.
>
> A scab is a two-legged animal with a corkscrew soul, a water brain, a combination backbone of jelly and glue. Where others have hearts, he carriers a tumor of rotten principles.
>
> When a scab comes down the street, men turn their backs and Angels weep in Heaven, and the Devil shuts the gates of hell to keep him out. No man (or woman) has a right to scab so long as there is a pool of water to drown his carcass, or a rope long enough to hang his body with. Judas was a gentleman compared with a scab. For betraying his Master, he had character enough to hang himself. A scab has not.
>
> Esau sold his birthright for a mess of pottage. Judas sold his Saviour for thirty pieces of silver. Benedict Arnold sold his country for a promise of a commission in the British Army. *The scab sells his birthright, country, his wife, his children and his fellowmen for an unfulfilled promise from his employer.*
>
> *Esau was a traitor to himself; Judas was a traitor to his God; Benedict Arnold was a traitor to his country; a SCAB is a traitor to his God, his country, his family and his class!*

Letter Carriers, 418 U.S. at 268 (emphasis in original).
53. *Id.* at 270.
54. *Id.* at 272-73.
55. 388 U.S. 53 (1966).

preempted a non-union employee's libel action. During an organizational campaign, the defendant union had circulated a pamphlet accusing the plaintiff and other employees of depriving employees of their right to vote in a union election, robbing employees of pay increases and lying to employees. The plaintiff's libel suit for $1,000,000 was regarded by the Court as stating a cause of action despite congressional intent to immunize "vehement, caustic, and sometimes unpleasantly sharp verbal attack."[56] However, this immunity for "the most repulsive speech" is lost, held the Court, if it is made "with knowledge of its falsity, or with reckless disregard of whether it was true or false."[57] The Court, by analogy, adopted the *New York Times* standard for labor dispute defamation cases.[58] The most obvious distinction between *Letter Carriers* and *Linn* is not whether or not the statements were made without regard for their truth or falsity, but, rather, whether they were such as would be reasonably perceived as statements of fact. In *Linn*, the plaintiff had been accused by the defendant of unambiguously illegal conduct which he contended to be false. In *Letter Carriers*, the plaintiff's name was simply attached to a term, presumptively defined by the defendants in a long, narrative statement which a reader would likely find unbelievable, if not facetious.

Again, in *Farmer v. Carpenters*,[59] an action for damages from a union for having inflicted severe emotional distress by its verbal onslaughts heaped upon workers, its "frequent public ridicule" and "incessant verbal abuse,"[60] the Supreme Court refused to apply the preemption doctrine. Reversing the state court's holding that federal labor law provided the exclusive remedy, the Court characterized the plaintiff's allegations as "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction . . . [it could not be inferred] that Congress had deprived the states of the power to act."[61]

It is noteworthy to mention a different cause of action deemed by the Supreme Court not to be preempted by federal law. In *Belknap, Inc. v. Hale*,[62] a striker's replacement had sued the employer who, after having hired him on a permanent basis during the

56. *Id.* at 62, *quoting* New York Times v. Sullivan, 376 U.S. 254, 270 (1964).
57. *Id.* at 61.
58. *Id.* at 65.
59. 430 U.S. 290 (1977).
60. *Id.* at 293.
61. *Id.* at 296-97, *quoting from Garmon, supra* note 40.
62. 463 U.S. 492 (1983).

strike, nonetheless rehired the strikers and dismissed the replacements when the dispute was settled.[63] The Supreme Court agreed with the Kentucky Court of Appeals that the employer's economic weapons were not unlimited, since he could not use them to injure innocent third parties.[64] The Court concurred with the state court's judgment that this conduct of the employer was only of "peripheral concern"[65] to the NLRB, and involved largely local feeling subject to the jurisdiction of the state court.[66] This holding has been harshly criticized as requiring the struck employer to condition any employment offer made to replacements during an economic strike as possibly temporary in order to avoid having to defend a breach of contract action later, thereby interfering unduly with Congress' intent for unfettered and orderly procedure in labor-management relations.[67]

