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SOME ASPECTS OF MINORITY UNION PICKETING IN NEW YORK

PHILIP FELDBLUM†

Section 8b(4)(C) of the Taft-Hartley Act¹ provides that it shall be unlawful for a labor organization to engage in, induce or encourage a strike 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." The NYSLRA, although it provides for certification of majority representatives,² contains no prohibition against union unfair labor practices and no provision similar to § 8b(4)(C). The New York courts, however, not only anticipated, but have extended, the rule enunciated in § 8b(4)(C) of the Taft-Hartley Act. The historical development of this judicial doctrine presents an interesting, if confusing, subject.

The purpose of this article is to trace the development of the current New York doctrine concerning minority picketing, analyze its rationale and consider the limitations imposed upon its application by the Taft-Hartley Act.

1932-1940

The New York Court of Appeals, in Stillwell Theatre Inc. v. Kaplan,³ decided in 1932, held it lawful for a union, peacefully and truthfully, to picket an employer who had a contract with a rival union, even though the employees were all members of the contracting union. "Resulting injury" to the employer was said to be "incidental and must be endured."⁴

The Stillwell case antedated the enactment of C.P.A. § 876-a, which

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² NYSLRA § 705 (1948).


⁴ 259 N. Y. 405, 409, 182 N. E. 63, 64 (1932).
restricted the issuance of injunctions in "labor disputes," and also
preceded the adoption of NLRA and NYSLRA. The decision was rendered
at a time when employers were under no legal compulsion to bargain
collectively, when company dominated unions were not unlawful, closed
shop contracts were valid even though the union represented only a
minority, or none, of the employees, and discrimination against employees
because of union membership or activity was not prohibited. Accordingly, it was then accurate for the Court of Appeals to refer to the
employer in the Stillwell case as having "patronized" the contracting
union, and to state that the conduct of the employer might be objection-
able to the defendant union. To grant an injunction "would thereby give
to one union an advantage over another by prohibiting the use of peaceful
and honest persuasion in matters of economic and social rivalry. This
might strike a death blow to legitimate labor activities.

C.P.A. § 876-a, enacted in 1935, specified the procedures to be followed,
and the extent to which injunctions could issue, in "labor disputes." A
"labor dispute," as defined therein, includes, among other things, any
controversy concerning terms or conditions of employment, the associ-
ation or representation of persons in negotiating terms or conditions of
employment, "or any other controversy arising out of the respective
interests of employer and employees, regardless of whether or not the
disputants stand in the relation of employer and employee." A case
involves a "labor dispute" if the persons involved "are engaged in the
same industry, trade, craft or occupation" and whether the dispute is
between employees or unions and employers or employer associations,
between employer associations, between employees and the unions, or
between unions.

The NLRA (1935) and NYSLRA (1937) both guaranteed to em-
ployees the right to form, join or assist labor organizations, to engage in
concerted activities, and to bargain collectively through representatives
of their own choosing, free from employer interference, restraint or
coercion. A labor organization which represented a majority of the
employees in an appropriate bargaining unit was made the exclusive

7. Ibid.
9. Subdiv. 10 (a).
10. NLRA § 7; NYSLRA § 703.
representative of all employees in the unit, and the employer was placed under a legal duty to recognize and negotiate with the majority representative, and no other. "Company unions," that is, organizations dominated or sponsored by an employer, were prohibited, the closed shop and other forms of union security were barred except to majority representatives, and the employer was prohibited from discriminating against employees because of their union affiliation or activities. Both acts provided election machinery to determine whether a majority of the employees in an appropriate bargaining unit desired to be represented by a particular union.

The enactment of the NLRA and NYSLRA thus substantially changed the legal background against which the Stillwell case had been decided. The employer could no longer "patronize" a particular union, nor could he establish, and contract with, a company dominated union. He was placed under legal compulsion to recognize and negotiate in good faith with a bona fide labor organization freely chosen by his employees as their representative.

During the first few years following the enactment of the NLRA and NYSLRA, the New York courts generally considered themselves bound by the Stillwell decision. The controversies involved were held to be "labor disputes" within the meaning of C.P.A. § 876-a and injunctions were denied.

Where one of the unions had been certified by the NLRB or NYSLRB, the reluctance of the courts to follow the Stillwell case was more clearly manifested. In Stalban v. Friedman et al., the court, at Special Term,

11. NLRA § 9 (a); NYSLRA § 705 (1).
12. NLRA § 8 (5); NYSLRA § 704 (6).
14. NLRA § 8 (2); NYSLRA § 704 (3).
15. NLRA § 8 (3); NYSLRA § 704 (5). The Taft-Hartley Act, of course, prohibits closed shop contracts and permits lesser forms of union security only after authorization by the employees in a Board election. Taft-Hartley Act §§ 8 (a) (3), 9 (e).
16. NLRA § 8 (3); NYSLRA § 704 (4) (5).
17. NLRA § 9; NYSLRA § 705.
distinguished the Stillwell case on the ground of the changes resulting from the enactment of the NYSLRA, found that no labor dispute existed, and enjoined all picketing. The Appellate Division, First Department, reversed in a brief per curiam opinion, stating that the record disclosed a labor dispute was involved and, as the plaintiff had failed to comply with the requirements of § 876-a, no injunctive relief could be granted. It added: "The question is not affected by the fact, if it be a fact, that the State Labor Relations Board has held that the union whose members are now employed by the plaintiff is the proper agency for collective bargaining."

