



Spring 3-1-1948

Some Union Unfair Labor Practices Under The Taft-Hartley Act

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Labor and Employment Law Commons](#)

Recommended Citation

Some Union Unfair Labor Practices Under The Taft-Hartley Act, 5 Wash. & Lee L. Rev. 13 (1948).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol5/iss1/3>

This Note is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

NOTES

SOME UNION UNFAIR LABOR PRACTICES UNDER THE TAFT-HARTLEY ACT

When, on June 23, 1947, more than two-thirds of the members of the Senate of the United States voted to override the President's veto of the Labor Management Relations Act, generally referred to as the Taft-Hartley Act,¹ the United States had adopted the most detailed, most complex, and most comprehensive national labor legislation in the history of the nation. According to its proponents, the Act is designed to establish a balance of power between employers and unions, to protect employee rights, and to emphasize and safeguard the public interest. It amends and re-enacts the National Labor Relations Act², commonly known as the Wagner Act, which has been the subject of continuous litigation and judicial interpretation during the past twelve years. It also extends statutory regulation in labor matters to areas not previously covered. Many of the changes effected by the Act are designed to remedy troublesome situations brought about by specific judicial and administrative decisions interpreting the National Labor Relations Act and the Norris-La Guardia Act.³

Because of the scope of the Act, it would be extremely difficult to discuss all of the problems presented. The following Note is intended to point to some of the more interesting problems existing before the passage of this Act, and the effect of the Act on these problems. This discussion will be principally concerned with Section 8 (b), entirely new in this statute, which for the first time expressly makes unions responsible for unfair conduct under a federal labor law. The actions of labor unions and their agents which are now unfair are specified in Section 8 (b) as "unfair labor practices", and the new Act's procedure for the prevention of unfair labor practices has application to these practices as well as to the unfair labor practices of the employer.

Inter-Union Disputes as to Bargaining Representative

Section 8 (b) (4) (C) : It shall be an unfair labor practice for a labor organization or its agents to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any

¹Pub. L. No. 101, 80th Cong., 1st Sess. (June 23, 1947). Hereinafter referred to as the Taft-Hartley Act.

²49 Stat. 449 (1935), 29 U.S.C.A. § § 151-166 (Supp. 1940) .

³47 Stat. 70 (1932), 29 U.S.C.A. § § 101-115 (Supp. 1940).

services, where an object thereof is: forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9 (a).⁴

This subsection outlaws strikes and boycotts in defiance of Labor Board certifications. As stated by the Senate Committee, it prohibits "strikes and boycotts having as their purpose forcing any employer to disregard his obligation to recognize and bargain with a certified union and in lieu thereof to bargain with or recognize another union."⁵ Picketing or other persuasive union activity in aid of these strikes and boycotts is illegal under Section 8 (b) (4).

Prior to the passage of the Taft-Hartley Act the remedy of the employer and the certified union had been at best uncertain. The Norris-La Guardia Act was the most formidable bar to injunction, inasmuch as peaceful picketing, striking, the publicizing of such strikes, and their financial maintenance could not be enjoined under the Act as long as a *labor dispute* existed.⁶ Subsequently, the National Labor Relations Act was passed, assuring to employees the right to negotiate with the employer through representatives selected by a majority of their number. The question inevitably arose whether, in the light of the latter Act, conflicts between employers and unions representing only a minority of employees or no employees at all were still to be termed labor disputes making applicable the Norris-La Guardia Act. Further, if such conflicts were labor disputes within the meaning of the Norris-La Guardia Act, was the employer or the union representing the majority of the employees nevertheless entitled to

⁴§ 9 (a) would make the representatives chosen by the majority of the employees in a bargaining unit the exclusive representative of all the employees for the purposes of collective bargaining. The National Labor Relations Act provides that any individual employee or group of employees may "present grievances to their employer." Placing a strang construction upon this language, the Labor Board says that while employees may "present grievances in person, the representative has the right to take over the grievances." The amended section permits the employees and their employer to settle the grievances, but only if the settlement is not inconsistent with the terms of any collective bargaining agreement then in effect. The proviso is thus given its obvious and proper meaning.

⁵Sen. Rep. No. 105, 80th Cong., 1st Sess. (1947) 22.

⁶Sec. 13 (c) of the Norris-LaGuardia Act defines a labor dispute to include "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons negotiating, fixing . . . conditions of employment, *regardless of whether or not the disputants stand in the proximate relation of employer and employee.*" (italics supplied)

protection against the picketing of minority groups because of special rights created by the National Labor Relations Act?⁷

Illustrative of the situation in which a minority group waged industrial warfare against an organized majority group was the case of *Oberman and Co. v. United Garment Workers of America*.⁸ Defendants, members of a C.I.O. organization, petitioned for an election in plaintiff corporation's factory in order to determine the representatives of the employees for the purpose of collective bargaining. An employees' association, a union the members of which were restricted to employees of the corporation, received a majority of the votes and was certified by the National Labor Relations Board as bargaining representative. Nevertheless, the defendant union called a strike, demanding sole bargaining privileges and a closed shop. Picketing, violence, and intimidation were alleged, as a result of which plaintiff's factory had to shut down. It was held that plaintiff was entitled to a restraining order, apparently on the reasoning that activities which were directed to ends opposed to the administration of the National Labor Relations Act could not be intended to be protected from injunction. In a word, the immunities of the anti-injunction law were only to be afforded in labor disputes waged for a lawful purpose. Whether the injunction would issue to prevent a minority from waging labor warfare to gain recognition where the majority had a contract but *had not been certified* had been answered in the negative in *Lund v. Woodenware Workers' Union*.⁹ The *Oberman* opinion distinguished the *Lund* case on the basis of the certification, but approved of the following remarks in the *Lund* opinion:

"... We would have the anomalous situation of the courts endeavoring to determine whether or not the unit which is

⁷ § 9 (a) of the National Labor Relations Act provided that "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . .," while § 8 (3) of the Act declared it to be an unfair labor practice for an employer "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 . . .," and § 8 (5) of the Act declared it to be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees . . ." Sec. 13 of the Act provided that "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike." Finally, § 2 (9) of the Act defined a "labor dispute" in terms practically identical with those contained in § 13 of the Norris-LaGuardia Act. (See Note 6, supra).

⁸21 F. Supp. 20 (W. D. Mo. 1937).

⁹19 F. Supp. 607 (D. C. Minn. 1937).

formed by the majority of the employees is appropriate for the purposes of collective bargaining, when it is clearly evident that Congress intended that all such questions should be determined by the Labor Board and not by the courts.

"... And no proceedings between employer and employee under the Wagner Act are entitled to any protection by the court until some affirmative action has been taken by the Labor Board, which is clothed with the only authority for such purposes."¹⁰

The point made was that, until the Board has certified a majority union, a court should not attempt to protect contracts from the onslaughts of the minority group. The distinction is difficult to justify, since certification is no more than an administrative determination of majority representation under the National Labor Relations Act, the employer being obligated to bargain with the majority union even in the absence of certification.¹¹ And it would seem that lack of certification should not preclude the issuance of an injunction where the majority representation is clear. To be sure, however, certification relieves the court of the duty of ascertaining whether the contracting union did represent a majority of the employees at the time of making the contract.

The *Oberman* case and the element of reason which it instilled in the law appear to have been entirely discredited by the more recent federal decisions, which almost uniformly hold that the Norris-La Guardia Act deprives the federal courts of the power to enjoin striking, even though the purpose of the strike is the unlawful one of inducing

¹⁰19 F. Supp. 607, 609, 610 (D. C. Minn. 1937).

¹¹The National Labor Relations Act imposes the duty upon employers to bargain collectively only with the chosen representatives of their employees, and the implied duty is not to bargain with anyone else. National Labor Relations Board v. Jones & Laughlin Steel Co., 301 U. S. 1, 57 S. Ct. 615, 81 L. ed. 893 (1937). "The employer acts at his peril in refusing to recognize a duly selected bargaining agency of an appropriate unit of his employees unless the facts show that in the exercise of reasonable judgment he lacked knowledge of the appropriateness of the unit or the selection of the majority representatives." National Labor Relations Board v. Piqua Munising Wood Products Co., 109 F. (2d) 552, 556 (C.C.A. 6th, 1940), enforcing 7 N.L.R.B. 782 (1938). See also the following Board decisions holding either expressly or impliedly that the employer's duty to bargain collectively with the proper bargaining agency of his employees takes effect upon majority authorization without Board certification in the absence of circumstances which raise reasonable doubt in connection with the claim to majority authorization. The Warfield Co., 6 N.L.R.B. 58 (1938); National Motor Bearing Co., 5 N.L.R.B. 409 (1938), enforced as mod. 105 F. (2d) 652 (C.C.A. 9th, 1939); Atlas Mills, Inc., 3 N.L.R.B. 10 (1937); Burnside Steel Foundry Co., 7 N.L.R.B. 714 (1938); Kuehne Manufacturing Co., 7 N.L.R.B. 304 (1938).

a violation of the National Labor Relations Act.¹² While some of the lower courts have ruled, in effect, that "motive" for picketing may be inquired into in passing on the right of an employer to an injunction, yet the ruling of the United States Supreme Court is to the contrary. In *New Negro Alliance v. Sanitary Grocery Co.*, the Supreme Court said, relative to the definition of a labor dispute in the Norris-La Guardia Act, that "The Act does not concern itself with the background or the motives of the dispute."¹³ In the case of *Lauf v. Shinner*¹⁴ the union demanded that the employer require his employees, as a condition of their continued employment, to become members of the union. When the employer left the decision to the employees, they refused to join, and the union was not chosen by the employees to represent them in any matter connected with their employment. Nevertheless, to coerce the employer to require his employees to join the union and accept it as a bargaining agent, the union picketed the employer, charging him with being unfair to organized labor. The district court held that no labor dispute existed and that an injunction could therefore be granted. The Seventh Circuit Court of Appeals affirmed the decree,¹⁵ but the Supreme Court held that the district court erred in holding that there was no labor dispute:

"The Court of Appeals erred in holding that the declarations of policy in the Norris-La Guardia Act and the Wisconsin Labor Code, to the effect that employees are to have full freedom of association, self organization, and designation of representatives of their own choosing, free from interference, restraint, or coercion of their employers, puts this case outside the scope of both acts, since respondent cannot accede to the petitioner's demands upon it without disregarding the policy declared by the statutes."¹⁶

¹²In the following cases injunctive relief was denied where an employer was the plaintiff: *Sharp & Dohme v. Storage Whse. Employees Union*, 24 F. Supp. 701 (E.D. Pa. 1938); *Cupples Co. v. American Federation of Labor*, 20 F. Supp. 894 (E.D. Mo. 1937); *Houston and North Texas Motor Freight Lines v. Local Union*, 24 F. Supp. 619 (W.D. Okla. 1938). Injunctive relief was also denied where plaintiff was an aggrieved majority union. *Fur Workers Union, Local No. 72 v. Fur Workers Union*, 105 F. (2d) 1 (App. D. C. 1939), aff'd 308 U. S. 522, 60 S. Ct. 291, 84 L. ed. 443 (1939); *Blankenship v. Kurfman*, 96 F. (2d) 450 (C.C.A. 7th, 1938). It seems to be immaterial whether or not the majority union has been certified. *United Electric Radio & Machinery Workers of America v. International Brotherhood of Electrical Workers*, 30 F. Supp. 927 (S.D. N.Y. 1940), aff'd 115 F. (2d) 488 (C.C.A. 2d, 1940).