One of the most recent, and surely one of the most protracted, litigations in a state court involving the preemption issue in picket line language is *Crawford v. United Steelworkers.*[68] After the lime company-employer had obtained a largely ignored state court injunction of improper conduct on the picket line, several nonstriking employees filed a state court action against the union and several individual members, seeking both injunctive relief and damages for intentional infliction of emotional distress, violation of the Virginia "fighting words" statute[69] and violation of portions of the Virginia right-to-work legislation.[70] Following a volatile eighteen-month strike which had begun in 1977, the case was finally tried by a Virginia trial court in May, 1981. Summarily finding no evidence of intentional infliction of emotional distress, the court dismissed all but one count in the plaintiffs' motion for judg-

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63. After an initially economic strike, the employer had unilaterally granted a pay increase for those union employees who had worked during the strike. The resulting § 8(a)(3) charge was mediated by the Board's Regional Director, and the settlement included dismissal of the unfair labor practice charge by the strikers, their recall by the employer, and termination of their replacements.

64. 463 U.S. at 500.

65. 110 L.R.R.M. 2377 (Ky. Ct. App. 1981).

66. *Id.* at 2398.

67. *See* Comment, *Strikebreakers, the Supreme Court and Belknap, Inc. v. Hale: The Continuing Erosion of Federal Labor Preemption,* 33 BUFF. L. REV. 839 (1984).

68. 230 Va. 216, 335 S.E.2d 828 (1985).

69. VA. CODE ANN. § 8.01-45 (1977).

70. VA. CODE ANN. §§ 40.1-53 (1974), 40.1-66 (1970), which forbid the use of force, threats of violence or use of insulting or threatening language to induce a person to cease work.

ment.[71] The lower court held not actionable as a matter of law under the "fighting words" statute the terms "scab," "scabby," "nigger," "bastard" and "son of a bitch." However, the court agreed with the plaintiff that two words which implied, respectively, incestuous activity by plaintiffs with their mothers and certain acts of sodomy by plaintiffs, did violate the statute.[72] Accordingly, the plaintiffs were awarded $1,000 in compensatory damages and $10,000 in punitive damages. Both parties appealed, and a very split (4-3) Supreme Court of Virginia affirmed all but the damage award, reversing because of its position that any action based on the "fighting words" statute in a labor dispute context was preempted by federal law. It is possibly germane that the objectionable language by the defendants was accompanied by obscene gestures and the pointing by certain union members of a gun[73] toward a vehicle owned by one of the plaintiffs, and, as such, might constitute coercion and restraint under section 8(b)(1) of Taft-Hartley.[74] There was also testimony that two of the defendants had attempted to run one of the plaintiffs off the road, that one had threatened him with a hammer[75] and that one had wielded a burning stick.[76] Additionally, this plaintiff testified that there were nails in his tires after he had crossed the picket line and that three defendants used threatening language to him.[77] Further, one defendant was said to have brandished a hammer at a worker, telling him to "Get out of the car and I'll knock your goddam brains out."[78]

In denying recovery and holding the state cause of action to have been preempted, the court distinguished the facts in *Crawford* from those in *Linn* because of its finding that the standards set out by the *Linn* Court were not met, and viewed the plaintiffs' reliance on *Linn* as "misplaced."[79] Too, even *Linn*, stated the court, was a

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71. Since § 40.1-53 is punishable as a misdemeanor, and § 40.1-66 and -67 provide only for injunctive relief, the plaintiffs' prayer for damages was ruled by the trial court to be inappropriate and was therefore dismissed. *See* 335 S.E.2d at 839.

72. *Id.* at 830, and Common Law Book 18, p.120, Circuit Court of Giles County, Virginia.

73. 335 S.E.2d at 832.

74. *See supra* notes 16-32 and accompanying text.

75. 335 S.E.2d at 833.

76. *Id.* at 832.

77. The allegedly threatening language included the following: "We'll get your damn ass," and "We'll get your black ass." *Id.* at 833. Another striker yelled that he "hoped that nigger has good life insurance" *Id.* at 834.

