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LABOR LAW-STATE REGULATION OF RECOGNITION AND ORGANIZATIONAL PICKETING

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LABOR LAW—STATE REGULATION OF RECOGNITION AND ORGANIZATIONAL PICKETING—Just as the fixed circumference of spheres of influence tends to reduce clash and friction in world affairs, so peaceful industrial relations are fostered by definite legal rules of conduct. Recent litigation, both by its amount and variety of result, testifies to a continued uncertainty as to the permissible scope of peaceful, primary picketing. The major problems may be subsumed under the loose cate-

gory of "stranger picketing,"[1] but a distinction of some legal significance has developed within this category between picketing by the non-representative union for recognition by the employer and picketing for organizational purposes, that is, to win the reluctant[2] employees into the union's fold. The complexity of human motivation makes this distinction difficult to administer, even if it were valid; the fact that, whatever the union's motivation, the *effect* of such picketing upon the business enterprise is likely to be the same suggests the invalidity of such a distinction as a fulcrum of legal decision. The distinction, however, will be recognized in the structure of this comment because of its acceptance by some courts.

Whether the stranger union is picketing for recognition or to organize the employees directly, in the typical case, union expansionism clashes with the employees' right, subject to the will of the majority, to choose freely between unions or to choose no union.[3] Caught in between is the harassed employer who is unwilling or unable legally to compel his employees to accede to union demands that they organize. State efforts to regulate this problem in social dynamics have been vexed by a double uncertainty: (1) Assuming that the state court has jurisdiction, to what extent does the Fourteenth Amendment protect such picketing as a form of speech? (2) Where the dispute affects interstate commerce, has the Labor-Management Relations Act occupied the field, ousting the state courts of jurisdiction? Neither question is susceptible of a complete answer with federal law in its present posture. It may be useful, nevertheless, to survey this confused area, indicating what certainty there does exist and possible solutions to questions unresolved.

I. *The Inhibitions of the Fourteenth Amendment*

Assuming that no state policy or law supports the employer's application for an injunction against the picketing,[4] the question remains

[1] Although the term "stranger picketing" may be used to include picketing by a union which represents *none* or which represents only a *minority*, no attempt will be made in this comment to differentiate the two situations, for the courts have not placed special emphasis upon such a distinction.

[2] In the cases considered, the employees have either failed to accept the picketing union or have deliberately rejected it by a formal or informal ballot.

[3] Where a rival union is competing for employee allegiance or where the employees are already represented by another union, additional reasons militate against stranger picketing. Except where specifically adverted to, these situations will not be covered in this comment.

[4] State law of course may protect such picketing irrespective of the 14th Amendment. It may be observed, however, that the states have not felt restricted by state anti-injunction statutes in dealing with this problem; see, for example, Matson Navigation Co. v. Brotherhood of Marine Engineers, 22 CCH Lab. Cas. ¶67,057 (1952); Goodwins v. Hagedorn, 303 N.Y. 300, 101 N.E. (2d) 697 (1951).

whether the state court can constitutionally act. It would be rethreshing old straw to trace extensively the United States Supreme Court's process of inclusion and exclusion in determining under what circumstances picketing is entitled to the shield of Fourteenth Amendment due process,[5] but it will not be inapposite briefly to sketch the shift in judicial *attitude* in recent years. In 1950, just ten years after the original assimilation of picketing to free speech in *Thornhill v. Alabama*,[6] the Court in the *Gazzam-Hughes-Hanke*[7] trilogy was disposed to recognize that such identification involved the fallacy of the unequal equation. Justice Frankfurter said, ". . . we must start with the fact that while picketing has an ingredient of communication it cannot dogmatically be equated with the constitutionally protected freedom of speech . . ."[8] and ". . . the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word."[9]

As a corollary, the Court stated that it would accord the highest respect to state prohibition of peaceful picketing where the objective of such picketing was contrary to state policy, either legislatively[10] or judicially declared.[11] Union protest notwithstanding, this retreat from the *Thornhill* doctrine was not quite a giving of *carte blanche* to the states, for the burden remained upon the state to justify its formulation of unlawful objectives upon a rational basis, and it is doubtful that a sweeping ban on picketing *as such* would be tolerated.[12] Furthermore, the Court's prior holdings protecting various forms of picketing have not been expressly overruled.

[5] Of the abundant literature on this subject, the following recent articles seem most useful: Tanenhaus, "Picketing-Free Speech: The Growth of the New Law of Picketing from 1940-1952," 38 CORN. L.Q. 1 (1952); Fraenkel, "Peaceful Picketing—Constitutionally Protected?" 99 UNIV. PA. L. REV. 1 (1950); comment, 26 N.Y. UNIV. L.Q. 183 (1951).