In Euclid Candy Co. v. Summa et al., the employer and two rival unions signed an agreement providing for an NLRB election, and further providing that the successful union would receive a closed shop contract and that the defeated union would not strike during the term of the contract. After the successful union had been certified by the NLRB, a closed shop contract was executed. A number of employees who were members of the rival union refused to join the certified union and went on strike. Special Term held that the certification, "following an election duly held by [the NLRB] pursuant to the agreements above referred to, brought that labor dispute to a conclusion." The Special Term opinion in Stalban v. Friedman et al., which had not yet been reversed, was cited. Since the purpose of the strike was to induce a breach of the contract made pursuant to the agreement entered into by both unions, a temporary injunction was granted. The Appellate Division, Second Department, affirmed without opinion.

In the Euclid case, the strike by the unsuccessful union was in violation of its agreement with the employer and the certified union, a factor not present in the Stalban case. C.P.A. § 876-a, 1 (a) expressly pro-

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20. 259 App. Div. 520, 19 N.Y.S.2d 978 (1st Dep't 1940). See also Fairbanks Cube Steak House v. Viera et al., 259 App. Div. 804, 20 N.Y.S.2d 776 (1st Dep't 1940), in which no opinion was written. The facts may be found in Brook-Maid Food Co. v. Goldberg, 21 N.Y.S.2d 984 (Sup. Ct. 1940).

21. 259 App. Div. 520, 521, 19 N.Y.S.2d 978, 979 (1st Dep't 1940). Actually the contracting union had not been certified. Petitions filed with the NYSLRB by the employer and the contracting union were dismissed on the ground that no question or controversy concerning representation of employees was involved, as it was conceded that the contracting union represented the employees and that the defendant unions did not. Old Russian Bear Restaurant, 1 N.Y.S.L.R.B. 977 (1938).


vides that no injunction shall issue except after findings that "... a breach of any contract not contrary to public policy has been threatened or committed...." Thus, even under § 876-a, a limited form of injunction could have been granted despite the existence of a "labor dispute."

1940-1950

In 1940 a dispute arose between two unions of retail shoe clerks concerning the employees of the Florsheim Shoe Company. The NYSLRB, after a hotly contested election, certified the successful union as representative of the employees.26 The intense rivalry between the unions continued and spread rapidly. Each union picketed stores previously organized by the other. A number of injunction suits were instituted and, in every case, the Supreme Court granted injunctive relief, declaring that the picketing was retaliatory, malicious, and wholly unrelated to terms and conditions of employment; that no labor dispute was involved and C.P.A. § 876-a inapplicable.27

Two of the cases, Florsheim Shoe Store Co. v. Retail Shoe Salesmen's Union et al.,28 and Dinny & Robbins, Inc., v. Davis,29 were carried to the Court of Appeals. In each, the Court of Appeals affirmed the injunctive relief granted by the Supreme Court. Both decisions were by a split court (4-3).

In the Florsheim case, the contracting union had been certified by the NYSLRB30 and there had been violence, mass picketing, and the use of "misleading" signs by the defendant union. The Court of Appeals affirmed a temporary injunction against all picketing. The majority declared: "On the record here presented it is impossible for the respondents successfully to maintain that any 'labor dispute' between plaintiffs and defendants theretofore existing under section 876-a of the Civil Practice Act survived the certification by the Labor Relations Board of the collective bargaining agent for plaintiffs' employees and the execution of the

collective bargaining contract." The picketing was said to be "malicious, coercive, and accompanied by acts of intimidation . . . for the purpose . . . of ruining plaintiffs' business, property and good will. It was unlawful for defendants falsely to represent . . . that plaintiffs were unfair to organized labor, that a labor dispute existed between the plaintiffs and their employees and that all plaintiffs' employees were out on strike." The Stillwell case was distinguished on the grounds of violence and the change in state policy resulting from the enactment of the NYSLRA and C.P.A. § 876-a.

In the Dinny & Robbins case, the contracting union had not been certified and the picketing, by one person at a time, was peaceful. The placard bore the statement "Dinny & Robbins Shoes are unfair to the Retail Shoe Salesmen's Union, Local 1115-F—R.C.I.P.A., American Federation of Labor." Trial Term granted a permanent injunction prohibiting picketing unless the sign was changed to read, "This is no strike. All employees of Dinny & Robbins, Inc., are regular members of Local 1268 C.I.O., not members of Local 1115-F—R.C.I.P.A., A.F. of L."

The majority of the Court of Appeals stated that the placard falsely "implied" that plaintiff's employees were on strike and that plaintiff was "unfair to organized labor," and, hence, that the limited injunction was proper, citing Angelos v. Mesevich. C.P.A. § 876-a was held to be inapplicable on the ground that it "was not designed as an instrument to promote and protect strife between rival labor groups or to injure or destroy the good will and business of innocent employers against whom there was no complaint concerning wages or working conditions solely because they refused to take sides with one group as against the other."


32. Florsheim Shoe Store Co. v. Retail Shoe Salesmen's Union et al., 288 N.Y. 188, 201, 42 N.E.2d 480, 485 (1942).

33. Ibid.


35. Ibid. Cf. Edjomac Amusement Corp. v. Empire State Motion Picture Operators' Union et al., 273 N.Y. 647, 8 N.E.2d 329 (1937), reversing, 247 App. Div. 879 (1st Dep't 1936), where the union had picketed with signs that read: "An Appeal. Don't patronize this theatre. It does not employ members of Empire State Theatrical Stage Employees Union." An injunction had been granted prohibiting picketing unless there were added to the signs words that plaintiff "employs union labor to operate motion picture machines." The Court of Appeals unanimously reversed without opinion and dismissed the complaint.