78. *Id.* at 835.

79. *Id.* at 836.

"partial preemption" in such actions,[80] holding that all state libel actions in a labor context were preempted except for a very narrow class of cases. Holding *Letter Carriers* as controlling,[81] the court emphasized the absence of a falsehood, or false statement of fact. Acknowledging the defendants' words as "disgusting, abusive, repulsive, and . . . in no way condoned by this Court,"[82] they nonetheless could not reasonably be understood to convey the false representation that the plaintiffs were actually guilty of the despicable conduct implied in the terms (sodomy or incest).

A forceful dissent viewed *Chaplinsky,* not *Letter Carriers,* as applicable[83] because the issue in *Letter Carriers* was that of defamation, not whether the "fighting words" statute had been violated. Conceding that the defendants' contemptuous epithets would not be defamatory because not representative of facts,[84] the minority opinion took the position that *Farmer,* decided subsequent to *Letter Carriers,* but not even mentioned by the majority opinion, should be the controlling precedent on the issue of federal preemption in a labor dispute setting.[85] The dissent likened the defendants' words to "physical blows . . . foul-mouthed violence tantamount to an assault [which] . . . [n]o free man or woman should be expected to endure . . . without redress" because of their "propensity to invoke an immediate breach of the peace, which is no trivial matter in light of the tendency of many of our citizens to keep and bear arms."[86] Since such a verbally abused person is not permitted under the law to respond with physical violence,[87] but, rather, to pursue damages under the "fighting words" statute in lieu of self help, the dissent criticized the court for destroying the only available remedy for the plaintiffs. Finally, the dissent recalled that *Garmon* had salvaged from preemption those "state-court actions to redress injuries caused by violence or threats of violence [regarded as] consistent with effective administration of the federal scheme . . . [which] can be adjudicated without regard to the merits of the underlying labor controversy."[88]

The *Crawford* decision has been subject to sweeping criticism as

80. *Id.* at 837.
81. *Id.* at 838.
82. *Id.* at 839.
83. *Id.* at 842 (Russell, J., dissenting).
84. *Id.* at 844 (Russell, J., dissenting).
85. *Id.* at 842 (Russell, J., dissenting).
86. *Id.* at 841 (Russell, J., dissenting).
87. *Id., citing* Roark v. Commonwealth, 182 Va. 244, 252, 28 S.E.2d 693, 696 (1944).
88. *Id.* at 842-43, quoting from *Garmon,* 359 U.S. at 244.

being "the luxury of justices who themselves never have to endure crude obscenities or fear threatened violence as do those workers who cross a picket line."[89] If the majority viewpoint of *Crawford* is shared by the United States Supreme Court,[90] it is indeed difficult to imagine a hypothetical where a state interest could survive any defense of preemption in a labor dispute setting.

III. Conclusion

The resurrection of common law slander/libel and "fighting words" rights of nonstrikers appears doubtful in those jurisdictions which follow the Virginia court's stance that federal law preempts any such state causes of action. Should other states adopt the dissenting view in *Crawford,* however, these rights of nonstrikers might be redressed, section 8(c) of Taft-Hartley notwithstanding. Until the United States Supreme Court clarifies the extent to which federal labor legislation preempts state law in the area of language abusive to nonstrikers, albeit language which is not physically threatening, there is no certainty as to whether any such rights survive strikers' section 8(c) protection.

If nonstrikers are left with only the right to file unfair labor practice charges because of the preemption doctrine, proving language to be tantamount to coercion or restraint is difficult, at best. Although the NLRB's former blanket protection for picket line language absent accompanying violence has been significantly qualified by *Clear Pine Mouldings,*[91] words which are purely insulting and not palpably threatening in nature apparently will continue to be privileged under section 8(c).

89. *See Fighting Words,* Richmond Times-Dispatch, Nov. 4, 1985, at A-14, col. 1-2.
90. The plaintiffs in *Crawford* have petitioned the Supreme Court for certiorari. *Id.*
91. *See supra* notes 20-29 and accompanying text.