[6] 310 U.S. 88, 60 S.Ct. 736 (1940).

[7] Building Service Employees Intl. Union v. Gazzam, 339 U.S. 532, 70 S.Ct. 784 (1950); Intl. Brotherhood of Teamsters v. Hanke, 339 U.S. 470, 70 S.Ct. 773 (1950); Hughes v. Superior Court of California, 339 U.S. 460, 70 S.Ct. 718 (1950).

[8] Speaking for the Court in Intl. Brotherhood of Teamsters v. Hanke, 339 U.S. 470 at 474, 70 S.Ct. 773 (1950).

[9] Speaking for the Court in Hughes v. Superior Court of California, 339 U.S. 460 at 465, 70 S.Ct. 718 (1950).

[10] Building Service Employees Intl. Union v. Gazzam, 339 U.S. 532, 70 S.Ct. 784 (1950). It should be noted that the Court in this case declared, at 540, that it was immaterial whether the state statute imposed criminal sanctions, thus extending the prior ruling in Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 69 S.Ct. 684 (1949).

[11] Hughes v. Superior Court of California, 339 U.S. 460, 70 S.Ct. 718 (1950).

[12] See Tanenhaus, "Picketing-Free Speech: The Growth of the New Law of Picketing from 1940-1952," 38 CORN. L.Q. 1 at 47-50 (1952), for an excellent summary of the present position of the Court.

Narrowing inquiry to the Court's treatment of stranger picketing, the shift in judicial attitude outlined above is mirrored in two decisions. In 1941, in the *Swing* case[13] a state court, upon the application of both the employer and his employees, had enjoined picketing by a stranger union on the theory that no labor dispute was involved. In striking down this injunction, the Supreme Court, speaking through Justice Frankfurter, said: "A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers 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."[14]

Nine years later, in *Building Service Employees Intl. Union v. Gazzam*,[15] a case substantially like the *Swing* case on its facts, an injunction was sustained where based on the finding that such picketing violated state policy because it was for the purpose of inducing the employer to coerce his employees to join the union. The *Swing* case was limited to the precise holding that a state could not enjoin peaceful picketing *solely* on the ground that no labor dispute existed between the employer and his employees. Even prior to the *nihil obstat* of the *Gazzam* decision, many state courts had enjoined recognition picketing,[16] but *Gazzam* had the effect of authoritatively clearing away the suspected inhibitions of the *Swing* case. The recent decisions are uniform in prohibiting recognition picketing, either on the basis of statute[17] or judicially declared policy,[18] where it is found from prior demands upon the employer for recognition or from misleading banners as to the employer's

[13] American Federation of Labor v. Swing, 312 U.S. 321, 61 S.Ct. 568 (1941).

[14] Id. at 326.

[15] 339 U.S. 532, 70 S.Ct. 784 (1950).

[16] For the division of authority prior to the Gazzam decision, see Annotation, 11 A.L.R. (2d) 1338 (1950).

[17] The cases are too numerous for exhaustive citation, but see, for example, Saperstein v. Rich, 114 N.Y.S. (2d) 779 (1952); WERB v. Chauffeurs, Teamsters & Helpers Local 200, 22 CCH Lab. Cas. ¶67,162 (1952); Blue Boar Cafeteria Co. v. Hotel and Restaurant Employees & Bartenders Intl. Union, (Ky. App. 1953) 254 S.W. (2d) 335; Klibanoff v. Tri-Cities Retail Clerks' Union, 23 CCH Lab. Cas. ¶67,468 (1953); and compare Kenmike Theatre Inc. v. Moving Picture Operators, Local 304, 139 Conn. 95, 90 A. (2d) 881 (1952), with Torrington Drive-in Corp. v. Intl. Alliance of Theatrical Stage Employees, 17 Conn. Supp. 417, 21 CCH Lab. Cas. ¶66,852 (1951). For a review of the many New York decisions on picketing for recognition, see Petro "Recognition and Organizational Picketing in 1952," 3 LAB. L.J. 819 (1952). It should be noted, however, that decisions remain on the books in many states permitting recognition picketing, most of them on the basis of the Swing case. See, for example, Watson Co. v. Wilson, 187 Tenn. 402, 215 S.W. (2d) 801 (1948).