Certiorari was denied by the Supreme Court of the United States.\textsuperscript{38}

In November, 1943, the Supreme Court of the United States reversed \textit{Angelos v. Mesewick},\textsuperscript{39} which had been cited in the Court of Appeals' decision in the \textit{Dinny & Robbins} case. Angelos, the owner of a small cafeteria, had made all his employees partners in the business in order to stop picketing. The union continued to picket, peacefully, with signs that "This place is unfair to organized labor, please help us."\textsuperscript{40} The Trial Court found that the signs were misleading in that they "tend to create the impression that plaintiffs are unfair to organized labor and that these pickets were previously employed by the plaintiffs."\textsuperscript{41}

The majority of the Court of Appeals held that as the cafeteria was operated without employees there was no labor dispute, that accordingly § 876-a was inapplicable and an injunction against all picketing was proper. The Supreme Court of the United States unanimously reversed and remanded the case. In a brief opinion, the Court said: "... a state cannot exclude working men in a particular industry from putting their case to the public in a peaceful way 'by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him,'" and that the "'[r]ight to free speech in the future cannot be forfeited because of dissociated acts of past violence. . . .' Still less can the right to picket itself be taken away merely because there may have been isolated incidents of abuse falling far short of violence occurring in the course of that picketing."\textsuperscript{42}

Thereafter, when the \textit{Florsheim} case was tried on the merits, the trial court granted a permanent injunction against all picketing. On appeal, however, the Appellate Division, Second Department, limited the scope of the injunction to violence and misleading signs\textsuperscript{43} citing the \textit{Angelos} case and other decisions of the Supreme Court of the United States.\textsuperscript{44}


\textsuperscript{39} \textit{Davis et al.} v. \textit{Dinny & Robbins}, Inc., 319 U.S. 774 (1942). An interesting side light to the \textit{Dinny & Robbins} case is that the defendant union recovered damages against the plaintiff because the temporary injunction was broader than the final injunction affirmed by the Court of Appeals. \textit{Dinny & Robbins, Inc. v. Retail Shoe Salesmen's Union \textit{et al.}}, 180 Misc. 643, 41 N.Y.S. 2d 375 (Sup. Ct. 1943).

\textsuperscript{40} 320 U.S. 293 (1943), \textit{reversing and remanding}, 289 N.Y. 498, 46 N.E. 2d 903 (1943).

\textsuperscript{41} \textit{Id.} at 502, 46 N.E. 2d at 905.

\textsuperscript{42} 320 U.S. 293, 296 (1943).


That same year, 1945, the Appellate Division, First Department, affirmed a similar injunction against false signs in *Sachs Quality Furniture Inc. v. Hensley.* The employer had a contract with a certified union covering all its employees. A petition by the defendant union, seeking to represent the salesmen as a separate unit, had been denied by the NYSLRB. The salesmen then picketed with signs that the certified union was a "company union." The Appellate Division, affirming the injunction against false signs, held that although no labor dispute was involved, "the defendant, a rival union, may, in the exercise of the right of free speech, by peaceful and truthful methods of picketing, attempt to win to itself the allegiance of members of the Association who are employees of the plaintiff."

For a few years, again, a regular pattern was established. The courts continued to hold that the issuance of a labor board certification, or the execution of a collective bargaining agreement "terminated" any labor dispute within the meaning of C.P.A. § 876-a but, generally, they limited injunctions to prohibiting violence and misleading signs. Attempts to enlarge the rule to include other types of situations, were rejected. Where a representation proceeding concerning the conflicting claims of rival unions was pending undetermined, it was held that a labor dispute existed. Where only one union was involved, labor disputes were found to exist although the union had been defeated in a board-conducted election, or the employer's petition had been dismissed on the union's concession that it did not represent a majority of the employees, or where there had been no board proceeding but the employer had "offered" an election.

*1950-1951*

The decision of the Supreme Court of the United States in *Building Service Employees et al. v. Gazzam,* a case originating in the State of

45. 269 App. Div. 264, 55 N.Y.S.2d 450 (1st Dep't 1945).
47. 269 App. Div. 264, 267, 55 N.Y.S.2d 450, 452 (1st Dep't 1945).
Washington, set the ball rolling once more. There, the union had demanded a closed shop contract. The employer rejected the union's demand after the employees, in a private poll, had voted against joining the union. The union then picketed with signs that the employer was "Unfair to Organized Labor." The Supreme Court sustained a state court injunction on the ground that "Picketing of an employer to compel him to coerce his employees' choice of a bargaining representative is an attempt to induce a transgression of this [State's] policy" as expressed in an anti-injunction statute similar to § 876-a. The statute declared that "though [an employee] should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing . . . free from interference, restraint, or coercion of employers. . . ." The Court cautioned, however: "There is no contention that picketing directed at employees for organization purposes would be violative of that policy. The decree does not have that effect."

Exactly five weeks after the decision in the Gazzam case, the Appellate Division, First Department, affirmed an injunction against all picketing in Haber & Fink, Inc. v. "John Jones." A union, whose contract with plaintiff had expired, engaged in mass demonstrations, violence and the use of misleading signs after the employees had voted for "no union" in an NYSLRB election. The union's contentions that it was picketing (1) to persuade the employees to support it, (2) for a "members only" contract, and (3) to publicize that plaintiff was now a non-union shop were rejected; the first two as "specious" and the third on the ground that plaintiff's shop was non-union through no fault of the plaintiff but because of the "policy of the Labor Relations Act that there shall be nonunion shops when the employees . . . vote that it shall be so." The court expressly stated that the rule of the Florsheim and Dinny & Robbins cases "applies where the [union's] objective is to nullify a labor board election that has resulted in a vote for no union."