¹³303 U. S. 552, 561, 58 S. Ct. 703, 707, 82 L.ed. 1012, 1016 (1938).

¹⁴303 U. S. 323, 58 S. Ct. 578, 82 L.ed. 872 (1938).

¹⁵90 F. (2d) 250 (C.C.A. 7th, 1937).

¹⁶303 U. S. 323, 330, 58 S. Ct. 578, 582, 82 L.ed. 872, 877-878, (1938).

Following the decision in the *Lauf* case, the Eighth Circuit Court of Appeals purported to recognize in *Grace Co. v. Williams*¹⁷, decided in 1938, that equity must protect from outside interference the performance of the employer's duty to deal with the majority union, though an injunction was denied because the procedural requirements of the Norris-La Guardia Act had not been followed. From the dictum of that case, it would seem that even peaceful picketing would be enjoined. However, in a later decision¹⁸ it was held that the equivalent right of the employer not to have the minority interfere with him while the Board is deciding the certification question was limited by the Norris-La Guardia Act and thus peaceful picketing could not be enjoined.

The inferences of the *Grace Co.* case were further refuted in *American Chain and Cable Co. v. Truck Drivers and Helpers Union*,¹⁹ decided in 1946. There the local A.F.L. union continued to picket the plant of the employer after the Board had certified the local C.I.O. union as the bargaining representative of the employees. The court recognized that under the Board certification the employer had a duty to bargain with the C.I.O. union and had a right to be protected in the performance of this duty by the general equity powers of the federal courts. The court nevertheless denied the injunction, because the controversy constituted a labor dispute under the Norris-La Guardia Act.

Under recent decisions it seems to be immaterial whether or not the majority union has been certified. In *Yoerg Brewing Co. v. Brennan* it was held that the minority union, though having no standing as collective bargaining agent, may strike or otherwise manifest dissatisfaction to the results of the election, notwithstanding certification of another union by the Board. The court observed:

"It may be urged that the situation presented strongly emphasizes the extreme one-sidedness of the National Labor Relations Act legislation; that is, the employer is bound to comply with the orders of the Board, but the employees are free to flout the Board's decision and create the anomalous and often calamitous situation of an employer's being caught, without fault on his part, between the upper and nether millstones. We are not unmindful of the apparent harsh consequences of our ruling, but such a result must not be permitted to affect our

¹⁷20 F. Supp. 263 (W.D. Mo. 1937), aff'd 86 F. (2d) 478 (C.C.A. 8th, 1938).

¹⁸*Cupples Co. v. American Federation of Labor*, 20 F. Supp. 894 (E.D. Mo. 1937).

¹⁹68 F. Supp. 54 (D.C. N. J. 1946).

judgment in applying the law in the field of interpretation. We do not have the power to legislate. In labor disputes, we have only such equity jurisdiction as Congress has seen fit to grant."²⁰

And in *J. J. Newberry Co. v. Retail Clerks' Union*,²¹ the owner of a retail store, who was making preparations to open the store for business, sought to enjoin a clerks' union from picketing the store prior to the employment of any employees. The purpose of the picketing, apparently, was to compel the employer to make an agreement to employ only members of the defendant union or those who would agree to become members. The injunction was sought upon the theory that the employer could not, under the National Labor Relations Act, make the agreement sought as under that Act the employer is obliged to bargain with a union designated by a majority of his employees. Not having hired any employees as yet, the employer was allegedly not in a position to make a contract with the picketing union. The injunction was again denied because the controversy constituted a labor dispute under the Norris-La Guardia Act.

The problem would seem to arise in the certification cases from the failure of Congress to provide any legislation whereby orders of the National Labor Relations Board become binding upon the employees.²² In a carefully considered opinion District Judge Nordbye, in *Lund v. Woodenware Workers Union*, pointed out:

"A reading of the Wagner Act impels the view that it was passed primarily to eliminate unfair labor practices on the part of the employer, to guarantee to the employees the right of self-organization, and to secure the right to bargain collectively through representatives of their own choosing. There is no express provision in the act which seeks to affect, limit, or curb unfair practices on the part of labor towards the employer. . . . There is no intimation in the act that, merely because an employer has entered into a contract with a majority union, Congress assumed to vest jurisdiction in the United States courts to protect or safeguard the integrity of such contract."²³

²⁰59 F. Supp. 625, 633 (D.C. Minn. 1945).

²¹67 F. Supp. 86 (E.D. Mo. 1946). This is a particularly strong case, as the union attempted to compel the employer to agree to a closed shop contract before any employees were hired. Compliance with this demand would be a clear violation of the National Labor Relations Act.

²²This impasse has been corrected by Section 8 (b) (4) of the Taft-Hartley Act, making it an unfair labor practice for a union to engage in strikes and secondary boycotts for certain defined purposes. The National Labor Relations Act provided only for employer unfair labor practices.

²³19 F. Supp. 607, 609 (D.C. Minn. 1937).

Attempts of the employer to obtain relief through the state courts have met with a somewhat greater degree of success than in the federal courts. Being unfettered by the limitations of the Norris-La Guardia Act, state courts in general have enjoined striking or picketing when it was found to be illegal under an application of the unlawful purpose test.²⁴ It has been suggested that the Norris-La Guardia Act has virtually revolutionized the substantive law governing strikes, picketing, and boycotts under cover of procedural prevention, through broad interpretation of the words "labor dispute," as employed in that Act.²⁵ However, state courts in construing their anti-injunction statutes are not bound by the United States Supreme Court's construction of the Norris-La Guardia Act, as to what is a "labor dispute." Instead of

²⁴In *Florsheim Shoe Store Co. v. Retail Shoe Salesmen's Union*, 288 N. Y. 188, 42 N.E. (2d) 480 (1942), the Court of Appeals held, for the first time, that picketing in furtherance of a jurisdictional controversy was illegal, did not constitute a "labor dispute" under the anti-injunction law, and may be enjoined, where the picketed employer was under contract with a union certified by the New York State Labor Relations Board as the proper and exclusive bargaining agent of the employees. The picketing union in the *Florsheim* case was a party to the Board's certification proceedings. While holding in *Bloedel Donovan Lumber Mill v. International Wood Workers of America*, 104 Wash. Dec. 80, 102 P. (2d) 270 (1940), that picketing may be enjoined by one union where the employer was under contract with another union certified by the National Labor Relations Board as the employees' bargaining representative, the Washington Supreme Court held in *Weyerhaeuser Timber Co. v. Everett District Council*, 119 P. (2d) 643 (Wash. 1941) that no injunction will be granted where, though the contracting union represented a majority of the employer's employees at the time of the making of the contract, it was not certified by the Board. A similar distinction has been made in Oregon. Thus in *Markham & Callow v. International Wood Workers*, 135 P. (2d) 727 (Ore. 1943), it was held that an employer under contract with a union certified by the Labor Relations Board may enjoin picketing carried on in behalf of employees discharged by the employer pursuant to the closed shop provisions of the contract, but in *Stone Logging & Contracting Co. v. International Workers*, 135 P. (2d) 759 (Ore. 1943), on the other hand, the employer was denied an injunction in a comparable situation simply because the union, with which the employer was under contract, had not been certified. The employer was concededly subject to the Wagner Act and apparently there was no dispute that the contracting union represented a majority of the employees. But it is evident from the well-reasoned decision of the court that it was reluctant to assume the task of deciding whether the contract was in full conformance with law. What the court virtually told employers in the state of Oregon was that if they desired protection against outside picketing they should insist that unions seeking contracts secure certification by the Board.

²⁵*Teller, Labor Disputes and Collective Bargaining* (1940) §.436. But a federal court has taken the opposite view, holding that the Norris-La Guardia Act has not deprived the federal courts of jurisdiction to entertain labor controversies, but has undertaken merely to regulate the manner of exercising such jurisdiction. *Miller Parlor Furniture Co. Inc. v. Furniture Workers Industrial Union*, 8 F. Supp. 209 (D.C. N. J. 1934).

construing the state laws as excluding the judiciary from labor controversies, state courts have almost uniformly held that such laws are procedural statutes which merely regulate the jurisdiction of the courts and have little if any effect upon prior substantive law.²⁶

The troublesome problem in the state cases arises in deciding to what extent a union might be restrained without unduly infringing labor's right to strike or picket under the guaranty of free speech implicit in the Fourteenth Amendment to the Federal Constitution.²⁷ The problem is neatly illustrated in the recent California case of *Park and Tilford Import Corporation v. International Brotherhood*.²⁸ In that case the plaintiff employer could not comply with the defendant union's demands for a closed shop without violating the National Labor Relations Act, since the union's membership did not include any of plaintiff's employees. The California Supreme Court, applying the unlawful-purpose test, held that the defendant union might be enjoined from striking and picketing insofar as its purpose was to compel plaintiff to violate the National Labor Relations Act. The court refused to enjoin *all* concerted action, however, holding that defendant might continue to strike or picket for the purpose of organizing plaintiff's employees, so long as it refrained from demanding that plaintiff violate the federal statute. The California Supreme Court reasoned:

²⁶See *Fashioncraft Inc. v. Halpern*, where the court stated that the anti-injunction statute "deals entirely with questions of jurisdiction, the conditions upon which injunctions may be issued in labor disputes, and the procedure to be followed in reference to injunctions and contempts. . . . It leaves unimpaired the distinction heretofore existing between legal and illegal strikes. . . . It neither restricts nor broadens the boundaries of permissible picketing. . . . In a word, the statute did not change the substantive law as to either the legality of a strike or the lawfulness of picketing." (italics supplied) 313 Mass. 385, 48 N. E. (2d) 1, 4 (1943). See also *Isolantite Inc. v. United Electrical, Radio & Machine Workers*, 129 A. (2d) 183 (N. J. 1942); *Harper v. Brennan*, 311 Mich. 489, 18 N. W. (2d) 905 (1945).