[18] Bitzer Motor Co. v. Local 604, (Ill. App. 1953) 110 N.E. (2d) 674.

position in the labor dispute that the union's purpose is to pressure the employer to interfere with his employees' freedom of choice.[19]

Where the union has been astute to clarify the purpose of its picketing as organizational or where it seeks to defeat the injunction by promising to picket solely for the purpose of organizing the reluctant employees, there is some question whether the court can constitutionally enjoin such activity. The uncertainty stems from Justice Minton's language in the *Gazzam* case where, speaking for the Court, he limited the impact of that decision to recognition picketing and stated:

> "The Washington statute has not been construed by the Washington courts in this case to prohibit *picketing of workers by other workers.* The construction of the statute which we are reviewing only prohibits coercion of workers by employers. We cannot agree with petitioners' reading of this injunction that 'whatever types of picketing were to be carried out by the union would be in violation of that decree.' Respondent does not contend that picketing *per se* has been enjoined but only that picketing which has as its purpose violation of the policy of the State. There is no contention that picketing directed at employees for organizational purposes would be violative of that policy."[20]

While it is probably overstatement to maintain that the above language affirmatively extends the protection of the Fourteenth Amendment to organizational picketing, the state courts which have been cognizant of this language have been reluctant to test its force by a prohibition of organizational picketing as such.[21]

Perhaps the easiest method of coping with this potential constitutional problem is to avoid it by a finding that the union's motivations are inseparably entangled and that since one purpose is to coerce the employer, this makes all further picketing enjoinable.[22] Where there is no basis for such a finding, however, the court must face the problem. And a pressing problem it is. For whatever the union's avowed motive, it is the employer who is forced to bear the economic impact of the picketing.[23]

[19] Bickford's Inc. v. Mesevich, 107 N.Y.S. (2d) 369 (1951); Metropolis Country Club, Inc. v. Lewis, 114 N.Y.S. (2d) 620, affd. 280 App. Div. 816, 113 N.Y.S. (2d) 923 (1952).

[20] Building Service Employees Intl. Union v. Gazzam, 339 U.S. 532 at 539-540, 70 S.Ct. 784 (1950).

[21] Painters and Paperhangers Local 1018, AFL v. Rountree Corp., (Va. 1952) 72 S.E. (2d) 402; Goodwins Inc. v. Hagedorn, 21 CCH Lab. Cas. ¶66,893 (1952), decision after remand from 303 N.Y. 300, 101 N.E. (2d) 697 (1951).

[22] Katz Drug Co. v. Kavner, (Mo. 1952) 249 S.W. (2d) 166.

[23] Although one court was hopeful that a clarification of the placards would ease the

Recent decisions in New York[24] and Pennsylvania[25] dealing with organizational picketing seem to subvert the "motivation analysis" underlying a distinction between recognition and organizational picketing by reasoning from the *effect* of such picketing upon the employer to a finding that the union's *purpose* was to bring pressure to bear upon him to compel his employees to join the union or to grant recognition. While this rationale finds support in the realities of the situation[26] and in the principle that the law will find that a person intends the reasonably foreseeable consequences of his acts, it leaves the unions free to picket only so long as the picketing has no economic impact. It is interesting to note that the Pennsylvania court, as an alternative ground for the injunction, quoted from the *Swing* case: "The right of free communication cannot therefore be mutilated by denying it to workers, *in a dispute with an employer,* even though they are not in his employ."[27] The court reasoned from this statement that since the union asserted it had no dispute with the employer, it was not constitutionally protected in making him bear the onus of the pressure exerted.

But assuming *arguendo* that there is no coercion of the employer, perhaps a stronger objection to organizational picketing may be found in the coercion of the employees. Several states have statutes which by their terms prohibit coercion of employee choice as to unionism *by any person.*[28] In the recent *Postma* case,[29] the Michigan Supreme Court, relying on language in previous decisions,[30] seems to interpret the Michigan Labor Relations Act[31] so as to make it unlawful for the union to picket to bring pressure upon employees ". . . either directly or indirectly

pressure on the employer [Haber & Fink v. "John Jones," 277 App. Div. 176, 98 N.Y.S. (2d) 393 (1950)], in the majority of cases the employer has suffered harassment by the refusal of union men supplying the enterprise to cross *any* picket line, regardless of the nature of the dispute.

[24] Amazon v. Local 178, Hotel and Restaurant Beverage Dispensers Industrial Union, 23 CCH Lab. Cas. ¶67,469 (1953).

[25] Matson Navigation Co. v. Brotherhood of Marine Engineers, 22 CCH Lab. Cas. ¶67,057 (1952).

[26] Query whether there can be a case of organizational picketing *pur et simple* unless the picketing is conducted before the homes of the employees?

[27] American Federation of Labor v. Swing, 312 U.S. 321 at 326, 61 S.Ct. 568 (1941). Emphasis added.

[28] See, for example, Ala. Code (1940) tit. 26, §383; Mich. Comp. Laws (1948) §423.17. And consider the possibility of such an interpretation of S.D. 1947 Sessions Laws, c. 92, §4. Arizona has recently passed a statute which prohibits stranger picketing for whatever purpose, 4 CCH Labor Law Rep. (Arizona) ¶41,510.