Shortly thereafter, in Pennock Co. v. Ferretti, Special Term, citing the Haber & Fink case enjoined all picketing by a union which had

54. Id. at 538.
56. See note 55 supra.
59. Id. at 180, 98 N.Y.S.2d at 396.
60. Id. at 181, 98 N.Y.S.2d at 397.
61. 125 N.Y.L.J. 956, col. 3 (Sup. Ct. Mar. 15, 1951). Cf. Mele Mfg. Co. v. Doe, 125 N.Y.L.J. 1530, col. 3 (Sup. Ct. Apr. 25, 1951), where, after the NLRB had vacated an election in which the union had been defeated, a labor dispute was held to exist.
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requested recognition, where the employer's petition to the NLRB had been withdrawn without prejudice on the union's concession that it did not represent a majority of the employees. The court said that the picketing was "part of a plan to avoid a labor board election" and, therefore, unlawful.\(^6\)

In LaManna v. O'Grady, et al.\(^6\) the Appellate Division, First Department, again reviewed a case in which the employees had voted for "no union." Here, however, the picketing was peaceful and orderly. The court again held that the union's defeat in the election "ended the dispute,"\(^6\) and affirmed an injunction against all picketing. It added, however, that it would be permissible for the union to picket, provided the information given the public included the fact "that the nonunion status of plaintiff's store is a matter of the employees' choice. . . ."\(^6\)

Accordingly, the affirmation was without prejudice to an application to Special Term for modification of the injunction. Thereafter, upon such application, the injunction was modified accordingly.\(^6\)

Analysis of Current Doctrine

It is apparent that the pendulum has swung its full arc. The "pro-union" state anti-injunction and labor relations acts sounded the knell of the "pro-union" Stillwell doctrine. The same court which once said the existence of a labor dispute "is not affected by the fact . . . that the State Labor Relations Board has held that the union . . . is the proper agency for collective bargaining"\(^6\) now holds that there is no labor dispute if the employees vote for "no union."\(^6\) The first step has been taken to extend further the new doctrine to cases in which a representation petition is withdrawn or dismissed on the union's concession of non-majority status.

The current enlargement of the Florsheim and Dinny & Robbins decisions warrants re-examination of those cases. As the extension followed immediately after, and apparently was based upon, the decision

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63. 278 App. Div. 77, 103 N.Y.S.2d 476 (1st Dep't 1951).
64. Id. at 78, 103 N.Y.S.2d at 478.
of the Supreme Court of the United States in the *Gazzam* case, the effect of that decision necessarily must be considered. Finally, in so far as the New York decisions overlap, exceed or contravene § 8b(4)(C) of the Taft-Hartley Act, consideration must be given to the effect of that Act on the jurisdiction of state courts in labor disputes which affect interstate commerce.

Many of the difficulties which have characterized the development and application of the current New York doctrine may be traced to the use of broad language to the effect that a certification "ends the labor dispute." The "question or controversy concerning representation" presented to a labor board in a representation proceeding is narrow, indeed, compared to the breadth of a labor dispute as defined in C.P.A. § 876-a. A representation proceeding is a non-adversary, fact-finding investigation designed to ascertain whether a union represents a majority of the employees in an appropriate bargaining unit. It has no concern with many activities or controversies which clearly fall within the broader definition of labor dispute in § 876-a, such as organizational picketing, controversies as to economic conditions or contract rights.

Even in disputes concerning representation there is a vital distinction between C.P.A. § 876-a and the labor relations acts. A controversy concerning representation may exist under § 876-a although the union represents none of the employees of the employer concerned. But a question of representation under the labor relations acts exists only where the union claims, expressly or by necessary implication from its act, to represent a majority of the employees in an appropriate bargaining unit. Absent such a claim of majority status, the petition is dismissed on the ground that no question or controversy concerning representation exists.

One of the reasons for such dismissals is that an employer should not be

69. Southern Steamship Co. v. N.L.R.B., 120 F.2d 505 (3d Cir. 1941); 5 BENJAMIN, ADMINISTRATIVE ADJUDICATION IN NEW YORK 162 (1942).
72. See note 70 supra.
74. See note 73 supra.
permitted "to forestall the effects of a union to organize his employees by seeking a premature election in the midst of the union's organizational campaign."76

Nor does a certification necessarily end either the question of representation or the labor dispute. Employers sometimes challenge a certification, and refuse to bargain with the certified union, on the ground that the unit found by the Board was inappropriate,77 that the board's rulings on challenged ballots or eligibility of voters were erroneous or that the election was improperly conducted,77 that the union had coerced, or fraudulently induced, the employees to vote for it,78 or that the union had subsequently lost its majority status.79

A union which has been defeated in a board election may also claim that the certification was erroneous for similar reasons. Unions, however, have been unable to secure judicial review of NLRB determinations in representation proceedings.80 In New York, the question whether a union may secure judicial review of a representation proceeding has not been finally decided.81

In other cases, the certified union and the employer may be unable to reach agreement and a strike may result.