²⁷In *Thornhill v. Alabama* an Alabama statute which forbade *all* picketing was held unconstitutional. In that case Justice Murphy declared that "The freedom of speech and of the press which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a state." 310 U. S. 88, 95, 60 S. Ct. 736, 740, 84 L.ed. 1093, 1098 (1940). In *American Federation of Labor v. Swing*, the United States Supreme Court went a step further in making peaceful picketing immune from injunction. The Court there allowed picketing by an outside union for the purpose of inducing the employer to require his employees to become members of that union. 312 U. S. 321, 61 S. Ct. 568, 85 L. ed. 855 (1941). The possible impact of constitutional guarantees of free speech upon § 8 (b) (4) will be discussed in Section III of this Note.

²⁸165 P. (2d) 891 (Cal. 1946).

"The dilemma in these cases arises from a failure to understand that the basic conflict is between the union and non-union workers. Until that conflict is resolved the employer is in the unhappy position of a neutral suffering its repercussions.

"... Though the employer may run the gamut of inconveniences and uncertainties, and even disruption of his business, he is under the harsh duty to maintain his position as a neutral."²⁹

The difficulty in applying the court's reasoning would seem to arise from the permission given the union to picket the employer's premises as a means of bringing pressure to bear on the employees, and thereby ultimately secure the very result forbidden by the National Labor Relations Act.

The Taft-Hartley Act proposes to meet this troublesome situation by restoring equity jurisdiction to the federal district courts to grant "such injunctive relief or temporary restraining orders as it deems just and proper, *notwithstanding any other provision of law.*"³⁰ This subsection makes it mandatory upon the Board to petition for injunctive relief in cases involving unfair labor practices within the meaning of Section 8 (b) (4).³¹ However, the injunction will not be obtained with such procedural ease as it was prior to the Norris-La Guardia Act, for it will only be granted at the instance of the Board, not of a private party. Thus, a minority union may now be enjoined from striking and picketing where the majority union has been certified. The Act makes no mention of "primary" strikes called by the minority union for the purpose of forcing an employer to withdraw recognition from the majority union, where the latter has not been certified. Though the attaching of such significance to certification may be unjustifiable, yet no particular need exists to protect the recognized union or the employer when the machinery to obtain certification is available.³²

²⁹165 P. (2d) 891, 898, 899 (Cal. 1946).

³⁰See § 10 (1). (italics supplied)

³¹Injunctive relief is mandatory under § 10 (1) in the case of violations of § 8 (b) (4) (A), (B), or (C). The same power to apply for injunctions is granted by § 10 (1) in the case of violations of § 8 (b) (4) (D) dealing with jurisdictional strikes. While this is discretionary with the Board, such injunctions are limited by the more specific provision of § 10 (1). While it is mandatory where charges are filed under § 8 (b) (4) (A), (B), or (C) that application for relief be made, it does not appear that it must be granted, for § 10 (1) gives the court "jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper. . . ."

³²Under previous Board practices, petitions for representation elections might be filed only by trade unions or employees, or by an employer where *two or more* unions each claimed to represent a majority of employees. Sec. 9 (c) (1) of the Act as

Fully aware of the abuses latent in the power of the injunction, the Board will no doubt proceed cautiously in the exercise of its discretion. An example of the difficulties which may face the Board can be seen in the following: Section 9 (c) (3) provides that employees on strike who are not entitled to reinstatement shall not be eligible to vote in any election to determine representation. Workers on strike for economic concessions are entitled to reinstatement only if the employer has rejected an unconditional offer on their part to return to work before replacements have been hired and while their jobs still remain in existence.³³ Thus, these striking employees who have been permanently replaced are no longer permitted to vote in certification elections.³⁴ If the Board certifies a union selected largely by striker replacements in an election called at the request of the employer, the strikers returning to work could hardly be expected to accept the certification with tranquillity. Obviously this provision places a tremendous weapon in the hands of the employer. If he can keep his plant open during the strike, and can hire a substantial number of replacements, the striking union will surely lose any election held

amended permits the filing of petitions "by any group of individuals or employees or any labor organization, who claim to represent a substantial group of employees, or who assert that their designated representative no longer represents a majority of employees (so-called decertification petitions), or by an employer who asserts that *one or more* individuals or unions have presented to him claims that they represent a majority of employees." (italics supplied)

³³The strike for economic concessions must be distinguished from the strike due to an employer unfair labor practice. The latter are strikes provoked or prolonged by an employer unfair labor practice, such as a refusal to bargain or a discriminating discharge. With respect to such strikers, the Board has established the rule that they are entitled to reinstatement upon application whenever their jobs remain, even though the employer has hired replacements. Economic strikes are those in which the strikers are seeking to compel the employer to accede to a demand for better wages or working conditions or to compel recognition without a Board certification. Employees on an "economic" strike are not entitled to reinstatement. See N.L.R.B. v. Mackay Radio & Telegraph Co., 304 U. S. 333, 58 S. Ct. 904, 82 L.ed. 1381 (1938).

³⁴In the case of Sartorius & Co. Inc., 10 N.L.R.B. 493 (1938), the Board held that individuals who took the place of striking employees were not eligible to vote, though the strike is neither precipitated nor prolonged by any unfair labor practice. This became known as the Sartorius doctrine. In the case of The Rudolph Wurlitzer Co., 32 N.L.R.B. 35 (1941), the Board repudiated the Sartorius doctrine, holding that both strikers and those hired to take their places were eligible to vote. Sec. 2 (3) of the new Act provides that a striker remains an employee "unless such individual has been replaced by a regular replacement;" and, at the end of the sub-section, it defines a "replacement" as being an individual who replaces a striker "if the duration of his employment is not to be determined with reference to the existence or duration of such labor dispute." Thus, "strike breakers" may not be regarded as "replacements."

during the strike. And once the change of bargaining representatives becomes effective, the strike by the former employees becomes an unfair labor practice under Section 8 (b) (4) (C). The Board's dilemma is quite apparent in this situation.³⁵ Nevertheless, there is much merit in the provision. The labor relations acts are intended to promote industrial peace by guaranteeing the right of collective bargaining and insuring freedom from employer interference with union efforts to organize. Where an employer has acted in full accord with a labor relations act, he has an argument of substance that the promise of peace underlying the act should become a reality. If an injunction can be secured against minority groups, employers will in all probability be less reluctant to fulfill their duties to majority representatives.

Strikes and Picketing To Enforce Secondary Boycotts

Section 8 (b) (4) (A) : It shall be an unfair labor practice for a labor organization or its agents to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, *where an object thereof is*: (a) forcing or requiring any employer or self-employed person to join any labor or employer organization, or (b) any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person.³⁶

In more general terms, clause (a) of this subsection prohibits strikes or secondary boycotts designed to force a self-employed person to join a union or to force an employer to join an employer organization. Strikes and boycotts within this provision are omitted from consideration in this Note. Clause (b) prohibits strikes and secondary boycotts to force an employer to cease dealing with another employer. Typically, this is the situation in which unions having a dispute with employer A attempt to strengthen their position in the dispute by applying pressure to force employer B to cease dealing with employer A. Employer A is thereby subject to the combined pressure of the union

³⁵Difficult problems in addition to this are presented by Section 9 (c) (3). Determining which employees have been permanently replaced is often an impossible task, since employees hired during a strike do not in the usual case replace any identifiable striker. The practical difficulties in the application of this provision are such that it may lead to the adoption of a rule that no elections will be held during a strike.

³⁶(italics supplied) This phrase, "where an object thereof is," will be discussed elsewhere in this section.

and employer B. This prohibition, originating in the Senate bill which formed the basis of the Taft-Hartley Act, was explained by the Senate Committee in its report as follows:

"Thus, it would not be lawful for a union to engage in a strike against employer A for the purpose of forcing that employer to cease doing business with employer B; nor would it be lawful for a union to boycott employer A because employer A uses or otherwise deals in the goods of or does business with employer B (with whom the union has a dispute)."³⁷

On its face this subsection seems to go somewhat further than the illustration cited. Senator Taft, in regard to this subsection, said:³⁸ "This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees." And after Senator Pepper had cited the decisions in *United States v. Hutcheson*³⁹ and *Bakery Drivers Local v. Wohl*,⁴⁰ he continued: "... this provision ... reverses the effect of the law as to secondary boycotts."

Not only does the Taft-Hartley Act make unfair labor practices of such secondary boycotts as fall within this provision, but it also makes these practices the subject of damage suits⁴¹ and immediate court injunctions,⁴² the Norris-La Guardia Act notwithstanding.⁴³ Section 303 (b) of Title III of the Act authorizes suits for damages by "who ever shall be injured in his business or property" by a prohibited strike or boycott. During the debates on the floor of the Senate, Senator Morse pointed out,⁴⁴ in regard to this provision, that, "It is not limited to the so-called direct injury suffered by the employer who has relationships with a particular trade union organization. It covers 140,000,000 American people, any one of whom, under this language, if he can show that he suffered any injury whatsoever from a secondary

³⁷Sen. Rep. No. 105, 80th Cong., 1st Sess. (1947) 22.

³⁸Cong. Rec., vol. 93, No. 80, p. 4323.