[29] Postma v. Intl. Brotherhood of Teamsters, 334 Mich. 347, 54 N.W. (2d) 681 (1952).

[30] Harper v. Brennan, 311 Mich. 489, 18 N.W. (2d) 905 (1945); Standard Grocer Co. v. Local 406, 321 Mich. 276, 32 N.W. (2d) 519 (1948).

[31] Mich. Comp. Laws (1948) §423.17.

through their employer. . . ."[32] The court ignored completely any distinction between recognition and organizational picketing. The test applied was whether the picketing was to "publicize" substandard wage and working conditions in the enterprise picketed, which the court indicated it would permit, or was to bring economic pressure to bear upon the employees to accept union representation regardless of any advantages that might accrue to them. The court sustained the injunction after the union representative admitted that picketing would continue until the employees were organized regardless of the question whether their working conditions were substandard or on a par with union standards in the area. This holding presents the most clear-cut challenge to date of the *Gazzam* dictum and it is surprising that the United States Supreme Court recently declined the opportunity to review this decision and another similar Michigan case.[33]

When the Court does consider the question, it is submitted that the state prohibition of organizational picketing must either be sustained against Fourteenth Amendment due process objections or the Court must move back toward the *Thornhill* doctrine and away from the rationale in the *Gazzam-Hanke-Hughes* trilogy. The *Gazzam* dictum loses much of its force when set in the context of the Court's declared respect for state determinations of the permissible scope of picketing.[34] Where state courts focus attention upon the economic pressure upon the employer, whatever the union's avowed purpose, a strong argument exists that the state must enjoin organizational picketing to prevent facile subversion of a state policy approved by the Supreme Court in the *Gazzam* case itself. Where the focus is upon coercion of employees, as in the *Postma* case, it is difficult to see how a state policy against such coercion could be regarded as arbitrary or capricious. The preservation of a distinction between recognition and organizational picketing depends upon the untenable thesis that the freedom of employee choice should only be protected against incursions by the employer and not against union pressures.[35] Although some NLRB decisions seem to ac-

[32] Postma v. Intl. Brotherhood of Teamsters, 334 Mich. 347 at 355, 54 N.W. (2d) 681 (1952). For a similar analysis, see Way Baking Co. v. Teamsters and Truck Drivers Local 164, 335 Mich. 479, 56 N.W. (2d) 357 (1953); Hall Steel Co. v. Intl. Brotherhood of Teamsters, 22 CCH Lab. Cas. ¶67,163 (1952).

[33] Certiorari was denied in the Postma case, 345 U.S. 922, 73 S.Ct. 779 (1953), and in the Way Baking Co. case, (U.S. 1953) 73 S.Ct. 939, which raised both the question of due process and the question of state jurisdiction over organizational picketing where the dispute affects interstate commerce.

[34] This argument is fully developed in Petro, "Free Speech and Organizational Picketing in 1952," 4 LAB. L.J. 3 (1953).

[35] See Lauritzen, "The Organizational Picket Line-Coercion," 3 STAN. L. REV. 413

cept this distinction,[36] state policy is not to be judged by its conformity with federal labor law but rather by the "rational basis" test. A further argument can be framed by analogy to the Court's willingness to accept state protection of self-employed workers against picketing to compel them to accept union standards.[37] The union would of course argue that the case of picketing the self-employed is different because there is a greater interdependence of economic interest where the picketing arises from a dispute with employees; this argument would seem to depend, however, upon a clear showing of substandard conditions in the enterprise picketed, and such a showing would probably not be possible in the usual case of organizational picketing, for it is unlikely that picketing would be needed to induce employees to unionize if their working conditions were materially substandard.

Admittedly, a Supreme Court ruling that the states can constitutionally ban organizational picketing entails virtually a complete retreat from the *Thornhill* position, for this would permit states in effect to issue a blanket ban on all stranger picketing. However such a ruling would seem to be a more logical consequence of the Court's present recognition that picketing is coercive than the perpetuation of gossamer distinctions based upon the union's subjective motivation.[38] Other channels of communication remain open to the union to state its case to the public, and the union has well-protected opportunities to reach the employees in the enterprise with rational arguments why they should unionize. Where such arguments are not accepted, it seems difficult to justify as a matter of constitutional policy the privilege to use the weapon of picketing against employees who are helpless to

(1951). For a purported rebuttal in which the issue never seems to be squarely joined, see Tobriner, "The Organizational Picket Line-Lawful Economic Pressure," 3 STAN. L. REV. 423 (1951).

[36] At least in cases involving representation proceedings, the NLRB has held that picketing for organizational purposes does not constitute a demand for recognition by the union. Hamilton's, Ltd., 93 N.L.R.B. 1076 (1951); General Paint Corp., 95 N.L.R.B. 539 (1951). But compare Intl. Brotherhood of Teamsters, Local No. 41 (Union Chevrolet Co.), 96 N.L.R.B. 957 (1951).

[37] Intl. Brotherhood of Teamsters v. Hanke, 339 U.S. 470, 70 S.Ct. 773 (1950). A caveat may be entered here, however, for the Court in the Hanke case did not overrule the earlier decision in Cafeteria Employees Union, Local 302 v. Angelos, 320 U.S. 293, 64 S.Ct. 126 (1943), which struck down an injunction against picketing of a cafeteria run by partners. The Angelos case is readily distinguishable, nevertheless, because the state court injunction, like that in the Swing case, was based solely on the ground that there was no labor dispute.

[38] The "motivation analysis" seems to prevail with the Court at present, however. See Local Union No. 10 v. Graham, 345 U.S. 192, 73 S.Ct. 585 (1953) in which the Court sustained an injunction against picketing for purposes in conflict with the Virginia Right-to-Work Act.

defend themselves in this economic cold war while permitting injunction if the picketing is directed formally only against the employer.

II. *State Jurisdiction Over Stranger Picketing Which Affects Interstate Commerce*

Since Congress failed to indicate expressly the extent to which the Labor-Management Relations Act was intended to preempt the field of labor relations law,[39] debate has flourished as to what areas of regulation, if any, remain within state jurisdiction in the case of employers and unions whose activities affect interstate commerce.[40] It seems clear that where a state statutory or common law rule conflicts with the LMRA,[41] or with its policy,[42] or where there is a possibility of conflict,[43] federal law prevails, but the real pre-emption problems arise when a state attempts to exercise concurrent or supplementary jurisdiction in areas covered specifically or generally by the LMRA without the sanction of express or clearly implied congressional approval.[44] Although able arguments have been made that the entire subject of picketing has been brought within exclusive federal jurisdiction,[45] subject to the exception that the state's general police power may be invoked to prevent violence and destruction of property,[46] no authorita-

[39] It is doubtful that even the most skilled draftsmanship could have solved all difficulties by a precise demarcation of the metes and bounds of federal jurisdiction, but the amount of controversy since 1947 indicates that the problem merited more attention than it received.

[40] This problem gained dimension even before the enactment of the LMRA [Bethlehem Steel Co. v. N.Y. State Lab. Rel. Bd., 330 U.S. 767, 67 S.Ct. 1026 (1947)], but the more extensive labor regulation embodied in the LMRA created many additional areas of real and potential conflict. General discussions of the pre-emption problem may be found in Smith, "The Taft-Hartley Act and State Jurisdiction over Labor Relations," 46 MICH. L. REV. 593 (1948); Cox and Seidman, "Federalism and Labor Relations," 64 HARV. L. REV. 211 (1950); for recent coverage see the interesting debate: Petro "Participation by the States in the Enforcement and Development of National Labor Policy," N.Y.U. FIFTH ANNUAL CONFERENCE ON LABOR 1 (1952), and Ratner, "Problems of Federal-State Jurisdiction in Labor Relations," N.Y.U. FIFTH ANNUAL CONFERENCE ON LABOR 77 (1952). Mr. Ratner's article is also available in 3 LAB. L.J. 750 (1952). For a review of the Supreme Court cases, see comment, 37 CORN. L.Q. 515 (1952).

[41] Intl. Union, UAW-CIO v. O'Brien, 339 U.S. 454, 70 S.Ct. 781 (1950); Amalgamated Assn. of Street, Electric Railway & Motor Coach Employees v. WERB, 340 U.S. 383, 71 S.Ct. 359 (1951).

[42] Hill v. Florida, 325 U.S. 538, 65 S.Ct. 1373 (1945).

[43] La Crosse Telephone Corp. v. WERB, 335 U.S. 866, 69 S.Ct. 379 (1948).

[44] No problem exists of course where Congress has expressly ceded jurisdiction to the states. Algoma Plywood & Veneer Co. v. WERB, 336 U.S. 301, 69 S.Ct. 584 (1949).

[45] See articles by Cox and Seidman and by Ratner, supra note 40; for a contrary view, see Petro, "State Jurisdiction to Control Recognition Picketing," 2 LAB. L.J. 883 (1951).