Even where there are existing contracts, labor disputes may exist or arise over interpretation, coverage or modification.82 Suits by employers, or unions, for specific performance of contracts consistently have been held to involve labor disputes.83 Where the employer, during the term

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of a collective agreement, negotiates, or executes a contract, with a rival union, labor disputes were held to exist.

Thus, it is apparent that determination of the limited question presented in a labor board representation proceeding does not necessarily “end” labor disputes as they are defined in C.P.A. § 876-a. And analysis of the majority opinion in the Florsheim case reveals that the broad implications ascribed to it in subsequent lower court decisions may be unjustified. The opinion expressly referred to the combination of “certification . . . and the execution of the collective bargaining contract." The picketing was found to be “malicious” and unlawful, “under the circumstances and conditions indicated.” And, in distinguishing the Stillwell case, it was pointed out that “the methods of selection of a collective bargaining agent had not then been declared by the Legislature as we now find it”; the employer in the Stillwell case had “voluntarily entered into a contract . . . with one union to the exclusion of its rival.

In Dinny & Robbins, Inc. v. Davis, et al. although the employer had a contract with the union which represented all the employees, there had been no prior board proceeding or certification. This distinction between the Florsheim and Dinny & Robbins cases supports the conclusion that it was not the certification in the Florsheim case, which, ipso facto, “ended” the dispute.

The NLRA, NYSLRA and Taft-Hartley Act all imposed upon employers a duty to bargain collectively with a union which represents a majority of the employees in the appropriate bargaining unit. An employer is required to approach the negotiations with a sincere resolve to reach an agreement, and to execute a written contract if agreement is reached. The duty to recognize the certified representative carries the

85. See, J. Rabinowitz & Sons, Inc. v. Devery et al., 33 N.Y.S.2d 752 (Sup. Ct. 1942).
86. See, Serval Slide Fasteners, Inc. v. Molletta et al., 188 Misc. 787, 70 N.Y.S. 2d 411 (Sup. Ct. 1947). “The decision by the Labor Board following the election meant that that ‘labor dispute’ was officially ended forever.” Id. at 790, 70 N.Y.S.2d at 415.
88. Id. at 201, 42 N.E.2d at 485 (emphasis added).
89. Id. at 201, 42 N.E.2d at 486 (emphasis added).
90. 290 N. Y. 101, 48 N.E.2d 280 (1943).
91. NLRA § 8(5); Taft-Hartley Act § 8a (5); NYSLRA § 704 (b).
correlative duty to recognize no other. Accordingly, where the objective of picketing is to compel recognition by an employer who has a contract with a certified rival union, its purpose is unlawful, for it seeks to induce or compel a violation of law.

The effect of an unlawful purpose had been considered by the Court of Appeals in Opera on Tour, Inc. v. Weber, et al. and American Guild of Musical Artists, Inc. v. Petrillo, et al. both decided before the Florsheim and Dinny & Robbins cases. "Unless the objective of the defendant-union is a lawful one, this controversy is not a 'labor dispute' in the sense of section 876-a of the Civil Practice Act." The validity of this doctrine was vigorously challenged by a minority of the court. Nevertheless, the decision constitutes the law of the State and, in view of the obvious distinctions between the limited question determined in a representation proceeding and the broad definition of a "labor dispute," provides a more reasonable rationale for the Florsheim decision.

Where an employer has a contract with an uncertified union, the same considerations are applicable. Certification by the NLRB or NYSLRB is not a condition precedent to the employer's duty to recognize and negotiate a contract with a union which represents a majority of the employees in the appropriate bargaining unit. Accordingly, a strike or

96. 286 N. Y. 226, 36 N. E. 2d 123 (1941).
97. Id. at 231, 36 N. E. 2d at 125. See also Lubliner et al. v. Reilrib et al., 184 Misc. 472, 50 N. Y. S. 2d 786 (Sup. Ct. 1944).
98. See Lehman, C. J., in American Guild of Musical Artists, Inc. et al. v. Petrillo et al., 286 N. Y. 226, 36 N. E. 2d 123 (1941): "I still do not understand how a statute which expressly provides that in a case 'involving or growing out of a labor dispute,' acts specified therein, may not be enjoined 'on the ground that the persons engaged therein constitute an unlawful combination or conspiracy or on any other grounds whatsoever' can be construed in manner which would exclude from the statutory definition of a 'labor dispute' any dispute with a labor union unless 'the objective of the labor union is a lawful one.'" Id. at 232, 36 N. E. 2d at 126 (dissenting opinion). Language of the Court of Appeals in the Bauer case, would seem contrary to the holding in the Opera on Tour and Petrillo cases. There, in rejecting a contention that extreme violence removed the case from the concept of a labor dispute, it was said: "The fallacy of this argument is revealed by the fact that where a defendant has not been guilty of unlawful activities, perforce no injunction would issue even in the absence of section 876-a. The need for statutory safeguards can exist only where a defendant is guilty of some wrongdoing and is liable to injunctive restraint. The effect of the statute is to regulate the procedure by which an injunction may be obtained and to limit the scope of the relief which may be granted. The statute is rendered meaningless unless it is allowed to operate in those cases where plaintiff is entitled to some relief." May's Furs and Ready-To-Wear, Inc. et al. v. Bauer et al., 282 N. Y. 331, 341, 26 N. E. 2d 279, 284 (1940). See also Galenson and Spector, The New York Labor-Injunction Statute and the Courts, 42 Col. L. Rev. 51, 66-8, 74 (1942).
99. N. L. R. B. v. Dahlstrom Metallic Door Co., 112 F. 2d 756 (2d Cir. 1940);
picketing to compel the employer to violate his legal duty, again, is for an unlawful purpose. Here, however, the problem is more complex. In the absence of a labor board certification, the union’s majority status at the time of execution of the contract, and hence the validity of the contract, is subject to challenge. And that question is one for determination by the appropriate labor relations board, not the courts.

The New York courts have proceeded on the presumption that the contract is valid until the appropriate board holds otherwise. This “presumption,” however, may present a vexatious question if the picketing union files a charge with the board challenging the validity of the contract. In the past unions which had filed charges with the NYSLRB, have applied to the courts for injunctions requiring maintenance of the status quo pending board determination. But such applications consistently have been denied by the courts on the ground that the board’s jurisdiction is exclusive and that the courts could not grant relief without prejudging the very issues before the board. In those cases, the injunctive relief sought was ancillary to, and in aid of, the board’s complaint. It would seem inconsistent, therefore, to grant injunctive relief in favor of the employer on the basis of a contract, the validity of which has been challenged in a complaint issued by the board.

Additional problems may also arise in situations where it is urged that an existing contract does not “bar” a representation petition filed by a rival union because the contract is about to expire, is of unreasonable duration, has been reopened by the parties thereto, has been pre-

100. N.L.R.B. v. Graham et al., 159 F.2d 787 (9th Cir. 1947); N.Y.S.L.R.B. v. Club Transportation Corp. et al., 275 App. Div. 536, 90 N.Y.S.2d 367 (2d Dep’t 1949).
104. Round California Chain Corp., 64 N.L.R.B. 242 (1945); Walter Jansen & Son, 63 N.L.R.B. 121 (1945); Peerless Stages, Inc., 62 N.L.R.B. 1514 (1945).
105. Universal Pictures Co., 55 N.L.R.B. 52 (1944); Dolese & Shepard Co., 57 N.L.R.B. 1598 (1944); Port Costa Packing Co., 46 N.L.R.B. 931 (1943).
maturely extended,\textsuperscript{107} or the contracting union has become defunct.\textsuperscript{108}

In cases where no majority representative has been selected by the employees and there is neither certification nor an existing contract, a wholly different type of situation is presented. In such cases, of course, there can be no contention that picketing is for the unlawful purpose of compelling the employer to violate his legal duty to recognize a majority representative. The question remains whether it is for any other unlawful purpose.

The Court of Appeals, in \textit{May's Furs and Ready-to-Wear, Inc. et al. v. Bauer et al.},\textsuperscript{109} held that a labor dispute existed within the meaning of C.P.A. § 876-a although none of the plaintiff's employees was a member of the union. Legal justification, under the \textit{prima facie tort theory},\textsuperscript{110} was found to exist in that "Although the members of the defendant union are not the employees of plaintiff employer, no less is their direct interest in the labor policy of an employer who is engaged in the same industry as they are. It is common knowledge that the conditions of employment prevailing in a given establishment cannot be insulated against the influence of different standards which may exist elsewhere in that industry."\textsuperscript{111}

In the \textit{May's} case, there had been no prior representation proceeding. The finding that the union did not represent the employees was made by the court in the first instance. However, the fact that the finding is made by a board, rather than the court, would not constitute an adequate basis for distinction. The \textit{method} of ascertaining the union's non-representative status manifestly has no bearing on the economic or legal justification for the union's actions. The absence of prior board proceedings did not prevent a determination in the \textit{May's} case that a labor dispute existed, nor did it prevent a contrary holding in the \textit{Dinny & Robbins} case. Clearly, then, the fact that a labor relations board, rather than a court, has determined the union's non-majority status should not occasion different legal consequences.

In \textit{Building Service Employees Union, et al. v. Gazzam},\textsuperscript{112} the Supreme

\begin{itemize}
\item\textsuperscript{107} Modine Manufacturing Co., 89 N.L.R.B. 1360 (1950); Indiana Deck Co., 82 N.L.R.B. 103 (1949).
\item\textsuperscript{108} Koppers Company, 72 N.L.R.B. 31 (1947); Perfection Spring and Equipment Co., 72 N.L.R.B. 590 (1947); Boston Machine Works Co., 89 N.L.R.B. 59 (1950).
\item\textsuperscript{109} 282 N.Y. 331, 26 N.E.2d 279 (1940).
\item\textsuperscript{110} See Opera on Tour v. Weber, 285 N.Y. 348, 34 N.E.2d 349 (1941).
\item\textsuperscript{111} May's Furs and Ready-to-Wear \textit{et al. v. Bauer et al.}, 282 N.Y. 331, 339, 26 N.E.2d 279, 283 (1940). A later case in which a labor dispute was held to exist, although the union did not represent the employees, is Schivera v. Long Island Lighting Co., 296 N.Y. 26, 69 N.E.2d 233 (1946).
\item\textsuperscript{112} 339 U.S. 532 (1950).
\end{itemize}
Court of the United States affirmed an injunction against picketing, stating: "An adequate basis for the instant decree is the unlawful objective of the picketing, namely, coercion by the employer of the employees' selection of a bargaining representative." The affirmance, however, was qualified in two significant respects. First, the union had demanded a contract which would have required the employees to join the union against their express desires. "If respondent [employer] had complied with petitioners' demands . . . he would have thereby coerced his employees" in violation of the state's statutory policy that employees should be free to join or not to join unions free from interference, restraint or coercion of employers of labor.