³⁹312 U. S. 219, 61 S. Ct. 463, 85 L.ed. 788 (1941).

⁴⁰315 U. S. 769, 62 S. Ct. 816, 86 L.ed. 1178 (1942). This case reversed the granting of an injunction against peaceful secondary picketing on free speech grounds.

⁴¹See Section 303.

⁴²Section 10 (1) makes it mandatory upon the Board to give priority to an investigation of any charge of a violation of Section 8 (b) (4) (A) and, upon reasonable belief of the truth of the charge, to seek an immediate injunction from a district court.

⁴³Section 10 (1) authorizes the federal courts to grant such injunctive relief notwithstanding any other provision of law.

⁴⁴Cong. Rec., vol. 93, No. 88 P. 5074.

boycott or from a jurisdictional dispute, can come in with an action against the union and flood our courts with a multitude of litigation." Senator Taft in his reply did not expressly deny this, but said, "Under the Sherman Act, the same question of boycott damage is subject to a suit for treble damages and attorney's fees. In this case we simply provide for the amount of the actual damages. But the parallel is exactly the same. . . ." This statement would seem to indicate that in his judgment the questions of liability were to be the same as those under the Sherman Act.

Before an attempt can be made to analyze the effect of this subsection upon the existing law, a review of earlier legal developments is necessary. Prior to the Norris-La Guardia Act secondary boycotts obstructing interstate commerce were civil and criminal offenses under the Sherman Anti-Trust Act.⁴⁵ Although it clearly appeared that the dominant purpose of Congress in enacting the Sherman Act was the regulation of monopolistic business enterprises the language found in Section 1 of the Act, that "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal," is amenable to an interpretation which would include labor combinations within its scope. This interpretation was first made in the famous (or infamous) *Danbury Hatters'* case.⁴⁶ This was an action for triple damages⁴⁷ under the Sherman Act brought by an employer against a labor union which not only had gone on strike, but also had boycotted plaintiff's hats in the hands of dealers outside the state. In finding a cause of action under the Sherman Act, the Supreme Court of the United States stated that there was a combination falling within the class of restraint of trade aimed at compelling third parties and strangers to refrain from business relationships in the course of trade except upon conditions that the combination imposed. Later cases accepted this holding without question and built on it as a foundation.

Six years later, in 1914, Congress passed the Clayton Act.⁴⁸ Sections 6 and 20 were direct responses to organized labor's cries for relief from

⁴⁵26 Stat. 209 (1890), 15 U.S.C.A. Sections 1-7 (1934).

⁴⁶*Loewe v. Lawler*, 208 U. S. 274, 28 S. Ct. 301, 52 L. ed. 488 (1908).

⁴⁷Under the Sherman Act the federal courts are given jurisdiction to enforce its provisions, and the Attorney General of the United States is empowered to initiate criminal prosecutions and resort to injunctive relief for violations of the Act. All persons injured in their property or business by violations of others are allowed to maintain civil suits for triple damages.

⁴⁸38 Stat. 730 (1914). The Clayton Act authorized requests for injunctive relief by private individuals as well as by the federal government.

the Sherman Act and from judicial control. The language of Section 6 was as follows:

"...Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor... organizations... or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws."⁴⁹

Section 20 provided:

"No restraining order or injunction shall be granted by any court of the United States... in any case... involving, or growing out of, a dispute concerning terms or conditions of employment..., unless necessary to prevent irreparable injury to property... for which injury there is no adequate remedy at law...."

"And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do;... or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; *nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.*"⁵⁰

The language of Section 6 was rendered almost meaningless in 1921, in the *Duplex* case,⁵¹ where the Supreme Court held the section merely to be declaratory of pre-existing law. In that case the plaintiff manufactured newspaper printing presses in Michigan and installed them at the purchaser's place of business, sending out employees to supervise the installation. In the United States there were only four manufacturers of such presses, all being in active competition. The union had induced three of them to recognize and bargain with it, but the plaintiff refused to do so, and a strike was immediately declared at the plaintiff's factory. As only fourteen of the employees struck, there was no material interference with the operation of the factory. Sales and shipments continued, about eighty per cent of the output being sold outside Michigan. In aid of its strike the union notified its members not to work on the installation of presses which the plaintiff had

⁴⁹38 Stat. 730 (1914), 15 U.S.C.A. Section 17 (1940).

⁵⁰38 Stat. 738 (1914), 29 U.S.C.A. Section 52 (1940). (italics supplied)

⁵¹*Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 41 S. Ct. 172, 65 L.ed. 349 (1921).

delivered in New York. In furtherance of this boycott, the union warned the plaintiff's customers that it would be better for them not to purchase, or having purchased, not to install, the plaintiff's presses, and threatened them with loss if they did so. It also threatened customers with sympathetic strikes in other trades, notified a trucking company usually employed by customers to haul the presses not to do so, and coerced union men by threatening them with loss of union cards and with being blacklisted as "scabs" if they assisted in the installation of the presses.

The Circuit Court of Appeals⁵² had previously held that Section 20 of the Clayton Act had legalized secondary boycotts. In denying that interpretation to the Act, the Supreme Court concluded that because of the ambiguities of Section 6, which exempted only *lawful* means and *legitimate* ends, Congress had not intended thereby to exempt from the Sherman Act those activities of labor unions which the Court considered restraints of trade. Furthermore, the Court decided that the activities enumerated in Section 20 were rendered non-enjoinable (and lawful) *only where indulged in by immediate parties to a labor dispute*—i.e., an employer and his employees.⁵³ In consequence of this restrictive interpretation of Section 20, the Clayton Act accomplished nothing by way of immunizing organized labor from the Sherman Act or protecting concerted activities from the injunctive weapon. Justice Brandeis, however, reached a different conclusion as to the effect of Section 20, his position being that it had legalized the employment of certain means by employees, among them the refusal to patronize, irrespective of the objectives that they thereby sought to promote.⁵⁴ His interpretation of the Clayton Act, which later became

⁵²252 Fed. 722 (C.C.A. 2d, 1918).

⁵³Note Justice Pitney's language in the Duplex case: "Nor can Section 20 be regarded as bringing in all members of a labor organization as parties to a 'dispute concerning terms or conditions of employment' which proximately affects only a few of them, with the result of conferring upon any and all members—no matter how many thousands there may be, nor how remote from the actual conflict—those exemptions which Congress in terms conferred only upon parties to the dispute." 254 U. S. 443, 472, 41 S. Ct. 172, 178, 65 L.ed. 349, 359 (1921).

⁵⁴"By 1914 the ideas of the advocates of legislation had fairly crystallized upon the manner in which the inequality and uncertainty of the law should be removed. It was to be done by expressly legalizing certain acts regardless of the effects produced by them upon other persons. As to them Congress was to extract the element of *injuria* from the damages thereby inflicted, instead of leaving judges to determine according to their own economic and social views whether the damage inflicted on an employer in an industrial struggle was *damnum absque injuria*, because an incident of trade competition, or a legal injury, because in their opinion, economic and socially objectionable. This idea was presented to the committees which

the law found only two other supporters on the Court.⁵⁵

The Supreme Court next grappled with labor and the Sherman Act in 1922 in the so-called *First Coronado* case.⁵⁶ A Local of the United Mine Workers of America struck a Coronado Coal Co. mine, closed it down, burned coal cars, dynamited the mine, and behaved in a highly illegal fashion. The company brought suit for triple damages under the Sherman Act against both the Local and the National union, assigning as the violation of the Act the stoppage of those shipments of coal which would have gone to other states had the mine not been prevented by the strike from continuing operations. Chief Justice Taft, speaking for the Court, said that there had been only an *indirect* restraint or interference with commerce. He distinguished this situation from that in the *Danbury Hatters'* case by showing that there the union had hit directly at interstate commerce. He thereby made clear that whereas the Sherman Act could be employed to prevent interstate boycotts, it could not be used to stop strikes, even when they interfered with, or *indirectly* restrained, interstate commerce.

The Supreme Court, in the *Second Coronado* case,⁵⁷ pointed out that on a new trial additional evidence was introduced by the company showing a subjective intent on the part of the members of the Local to restrain interstate commerce.⁵⁸ The Court then affirmed a judgment only against the Local:

"The mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious pre-

reported the Clayton Act. The resulting law set out certain acts which had previously been held unlawful, whenever courts had disapproved of the ends for which they were performed; it then declared that, when these acts were committed in the course of an industrial dispute, they should not be held to violate any law of the United States. In other words the Clayton Act substituted the opinion of Congress as the propriety of the purpose for that of differing judges; and thereby it declared that the relations between employers of labor and workmen were competitive relations, that organized competition was not harmful and that it justified injuries necessarily inflicted in its course." *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 485-486, 41 S. Ct. 172, 183, 65 L.ed. 349, 364-365 (1921). See also *American Steel Foundries v. Tri-City Control Trades Council*, 257 U. S. 184, 42 S. Ct. 72, 66 L. ed. 189 (1921).

⁵⁵Justices Clarke and Holmes concurred with Justice Brandeis in his dissent.

⁵⁶*United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344, 42 S. Ct. 570, 66 L.ed. 975 (1922).

⁵⁷*Coronado Coal Co. v. United Mine Workers of America*, 268 U. S. 295, 45 S. Ct. 551, 69 L.ed. 963 (1925).