[46] Support for this may be found in Allen-Bradley Local No. 1111, United Electrical, Radio and Machine Workers of America v. WERB, 315 U.S. 740, 62 S.Ct. 820 (1942), where a state injunction against mass picketing was sustained, and also in Intl. Union,

tive ruling supports this broad an assertion, and the state courts, naturally, have been reluctant to surrender more than is absolutely required. At present, Supreme Court decisions prohibit state regulation of conduct which constitutes an unfair labor practice under section 8 of the NLRA[47] or which constitutes a "protected concerted activity" under section 7.[48] Some state courts, dealing with conduct which violates federal law, have continued to exercise concurrent jurisdiction where this was considered necessary to prevent irreparable injury during the delay before NLRB action,[49] but the better view is contrary,[50] and in most cases the problem assumes this shape: (1) Is the activity in question protected or condemned under the LMRA? (2) If not, may the state exercise jurisdiction in this "middle area"?[51]

Prior to a discussion of the central issues, two specific situations deserve brief mention. Where the picketing involves a demand for a closed shop or other union-security device which is forbidden by state law, it would seem that the state would have a special claim in support of jurisdiction, for Congress specifically gave the states authority to regulate union security provisions.[52] On the other hand, unless one accepts the concurrent jurisdiction thesis, it seems clear that the state has no jurisdiction to enjoin recognition picketing where a union

UAW-CIO v. O'Brien, 339 U.S. 454 at 459, 70 S.Ct. 781 (1950). Since violence may also be a violation of §8(b)(1)(A) of the NLRA, this would seem to be an exception to the general rule against concurrent jurisdiction. For a full analysis of this problem and the pertinent cases, see Petro, "State Jurisdiction to Regulate Violent Picketing," 3 LAB. L.J. 3 (1952).

[47] This would seem to be the holding in the Court's one sentence per curiam decision in Plankinton Packing Co. v. WERB, 338 U.S. 953, 70 S.Ct. 491 (1950). For the Court's subsequent interpretation of the Plankinton case confirming this view, see Amalgamated Assn. v. WERB, 340 U.S. 383 at 390, n. 12, and the dissenting opinion at 402, 71 S.Ct. 359 (1951).

[48] See cases cited in notes 41 and 42 supra.

[49] Montgomery Bldg. & Construction Trades Council v. Ledbetter Erection Co., (Ala. 1951) 57 S. (2d) 112, cert. dismissed because temporary injunction not a "final decree," 344 U.S. 178, 73 S.Ct. 196 (1952); Tidewater-Shaver Barge Lines v. Dobson, (Ore. 1952) 245 P. (2d) 903.

[50] Ryan v. Simons, 302 N.Y. 742, 98 N.E. (2d) 707 (1951); Norris Grain Co. v. Nordaas, 232 Minn. 91, 46 N.W. (2d) 94 (1950); Gerry of California v. Superior Court, 32 Cal. (2d) 119, 194 P. (2d) 689 (1948).

[51] For an excellent discussion of federal jurisdiction over stranger picketing and the present status of federal labor law, see comment 20 UNIV. CHI. L. REV. 109 (1952). The writer there explores the possibilities of state jurisdiction in this "middle area" at much greater length than is possible in this comment.

[52] Texas State Federation of Labor v. Brown & Root, Inc., (Tex. Civ. App. 1952) 246 S.W. (2d) 938. But see Pocahontas Corp. v. Bldg. Trades Council, (D.C. Me. 1950) 93 F. Supp. 217, where the union obtained removal to a federal court because the cause of action was also cognizable under §8(b)(2) of the NLRA. Where the union's demand for a union security provision does not violate the NLRA, but does violate the stricter provisions of state law, it would seem that the state should clearly have jurisdicion to enforce its law.

certified by the NLRB already represents the employees in the enterprise, for such picketing constitutes an unfair labor practice under section 8(b)(4)(C) of the NLRA.[53]

Where there is no certified union, and picketing occurs while representation proceedings before the NLRB are pending or where such proceedings have not been successfully initiated,[54] the state courts have divided on the question of jurisdiction. In the leading case of *Goodwins Inc. v. Hagedorn*,[55] the New York Court of Appeals held for state jurisdiction. The picketing was for recognition and this is not an unfair labor practice under the NLRA for the most nearly applicable sections of the act, 8(b)(4)(A) and (B),[56] refer only to strikes. And further, recognition picketing is not a concerted activity protected under section 7 of the NLRA[57] because, although not an unfair labor practice in itself, its purpose is to compel the employer to commit an unfair labor practice, namely, interference with his employees' choice of representatives.[58]

A recent Pennsylvania decision[59] challenges the New York court's ruling on the basis that recognition picketing *is* an unfair labor practice under section 8(b)(2) which forbids the union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection [8](a)(3)."[60] This interpretation of section 8(b)(2), however, is at least debatable. The specific forms of discrimination mentioned in section 8(a)(3) are discrimination "in regard to hire or tenure of employment or any term or condition of employment";[61] recognition picketing does not necessarily involve union demands for these particular forms of employer discrimination—indeed, the union would be ill-advised even to hint at such demands—and no federal decision has as yet found recognition picketing an unfair labor practice where the union leaves the type of pressure to be exerted up to "the worried resourcefulness of the employer."[62]

[53] 61 Stat. L. 141 (1947), 29 U.S.C. (Supp. V, 1952) §158(b)(4)(C).