Second, the Court's opinion repeatedly emphasized that the decree which it affirmed only enjoined picketing for the specified unlawful purpose, and did not bar peaceful picketing "directed at employees for organization purposes" or "any lawful purpose."

It may be that, under the principles of the Gazzam case, the dispute is between the union and the employees, not the employer. Nevertheless, C.P.A. § 876-a specifically provides that a "labor dispute" includes controversies between unions and employees. That the plaintiff is not a party to the dispute does not enable him to "by-pass the express prohibition of § 876-a."

Moreover, the NYSLRA, unlike the Taft-Hartley Act and the Washington statute in the Gazzam case, makes no mention of a right of employees to "decline" to associate. Section 704(5) of the NYSLRA, provides that it shall be an unfair labor practice for an employer "to encourage membership in any company union or discourage membership in any labor organization." In this respect it differs too from the NLRA

113. Id. at 539.
114. Id. at 540.
115. Id. at 539. Also: "There was no injunction against picketing generally." Id. at 536. "Peaceful picketing for any lawful purpose is not prohibited by the decree under review." Id. at 539. "The Washington statute has not been construed by the Washington courts in this case to prohibit picketing of workers by other workers." Ibid. "There is no contention that picketing directed at employees for organization purposes would be violative of that policy. The decree does not have that effect." Ibid.
116. Picketing the homes of non-striking or non-union employees has been enjoined as occurring away from the situs of the dispute. Remington Rand, Inc. v. Crofoot, 248 App. Div. 356, 359, 289 N.Y. Supp. 1025 (4th Dep't 1936), aff'd without opinion, 279 N.Y. 635, 18 N.E.2d 37 (1938); Miller v. Gallagher, 176 Misc. 647, 28 N.Y.S.2d 606 (Sup. Ct. 1941). Quaere. Are such activities now permissible under the theory that the dispute is between the union and the employees, rather than between the union and the employer?
117. C.P.A. § 876-a (10) (a).
which declared it unlawful for an employer to encourage or discourage membership in any labor organization.\textsuperscript{119}

Assuming that New York policy is similar to that of the State of Washington, it would seem, nevertheless, that, in the absence of a demand for a contract requiring union membership,\textsuperscript{120} peaceful and truthful organizational picketing, after dismissal or withdrawal of a representation proceeding, is not unlawful in purpose and hence involves a labor dispute within C.P.A. § 876-a. Indeed, despite the recent restrictive interpretations of \textit{Thornhill v. Alabama},\textsuperscript{121} such picketing probably is still constitutionally protected. Even where such a contract has been unlawfully demanded, it is doubtful, in view of the Supreme Court's language in the \textit{Gazzam} case, that picketing for other, and lawful purposes, could be enjoined. The Court frequently has cautioned that wherever it is possible to separate the legal from the illegal, injunctive relief should be limited to prohibition of the latter only.\textsuperscript{122}

\textit{Effect of the Taft-Hartley Act}

There remains for consideration the effect of the Taft-Hartley Act on state regulation of minority union strikes or picketing in disputes which affect interstate commerce.\textsuperscript{123}

The Taft-Hartley Act "preempts the field that the Act covers in so far as commerce within the meaning of the Act is concerned."\textsuperscript{124} The field covered is vast, both in the comprehensiveness of the regulation and the extent to which federal power under the Commerce Clause was

\textsuperscript{119} NLRA § 8 (3).
\textsuperscript{120} If there is no majority representative, a "members only" contract is lawful. Hoover Co., 90 N.L.R.B. No. 201 (Aug. 1, 1950). See also N.L.R.B. v. Reliable Newspaper Delivery, Inc., 187 F.2d 547 (3d Cir. 1951); Electronics Equipment Co., 94 N.L.R.B. No. 19, (Apr. 30, 1951).
\textsuperscript{124} Electric Railway Employees v. Wisconsin Employment Relations Board et al., 340 U.S. 383 (1950).
exercised.\textsuperscript{125} Within that field, state regulation, even if consistent with federal law, is forbidden.\textsuperscript{126} State regulation in an industry in which the NLRB customarily asserts jurisdiction is precluded even though the NLRB has never asserted jurisdiction over the particular employer.\textsuperscript{127} Power to prevent unfair labor practices which affect interstate commerce is vested exclusively in the NLRB,\textsuperscript{128} and the ban on state regulation is applicable whether effected through board order,\textsuperscript{129} court decree\textsuperscript{130} or legislative enactment.\textsuperscript{131}

It seems clear, therefore, that state courts are deprived of jurisdiction over minority union efforts to compel disregard of an NLRB certification, for such activities violate section 8b(4)(C) of the Taft-Hartley Act and thus come within the exclusive jurisdiction of the NLRB.

Attempts to compel disregard of contracts with uncertified unions again present a more difficult problem. There can be no violation of § 8b(4)(C) in the absence of an outstanding NLRB certification.\textsuperscript{132} Since the Taft-Hartley Act does not specifically cover this type of situation it may be urged that the states are free to act. The argument finds support in § 8d of the Taft-Hartley Act which requires a sixty day notice of intention to terminate or modify a collective agreement and deprives premature strikers of their status as employees. It may be said, therefore,

\textsuperscript{125} "Congress ... saw fit to regulate labor relations to the full extent of its constitutional power under the Commerce Clause." \textit{Id.} at 388.

\textsuperscript{126} Bethlehem Steel Co. v. N.Y.S.L.R.B., 330 U.S. 767, 775-6 (1947).