⁵⁸Oral evidence was introduced that by the strike the Local sought to keep the coal out of the interstate markets until the mine became unionized. The testimony indicated that this was intended in order to eliminate the competition in national

vention of its manufacture or production is ordinarily an indirect and remote obstruction of that commerce. But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act."⁵⁹

In 1927, in the *Bedford Cut Stone* case⁶⁰ the Supreme Court again declined to interpret the Clayton Act as manifesting a Congressional purpose to exempt labor unions from the Sherman Act. The Court ordered an injunction against the Journeymen Stone Cutters Association to restrain a peaceful refusal to work upon stone produced in the plaintiff's quarries by non-union labor. No other crafts were called to their aid and no coercion, intimidation, or other kind of boycott was involved. The process by which this decision was achieved Justice Stone elucidated in his separate opinion:

"As an original proposition, I should have doubted whether the Sherman Act prohibited a labor union from peaceably refusing to work upon material produced by non-union labor or by a rival union, even though interstate commerce were affected. In the light of the policy adopted by Congress in the Clayton Act, with respect to organized labor, . . . I should not have thought that such action as is now complained of was to be regarded as an unreasonable and therefore prohibited restraint of trade. But in *Duplex Printing Press Co. v. Deering*, . . . these views were rejected by a majority of the court and a decree was authorized restraining in precise terms any agreement not to work or refusal to work, such as is involved here. . . . These views, which I should not have hesitated to apply here, have now been rejected again largely on the authority of the *Duplex* case. For that reason alone, I concur with the majority."⁶¹

This was the existing situation when the Norris-La Guardia Act became law in 1932. This Act deprived the lower federal courts of jurisdiction to issue injunctions against the doing of specifically enumerated acts by the participants in a *labor dispute* as defined in that Act.⁶² The Act on its face has no relation to criminal proceedings or to actions for triple damages under the Sherman Act, and early inter-

markets between union-mined and nonunion-mined coal, pursuant to the economic program of the national union.

⁵⁹268 U. S. 295, 310, 45 S. Ct. 551, 556, 69 L. ed. 963, 970 (1925).

⁶⁰*Bedford Cut Stone Co. v. Journeyman Stone Cutters Association*, 274 U. S. 37, 47 S. Ct. 522, 71 L.ed. 916 (1927).

⁶¹274 U. S. 37, 55-56, 47 S. Ct. 522, 528, 71 L.ed. 916, 924-925 (1927).

⁶²See note 6, *supra*.

pretations regarded it as merely a procedural withdrawal of the power of the federal courts to issue injunctions and not as an alteration of the substantive law. Therefore, actions against labor unions continued on the non-injunctive front. In 1940, the *Apex* case⁶³ came before the Supreme Court. This was a suit for triple damages arising out of a sit-down strike which was accompanied by violence and a refusal by the union to allow the manufacturer to ship \$800,000 worth of finished hosiery, eighty per cent of which was destined for interstate markets. There the Court fitted a new doctrine over its own past interpretation of the anti-trust laws, and found that those activities did not constitute a conspiracy in restraint of trade and commerce. The test which the Court enunciated was that in order for the activities of a labor union to constitute a *direct* restraint there must be a "showing of some form of market control of a commodity, such as to monopolize the supply, control its price, or discriminate between its would-be purchasers." By creating this test, the Court made it clear that the Sherman Act was designed to prevent restraints on free competition in national markets, and was not devised to set the federal courts up as policing agencies to prevent those interferences with interstate transportation which local authorities should punish.⁶⁴

In a case decided shortly after the *Apex* case, *Milk Wagon Drivers' Union, Local No. 753 v. Lake Valley Farm Products, Inc.*,⁶⁵ the Court held that, where a labor dispute existed, an injunction contrary to the provisions of the Norris-La Guardia Act could not be issued against a labor union accused of violating the Sherman Act. This decision merely made certain activities of labor unions *non-enjoinable*, and, in thereby restricting the scope of the remedy of injunction under the Norris-La Guardia Act, it naturally led to predictions of increased employment of *criminal prosecutions* under the Sherman Act in labor cases.

But this weapon was virtually destroyed by the decision in *United*

⁶³*Apex Hosiery Co. v. Leader*, 310 U. S. 469, 60 S. Ct. 982, 84 L.ed. 1311 (1940). The literature on this case is voluminous: Gregory, *The Sherman Act v. Labor* (1941) 8 U. of Chi. L. Rev. 222; Cavers, *Labor v. Sherman Act* (1941) 8 U. of Chi. L. Rev. 246; Landis, *The Apex Case* (1941) 26 Corn. L. Q. 191; Brown, *The Apex Case and Its Effect Upon Labor Activities and the Anti-Trust Laws* (1941) 21 B. U. L. Rev. 48.

⁶⁴The *Apex* decision was a very significant victory for organized labor. Of course, this decision did not legalize a violent or a sit-down strike. The defendants in that case were made defendants in a tort action in a state court—the appropriate tribunal for the adjudication of claims of assault and malicious destruction of property.

⁶⁵311 U. S. 91, 61 S. Ct. 122, 85 L.ed. 63 (1941).

States v. Hutcheson.⁶⁶ There a criminal prosecution for violation of the Sherman Act was instituted by the Department of Justice against the defendant A.F.L. union, which was involved in a jurisdictional dispute with another A.F.L. union. Members of both unions were employed by the complaining corporation, and defendant union struck and picketed to oust the rival union of its jurisdiction over certain employees. Defendant union also picketed the corporation's lessee and struck against contractors doing work for the corporation. Besides these activities circulars were sent to persons in various states urging them not to purchase the corporation's products. This latter activity had aspects of primary and secondary boycott. Demurrers to the indictment were sustained, and the Supreme Court, speaking through Justice Frankfurter, affirmed the judgment of the lower court:

"Therefore, whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and § 20⁶⁷ of the Clayton Act and the Norris-La Guardia Act as a harmonizing text of outlawry of labor conduct.

"... If the facts laid in the indictment come within the conduct enumerated in § 20 of the Clayton Act they do not constitute a crime within the general terms of the Sherman Law because of the explicit command of that section that such conduct shall not be 'considered or be held to be violations of any law of the United States.' *So long as a union acts in its self-interest and does not combine with non-labor groups,*⁶⁸ *the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.* There is nothing remotely within the terms of § 20 that differentiates between

⁶⁶312 U. S. 219, 61 S. Ct. 463, 85 L.ed. 788 (1941). This case arose out of a drive by the Anti-Trust Division of the Department of Justice to eliminate certain labor union activities which that Division felt to have a restraining effect on interstate commerce.

⁶⁷Sec. 20 of the Clayton Act, which had sought to remove certain of labor's activities from the reach of federal injunction, had also in its concluding clause protected those activities from being considered violations of any law of the United States, including the Sherman Act.

⁶⁸See *United States v. Brims*, 272 U. S. 549, 47 S. Ct. 169, 71 L.ed. 403 (1926). Union millwork manufacturers in Chicago, because of the difference between union and non-union labor standards, were being undersold by non-union manufacturers located in other states. As a result, Chicago manufacturers had to reduce operations. In order to maintain employment and union standards, the union made an agreement with the manufacturers whereby the employers would employ only union carpenters and the union members would work only on union-made millwork. This activity was held to be a violation of the Sherman Act.

trade union conduct directed against an employer because of a controversy arising in the relation between employer and employee, as such, and conduct similarly directed but ultimately due to an internecine struggle between two unions seeking the favor of the same employer.

"But to argue, as it was urged before us, that the Duplex case still governs for the purposes of a criminal prosecution is to say that which on the equity side of the court is allowable conduct may in a criminal proceeding become the road to prison.

*"The underlying aim of the Norris-La Guardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction. . . . The Norris-La Guardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act."*⁶⁹

Thus, Justice Frankfurter repudiated the *Duplex* case by reading Section 13 of the Norris-La Guardia Act into Section 20 of the Clayton Act. The *Duplex* case was overruled both with reference to its substantive Sherman Law doctrine and to its interpretation of Section 20 of the Clayton Act, but the technique of Justice Frankfurter places the onus of this overruling upon Congress and not the Court, thereby defending the Court from the criticism so frequently made at that time that it had been indulging somewhat too extensively in overruling cases decided prior to the "reconstruction in the membership of the Court."⁷⁰

The Department of Justice's drive against illegal labor activities was stalled by the *Hutcheson* decision.⁷¹ Efforts to restrict the holding in the *Hutcheson* case have been confounded by the United States Supreme Court in numerous indictments dismissed on the authority of that decision.⁷² The result of that decision was that those unions

⁶⁹312 U. S. 219, 231, 232, 234-236, 61 S. Ct. 463, 466, 467, 468, 85 L.ed. 788, 793, 794, 795 (1941). (italics supplied)

⁷⁰See Landis, *The Apex Case*, Addendum (1941) 26 Corn. L. Q. 212A, 212B.

⁷¹When Mr. Thurman Arnold was Assistant Attorney General in charge of the Anti-Trust Division, he announced [9 U.S.L. Week 2485 (1941)] that, notwithstanding the *Hutcheson* decision, the following labor activities would be considered illegal under the Sherman Act and prosecuted by the Department of Justice:

1. Where carried on by one union in disregard of another union's certification by the National Labor Relations Board as proper bargaining representative.
2. Where evidencing an intent to erect a tariff wall around a given locality.
3. Where designed to exclude efficient methods of production from building construction.
4. Where directed against small, independent businessmen.
5. Where effecting artificial price-fixing.

⁷²See *United States v. Building and Construction Trades Council*, 313 U. S. 539,

sufficiently strong to control the marketing of goods in whole areas would be able to exclude competing goods and to promote unreasonably high noncompetitive prices, thereby insuring their restricted memberships steady employment at attractively high wage rates. An instance of a union economic embargo of this sort appeared in *Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers*,⁷³ decided in 1945. There a local union, which controlled all employment in the manufacture and installation of electrical equipment in the New York City area would allow no outside manufactured equipment to be sold in the New York market. This embargo was placed on union-made and non union-made equipment alike, and was effected by the refusal of the installation electricians to handle equipment not locally produced by their fellow members. The tight market control which ensued was very harmful to local consumers and beneficial only to local union members and their employers. It is true that the Supreme Court disapproved of this practice insofar, *but only insofar, as it depended on the co-operation of the employers*. But nonetheless, it left the union free to use its own economic strength, quite adequate to the occasion, in continuing this anti-competitive embargo.