[54] It may be noted that the union can prevent an election by disclaiming representative status and continue its picketing for organizational purposes. Cooper d.b.a. Smith's Hardware Co., 93 N.L.R.B. 1009 (1951); Ny-Lint Tool and Mfg. Co., 77 N.L.R.B. 642 (1948).

[55] 303 N.Y. 300, 101 N.E. (2d) 697 (1951).

[56] 61 Stat. L. 141 (1947), 29 U.S.C. (Supp. V, 1952) §158(b)(4)(A),(B).

[57] 61 Stat. L. 140 (1947), 29 U.S.C. (Supp. V, 1952) §157.

[58] This position finds support in Thompson Products Inc., 72 N.L.R.B. 886 (1947); cf. American News Co., 55 N.L.R.B. 1302 (1944).

[59] Garner d.b.a. Central Storage and Transfer Co. v. Teamster, Chauffeurs and Helpers Local Union No. 776, (Pa. 1953) 94 A. (2d) 893.

[60] 61 Stat. L. 141, 29 U.S.C. (Supp. V, 1952) §158(b)(2).

[61] 61 Stat. L. 140, 29 U.S.C. (Supp. V, 1952) §158(a)(3).

[62] This was the analysis followed in Hall Steel Co. v. Intl. Brotherhood of Teamsters,

Since both recognition and organizational picketing impose economic pressure upon the employees in the enterprise, to the extent that such picketing is effective in hindering the employer's activity and causing a lessening or cessation of business, it would seem that such picketing would be an unfair labor practice under section 8(b)(1)(A),[63] forbidding restraint or coercion of employees in the exercise of the rights guaranteed in section 7, which includes the right to refrain from joining a union. The legislative history of the NLRA lends some support to such an interpretation,[64] and the NLRB has ruled that a direct threat to an employee of loss of job[65] and other forms of economic pressure, such as a strike[66] or threat to strike,[67] constitute coercion within the meaning of section 8(b)(1)(A), but the Board has yet to overrule its holding in *NLRB v. Local 74, United Brotherhood of Carpenters and Joiners of America*[68] that peaceful stranger picketing is persuasion and not coercion. The Board's tendency to follow the Supreme Court's shifting analysis of the nature of picketing[69] may yet result in the regulation of stranger picketing under section 8(b)(1)(A). In the meantime, at least one state court has assumed jurisdiction of organizational picketing on the basis that it is not an unfair labor practice under the federal law.[70] The court did not consider the question whether such picketing might be a protected concerted activity, but it would seem that a good argument can be made that such picketing should not be protected since it violates the overriding policy of free employee choice as to union representation.[71]

In the absence of federal determination that recognition or organizational picketing constitute protected concerted activities or unfair labor practices, the question remains: did Congress intend to foreclose state jurisdiction over these middle area activities? The major support for state jurisdiction is the Supreme Court's decision in the *Briggs-*

22 CCH Lab. Cas. ¶67,163 (1952). Cf. Denver Bldg. and Construction Trades Council, 90 N.L.R.B. 1768 (1950), enforced in NLRB v. Denver Bldg. & Construction Trades Council, (10th Cir. 1951) 192 F. (2d) 577; Intl. Longshoreman's and Warehouseman's Union, Local No. 16, CIO, 90 N.L.R.B. 1753 (1950).

[63] 61 Stat. L. 141 (1947), 29 U.S.C. (Supp. V, 1952) §158(b)(1)(A).

[64] 93 CONG. REC. 4017 et seq. (1947).

[65] Smith Cabinet Mfg. Co., 81 N.L.R.B. 886 (1949).

[66] Pinkerton's National Detective Agency, 90 N.L.R.B. 205 (1950).

[67] Clara Val Packing Co., 87 N.L.R.B. 703 (1949).

[68] 80 N.L.R.B. 533 (1948), enforced (6th Cir. 1950) 181 F. (2d) 126.

[69] See Denver Bldg. and Construction Trades Council, 90 N.L.R.B. 1768 at 1769, 1770 (1950).

[70] Hall Steel Co. v. Intl. Brotherhood of Teamsters, 22 CCH Lab. Cas. ¶67,163 (1952).

[71] See Petro, "Free Speech and Organizational Picketing in 1952," 4 LAB. L.J. 3 (1953).

Stratton case[72] where the Court upheld a Wisconsin cease and desist order against the union's intermittent work stoppages on the theory that "This conduct is governable by the states or it is entirely ungoverned."[73] Opponents of state jurisdiction over stranger picketing argue that the *Briggs-Stratton* decision is not applicable for that decision was limited to permitting state jurisdiction over illegal union *tactics* and cannot be extended to cases of stranger picketing where the illegality is predicated on *motivation*.[74] The force of this argument is vitiated, however, by the fact that stranger picketing can as well be designated an illegal tactic to gain membership—as contrasted with such acceptable tactics as speeches to the unorganized employees or other appeals to reason—and therefore any distinction between tactics and motives seems purely verbal.[75] A stronger argument against state jurisdiction is that, unlike the novel "quickie strike" in the *Briggs-Stratton* case, stranger picketing has been the subject of congressional attention in that Congress rejected a bill sharply restricting stranger picketing and in the NLRA as finally amended in 1947 dealt expressly only with collective action where another union has been certified.[76] Therefore, it may be argued, Congress intended that there should be no other restrictions. It has been pointed out, however, that ordinarily no one would argue that the mere rejection of a policy by Congress precludes a state from adopting that policy, for "Any such canon of interpretation of Congressional lawmaking would magnify silence or inaction by Congress to terrific proportions."[77] Unless one assumes in the first place that Congress intended to preclude state action, mere rejection is no more than an ambiguous act. And further, any argument on the basis of congressional intent seems somewhat weakened by the fact that unless the states take action, the congressional policy of free employee choice as to union representation is easily subverted by stranger picketing. Rather than posit a conflicting intent, a congressional schizophrenia, it would seem more reasonable to conclude that Congress had not thoroughly considered the problem.

The legal vacuum that ensues if the state does not take jurisdiction

[72] Intl. Union, UAW-AFL v. WERB, 336 U.S. 245, 69 S.Ct. 516 (1949), commonly known as the Briggs-Stratton case.

[73] Id. at 254.

[74] Ratner, "Problems of Federal-State Jurisdiction in Labor Relations," N.Y.U. FIFTH ANNUAL CONFERENCE ON LABOR 77 at 103-104 (1952).

[75] This argument is fully developed in a comment, 20 UNIV. CHI. L. REV. 109 at 118 (1952).

[76] Ratner, supra note 74, at 97-103.

[77] Smith, "The Taft-Hartley Act and State Jurisdiction over Labor Relations," 46 MICH. L. REV. 593 at 613, n. 44 (1948).

is difficult to justify in terms of a congressional intent to leave the problem of stranger picketing to the free play of economic forces, unhindered by the courts. For, unlike strikes, the employer and employees have no countervailing weapons against stranger picketing, except perhaps where the picketing union includes a minority of the employees, in which case the employer could discharge his picketing employees and raise the question whether they were engaged in a protected concerted activity. Where the union represents none of the employees, as in most of the cases considered in this comment, the employer is helpless. If representation proceedings are pending, his distress may be only temporary, but what of the situation where no union is certified by the NLRB? And further, where the union prevents an election by disclaiming representative status,[78] or where the employer does not meet the jurisdictional requirements of the NLRB,[79] the state courts afford the only means of breaking the deadlock. In such situations, the pre-emption argument seems to exact an extremely high price for symmetry in national labor law.

Perhaps the central weakness in the pre-emption argument against state jurisdiction over these "middle area" activities is an assumption that federal labor law is a complete, well thought out system of regulation. Experience has shown, it is submitted, that this assumption is not valid. Unless the unions are more successful than they have been in the past in securing removal to federal courts,[80] it seems likely that state courts will continue to shape the law in the peripheral area of stranger picketing. State action at least has the virtue of underscoring the need for a rationalization and clarification of national labor policy either by the NLRB, through injecting new content into section 8(b)(1)(A) to regulate stranger picketing,[81] or preferably by congressional action.

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[78] See cases cited in note 54 supra.

[79] The problem of the legal limbo that exists where the dispute affects interstate commerce but does not come within the NLRB's discretionary jurisdictional requirements is extensively discussed in Feldblum, "Jurisdictional 'Tidelands' in Labor Relations," 38 VA. L. REV. 187 (1952).

[80] For possible methods of federal control over state action by the NLRB or the lower federal courts, see Ratner, supra note 74, at 110-115.

[81] This of course would not solve the problem raised in note 79 supra; indeed it would aggravate the problem, for if the NLRB declared stranger picketing an unfair labor practice, then state courts would seem to be precluded from jurisdiction under the holding in the Plankinton case, 338 U.S. 953, 70 S.Ct. 491 (1950).