\textsuperscript{127} LaCrosse Telephone Co. v. Wisconsin Employment Relations Board \textit{et al.}, 336 U.S. 18 (1949).


\textsuperscript{129} Plankington Packing Co. v. Wisconsin Employment Relations Board \textit{et al.}, 338 U.S. 953 (1950).


that as a minority union strike during the term of a contract is neither
protected nor prohibited by the Taft-Hartley Act, state action is not
precluded. Nevertheless, more detailed analysis would appear to
indicate a contrary conclusion.

Congress, in section 8b(4), specified what union objectives or purposes
shall be unlawful. It did not include all minority union efforts to obtain
recognition. On the contrary, it prohibited such activities only where a
majority representative had been certified by the NLRB, or where a
"secondary boycott" is involved. This limitation appears to have been
intentional. The original House bill would have prohibited strikes by
all uncertified unions and strikes "to compel an employer to violate any
law." Manifestly, a much broader ban than that was eventually
enacted. The intention to distinguish between certified and uncertified
majority representatives is further emphasized by other provisions of §
8b(4). Certain secondary pressures are permissible only where there
is a certified representative. On the other hand, a refusal to cross a
picket line is permitted where the strike has been ratified by a union
which the employer "is required to recognize under this Act," i.e., either
a certified or uncertified majority representative.

Moreover, the comprehensive nature of the federal regulation of labor-
management disputes generally, and the extent of the field which has
been preempted, make it appear unlikely that Congress intended to
leave this small segment open to state regulation. Congress "spell[ed]
out with particularity those areas in which it desired state regulation to
be operative." The provision in § 8(d), depriving premature strikers
of reinstatement rights, is a form of federal regulation applicable to
minority union strikes. "Congressional imposition of certain restrictions
on...[the] right to strike, far from supporting [state regulation] shows
that Congress has closed to state regulation the field of peaceful strikes
in industries affecting commerce...And where, as here, the state seeks
to deny a federally guaranteed right which Congress itself restricted
only to a limited extent...[the state regulation] is in conflict with
federal law."

136. Id., proviso to § 8b (4).
138. Electric Railway Employees v. Wisconsin Employment Relations Board, 340 U.S. 383 (1950), citing Taft-Hartley Act §§ 8 (d), 10 (a), 14 (b), 202 (c) and 203 (b).
139. Id. at 389.
Where the employees have voted for no union, or where a representation proceeding has been withdrawn or dismissed on the union's concession of non-majority status, the state courts again would appear to be without jurisdiction. The Taft-Hartley Act "expressly safeguarded for employees [in industries affecting commerce] the 'right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection,' 'e.g. to strike,'"\textsuperscript{140} except as Congress itself imposed limitations thereon. If a strike or picketing after dismissal or withdrawal of an NLRB representation proceeding is "part of a plan to avoid a labor board election\textsuperscript{141} or to "nullify" the results thereof,\textsuperscript{142} that would seem particularly a matter of federal, not state, concern.

In \textit{Plankington Packing Co. v. Wisconsin Employment Relations Board}, et al.,\textsuperscript{143} the Supreme Court reversed, without opinion, an order of the Wisconsin Board which directed reinstatement of an employee discharged for non-membership in a union even though his employment was not covered by a union shop or similar contract. The grounds for the reversal were a subject of considerable speculation.\textsuperscript{144} The decision was recently explained in \textit{Electric Railway Employees v. Wisconsin Employment Relations Board}, et al.,\textsuperscript{145} where the Court said:

"Section 7 of the Labor Management Relations Act not only guarantees the right of self-organization and the right to strike, but also guarantees to individual employees the 'right to refrain from any or all of such activities,' at least in the absence of a union shop or similar contractual arrangement applicable to the individual. Since the NLRB was given jurisdiction to enforce the rights of the employees, it was clear that the Federal Act had occupied this field to the exclusion of state regulation. \textit{Plankington} and \textit{O'Brien}\textsuperscript{146} both show that states may not regulate in respect to rights guaranteed by Congress in § 7."\textsuperscript{147}

Thus, whether the purpose of minority union picketing is to "nullify" or "avoid" an NLRB election, or to compel an employer to coerce his

\textsuperscript{140} Id. at 387.
\textsuperscript{141} Pennock Co. v. Ferretti, 125 N.Y.L.J. 956, col. 3 (Sup. Ct. Mar. 15, 1951).
\textsuperscript{143} 338 U.S. 953 (1950).
\textsuperscript{144} See Cox and Seidman, \textit{Federalism and Labor Relations}, 64 \textit{Harv. L. Rev.} 211, 220 (1950).
\textsuperscript{145} 340 U.S. 383 (1950).
employees' choice of representatives, if interstate commerce is affected, the case would appear to be subject to federal jurisdiction only.

CONCLUSION

In intrastate matters, state regulation is permissible within Constitutional limits. However, the courts, in the great majority of cases, have limited injunctive relief to prohibition of violence and misleading signs. Inasmuch as such limited injunctions are permissible under the express provisions of C.P.A. § 876-a, it would seem that, for all practical purposes, the real effect of the current New York doctrine is to eliminate the procedural safeguards of that section.

Where interstate commerce is affected, it would appear that the NLRB has exclusive jurisdiction over minority union strikes and the state may act only to prevent violence or the violation of some state law of general application.


149. Subdiv. 1 (f) (5).


151. Giboney et al. v. Empire Storage and Ice Co., 336 U.S. 490 (1940), involving an attempt to compel violation of the state anti-trust law.