Justice Black, speaking for the Court, observed:

"Our holding means that the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups. This, it is argued, brings about a wholly undesirable result—one which leaves labor unions free to engage in conduct which restrains trade. But the desirability of such an exemption of labor unions is a question for the determination of Congress."⁷⁴

The decision was a union defeat in form but very nearly a union victory in substance. It demonstrated that previous judicial declara-

61 S. Ct. 839, 85 L.ed. 1508 (1941) (A.F.L. secondary strike in spite of C.I.O.'s certification by National Labor Relations Board in proceeding to which A.F.L. was a party); *United States v. International Hod Carriers' and Common Laborers' District Council*, 313 U. S. 539, 61 S. Ct. 839, 85 L.ed. 1508 (1941) (conspiracy to prevent mixers from without the state from shipping truck mixers into the city, upon the ground that labor saving was thereby effected); *United States v. United Brotherhood of Carpenters and Joiners*, 313 U. S. 539, 61 S. Ct. 839, 85 L.ed. 1508 (1941) (conspiracy by A.F.L. against employers whose employees had chosen C.I.O. after election held under the direction of the National Labor Relations Board). See also *United States v. American Federation of Musicians*, 318 U. S. 741, 63 S. Ct. 665, 87 L.ed. 1120 (1943).

⁷³325 U. S. 797, 65 S. Ct. 1533, 89 L.ed. 570 (1945).

⁷⁴325 U. S. 797, 810, 65 S. Ct. 1533, 1540, 89 L.ed. 570 (1945).

tions that the Sherman Act still had some application to labor unions were not mere empty phrases, but the Act restricts nothing but the use of a particular technique which even monopolistically-minded unions are not likely to find essential.

Thus, it may be clearly perceived that the existing national labor policy, prior to the 1947 labor legislation, was a bedlam of conflicting conceptions in its quest for a consistent rule to determine the legality of labor objectives. The Taft-Hartley Act is an attempt by Congress to formulate a national labor policy which will eliminate much of this confusion. It has been argued by opponents of the legislation that strikes and boycotts proscribed by this Act are again subject to tests and sanctions similar to those applied under prior interpretations of the anti-trust laws, and there is some basis for these contentions. However, there are certain provisions which must be made clear at the outset. Section 303 does not give private parties the right to seek injunctions against the strikes and secondary boycotts declared unlawful by Section 8 (b) (4). The Act restores equity jurisdiction to the federal courts to grant "such temporary relief or restraining order as it deems just and proper" *only at the instance of the National Labor Relations Board* after it has issued a complaint.⁷⁵ It is worthy of special note, moreover, that, by its express terms, such strikes and secondary boycotts are unlawful under Section 303 "*for the purposes of this section only.*"⁷⁶ This would seem to make it clear that there is no right to bring a criminal action under anti-trust laws and conspiracy statutes for violation of this section.⁷⁷ The requirement of Section 10 (e) that "the court shall cause notice to be served . . . and thereupon shall have jurisdiction" appears to preclude the granting of relief *ex parte*. Further, compliance must be made with the provisions of Rule 65 (b) of the Rules for Civil Procedure requiring that an application for temporary injunction should be set for hearing as soon as possible after a temporary restraining order has been issued, and the provisions of Rule 65 (d) requiring that "every order granting an injunction and every restraining order shall set forth the reasons for its issuance, shall be specific in terms, shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." The federal injunction, which was effectively removed from the employer's arsenal of weapons by the Norris-La Guardia Act,

⁷⁵See § 10 (j).

⁷⁶See § 303 (a). (italics supplied)

⁷⁷See *United States v. Hutcheson*, 312 U. S. 219, 61 S. Ct. 463, 85 L.ed. 788 (1941).

has been returned, but in a much less deadly form than that resorted to under the anti-trust laws. Attacks upon the injunction under the Sherman Act were directed largely at the procedural ease with which it was possible for management to restrain the concerted activities of labor. This evil has been corrected without denying the employer his right to petition for equitable relief where the union is engaged in a prohibited activity.

Section 303 authorizes an action for damages by "who ever shall be injured in his business or property" by a prohibited strike or boycott. Under this provision, of course, the number of persons eligible to sue is very great. However, it is likely that judicial construction of the legal concepts "business" and "property" and the use of a proximate cause doctrine will allow only those within a "reasonably foreseeable" area of possible injury to recover. Damages may be assessed only against the funds of the union, not against the assets of any individual. Since the *Second Coronado* case⁷⁸ labor unions have been proper parties to sue or be sued as entities in federal courts.⁷⁹ Apparently diversity of citizenship will be necessary to recover in a federal court, although the amount in controversy will not be relevant.⁸⁰ Any state court willing to take jurisdiction of the parties may determine the cause.⁸¹

An intent is evident to define in the broadest possible language the terms *strike* and *boycott* to cover any union activity designed to achieve ends prohibited by the Act.⁸² Much litigation will inevitably revolve around the phrase contained in Section 8 (b) (4), which brings into question the objective of the labor practice alleged to be unfair.⁸³

⁷⁸*Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295, 45 S. Ct. 551, 69 L.ed. 963 (1925).

⁷⁹301 (b) provides: "Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States."

⁸⁰Sec. 303 (b); cf. § 301 (a) which removes necessity for diversity of citizenship in breach of contract cases.

⁸¹Sec. 303 (b).

⁸²Sec. 501 of Title V defines a strike as "any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees." Further, § 13 of the National Labor Relations Act has been amended to limit the unqualified right to strike contained in that Act by the addition of the words "except as specifically provided for herein" and the addition of language that the Act shall not be construed "to affect the limitations or qualifications on that right."

⁸³See Sec. 8 (b) (4) which provides that it shall be an unfair labor practice for a labor organization to commit certain acts, where an object thereof is: see subsections (A), (B), (C), and (D). President Truman in his veto message complained that the provision "would invite employers to find any pretext for arguing that 'an object' of

Obviously, the intent of the legislators was to close any loophole which would prevent the Board from giving relief against activities proscribed by the section simply because one of the purposes of such strikes might have been lawful. Latent in this phrase is the question whether the distinction between "primary" and "secondary" intents which developed in the *Coronado* cases⁸⁴ under the Sherman Act is intended to be imported into this Act. For example, if the view be adopted that the union's activity violates the section if *any object* be unlawful, this would seem to adopt a view even more restrictive than that followed by the courts when concerted activities of labor unions were subjected to prosecution under the conspiracy⁸⁵ and anti-trust laws. Even then the test in determining whether the union activity was unlawful was that of *primary* objective. On the other hand, if only the overt demands of the union are to be looked to, without examining into hidden motives, then the prohibitions of the section may mean little.⁸⁶ The question is a complex one,⁸⁷ but the Board and the courts will in all probability require a demonstration that in the light of all the facts the predominant motive in the strike is illegal.

As a matter of statutory history, it would seem that Congress did not wish to create or restore a liability under the Sherman Act. The provision for the recovery of only single damages under Section 303

the union's activity was one of the [objects within the act], even though the primary object was fully legitimate."

⁸⁴259 U. S. 344, 42 S. Ct. 570, 66 L.ed. 975 (1922); 268 U. S. 295, 45 S. Ct. 551, 69 L.ed. 963 (1925). See also *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 60 S. Ct. 982, 84 L.ed. 1311 (1940).

⁸⁵See *Commonwealth v. Hunt*, 4 Met. 111, 38 Am. Dec. 346 (Mass. 1842).

⁸⁶For example, it is possible to exercise an economic pressure on employer A by a series of strikes, called for wholly legitimate overt reasons, against his suppliers, B and C. If only the *overt demands* are to be examined, then there is no violation of the section, even though the real objective is to drive employer A out of business.

⁸⁷Certainly one of the most significant questions to come before the Board and the courts will be whether an alleged violation of this provision was one authorized by the union or its agents or was an unauthorized or spontaneous action on the part of an employee or a group of employees. In relations to this problem the impact of Sec. 2 (13) is to be considered. This section provides that "In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." This provision adopts the common-law rule and was primarily directed at the decision of the Supreme Court in *United States v. United Brotherhood of Carpenters*, 330 U. S. 395, 67 S. Ct. 775 (1947), which rested, in turn, upon Sec. 6 of the Norris-La Guardia Act. That section, which requires actual participation in or authorization or ratification of particular acts, is not applicable under the present Act. Section 2 (2) applies the same rule to employers.

also indicates that triple damages under the Sherman Act were not contemplated. Private litigants are not permitted to storm the courts for injunctive relief as they did prior to the Norris-La Guardia Act. And under Section 8 (b) (4) (B) labor unions are allowed to resort to secondary action to compel an employer to bargain where he is under a legal duty to do so.⁸⁸ However, it is quite apparent that the secondary activities in the *Allen Bradley* and *Hutcheson* cases are now unfair labor practices,⁸⁹ although the Act does not make secondary boycotts a crime as did the Sherman Act.

Freedom of Speech of Employer and Employee

“Congress shall make no law . . . abridging the freedom of speech or of the press. . . .” First Amendment to the Constitution of the United States.

A problem underlying all unfair labor practices, whether of employers or unions, is that arising from the constitutional guarantee of free speech explicit in the First Amendment and implicit in the Fourteenth Amendment to the Federal Constitution. This protection of individual civil liberties led Congress to incorporate into the Taft-Hartley Act Section 8 (c) which provides in general terms that no statement of views, arguments, or opinions not coercive on its face shall “constitute or be evidence of an unfair labor practice.”⁹⁰ This provision indicates clearly the dissatisfaction of Congress with the administration of the original National Labor Relations Act. Its first noteworthy feature is that it is phrased generally enough to apply to all utterances, whether by unions or employers. Secondly, it in all

⁸⁸Sec. 8 (b) (4) (B) makes illegal strikes or boycotts designed to “force or require any *other* employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified . . . under the provisions of Sec. 9.” This is probably in the nature of a saving clause, for subsection 4 (A) would seem to outlaw a strike which would necessarily have as one of its objectives forcing the employer to cease dealing with any other person.

⁸⁹The jurisdictional strike illustrated by the *Hutcheson* case is prohibited by § (b) (4) (D). This provision makes it illegal to assign work tasks to employees who other concerted activity to force an employer to assign work tasks to employees who are members of that union in preference to employees who are members of another union or who are not members of any union, unless the employer fails to comply with a Board order or certification determining the employees’ representative for such work.

⁹⁰(italics supplied) The exact wording of § 8 (c) is as follows: “The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.”

probability requires the Board to discard certain doctrines which it had developed under the original Act.

To begin with, it must be assumed that the National Labor Relations Act was never intended by Congress to abridge the employer's constitutional right to give free expression to his views. Section 8 (1) of that Act provided that it shall be an unfair labor practice for an employer "to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7." The substantive evil aimed at there was the use by an employer of his *superior economic position* to prevent his employees from exercising the rights recognized by Congress in that legislation.⁹¹ The Board appears to have adopted an extreme policy with regard to employer utterances.⁹² In its Third Annual Report the Board took the view that the slightest suggestions or activities which would be innocuous and without significance between other individuals, become enormously significant and "heighten to proportions of coercion when engaged in by the employer in his relationship with his employees."⁹³ The extremity of the Board's paternalistic view toward labor unions has been recognized by certain courts.⁹⁴ The Fourth Circuit Court of Appeals has commented that the Board's position is predicated upon the unsupported assumption that labor, as a group, is today docile and uninformed:

"The still picture of a sheep-like body of laboring men led by a dominating employer, is not representative of the true situation. Since the passage of the [National Labor Relations] Act, the picture has been quite effectively streamlined. We see today a mobile labor force, strengthened by statutory safeguards, working on comparatively even terms with the em-

⁹¹Those rights guaranteed in § 7 ("to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining") have not been altered by the Taft-Hartley Act.

⁹²See *Pennsylvania Greyhound Lines, Inc.*, 1 N.L.R.B. 1, 22-23 (1935), aff'd 303 U. S. 261, 58 S. Ct. 571, 82 L.ed. 831 (1938), where the Board said: "The prohibition of § 8 (1) clearly reaches the employer who urges and persuades men in his employ not to form a labor organization. Such 'advice' is not the advice of a person on an equal plane and having an unprejudiced mind. It is the 'advice' of an employer who has the right to discharge the employees to whom the advice is given—to control to a large extent his economic position and thus his welfare." See also *Ford Motor Co.*, 14 N.L.R.B. 341 (1939); *Rockford Mitten & Hosiery Co.*, 16 N.L.R.B. 53 (1939).

⁹³Third Annual Report of National Labor Relations Board (1938) 125.

⁹⁴The view of the Board "that an employer's opinion of labor organizations and organizers must, because of the authority of master over servant, nearly always prove coercive," was expressly rejected in *N.L.R.B. v. Ford Motor Co.*, 114 F. (2d) 905 (C.C.A. 6th, 1940), cert. denied 312 U. S. 689, 61 S. Ct. 621, 85 L.ed. 1126 (1941).

ployer, who may often owe his particular strength to a superior economic, educational and social position. Under this view of the modern industrial situation, we surely cannot indulge in any assumption of weakness on the part of the employee."⁹⁵

As a matter of general constitutional doctrine, the right of free speech and publication, guaranteed by the Constitutions of the United States and of the several states, has its limitations. The question in such a case of an alleged infringement of these constitutional rights is whether the words used are employed in such circumstances and are of such a nature as to create a clear and present danger⁹⁶ that they will bring about the substantive evils that Congress or the state legislature has a right to prevent. In conformance with this doctrine, the courts have held that the National Labor Relations Act, and similar state statutes, were not intended to abridge an employer's constitutional right of free speech and publication concerning labor unions, so long as statements made in the exercise of these rights do not amount to an interference with, or restraint or coercion of, his employees in the exercise of their rights guaranteed by the statute. Thus, utterances of an employer which, standing alone and separated from their background,⁹⁷ did not appear to be coercive on their face, were held by the Supreme Court of the United States in *National Labor Relations Board v. Virginia Electric & Power Co.*⁹⁸ not to be a proper basis upon which the Board might predicate the unfair labor practice of employer interference.

In the later case of *National Labor Relations Board v. American Tube Bending Co.*,⁹⁹ decided in 1943, employers received further reassurance, provided by Judge Learned Hand. A few days before an election by the company's employees to determine their bargaining

⁹⁵E. I. du Pont de Nemours & Co. v. N.L.R.B., 116 F. (2d) 388, 398 (C.C.A. 4th, 1940), cert. denied 313 U. S. 571, 61 S. Ct. 595, 85 L.ed. 1529 (1941).

⁹⁶Justice Holmes, speaking for a unanimous Supreme Court in *Schenck v. United States*, laid down the following test: "The question in every case is whether the words used are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." 249 U. S. 47, 52, 39 S. Ct. 247, 249, 63 L.ed. 470, 473-474 (1919).

⁹⁷Under the original Act the Board had developed the "totality-of-conduct" doctrine under which it held that statements not coercive upon their face might become coercive when uttered in a background of anti-union activity by an employer guilty of other unfair labor practices.

⁹⁸314 U. S. 469, 62 S. Ct. 344, 86 L.ed. 348 (1941).

⁹⁹134 F. (2d) 993 (C.C.A. 2d, 1943), cert. denied 320 U. S. 768, 64 S. Ct. 84, 88 L.ed. 459 (1943).

representative the president of the company sent a letter to employees reminding them that the election was by secret ballot, that they could vote in any way they wished, and that they should consider whether the leadership they were about to select was interested in the employee's welfare or not. It was also pointed out that whatever they should decide, the company would cooperate, knowing that the interests of the employees and the company were the same. The president also delivered a speech to the employees, stating that the company favored an open shop and appealed, by implication at least, for them to reject both unions on the ballot. The Board found the employer guilty of an unfair practice, but in the Circuit Court of Appeals the Board's order was set aside, and a petition for writ of certiorari was denied by the Supreme Court. However, as Justice Holmes once stated, "The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times."¹⁰⁰

On the other hand, in 1944, an employer who posted that "it is not necessary for any employee to join any organization or to pay dues to any organization to continue in our employ" was found guilty of an unfair labor practice.¹⁰¹ The employer took the position that although his notice was intended to discourage membership in the union, he could so address his employees in pursuit of his right of freedom of speech. The court found the notice objectionable, however, because uttered in a background of anti-union activity on the part of the employer.

These cases illustrate that attendant facts and circumstances may indicate an act to be coercive which when considered by itself does not disclose any such conduct. As the power of organized labor has grown, the Board has recognized that employer's statements carry progressively less restraining force and for that reason now infers a threat of coercion only when "reasonably contemporaneous" unfair practices indicate that a statement is likely to have a positive coercive effect.¹⁰² Therein

¹⁰⁰See *United States v. Carver*, 260 U. S. 482, 490, 43 S. Ct. 181, 182, 67 L.ed. 361, 364 (1923). On the same day the Supreme Court refused to hear the *Tube Bending* case, it also denied certiorari in the case of *Trojan Powder Co. v. National Labor Relations Board* where the Board's cease and desist order had been upheld by the Third Circuit Court of Appeals. 135 F. (2d) 337 (C.C.A. 3d, 1943), cert. denied 320 U. S. 768, 64 S. Ct. 76, 88 L.ed. 458 (1943), petition for rehearing denied, 320 U. S. 813, 64 S. Ct. 194, 88 L.ed. 491 (1943).

¹⁰¹*National Labor Relations Board v. M. E. Blatt Co.*, 143 F. (2d) 268 (C.C.A. 3d, 1944), cert. denied 323 U. S. 774, 65 S. Ct. 135, 89 L.ed. 619 (1944).

¹⁰²*Fisher-Governor Co.*, 71 N.L.R.B. 1291 (1947); *La Salle Steel Co.*, 72 N.L.R.B. 78 (1947).

the Board has been forced by the courts to retreat from its original position that an employer has no right to express his views to his employees as to whether or how they should organize. However, proponents of the free speech provision in the Taft-Hartley Act felt that the retreat had been so reluctant that many employers still feared to express themselves on labor affairs.

Insofar as speech is declared not to constitute an unfair labor practice, the effect of this subsection will be to preclude a finding that speech in its context is coercive, unless on its face it contains a bribe or threat. But the provision that speech shall not be *evidence* of an unfair practice is more difficult to understand. The purpose of this clause is to forestall the Board's practice of considering past anti-union statements made by an employer as evidence of motive in discharging an employee. Under Section 8 (c) such statements may no longer be used as evidence. It thus appears that the Board is denied the right to consider evidence which would be admissible in a court under common law rules of evidence. However, Congress, by ordering a blanket exclusion of this particular evidence, is merely exercising its recognized power to prescribe what evidence the Board shall hear. Clearly, this protection afforded the employer is much wider than the constitutional guarantee of free speech. But it should be noted that the provision is limited to "views, arguments or opinions" and does not cover instructions, directions, or statements coercive in themselves.

The right of free speech as invoked by unions generally takes the form of peaceful picketing as an aid in attaining their objectives. This technique for achieving constitutional immunity for peaceful picketing was suggested in a dictum by Justice Brandeis in *Senn v. Tile Layers Protective Union*.¹⁰³ That case involved the picketing of the premises of a self-employed tilelayer in order to compel him to sign a union contract which would prohibit him from personally performing the manual labor of his business. Justice Brandeis characterized peaceful picketing as mere advertising of the facts of a labor dispute and remarked in passing that such activity was protected against state interference by the constitutional guarantee of freedom of speech. This observation afforded the Supreme Court of the United States, in *Thornhill v. Alabama*¹⁰⁴ and *Carlson v. California*,¹⁰⁵ a basis for invalidating a state statute and a county ordinance, which forbade all

¹⁰³301 U. S. 468, 57 S. Ct. 857, 81 L.ed. 1229 (1937).

¹⁰⁴310 U. S. 88, 60 S. Ct. 736, 84 L.ed. 1082 (1940).

¹⁰⁵310 U. S. 106, 60 S. Ct. 746, 84 L.ed. 1104 (1940).

picketing. By viewing picketing as a method of communication, the Court was able to assert that picketing was entitled to the same protection against state interference by virtue of the Fourteenth Amendment as was any other form of communication. Proof of clear and present danger to justify suppression of the right must rest upon a showing of acts of violence or mass picketing. Thus, in the Thornhill case, the Court stated:

"In the circumstances of our times, the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution.

"It is true that the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants. It does not follow that the State in dealing with the evils arising from industrial disputes may impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern."¹⁰⁶

This conception of picketing has been criticized on the ground that since picketing is a weapon of industrial conflict, and inherently a coercive rather than an enlightening technique, it is inappropriate to immunize picketing with the constitutional safeguards surrounding newspaper or radio advertising, and that legality of picketing should properly depend upon the substantive law of each state.¹⁰⁷ However, the Supreme Court, in 1941, went a step further in making peaceful picketing immune from injunction by extending the privilege to picketing carried on by persons not in a proximate relation of employment with the plaintiff employer. The Court, speaking through Justice Frankfurter, declared:

"A state cannot exclude working men from peacefully exercising the right of free communication by drawing the circle of 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 commonplace."¹⁰⁸

¹⁰⁶310 U. S. 88, 102, 103-104, 60 S. Ct. 736, 744, 745, 84 L.ed. 1093, 1102, 1103 (1940).

¹⁰⁷See, for example, Gregory, *Peaceful Picketing and Freedom of Speech* (1940) 26 A.B.A.J. 709. See also Teller, *Labor Disputes and Collective Bargaining* (1947) Sec. 136.

¹⁰⁸*American Federation of Labor v. Swing*, 312 U. S. 321, 326, 61 S. Ct. 568, 570,

It would seem quite apparent that picketing, even where no violence exists, tends to influence conduct in other ways than by the communication of ideas. Many prospective customers will decline to cross a picket line either because they feel unpleasantly conspicuous when they do so or because they shrink from the picket's expression of disapproval. The remoteness of picketing from free speech was noted by Professor Corwin in the following words: "In many circumstances picketing, even when unaccompanied by actual violence or fraud, is coercive and intended so to be; and when it is, it is related to freedom of speech to about the same extent and in the same sense as the right to tote a gun is related to the right to move from place to place."¹⁰⁹ On the other hand, to hold that no such privilege exists is to hold that labor unions may be denied the only practicable method of communicating the ideas they wish to express. Faced with this dilemma the Supreme Court of the United States has wisely qualified its earlier position that the right to picket peacefully is absolute.

In *Bakery & Pastery Drivers & Helpers Local 802 v. Wohl*,¹¹⁰ decided in 1942, the Court in a more cautious opinion, extended the constitutional protection to secondary picketing. There a union of truck drivers attempted to induce two peddlers, who worked seven days a week distributing bakery products in competition with the truck drivers, to work only six days and to employ a member of the union on the seventh day.¹¹¹ When the peddlers refused, the union picketed the bakeries from which the peddlers obtained their goods and also some of the peddlers' customers. The state court's injunction¹¹² against this picketing was set aside, but there was language in Justice Jackson's opinion which appears to mean that the injunction would have been permitted to stand if the state court had been more explicit in holding

85 L.ed. 855, 857 (1941). None of plaintiff's employees had joined the union, so that the picketing was carried on solely by strangers. The plaintiff obtained an injunction in an Illinois court on the ground that, under the law of that state, picketing by persons not in the proximate relation of employment, was unlawful. This holding was reversed by the Supreme Court of the United States, thus denying the right of a state court to restrain such picketing.

¹⁰⁹Corwin, Book Review (1942) 56 Harv. L. Rev. 484, 486.

¹¹⁰315 U. S. 769, 62 S. Ct. 816, 86 L.ed. 1178 (1942).

¹¹¹The peddler did all his own work, laboring seven days a week and earning approximately \$32. Out of this he must absorb credit losses and maintain a delivery truck. The peddler was requested to employ a relief driver at the union scale of \$6 per day.

¹¹²*Wohl v. Bakery & Pastry Drivers & Helpers Union*, 259 App. Div. 868, 19 N. Y. S. (2d) 811 (1940).

the picketing to be in aid of an unlawful labor objective.¹¹³ And he specifically said that "A state is not required to tolerate in all places and all circumstances even peaceful picketing by an individual."¹¹⁴ Justice Douglas, in his concurring opinion, declared:

"Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of ideas which are being disseminated. Hence, those aspects of picketing make it the subject of restrictive regulation."¹¹⁵

In the *Ritter's Cafe* case, members of the Carpenters and Joiners Union peaceably picketed in front of a restaurant, whose sole proprietor had awarded a building contract to a contractor who employed non-union labor. The state court enjoined the picketing on the ground that it violated the state anti-trust statute.¹¹⁶ In a five to four decision,¹¹⁷ on the same day the *Wohl* case was decided, the Supreme Court of the United States sustained the injunction on the ground that the Fourteenth Amendment does not forbid an injunction against picketing a business which is "wholly outside the economic context of the real dispute," and which is owned by a person whose sole relation thereto arises from dealing with one of the disputants. The Supreme Court did not appear to consider the fact that picketing the plaintiff at his place of business was the only effective means whereby the union could present to the public the facts of the labor dispute. To picket the contractor at the place of construction would have been almost useless. It is interesting to note that the picketing which took place here could not have been enjoined by the federal courts, because a labor dispute

¹¹³"The respondents say that the basis of the decision below was revealed in a subsequent opinion of the Court of Appeals, where it was said with regard to the present case that 'we held that it was an unlawful labor objective to attempt to coerce a peddler employing no employees in his business and making approximately thirty-two dollars a week'. *Opera-on-Tour v. Weber*, 285 N. Y. 348, 357, 34 N. E. (2d) 349, writ of certiorari denied in 314 U. S. 615.... But this lacks the deliberateness and formality of a certification, and was uttered in a case where the question of the existence of a right to free speech under the Fourteenth Amendment was neither raised nor considered." 315 U. S. 769, 774-775, 62 S. Ct. 816, 818-819, 86 L.ed. 1178, 1183 (1942).

¹¹⁴315 U. S. 769, 775, 62 S. Ct. 816, 819, 86 L.ed. 1178, 1184 (1942).

¹¹⁵315 U. S. 769, 776-777, 62 S. Ct. 816, 819-820, 86 L.ed. 1178, 1184 (1942).

¹¹⁶*Carpenters & Joiners Union of America, Local No. 213 v. Ritter's Cafe*, 138 S. W. (2d) 223 (Tex. Civ. App. 1940) (appeal from order granting temporary injunction); 149 S. W. (2d) 694 (Tex. Civ. App. 1941) (appeal from order granting permanent injunction); writ of error refused 136 Tex. 414 (1941).

¹¹⁷315 U. S. 722, 62 S. Ct. 807, 86 L.ed. 1143 (1942).

existed within the meaning of Section 13 of the Norris-La Guardia Act.

The Supreme Court decisions discussed here have had a far-reaching effect on the common law of the states, for by identifying picketing with free speech the Court has very conveniently extended the power of judicial review over the statutory and common law of the states on the subject of picketing. The inconsistency in the *Wohl* and *Ritter* opinions reflects the uncertainty of that tribunal in peaceful picketing cases. Picketing has been recognized as being not only a means of communicating grievances but also as a method of exerting economic pressure. Because of the former aspect it cannot be wholly forbidden; because of the latter, it must be limited as are other civil liberties, and must be exercised in conjunction with other rights equally as desirable.¹¹⁸

It seems probable that peaceful picketing to disseminate "views, arguments or opinion" is still lawful either under Section 8 (c) of the Taft-Hartley Act or as constitutionally protected. If a union, or a group of employees, do no more than disseminate the facts concerning a particular employer, or if they confine themselves to addressing arguments to employees of another employer, or inform the trade of substandard conditions at an employer's factory, there would appear to be no liability. The same rule should govern picketing to inform the public. If, after a union informs the public that employer A is unfair, employer B of his own initiative ceases to purchase the goods of employer A, there would appear to be no liability on the part of employer B or the union. The prohibited area seems confined to strikes, or other refusals to process, by a labor organization or its agent, intended to have a "secondary" effect. However, there is reason to believe that Section 8 (c) will be held inapplicable to Section (b) (4). In the first place, to accept an interpretation that the free speech provision immunizes picketing would be to grant that picketing is

¹¹⁸See *Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies*, where a state court's decree enjoining peaceful picketing was affirmed when there were, in the background, acts of violence by members of the union. The Court, in finding that the injunction was necessary, said: "We are here concerned with power and not the wisdom of its exercise. We merely hold that in the circumstances of the record before us the injunction authorized by the Supreme Court of Illinois does not transgress its constitutional power. That other states have chosen a different path in such a situation indicates differences of social view in a domain in which the states are free to shape their local policy. . . . To maintain the balance of our federal system . . . , demands at once zealous regard for the guaranties of the Bill of Rights and due recognition of the powers belonging to the states." 312 U. S. 287, 296, 61 S. Ct. 552, 559, 85 L.ed. 836, 843 (1941).

merely an expression of opinion free from the taint of threat or promise. Secondly, the legislative history indicates that the purpose of the section was to protect employer, rather than union, expression.¹¹⁹ And, thirdly, if all non-coercive expressions were intended to be exempt from Section 8 (b) (4), the phrase "to induce or encourage" would mean very little.

The provision may be subject to attack on the ground that since it bans inducement directed at employees, it violates the First Amendment. The unions might argue that they have just as much right to communicate their grievances to employees as they have to the public, even though the purpose of such speech is to induce the employees within the meaning of the Act. The employer might utilize the argument that because the union is still free to disseminate information to the public, there is no unreasonable legislative restraint upon free speech. The Supreme Court can logically sustain the provision by adopting a view similar to the position taken in the *Ritter's Cafe* case,¹²⁰ that the Constitution protects strikes and secondary boycotts within an area of allowable economic conflict. And the Court may also hold that Congress can constitutionally curtail speech having the "clear and present danger" of causing a concerted refusal on the part of employees, insofar as Congress can validly ban such activities.

Conclusion

The principal objectives of labor in its long and successful crusade have been reasonable wages, hours, working conditions, and recognition for purposes of collective bargaining. Labor representatives demanded, and in the National Labor Relations Act received, the right to equal bargaining power with management. That Act addressed itself only to the issue of how the parties were to be brought together peacefully at the bargaining table. From there they are on their own, prudence forbidding any attempt by the government to interfere with the play of competitive forces in this field of human relations. The Taft-Hartley Act does not strike at collective bargaining,¹²¹ but is

¹¹⁹Sen. Rep. No. 105, 80th Cong., 1st Sess. (1947) 23, 24.

¹²⁰See *Carpenters & Joiners Union of America, Local No. 213 v. Ritter's Cafe*, 315 U. S. 722, 62 S. Ct. 807, 86 L.ed. 1143 (1942).

¹²¹Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages,