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A SUMMARY AND CRITIQUE OF THE LAW OF PEACEFUL PICKETING IN NEW YORK

EMIL SCHLESINGER†

COMPLETE candor compels the introductory observation that the present law of New York respecting peaceful picketing in labor disputes* is in a state of general uncertainty. It is undoubtedly true that the courts of original jurisdiction, and often the Appellate Divisions, and less frequently the Court of Appeals, have, by their decisions, attempted to create specific formulae in which to fit the facts of particular cases. But these formulae have been entirely artificial; there has not emerged any general understanding or solution of the problems involved. The Supreme Court of the United States has suffered from the same infirmity. Having made a complete identification of picketing with free speech in *Thornhill v. Alabama*[1] and *American Federation of Labor* et al. *v. Swing* et al.,[2] it then began to recede steadily in subsequent cases from the position which it had taken, and to such an extent, that Mr. Justice Frankfurter's declaration in *Milk Wagon Drivers' Union* et al. *v. Meadowmoor Dairies*[3] that "picketing is the workingman's means of communication" has lost much of its significance. Indeed, in *Hughes* et al. *v. Superior Court*,[4] the learned justice vigorously opposed the use of generalizations and efforts to establish a set of principles to guide decisions in future picketing cases and insisted that "Lawmaking is essentially empirical and tentative, and in adjudication as in legislation the Constitution does not forbid 'cautious advance, step by step, and the distrust of generalities'. . . . Generalizations are treacherous in the application of large constitutional concepts."

Therefore, until the New York higher courts and the Supreme Court of the United States have spoken with more authority on a greater number of factual picketing situations, the law of New York will continue to be blurred and indecisive. In the meantime, injunctions against peaceful picketing are likely to continue in cases which were originally thought to be within the allowable area of economic conflict.

Prior to 1932, the abuse of the injunction in labor disputes throughout the United States had become so widespread and notorious that it soon began to be characterized as "government by injunction." In 1914, a legislative effort was made on the national level to stem the tide.

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* This article does not include the subject of picketing in secondary boycott situations.

1. 310 U.S. 88 (1940).
2. 312 U.S. 321 (1941).
3. 312 U.S. 287 (1941).
4. 339 U.S. 460, 469 (1951).

The Clayton Act[5] was enacted, which seemingly provided procedural safeguards and immunized certain types of labor controversies and activities from injunctive restraint. The trade union movement hailed it as "Labor's Magna Charta."[6] But its exuberance was short lived. In the first cases to reach the Supreme Court of the United States for interpretation, the majority ruled in substance that the statute was merely "declaratory of the law as it stood before,"[7] "declaratory of what was the best practice always."[8]

It is not generally known, but it is nevertheless a fact, that Frankfurter and Greene's book *The Labor Injunction,* which has since become a classic in labor law, originally started as a legal study and brief in support of a bill which the authors had drafted for introduction in the Congress of the United States to regulate the use of injunctions in labor disputes—a bill which, with some modifications, was subsequently enacted into law in 1932 and became known as the Norris-LaGuardia Act. It represented "the culmination of a bitter political, social and economic controversy extending over half a century. . . . The Congress made abundantly clear their intention that what they regarded as the misinterpretation (by the courts) of the Clayton Act should not be repeated in the construction of the Norris-LaGuardia Act."[9]

I

Even before the enactment of the Norris-LaGuardia Act the New York Court of Appeals had achieved a measure of recognition for its liberality in labor cases even though, from time to time, some of the lower courts made specious distinctions upon which to base unfavorable rulings against labor unions in picketing cases.

As early as 1902, in *National Protective Association* et al. *v. Cumming* et al.,[10] and fifteen years later, in *Bossert* et al. *v. Dhuy* et al.,[11] it recognized and reiterated the principle that workingmen have the right to organize, to strike and to picket on any ground which they deemed to be sufficient so long as their purpose was to better their conditions of labor and not, through malice or otherwise, to injure their employer. Resulting injury was deemed incidental and *damnum absque*

5. 38 STAT. 731, 15 U.S.C. § 14 *et seq.* (1914).

6. GOMPERS, SEVENTY YEARS OF LIFE AND LABOR 299 (1943).

7. Duplex Printing Press Co. *et al.* v. Deering *et al.,* 254 U.S. 443, 470 (1921).

8. American Steel Foundries v. Tri-City Central Trades Council *et al.,* 257 U.S. 184, 203 (1921).

9. Milk Wagon Drivers Union *et al.* v. Lake Valley Farm Products Inc. *et al.,* 311 U.S. 91, 102, 103 (1940).

10. 170 N.Y. 315, 63 N.E. 369 (1902).

11. 221 N.Y. 342, 117 N.E. 582 (1917).

injuria. This was an even more generous concept than that which had been urged by Mr. Justice Holmes in one of his famous dissents.[12]

Despite these decisions, the lower courts of New York continued to inflict heavy blows on organized labor by granting injunctions upon new theories which they quickly developed. They held that there could be no picketing, no matter how peaceful, in the absence of a strike, and that there could be no strike unless the workers of the employer involved had actually honored the union's request to quit work.[13] In addition, they enjoined all picketing which in any way interfered with the performance of a "yellow dog" contract.[14]

Possibly the political climate prevalent at the time, the results of the election returns, the economic predilections of the judge deciding the particular case, may have influenced these decisions. If they looked for a peg on which to hang their views, anti-labor judges easily found it in the anti-labor decisions of that day of the Supreme Court of the United States in the *Hitchman Coal & Coke Co.* case[15] (which sus-

12. While still a member of the Supreme Judicial Court of Massachusetts the learned Justice had stated, in Vegelahn v. Guntner *et al.*, 167 Mass. 92, 105, 106, 44 N.E. 1077, 1080 (1896),

". . . when a plaintiff proves that several persons have combined and conspired to injure his business, and have done acts providing that effect, he shows temporal damage and a cause of action, unless the facts disclose or the defendants prove some ground of excuse or justification, . . .

"Nevertheless, in numberless instances the law warrants the intentional infliction of temporal damage, because it regards it as justified. It is on the question of what shall amount to a justification, and more especially on the nature of the considerations which really determine or ought to determine the answer to that question, that judicial reasoning seems to me often to be inadequate. The true grounds of decisions are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and general propositions of law which nobody disputes. Propositions as to public policy rarely are unanimously accepted, and still more rarely, if ever, are capable of unanswerable proof. They require a special training to enable anyone even to form an intelligent opinion about them."

Here, again, Mr. Justice Holmes was far ahead of his time. His prophetic vision came to realization some forty years later when Congress and state legislatures created special boards of experts to resolve the problems which might arise under the respective labor-management laws which they had, in the meantime, enacted.

13. L. Daitch & Co. v. Cohen, 218 App. Div. 80, 217 N.Y. Supp. 817 (1st Dep't 1926); Cushman's Sons Inc. v. Amalgamated Food Workers' Bakers, 127 Misc. 152, 215 N.Y. Supp. 401 (Sup. Ct. 1926); Public Baking Co. v. Stern, 127 Misc. 229, 215 N.Y. Supp. 537 (Sup. Ct. 1926); Traub Amusement Co. v. Macker, 127 Misc. 335, 215 N.Y. Supp. 397 (Sup. Ct. 1925); Bolivian Panama Co. v. Finkelstein, 127 Misc. 337, 215 N.Y. Supp. 399 (Sup. Ct. 1925).

14. Altman v. Schlesinger, 204 App. Div. 513, 198 N.Y. Supp. 128 (1st Dep't 1923); Vail-Ballou Press v. Casey, 125 Misc. 689, 212 N.Y. Supp. 113 (Sup. Ct. 1906). See also People v. Marcus, 185 N.Y. 257, 77 N.E. 1177 (1906), holding unconstitutional a statute making it a criminal offense to coerce workers to enter into a "yellow dog" contract.

15. Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917).

tained the "yellow dog" contract) and in the *Duplex Printing Press Company*[16] and the *Bedford Cut Stone*[17] cases (which limited picketing to situations in which the labor disputants stood in the proximate relation of employer and employee).

The Court of Appeals, in the first case on the subject to come before it, reversed the superficial thinking of the courts below. At the same time it by-passed the principles enunciated in the *Cumming* and *Bossert* cases and substituted the doctrine of legality of means and ends as a basis for justification of temporal damage caused by the activities of a union. In 1927, in *Exchange Bakery & Restaurant, Inc. v. Rifkin* et al.,[18] the court held:

"The purpose of a labor union to improve the conditions under which its members do their work; to increase their wages; to assist them in other ways, may justify what would otherwise be a wrong. So would an effort to increase its numbers and to unionize an entire trade or business. It may be as interested in the wages of those not members, or in the conditions under which they work as in its own members because of the influence of one upon the other. All engaged in a trade are affected by the prevailing rate of wages. All, by the principle of collective bargaining. Economic organization today is not based on the single shop. Unions believe that wages may be increased, collective bargaining maintained only if union conditions prevail, not in some single factory, but generally. That they may prevail it may call a strike and picket the premises of an employer with the intent of inducing him to employ only union labor. And it may adopt either method separately. Picketing without a strike is no more unlawful than a strike without picketing. Both are based upon a lawful purpose. Resulting injury is incidental and must be endured."

It may be noted, parenthetically, that some years later the Supreme Court of the United States in *American Federation of Labor* et al. *v. Swing* et al.,[19] arrived at the same result. In reversing an injunction which had been sustained by the highest court of the State of Illinois, Mr. Justice Frankfurter, writing for the majority of the Court, stated:

"A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace. . . . The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ."[19a]

Under such circumstances, peaceful picketing was declared to be constitutionally protected under the Fourteenth Amendment.

16. Duplex Printing Press Co. *et al.* v. Deering *et al.*, 254 U.S. 443 (1921).

17. Bedford Cut Stone Co. v. Journeymen Stone Cutters Ass'n *et al.*, 274 U.S. 37 (1927).

18. 245 N.Y. 260, 263, 157 N.E. 130, 132, 133 (1927).

19. 312 U.S. 321 (1941).

19a. *Id.* at 326.

In 1932, five years after the decision in the *Exchange Bakery* case, the Court of Appeals, in *Stillwell Theatre v. Kaplan,*[20] expanded its philosophy still further. That case involved a jurisdictional dispute between two unions of motion picture operators. One of these unions had entered into a contract with the plaintiff. Thereupon, defendant union peacefully picketed the plaintiff for the purpose of inducing it to employ members of that union. Special Term[21] enjoined the picketing upon the ground that its purpose was to induce a breach of the existing contract between plaintiff and the rival union and was, therefore, illegal. The Appellate Division affirmed.[22] In voicing disagreement with these rulings, the Court of Appeals declared[23] that the defendant union's conduct was "within the allowable area of economic conflict" and that "the interests of capital and labor are at times inimical and the courts may not decide controversies between the parties so long as neither resorts to violence, deceit or misrepresentation to bring about desired results."

It concluded that:

"We would . . . give to one labor 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. It is not within the province of the courts to restrain conduct which is within the allowable area of economic conflict."[24]

A year earlier, Chief Judge Cardozo declared in *Nann v. Raimist,*[25] that a union had an "indubitable right to win converts over to its fold by recourse to peaceable persuasion, and to induce them by like methods to renounce allegiance to its rival," and that "What is wrong must be so clearly wrong that only 'disinterested malevolence' . . . or something close akin thereto, can have supplied the motive power. . . . If less than this appears, a court of equity will stand aside."[25a]

Generally speaking, the legal climate of labor-management relations in the State of New York prior to the enactment by Congress of the Norris-LaGuardia Act[26] in 1932 was as follows: employers were under no legal compulsion to bargain collectively, company dominated unions were not unlawful, stranger picketing was recognized, closed shop contracts were valid even though the union represented only a minority or

20. 259 N.Y. 405, 182 N.E. 63 (1932).
21. 140 Misc. 142, 249 N.Y. Supp. 122 (Sup. Ct. 1931).
22. 235 App. Div. 738, 255 N.Y. Supp. 715 (2d Dep't 1932).
23. 259 N.Y. 405, 410, 412, 182 N.E. 63, 65, 66 (1932).
24. *Id.* at 412, 182 N.E. at 66.
25. 255 N.Y. 307, 174 N.E. 690 (1931).
25a. *Id.* at 319, 174 N.E. at 695.
26. 47 STAT. 70, 29 U.S.C.A. § 101 *et seq.* (1932).

none of the employees, discrimination against employees because of union membership or activity was not prohibited,[27] and injunctions were issued freely in labor controveries where there was evidence of violence, breach of the peace or fraud.

II

Although the Norris-LaGuardia Act antedated by approximately one year the advent of the first Franklin D. Roosevelt administration, it may fairly be said to be part of that philosophy of government which has since been lauded and excoriated as the "New Deal." And it is the New Deal which marks the origin of the modern law of labor relations. It was during this period that the National Industrial Recovery Act,[28] with its famous Section 7(a), was enacted, guaranteeing to workers the right of self-organization and to bargain collectively through representatives of their own choosing. A learned justice[29] said of it, "In section 7(a) we have reached the rubicon of industrial relations." It was during the same era that the Wagner Act[30] came into being.

During the same period, the legislature of the State of New York enacted measures designed not only to guard against infringements of the rights already granted to labor unions by the New York courts, but also to expand those rights and to create new ones. Thus, in 1935, it passed Section 876-a of the Civil Practice Act,[31] as the state counterpart of the Norris-LaGuardia Act, and, in 1937, it passed the New York State Labor Relations Act,[32] as the state counterpart of the Wagner Act, to insure to workers engaged in intrastate commerce the same rights as those possessed by workers engaged in industries affecting interstate commerce.

Yet, it is one of the anomalies of our law that these statutes, the purpose of which was to protect and expand the rights of labor unions and to create new rights for them, have been perverted by the New York courts into instruments for oppressing them and restricting their rights.

Section 876-a of the Civil Practice Act was intended to regulate the use of the injunction in labor disputes. It divested the courts of juris-

27. Exchange Bakery & Restaurant, Inc. v. Rifkin, *et al.*, 245 N.Y. 260, 264, 157 N.E. 130, 133 (1927); Interborough Rapid Transit Co. v. Lavin, 247 N.Y. 65, 74, 75, 79, 159 N.E. 863, 866, 868 (1928).

28. 48 STAT. 195 (1933); declared unconstitutional in A. L. A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935).

29. Farulla v. Ralph A. Freundlich, Inc., 153 Misc. 738, 277 N.Y. Supp. 47, 62 (Sup. Ct. 1934) (J. Black).

30. 49 STAT. 449, 29 U.S.C.A. § 151 *et seq.* (1935).

31. N.Y. Laws of 1935, c. 477, effective April 25, 1935.

32. N.Y. Laws of 1937, c. 443, effective May 20, 1937; N.Y. LABOR LAW § 700 *et seq.*

diction to issue restrictive decrees in cases involving or growing out of labor disputes, except upon specified conditions. These included a finding of fact that an unlawful act or breach of a contract not contrary to public policy had been threatened or committed, as a result of which the complainant's property was being subjected to substantial and irreparable injury. Such finding could be made only after a hearing upon notice in which there was full opportunity for confrontation and cross-examination of witnesses. Any temporary injunction granted was to be limited to a duration of ten days and any permanent injunction was to be limited to six months subject to renewal after a further hearing. The term "labor dispute" was defined in the broadest possible language. It included "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the relation of employer and employee." A case involved or grew out of a "labor dispute" when it "involves persons who are engaged in the same industry, trade, craft or occupation, or who are employees of one employer" 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, or when the case involves any conflicting or competing interests of persons participating or interested in a "labor dispute." In cases "involving or growing out of a 'labor dispute' " the courts were deprived of power to issue injunctions, which prohibit, directly or indirectly, any person or persons from doing, whether singly or in concert, the following, among other, acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any agreement, undertaking or promise;

(c) Giving publicity to and obtaining or communicating information regarding the existence of, or the facts involved in, any dispute, whether by advertising, speaking, picketing, patrolling any public street or any place where any person or persons may lawfully be, or by any other method not involving fraud, violence or breach of the peace;

(d) Ceasing to patronize or employ any person or persons;

(e) Doing in concert any of the aforementioned acts on the ground

that the persons engaged therein constitute an unlawful combination or conspiracy or on any other grounds whatsoever.

The Wagner Act and the New York State Labor Relations Act both guaranteed to employees 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 intervention, restraint or coercion. A labor organization which represented a majority of the employees in an appropriate bargaining unit became the exclusive bargaining representative of all of the employees in the unit and the employer was placed under a legal duty to recognize and negotiate with the majority representative. "Company unions" were prohibited, the closed shop was declared legal if assented to by the majority representatives and the employer was prohibited from discriminating against his workers because of their union affiliation or activities. Election machinery was provided to determine which labor organization, if any, a majority of the employees in an appropriate bargaining unit desired to represent them. Boards of experts were created to deal with the problems arising under each of the labor relations acts and to enforce their decisions.

During the first few years following the enactment of Section 876-a, the Wagner Act, and the New York State Labor Relations Act, the trade union movement in America began to make substantial progress. It was during this period that the CIO was created. It set itself out to organize the workers in the mass production industries. But soon, an intense rivalry developed between the CIO and the AFL. Each competed with the other to represent the unorganized workers of the same employer. A number of jurisdictional strikes took place and new legal problems were created for the courts. Nevertheless, unionization proceeded at a rapid pace. Strikes for higher wages, shorter hours, and improved working conditions were occurring with greater frequency. New techniques of picketing developed. The whole industrial picture of America was undergoing a fundamental change. The organized labor movement was pressing forward toward greater gains. But there was still an overwhelming number of employers, large and small, who were resisting unionization of their workers and improvement of their conditions of labor. In this struggle, the trade unions, on their side, had the rights granted them in Section 876-a, the Norris-LaGuardia Act, and the national and state labor relations acts which set forth the allowable area of economic conflict; the employers, on their side, enlisted the aid of courts of equity to grant them relief notwithstanding these statutes.

Under the definitions in Section 876-a of "labor dispute" and "cases

involving or growing out of a labor dispute," the court was obviously limited to an inquiry into the question of whether the controversy concerned terms or conditions of employment, or employment relations, or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stood in the proximate relation of employer and employee. If the controversy came within the definitions, Section 876-a deprived the courts of power to issue injunctions except under specified circumstances. The court did not have the function or responsibility to weigh the interests of labor, capital and the public, or to approve the wisdom of the union's objective, no matter how disastrous the social consequences. That had already been done by the legislature. It had declared the public policy of the State of New York.

However, the courts found a convenient way of by-passing Section 876-a in cases where they themselves believed that the facts warranted the issuance of an injunction even though Section 876-a precluded it. They ignored the will of the legislature by resurrecting the old and hoary phrase "unlawful labor objective." They reasoned that if the conduct pursued by a union was in furtherance of a purpose which they did not understand or which, to them, seemed economically, industrially or socially unsound, or otherwise unjustified, then such conduct was in furtherance of an "unlawful labor objective" and, therefore, no "labor dispute" could be involved; absent a "labor dispute," Section 876-a offered no protection.

And so it came to pass that, as the New York legislature expanded organized labor's rights by broadening the concept of "labor dispute," so the New York courts responded by contracting organized labor's rights and eliminating from the definition of "labor dispute" such activities and objectives which they themselves deemed objectionable. This was but a repetition of what the United States Supreme Court had done many years earlier in stripping the Clayton Act—"Labor's Magna Charta"—of all of its vitality.

From this point on, the main questions which the courts of New York State proceeded to determine first in all picketing cases to come before them were: "When is a 'labor dispute' a 'labor dispute'?" "When is a strike a strike?"

The first major test of Section 876-a arose in 1937 in *Thompson v. Boekhout* et al.[33] In that case, the plaintiff was the sole owner of a small motion picture theatre. He had employed one projectionist. Later he discharged him and took over his duties himself. Thereupon, the defendant union stationed pickets, including the discharged employee, to

33. 273 N.Y. 390, 7 N.E.2d 674 (1937).

force plaintiff to reemploy the projectionist under a contract prepared by the union. Special Term granted an injunction and held that a "labor dispute" within the meaning of Section 876-a was not involved. The Court of Appeals in a per curiam opinion held:

"Where the owner of a small business seeks to avoid 'labor disputes' as defined in the statute, by running his business without any employees, an attempt to induce or coerce him to hire an employee or employees, upon terms and conditions satisfactory to persons associated in such attempted inducement or coercion, is not a 'labor dispute' within the letter or spirit of the statutory definition."[33a]

Prior to Section 876-a, the courts of New York had consistently enjoined picketing of firms which employed no workers.[34]

Although Section 876-a did not expressly require that there be employment, it did include in the definition of "labor dispute" "any controversy . . . concerning employment relations. . . ."

The Court of Appeals, nevertheless, ruled in the *Thompson* case that employment was a prerequisite to any "labor dispute."

Decisions in the Federal courts interpreting "labor dispute" under the Norris-LaGuardia Act have taken a contrary position.[35]

Notwithstanding the decision in *Thompson v. Boekhout* et al., the Court of Appeals later in the same year rendered two decisions which were notable for their liberality.

In the first, *Edjomac Amusement Corp. v. Empire State Motion Picture Operators' Union, Inc.*,[36] decided in April 1937, the defendant union picketed an employer, who was in contractual relations with a rival union, for the purpose of peacefully persuading its employees to join the defendant. Special Term permitted picketing, under these circumstances, but enjoined the use of signs which read—"An Appeal. Don't patronize this theatre. It does not employ members of (defendant union)," unless there was added to it the legend that plaintiff "employs union labor to operate motion picture machines." On appeal, the complaint was dismissed on the authority of *Stillwell Theater v. Kaplan*.[37]

In the second case, decided in December 1937, the Court of Appeals handed down one of its most notable decisions—*Goldfinger v. Feintuch*.[38] In that case a non-union manufacturer of "kosher" meat products was paying its butchers wages substantially less than were being paid in

33a. *Id.* at 393, 7 N.E.2d at 675.

34. Luft v. Flove, 270 N.Y. 640, 1 N.E.2d 369 (1936); Yablonowitz v. Korn, 205 App. Div. 440, 199 N.Y. Supp. 769 (1st Dep't 1923).

35. Rohde v. Dighton, 27 F. Supp. 149 (W.D. Mo. 1939). *Cf.* Senn v. Tile Layers Protective Union, 301 U.S. 468 (1937).

36. 273 N.Y. 647, 8 N.E.2d 329 (1937).

37. 259 N.Y. 405, 182 N.E. 63 (1932).

38. 276 N.Y. 281, 11 N.E.2d 910 (1937).

union plants. The union endeavored to obtain a collective agreement from him providing for the same labor standards as prevailed in union plants. When it was unsuccessful, it decided to picket the non-union made products at the retail stores selling the product. It placed one or two pickets at the plaintiff's store who carried signs bearing legends which called the attention of the public to the name of the non-union manufacturer whose products were being sold in the store and which requested customers to buy union-made products only. Plaintiff sought an injunction to restrain the picketing. The Court of Appeals ruled that a "labor dispute" was involved under Section 876-a and dismissed the complaint. It stated that "where a retailer is in unity of interest with the manufacturer, the union may follow the *non-union goods* and seek by peaceful picketing to persuade the consuming public to refrain from purchasing the *non-union product,* whether that is at the plant of the manufacturer or at the store of the retailer in the same line of business and in unity of interest with the manufacturer," even though the storekeeper may be "the sole person required to man his business."[38a]

This decision still stands as the authoritative law[39] of New York. But, as the courts developed an unsympathetic attitude towards many of organized labor's objectives and activities so they began to limit the *Goldfinger v. Feintuch* decision to the precise facts of that case.[40]

Until the enactment of the Taft-Hartley Act, the federal courts gave a much broader interpretation to the term "labor dispute" in the Norris-LaGuardia Act. They permitted not merely picketing of the product, but also of the retailer who sold the product.[41]

The next major test of Section 876-a arose in 1939. In *Busch Jewelry Co. Inc. v. United Retail Employees Union, Local 830,*[42] the Court of Appeals was confronted with picketing which was accompanied by

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38a. *Id.* at 287, 11 N.E.2d at 913.

39. People v. Muller *et al.,* 286 N.Y. 281, 36 N.E.2d 206 (1941).

40. People v. Bellows, 281 N.Y. 67, 22 N.E.2d 238 (1939); Mayer Bros. v. Meltzer *et al.,* 274 App. Div. 169, 80 N.Y.S.2d 874 (1st Dep't 1948); Canepa v. Doe, 251 App. Div. 802, 297 N.Y. Supp. 147 (1st Dep't 1937), *aff'd,* 277 N.Y. 52, 12 N.E.2d 790 (1938); American Gas Stations, Inc. v. Doe, 250 App. Div. 227, 293 N.Y. Supp. 1019 (2d Dep't 1937); City Entertainment Corp. v. Young, 194 Misc. 367, 85 N.Y.S.2d 605 (Sup. Ct. 1948); Elizabeth Arden Sales Corp. v. Hawley *et al.,* 176 Misc. 821, 28 N.Y.S.2d 936 (Sup. Ct.), *aff'd,* 261 App. Div. 953, 27 N.Y.S.2d 423 (1st Dep't 1941).

41. Bakery Sales Drivers v. Wagshal, 333 U.S. 437 (1948); Milk Wagon Drivers Union *et al.* v. Lake Valley Farm Products Inc. *et al.,* 311 U.S. 91 (1940); Taxicab Drivers Local v. Yellow Cab, 123 F.2d 262 (10th Cir. 1941); Wilson & Co. v. Birl *et al.,* 27 F. Supp. 915 (D. C. Pa.), *aff'd,* 105 F.2d 948 (3d Cir. 1939).

42. 281 N.Y. 150, 22 N.E.2d 320 (1939).

intense violence. Upon the facts it was clear that injunctive relief was warranted even under the provisions of Section 876-a.

No defense will here be made of violence as a technique of picketing. Nor is there any question about the power of state courts, either in the absence or presence of statute, to enjoin violent and fraudulent conduct.[43] Although the result reached in the *Meadowmoor* case, decided two years later, has been severely criticized, there can be no quarrel with Mr. Justice Frankfurter's statement that there is "nothing in the Fourteenth Amendment that prevents a state if it so chooses from placing confidence in a chancellor's decree and compels it to rely exclusively on a policeman's club"[44] in situations where police protection is inadequate. But as the learned justice recognized in that case, "the right of free speech cannot be denied by drawing from a trivial rough incident or a moment of animal exuberance the conclusion that otherwise peaceful picketing has the taint of force," a conclusion fortified by him in a later opinion in *Cafeteria Employees Union* et al. *v. Angelos* et al.,[45] where he held that the:

"Right 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."

and where he also declared that:

". . . to use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies—like 'unfair' or 'fascist'—is not to falsify facts."[45a]

The question in the *Busch Jewelry* case was not whether violence could be enjoined under Section 876-a, but whether a permanent injunction, issued by the court below, restraining all picketing, including peaceful picketing, should be sustained. If the court were to follow Section 876-a meticulously, it would modify the injunction by restraining only the continuance of such acts as were illegal—and then only for six months—and would permit peaceful picketing to continue in the meantime. If the court were to ignore Section 876-a, then it would sustain the injunction upon the finding of the court below that the union had failed in its responsibility to the public and that any picketing by it in the future would result in the same kind of disorderly conduct and unlawful acts as had occurred in the past.[46] The Court of Appeals chose

43. Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940).

44. Milk Wagon Drivers' Union *et al.* v. Meadowmoor Dairies, 312 U.S. 287, 295 (1941).

45. 320 U.S. 293, 296 (1943).

45a. *Id.* at 295.

46. Nann v. Raimist, 255 N.Y. 307, 174 N.E. 690 (1931); Exchange Bakery & Restaurant, Inc. v. Rifkin *et al.*, 245 N.Y. 260, 157 N.E. 130 (1927).

the latter course and held that, under the circumstances of this case, Section 876-a did not limit the powers of the court to prohibit all picketing.

It should be observed that the following year, however, the Court in *May's Furs & Ready-To-Wear, Inc.* et al. *v. Bauer*[47] applied Section 876-a and permitted peaceful picketing upon the ground that there was no finding by the court below "and perhaps no basis for a finding that an injunction against continuance of the wrongful acts which accompanied the violence would be disobeyed or that peaceful picketing is 'out of the question.'"

In that case, the employer of a large retail store and a company union with which it had entered into a collective relationship sued to enjoin the defendant, a rival union, which represented none of the employees in the store, from picketing for recognition. The court said, "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."[47a]

In the same year, 1940, in *Baillis v. Fuchs*,[48] the Court of Appeals reiterated the principle of the *Thompson v. Boekhout* et al. case that "the first essential of a 'labor dispute' is employment." However, it disregarded the lack of employment of workers at the time of the action, and held that a "labor dispute" existed because the strikers were those who, before the strike, had been in the plaintiff's employ.

A year later in *Opera on Tour, Inc. v. Weber* et al.,[49] it went the whole hog in contracting and practically destroying the definition of "labor dispute." In that case, the plaintiff was engaged in the performance of grand opera in cities and towns unable to support grand opera companies. In order to minimize its expenses the plaintiff used recorded music instead of a live orchestra to provide musical accompaniment. The defendant Musicians' Union, seeking employment for its members, demanded that the plaintiff discard the "canned" music. When the plaintiff refused to accede, the defendant union induced the

47. 282 N.Y. 331, 26 N.E.2d 279 (1940). See also Strauss *et al.* v. Steiner *et al.*, 173 Misc. 521, 18 N.Y.S.2d 395 (Sup. Ct.), *aff'd*, 259 App. Div. 725, 18 N.Y.S.2d 75 (2d Dep't 1940).

47a. May's Furs & Ready to Wear, Inc. *et al.* v. Bauer, 282 N.Y. 331, 339, 340, 26 N.E.2d 279, 283 (1940).

48. 283 N.Y. 133, 27 N.E.2d 812 (1940).

49. 285 N.Y. 348, 34 N.E.2d 349 (1941).

Stagehands' Union and the Guild of Musical Artists to order their members not to work for the plaintiff.

Although the facts clearly brought the situation within the Section 876-a definition of "labor dispute," the court nevertheless held that, inasmuch as the dispute was not reasonably connected with wages, hours, health, safety, the right of collective bargaining, or any condition of employment or for the protection from labor abuses," no lawful labor objective was involved and, hence, Section 876-a did not apply. In the words of the court, "For a union to insist that machinery be discarded in order that manual labor may take its place and thus secure additional opportunity of employment is not a lawful labor objective."[49a] The court made no attempt to evaluate the connection between the elimination of recordings and the wages, hours and conditions of employment of union members. Chief Judge Lehman dissented. He took the view that only the legislature "may restrict or enlarge the field within which combinations may lawfully act, the purposes which they may lawfully promote, and even the means which they may lawfully use; and its actions there may properly be dictated by its considered opinion of the economic, social or political consequences and the effect upon the public welfare of combinations to achieve particular ends. . . . The courts have no such power."[49b]

In the same year, the Court of Appeals reiterated its concept of "unlawful labor objective." In *American Guild of Musical Artists, Inc.*, et al. *v. Petrillo* et al.,[50] it held that a complaint for a permanent injunction stated a cause of action when it alleged that the defendant Musicians' Union refused to permit its members to render services at functions participated in by members of plaintiff Guild who were opera and concert artists unless the instrumentalists and symphony orchestra leaders resigned from plaintiff Guild and joined defendant Musicians' Union. The complaint had been attacked on the ground that a "labor dispute" was involved and the acts sought to be enjoined fell within the protection of Section 876-a. The court held that in the absence of a factual showing that defendant's demand was connected with an activity "having some reasonable connection with wages, hours, health, safety, the right of collective bargaining or some other condition of employment," the actions of the defendant did not constitute a lawful labor activity. Judge Lehman again dissented and again insisted that the majority of the court was intruding into a field from which it had been excluded by Section 876-a.

49a. *Id.* at 357, 34 N.E.2d at 353.
49b. *Id.* at 368, 34 N.E.2d at 358.
50. 286 N.Y. 226, 36 N.E.2d 123 (1941).

Reference must also be made to the decision which the Appellate Division, Second Department, rendered in *DeNeri v. Gene Louis, Inc.*[51] in 1941. The case went up on an agreed statement of facts. Here the union was the plaintiff. It sued for an injunction to restrain the violation of a collective agreement entered into by defendant, a beautician, which provided that the defendant would not charge less than certain stated minimum prices for services rendered to its customers in order to insure its ability to pay its workers the scales of wages which had been agreed upon. The *defendant employer* contended that the agreement was illegal as in restraint of trade under Section 340 of the General Business Law, that a "labor dispute" existed and that *plaintiff union* had not complied with the requirements of Section 876-a of the Civil Practice Act. The court dismissed the complaint. It held that the agreement was in restraint of trade but that a "labor dispute" did exist.

But, in *Wolchok v. Kovenetsky*,[52] which involved a dispute between two unions as to which had the right to administer an existing collective agreement with an employer and the right to the funds and records of the contracting union, the Appellate Division, First Department, held that no "labor dispute" existed. However, it denied the injunction on the ground that the affidavits raised issues of fact and ordered an immediate trial.

Also beginning with 1940, the courts of New York started to interpret Section 876-a in the light of the provisions contained in the New York State Labor Relations Act.

In *Stalban v. Friedman* et al.,[53] the defendant union, which represented none of plaintiff's employees, was picketing plaintiff who had signed a collective agreement with a rival union which had been certified by the State Labor Relations Board. The court found that a labor dispute was involved and since plaintiff had failed to comply with Section 876-a he was not entitled to injunctive relief. It said:

"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."[53a]

Two years later, the Court of Appeals decided *Florsheim Shoe Store Co.* et al. *v. Retail Shoe Salesmen's Union* et al.,[54] in which the same problem was involved. The facts showed that two unions were striving for recognition as the collective bargaining agent of plaintiff's employees.

51. 261 App. Div. 920, 25 N.Y.S.2d 463 (2d Dep't 1941).
52. 274 App. Div. 282, 83 N.Y.S.2d 431 (1st Dep't 1948).
53. 259 App. Div. 520, 19 N.Y.S.2d 978 (1st Dep't 1940).
53a. *Id.* at 521, 19 N.Y.S.2d at 979.
54. 288 N.Y. 188, 42 N.E.2d 480 (1942).

The defendant union had called a strike for recognition and was picketing plaintiff's stores. Thereafter one of the unions (said to be company dominated and controlled) instituted representation proceedings before the State Labor Relations Board and the defendant union intervened in the proceeding. An election was held in which the petitioning union was successful. It was certified and immediately entered into a collective agreement with the plaintiff. The defendant, the defeated union, continued its strike.

Special Term granted plaintiff a temporary injunction against the picketing. The Appellate Division reversed. The Court of Appeals had to contend (a) with its previous decision in the *Stillwell Theatre* case in which it had permitted picketing under these circumstances, (b) with the provisions of Section 876-a which had been enacted since that time, (c) with the State Labor Relations Act and the Wagner Act which expressly declared that the rights of employees to strike or engage in other lawful concerted activities should not be interfered with, impeded or diminished in any way, and (d) with the fact that nothing in these Acts contained any prohibitions, such as exist in the present Taft-Hartley Law, against striking or picketing an employer to compel him to bargain collectively with a union when another has been certified as the collective bargaining agent of his employees.

The majority of the court held that any "labor dispute" which may have theretofore existed under Section 876-a terminated with the election and that anything thereafter done by the defeated union fell outside the protective ambit of that section. The court declared that no other decision would be consonant with the New York State Labor Relations Act, the underlying policy of which was to provide a peaceful procedure for ending industrial disputes.[55] Judge Desmond who, together with Chief Judge Lehman and Judge Loughran, dissented, prefaced his dissenting opinion with a statement which emphasized the new attitude taken by the majority of the court. "It is no function of ours," he wrote, "to decide whether defendants' picketing is unfair or antisocial, or whether attitudes like those taken by defendants tend to promote and prolong industrial strife and make more difficult the achievement of industrial peace. Such questions are for other forums." He wrote further that the State Labor Relations Act "nowhere provides that all industrial strife and dispute are forbidden, once resort is had to the State Labor Relations Board. On the contrary, it says in so many words that 'nothing in this article shall be construed so as to

55. A contrary rule prevailed in the federal courts. American Chain & Cable v. Truck Drivers, 68 F. Supp. 54 (D.C.N.J. 1946); Yoerg Brewing Co. v. Brennan, 59 F. Supp. 625 (D.C. Minn. 1945).

interfere with, impede or diminish in any way the right of employees to strike or engage in other lawful, concerted activities.' "[55a]

When the *Florsheim* case was tried on the merits, the trial court granted a permanent injunction against all picketing because there had been evidence of violence, mass picketing and the use of misleading signs. On appeal, the Appellate Division limited the scope of the injunction to violence and misleading legends.[56]

In *Dinny & Robbins, Inc. v. Davis* et al.,[57] decided in 1943, the Court of Appeals went one step further. It denied the existence of a "labor dispute" in a jurisdictional controversy between two unions, neither of which had been certified by the New York State Labor Relations Board. In that case, the plaintiff company had bargained collectively with one of the unions and had entered into an agreement with it. Thereupon, the defendant rival union began to picket plaintiff, with one person at a time, in retaliation for the picketing which the contracting union had engaged in against employers who had signed contracts with defendant union. The court concluded that the picketing was to compel the employer to breach the agreement which it had entered into with the other union and that such purpose was illegal. It said Section 876-a "does not compel courts of equity to force the breach of a valid contract . . . made as a result of collective bargaining. . . . On the contrary, the Legislature provided in the State Labor Relations Act a due and orderly process for settling such jurisdictional disputes."[58] It held Section 876-a to be inapplicable on the ground that it "was not designed as an instrument to promote and protect strife between rival 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." Hence, it ordered that an injunction issue but permitted picketing with signs which stated the fact that there was no strike against the employer and that, although none of the workers were members of defendant union, they were regular members of another union.

Thereafter and until the Taft-Hartley Law[59] was enacted, New

55a. 288 N.Y. 188, 203, 42 N.E. 2d 480, 487 (1942).

56. 269 App. Div. 850, 54 N.Y.S.2d 788 (2d Dep't 1945).

57. 290 N.Y. 101, 48 N.E.2d 280 (1943).

58. *Id.* at 106, 48 N.E.2d at 282. It should be noted that the federal rule under the Taft-Hartley Law is less restrictive. In Matter of Perry Norvell Co. *et al.*, 80 N.L.R.B. 225 (1948), the National Labor Relations Board held that a union seeking to supplant a collective bargaining representative which had not been certified may legally picket for such a purpose.

59. 61 STAT. 136, 29 U.S.C.A. § 141 *et seq.* (1947).

York courts followed a regular pattern in co-relating Section 876-a with the State Labor Relations Act.[60] They 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 Section 876-a, but in most cases they limited injunctions to prohibiting violence and misleading signs.[61] However, where a representation proceeding concerning the conflicting claims of rival unions was pending undetermined, they held that a "labor dispute" existed.[62] Where only one union was involved, the courts found that a "labor dispute" existed although the union had been defeated in a board-conducted election,[63] or the employer's petition had been dismissed on the union's concession that it did not represent a majority of the employees,[64] or where there had been no board proceeding but the employer had "offered" an election.[65]

Attention must also be called to the fact that despite the fact that no specific exemption is provided in Section 876-a, the courts have held that the term "labor dispute" may not be applied to any controversy arising between a union and the state or any political or civil subdivision or other agency thereof or to employees of charitable, educational or religious associations or corporations except in instances where the workers are employed in profit making enterprises of such employer. The excuse for this has been that these employers are exempt from the operation of the New York State Labor Relations Act.[66]

III

While the New York courts were thus engaged in groping for solutions to complex and difficult industrial problems, the Supreme Court of the United States had gone on peregrinations of its own in quest of

60. The summary which follows in this paragraph is from Feldblum, *Some Aspects of Minority Union Picketing in New York*, 20 FORD. L. REV. 176, 183 (1951).

61. Theatre Co. v. Lederfine, 24 LAB. REL. REP. (Ref. Man.) 2273 (1949); Sachs Quality Furniture, Inc. v. Hensley, 269 App. Div. 264, 55 N.Y.S.2d 450 (1st Dep't 1945); Lou G. Siegel, Inc. v. Rosenzweig, 85 N.Y.S.2d 733 (Sup. Ct. 1948).

62. Oppenheim Collins & Co. v. Carnes, 81 N.Y.S.2d 825 (Sup. Ct. 1948).

63. Yonkers New System Laundry, Inc. v. Simon, 18 N.Y.S.2d 73 (Sup. Ct.), *modified*, 259 App. Div. 912, 20 N.Y.S.2d 74 (2d Dep't 1940).

64. Stein's Wines and Liquors, Inc. v. O'Grady, 75 N.Y.S. 2d 627 (Sup. Ct. 1947).

65. Carl Ahlers, Inc. v. Papa, 272 App. Div. 905, 71 N.Y.S. 2d 423 (1st Dep't 1947).

66. Jewish Hospital of Brooklyn v. Doe *et al.*, 252 App. Div. 581, 300 N.Y. Supp. 1111 (2d Dep't 1937); Beth-El Hospital *et al.* v. Robbins, 186 Misc. 506, 60 N.Y.S.2d 798 (Sup. Ct. 1946); Society of New York Hospital v. Hanson *et al.*, 185 Misc. 937, 59 N.Y.S.2d 91 (Sup. Ct. 1945), *aff'd*, 272 App. Div. 998, 73 N.Y.S.2d 835 (1st Dep't 1947).

new legal concepts with which to clear the muddy waters of labor relations.

In 1938, three years after the enactment of the Wagner Act and eight years after the adoption of the Norris-LaGuardia Act, it refused an injunction in *Lauf* et al. *v. E. G. Shinner & Co.*,[67] against a union which was picketing an employer for recognition and for a closed shop agreement even though none of the workers involved were members of the union. The Court held that a labor dispute was involved and, in the absence of compliance with the Norris-LaGuardia Act, the issuance of an injunction by the lower court was in excess of its jurisdiction.

In 1940, in *Thornhill v. Alabama*,[68] the Supreme Court struck down an Alabama statute forbidding peaceful picketing, engaged in for the purpose of dissuading persons from dealing with a disputed firm, as an unconstitutional restriction of freedom of speech. Mr. Justice Murphy, writing for a majority of the Court, declared that industrial controversies are "matters of public concern," and picketing the only "practicable method whereby the facts of a labor dispute may be publicized in the vicinity of the place of business of the employer," and that "abridgment of the liberty of [peaceful and truthful discussion on matters of public interest] can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunities to test the merits of ideas by competition for acceptance in the market of public opinion."[68a]

Later in the same year, in *American Federation of Labor* et al. *v. Swing* et al., the Court held:

"The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state."[69]

In 1942, it had to cope with an injunction which had been sustained by the New York Court of Appeals two years earlier in *Wohl* et al. *v. Bakery and Pastry Drivers' Union* et al.[70] The union involved had a dispute with two independent peddlers because of their refusal to hire an unemployed union member as a relief worker on one day each week. The union, in order to bring secondary pressure upon them, picketed the manufacturing bakers from whom the peddlers bought products and

67. 303 U.S. 323 (1938). See also New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938).

68. 310 U.S. 88 (1940).

68a. *Id.* at 104, 105.

69. 312 U.S. 321, 326 (1941).

70. 284 N.Y. 788, 31 N.E.2d 765 (1940)

picketed the retail stores to which they sold them. The Supreme Court[71] found no difficulty in reversing the decision of the Court of Appeals.

Mr. Justice Jackson, writing for the majority, held:

". . . one need not be in a 'labor dispute' as defined by state law to have a right under the Fourteenth Amendment to express a grievance in a labor matter by publication unattended by violence, coercion, or conduct otherwise unlawful or oppressive."[71a]

"A state is not required to tolerate in all places and all circumstances even peaceful picketing by an individual. But so far as we can tell [the peddlers] mobility and their insulation from the public as middlemen made it practically impossible for [the Union and other plaintiffs] to make known their legitimate grievances to the public whose patronage was sustaining the peddler system except by the means here employed and contemplated; and those means are such as to have slight, if any, repercussions upon the interests of strangers to the issue."[71b]

Mr. Justice Douglas wrote a separate concurring opinion, some of the language of which was used in later cases by the majority of the Court[72] as a basis for receding from the position which it had originally expressed in the *Thornhill* case. He asserted that "Picketing by an organized group is more than free speech, since it involves control 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 the ideas which are being disseminated. Hence those aspects of picketing make it the subject of restrictive legislation." He went on to say:

". . . since dissemination of information concerning the facts of a 'labor dispute' is constitutionally protected, a state is not free to define 'labor dispute' so narrowly as to accomplish indirectly what it may not accomplish directly. That seems to me to be what New York has done here. [Section 76-a], as construed and applied, in effect eliminates communication of ideas through peaceful picketing in connection with a labor controversy arising out of the business of a certain class of retail bakers. But the statute is not a regulation of picketing per se—narrowly drawn, of general application and regulating the use of the streets by all picketeers. In substance it merely sets apart a particular enterprise and frees it from all picketing. If the principles of the Thornhill case are to survive, I do not see how New York can be allowed to draw that line."[72a]

In explaining the *Wohl* decision, Mr. Justice Frankfurter, in *Carpenters and Joiners Union of America* et al. *v. Ritter's Cafe* et al., stated that the businesses picketed there were "directly involved in the dis-

71. Bakery and Pastry Drivers' Union *et al.* v. Wohl *et al.*, 315 U.S. 769 (1942).
71a. *Id.* at 774.
71b. *Id.* at 775.
72. Hughes *et al.* v. Superior Court of California, 339 U.S. 460 (1950).
72a. See note 71 *supra*, at 777.

pute. In picketing the retail establishments, the Union members would only be following the subject matter of their dispute."[73]

In the *Ritter* case, a restaurateur, who employed union help in his cafe, engaged a contractor to erect a building wholly unconnected with the business of the cafe at a site one and a half miles from it. The defendant union, objecting to the contractor's use of non-union labor, picketed the cafe in a truthful and peaceful manner. The Texas court held that the picketing was an illegal restraint of trade in violation of the state's anti-trust laws. In sustaining the injunction against all picketing against Ritter's cafe, Mr. Justice Frankfurter wrote:

". . . recognition of peaceful picketing as an exercise of free speech does not imply that the states must be without power to confine the sphere of communication to that directly related to the dispute. Restriction of picketing to the area of the industry within which a labor dispute arises leaves open to the disputants other traditional modes of communication. To deny to the states the power to draw this line is to write into the Constitution the notion that every instance of peaceful picketing —anywhere and under any circumstances—is necessarily a phase of the controversy which provoked the picketing. Such a view of the Due Process Clause would compel the states to allow the disputants in a particular industrial episode to conscript neutrals having no relation to either the dispute or the industry in which it arose."[73a]

In the *Wohl* case, the Court found a nexus between the subject matter of the dispute and the establishments which were being picketed. In the *Ritter* case, the Court found absent any close interdependence of economic interests between picketing Ritter's cafe and the labor dispute against a building contractor who was erecting another building for him wholly unconnected with the cafe a mile and a half away.

But courts all over the country went far beyond the decisions in the *Wohl* and *Ritter* cases and held that picketing, to be constitutionally protected, had to be conducted for lawful objectives. They took the position that the *Thornhill* case held merely that blanket legislation banning all picketing was unconstitutional and not that all picketing was constitutionally protected.[74] Injunctions were invariably issued against (a) picketing to compel the violation of a statute; and (b) picketing to compel the acceptance of practices which the judges themselves deemed improper or undesirable. The courts believed that they were as fully qualified as the legislature to separate the worthwhile and legitimate labor objectives from the anti-social and undesirable ones, and undertook to do so.

Sooner or later, these questions were bound to reach the Supreme Court of the United States.

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73. 315 U.S. 722, 727 (1942).

73a. *Id.* at 727, 728.

74. Saveall v. Demers, 322 Mass. 70, 76 N.E.2d 12 (1947); Peters v. Central Labor Council, 179 Ore. 1, 169 P.2d 870 (1946).

IV

By 1947, the economic and industrial situation in the United States had changed materially. Our country had but recently emerged victoriously from the Second World War. During that war, wages and prices had been placed under governmental control. However, wages remained more stable than prices. Unions had voluntarily given a no-strike pledge and practically all of them observed it. When the controls were released, unions sought to obtain from employers, throughout the country, increases in wages to meet the increases which had taken place in the cost of living and to improve conditions of employment further. When these were refused, a wave of strikes broke out. The political situation had likewise changed. For the first time since 1930, the Republican Party had regained control of both Houses of Congress.

It was in this atmosphere that the 80th Congress enacted the Taft-Hartley Law,[75] one of the most controversial pieces of legislation of modern times. The new law modified the Wagner Act substantially. It undertook to regulate the entire field of labor-management relations in industries affecting interstate commerce. Among other things, it added a series of unfair practices of labor organizations to the existing unfair practices of employers. New problems immediately arose which required immediate resolution. Whether Mr. Dooley's famous quip that the "Supreme Court follows the election returns" is right or not, the fact remains that the provisions of the Taft-Hartley Law had tremendous impact upon the courts and their attitudes in picketing cases changed perceptibly. The Supreme Court of the United States and the courts of the State of New York were not immune.

The first important case to reach the Supreme Court after Taft-Hartley, was *Giboney* et al. *v. Empire Storage and Ice Company*,[76] decided on April 4, 1949. In that case, the defendant union, which included ice peddlers, started a drive to improve the wages and other working conditions of its members. In this effort, the union sought to organize the non-union peddlers. Because of lack of progress in this direction, it requested every wholesale ice distributor in Kansas City to stop selling ice to non-union peddlers. The plaintiff refused. The union threw a picket line around its plant. Most of the truckdrivers servicing plaintiff were union men and they honored the picket line. Plaintiff sought an injunction restraining picketing by the defendant union on the ground that any agreement made by the plaintiff not to sell ice to non-union peddlers would be in restraint of trade and a felony under the Missouri anti-trust law and, that, therefore, the union's efforts to

75. 61 STAT. 136, 29 U.S.C.A. § 141 *et seq.* (1947).
76. 336 U.S. 490 (1949).

compel plaintiff to make such an agreement was for an unlawful purpose. The Missouri Supreme Court, in approving the injunction granted by the court below, affirmed the finding that the picketing had been undertaken for the purpose of coercing the plaintiff to perform acts in restraint of trade and that under the Missouri statute such activities were unlawful. Only intrastate commerce was involved.

Mr. Justice Black, writing for a unanimous Court, brushed aside the union's contention that its primary purpose in picketing was to improve wages and working conditions by winning new members. He upheld the injunction on the ground that the sole immediate object of the picketing was not an attempt to publicize the facts of a labor dispute, but part of an integrated unlawful course of action to compel plaintiff to agree to stop selling ice to non-union peddlers, in violation of Missouri law—a law which was not directed at a "slight public inconvenience or annoyance." He held that the purpose of that law was to afford all persons an equal opportunity to buy goods and that the union's conduct created a "clear danger, imminent and immediate, that unless restrained" would enable the union and its allies to "succeed in making that policy a dead letter insofar as purchases by non-union men were concerned." He ruled that there is no constitutional right, in picketing cases, to take advantage of speech or press to violate valid laws designed to protect important interests of society and for the benefit of the whole public. Finally, the Court said the basic issue is whether Missouri or a labor union has paramount constitutional power to regulate and govern the manner in which certain trade practices shall be carried on in Missouri. "Missouri has by statute regulated trade one way. The (union) members have adopted a program to regulate it another way. The state has provided for enforcement of its statutory rule by imposing civil and criminal sanctions. The union has provided for enforcement of its rule by sanctions against union members who cross picket lines."[76a] The Court held, without passing upon the wisdom of the Missouri statute, that "the state's power to govern in this field is paramount, and that nothing in the constitutional guaranties of speech or press compels a state to apply or not to apply its anti-trade-restraint law to groups of workers, business men or others."[76b]

Obviously, the union's primary purpsoe was to further its self-interests and not a desire to violate the anti-trust law of Missouri; the picketing was peaceful and the legends on the placards which were carried were truthful. But the Court refused to separate the picketing conduct into illegal and legal parts. It reaffirmed an earlier holding

76a. *Id.* at 504.
76b. *Ibid.*

that "It is too late in the day to assert against statutes which forbid combinations of competing companies that a particular combination was induced by good intentions."[77]

Some thirteen months later, the Supreme Court of the United States handed down three important decisions on the same day in cases involving picketing and the right of free speech.

The first was *Hughes* et al. *v. Superior Court of California.*[78] In that case, an association of individuals interested in defending the rights of negroes, demanded of the proprietor of a small grocery store whose customers were equally divided among whites and negroes, that he hire negro clerks, as white clerks quit or were transferred, until the proportion of negro clerks to white clerks approximated the proportion of negro to white customers. Upon refusal of this demand, and in order to compel compliance, pickets were placed about the store carrying placards stating that the owner "Won't Hire Negro Clerks in Proportion to Negro Trade—Don't Patronize." The owner sued and was granted an injunction which was sustained by the highest Court of California. The Supreme Court affirmed. Mr. Justice Frankfurter wrote the prevailing opinion. He declared:

"Picketing is not beyond the control of a State if the manner in which picketing is conducted or the purpose which it seeks to effectuate gives ground for its disallowance. . . ."[78a]

"The policy of a State may rely for the common good on the free play of conflicting interests and leave conduct unregulated. Contrariwise, a State may deem it wiser policy to regulate. Regulation may take the form of legislation, e.g., restraint of trade statutes, or be left to the ad hoc judicial process, e.g., common law mode of dealing with restraints of trade. Either method may outlaw an end not in the public interest or merely address itself to the obvious means towards such end. The form the regulation should take and its scope are surely matters of policy and, as such, within a State's choice."[78b]

The Court ruled that the fact that California's policy was expressed by the judicial organ of the state rather than by the legislature was immaterial. "It is not for this Court to deny to California that choice from among all 'the various weapons in the armory of the law.' " The decision was undoubtedly influenced by policy considerations against arbitrary discrimination in hiring based "not on fitness for work nor on an equal right of all, regardless of race, to compete in an open market, but, rather, on membership in a particular race." Mr. Justice Black and Mr. Justice Minton concurred on the ground that the case was controlled by the principles announced in the *Giboney* case.

77. International Harvester Co. v. Missouri, 234 U.S. 199, 209 (1914).

78. 339 U.S. 460 (1950).

78a. *Id.* at 465, 466.

78b. *Id.* at 468.

The second case, decided the same day, was *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers Union* et al. *v. Hanke* et al.[79] In that case, Hanke and his three sons, as co-partners, were engaged in the business of repairing automobiles, dispensing gasoline and automobile accessories and selling used automobiles on a used car lot. They had no employees. Their predecessor in interest had been a member of the defendant union which permitted membership of persons employed or engaged in the gasoline service station business. Upon purchase of the business, the Hankes continued to display, in their show window, the union shop card of their predecessor. In the meantime, the union had negotiated an agreement with an association of automobile dealers, to which the Hankes did not belong, having a membership of 115 used car dealers, all of whom except 10 were self-employers with no employees. The agreement provided that used car lots be closed by 6:00 P.M. on week days and all day on Saturdays, Sundays and eight specified holidays. It was the practice of the Hankes to remain open nights, week-ends and holidays. As a result, the business and profits of the Hankes improved, while the business of their competitors diminished and the earnings of their salesmen, who were members of the union and who worked on commission, suffered substantially. The Hankes were requested by the union to abide by the limitation on business hours or give up their union shop card. They chose to surrender their card. Thereafter, one or two pickets peacefully picketed their place of business. The trial court granted a permanent injunction against all picketing and awarded a money judgment of $250.00 against the union for damages sustained. The Supreme Court of the State of Washington affirmed. So did the Supreme Court of the United States.

Again, Mr. Justice Frankfurter wrote the opinion of the Court. He noted the "interplay" present in the case of "competing social-economic interests and viewpoints." He recognized that "unions obviously are concerned not to have union standards undermined by non-union shops" and that "this interest penetrates into self-employer shops." He held that a state, presented with such serious problems, had the right to determine for itself "whether to prefer the union or the self-employer in such a situation, or to seek partial recognition of both interests, and, if so, by what means to secure such accommodation." He noted that the state court had determined that—

"'. . . the conclusion seems irresistible that the union's interest in the welfare of a mere handful of members (of whose working conditions no complaint at all is made) is far outweighed by the interests of individual proprietors and the people of the community as a whole, to the end that little businessmen and property

79. 339 U.S. 470 (1950).

owners shall be free from dictation as to business policy by an outside group having but a relatively small and indirect interest in such policy.' "[79a]

As a result, it is now established that it is within the power of a state, in determining the permissibility of restrictions on picketing in a particular case, to weigh such community interests as free communications, effective unions, and the welfare of small businessmen, without running afoul of the Constitution.

The third case, which was decided on the same day, and bearing most importantly on the subject under discission, was *Building Service Employees International Union v. Gazzam.*[80] In that case, the employer was engaged in intrastate commerce as the proprietor of a small hotel employing abuot fifteen persons. None of them was a member of any union. Representatives of the respondent called upon the proprietor and asked him to sign a contract which would require his employees to join the union. He replied that that was a matter for the employees to decide; that signing such a agreement would put him in the position of coercing his employees to join a union, that it was contrary to the law of the state for him to do so. However, he gave the representatives of the union permission freely to visit and solicit his employees for membership while he was absent from the city on a brief trip. Upon his return, he arranged, at the union's request, a meeting of his employees at which the union representatives could come and present their case. Six labor representatives attended this meeting as did eleven of the properietor's employees. The union representatives were afforded a full opportunity to persuade the employees to join the union. At the conclusion of the meeting, a vote was taken. The overwhelming majority of employees voted against joining the union. Thereupon, the proprietor was put on the union's "We Do Not Patronize" list and pickets began walking in front of his hotel bearing a sign reading "Unfair To Organized Labor." The picketing was carried on by a single picket at a time and was intermittent and at all times peaceful.

The State of Washington has a statute declaring its public policy on the subject of organization of workers for bargaining purposes. Under that public policy, workers are free to join or not to join a union and are to be free from the coercion, interference or restraint of employers of labor in the designation of their representatives for collective bargaining. Also, the State of Washington has an anti-injunction act in which the definitions of "labor dispute" and "cases arising or growing out of a labor dispute" are substantially identical with Section 876-a of the New York Civil Practice Act.

79a. *Id.* at 477, 478.

80. 339 U.S. 532 (1950).

Mr. Justice Minton wrote for the Court. He held that the *Giboney* decision controlled the disposition of this case and that, therefore, the injunction which had been issued and the judgment for damages which had been awarded by the Washington court must be approved. He found that "under the enunciated public policy" of the State of Washington, "picketing of an employer to compel him to coerce his employees' choice of a bargaining representative," i.e., picketing by a minority or stranger union for recognition, "is an attempt to induce a transgression of this policy" though no criminal sanctions attached thereto. He declared, "To judge the wisdom of such policy is not for us; ours is but to determine whether a restraint of picketing in reliance on the policy is an unwarranted encroachment upon rights protected from state abridgement by the Fourteenth Amendment." He held that there was "no unwarranted restraint of picketing" present in this case. "The decree was limited to the wrong being perpetrated, namely, 'an abusive exercise of the right to picket.'" He pointed out that the injunction issued by the state court did not enjoin picketing per se but only that picketing which had as its purpose violation of the policy of the state and that the state statute had not been construed by the state court to prohibit picketing of workers by other workers but only prohibited coercion of workers by employers. He added, "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." The applicability of the definition of "labor dispute" in the state statute was not discussed. Mr. Justice Black contented himself by announcing his concurrence solely on the ground that the case was controlled by the principles announced in *Giboney* et al. *v. Empire Storage & Ice Company*.[80a]

Thus, the decisions of the Supreme Court in picketing cases have undergone substantial changes in the past thirteen years. The starting point, of course, was the *Thornhill* case in which the Court identified picketing with free speech and afforded constitutional protection in all picketing cases save those in which there was present a "clear and present danger" of a substantive evil. In the *Swing* case, it extended the constitutional protection to stranger picketing. From that point on, the Court started to alter its views. In the *Meadowmoor* case, it left to state regulation picketing by violence and "acts of picketing in themselves peaceful when they are enmeshed with contemporaneously violent conduct which is concededly outlawed." In the *Wohl* and *Ritter* cases, it adopted a "reasonable basis" test; when it found a "close interdependence of economic interest" it allowed picketing; when it did not,

80a. See note 76 *supra*.

it enjoined picketing. In later cases, it abandoned this test and adopted the "unlawful objective" test as the basis upon which to deny constitutional protection. In the *Giboney* and *Gazzam* cases, it held that where the state found it to be an "unlawful objective" to picket for a purpose not consonant with public policy, *as declared by state legislation,* it would deny to such picketing the healing benediction of the First and Fourteenth Amendments. In the *Hughes* case, it held that where the state declared it to be an "unlawful objective" to picket for a purpose not consonant with the public policy of the state, *as judicially formulated,* it would likewise deny constitutional protection to such picketing. In the *Hanke* case, it declared that where the state found it to be an "unlawful objective" to picket where such picketing contravened the "communities best interests," it would not substitute its judgment for that of the state court in order to grant constitutional immunity to such picketing. Of course, the *Swing, Ritter, Giboney, Hughes, Hanke* and *Gazzam* cases all involved *intrastate* commerce. In later cases,[81] decided under the "secondary boycott provisions" of the Taft-Hartley Law, it decided that where Congress declared it to be an "unlawful objective" to picket in situations defined in Section 8(b)(4) of the Taft-Hartley Law, it would follow a similar rule.

V

The changing views of the Supreme Court of the United States in picketing situations were bound to have their effect upon the New York courts.

Five weeks after the decision in the *Gazzam* case, the Appellate Division, First Department, decided *Haber & Fink, Inc. v. "Jones," etc.*[82] It affirmed an injunction against all picketing by a union which lost a representation election in which it was the sole contender for certification.[83]

Less than a year later, there again arose the problem of reconciling the alleged conflict of policies between Section 876-a and the State

81. N.L.R.B. v. International Rice Milling Co. *et al.,* 341 U.S. 665; N.L.R.B. v. Denver Bldg. & Construction Trades Council *et al.,* 341 U.S. 675; International Brotherhood of Electrical Workers *et al.* v. N.L.R.B., 341 U.S. 694; Local 74, United Brotherhood of Carpenters & Joiners *et al.* v. N.L.R.B., 341 U.S. 707; all cases decided on June 4, 1951.

82. 277 App. Div. 176, 98 N.Y.S.2d 393 (1st Dep't 1950).

83. Under federal law, "A labor organization may lose an election in which it was the only union on the ballot and the next day call a legal strike to recognize it as the bargaining agent for those employees who have just rejected it." See REPORT OF THE JOINT COMMITTEE ON LABOR MANAGEMENT RELATIONS, SEN. REP. 986, pt. 3, 80th Cong., 2d Sess. 71 (1948).

Labor Relations Act. In *S. S. Pennock Co. v. Ferretti*,[84] representation proceedings were terminated without an election by a disclaimer filed by the defendant union. Subsequently, the union commenced to picket the plaintiff employer, ostensibly for the purpose of organizing its workers. During all of this time a rival union also made demands upon the employer for recognition. In these circumstances, the employer sued to enjoin the picketing and for damages.

The court held that the picketing was part of a plan to avoid a labor board election, thus depriving the workers of the right to select bargaining representatives of their own choice. Pushing the doctrine of *Haber & Fink, Inc. v. "Jones," etc.* one step further, the court concluded that such an objective was unlawful and granted the injunction against all picketing and awarded damages.

This, then, was the legal setting when, in 1951, *Goodwins, Inc.*, et al. *v. Hagedorn* et al.[85] came before the Court of Appeals. In that case the complaint had been dismissed by Special Term for lack of jurisdiction, after a full hearing. The Court of Appeals predicated its opinion upon the assumption that the allegations of the complaint and the evidence offered by the plaintiff in support thereof were true. The plaintiff's evidence was to the effect that it was engaged in interstate commerce; that two unions, one of which was defendant, claimed to represent the plaintiff's employees; that the rival union had commenced a representation proceeding before the National Labor Relations Board, in which the defendant had intervened; that both the rival union and defendant union had filed unfair practice charges against the plaintiff with the Board; that while these charges were being processed no election could be scheduled; that approximately six months after the initiation of the National Labor Relations Board proceeding, the defendant union made a demand upon the plaintiff employer for an exclusive bargaining contract which was refused by the plaintiff on the ground that it would be committing an illegal act; that upon such refusal the defendant union started picketing the plaintiff's premises "with the avowed object of forcing the plaintiff employer forthwith to recognize the defendant union as sole collective bargaining agent despite the competing claims of a rival labor organization to represent the same employees."

Chief Judge Loughran, speaking for the majority of a sharply divided court, which disclaimed any attempt to pass upon the true reasons for the picketing but merely assumed the truth of plaintiff's evidence, held "The picketing in question is unlawful under the law of this State."

84. 201 Misc. 563, 105 N.Y.S.2d 889 (Sup. Ct. 1951).
85. 303 N.Y. 300, 101 N.E.2d 697 (1951).

After quoting from the State Constitution, the State Labor Relations Act and the Taft-Hartley Law, he concluded that:

"In the face of the above legislation there is no denying that it would be unlawful for the plaintiff employers to yield to a demand that they recognize the defendant union instead of some rival labor organization as the exclusive collective bargaining agent for the employees of the plaintiff employers in advance of certification by the National Labor Relations Board in the pending representation proceeding. . . . Section 876-a of the New York Civil Practice Act does not bar injunctive relief in a case where, as here, no lawful labor objective is sought by the defendant union."[85a]

He closed his opinion with the following:

"Our conclusion is that the acts of the defendant union here complained of by the plaintiff employers, if established by proof (1) would constitute an actionable tort under the law of this State entitling the employer to injunctive relief; (2) are not within the provisions of the National Labor Relations Act; and (3) are not such concerted union activity as is protected thereby. Even so, in the absence of any findings establishing the right of the plaintiff employers to the relief sought in the complaint, a new trial must be ordered. Hence we remit the case for a decision on the merits."[85b]

This decision makes no distinction between situations involving *intrastate commerce only* and those affecting *interstate commerce* and, apparently, applies the same rule to both. It has provoked a mass of lower court rulings which seem to go far beyond that intended by the Court of Appeals and which have raised a variety of new questions which are far from settled.

Since, under both federal[86] and state[87] law, a representation proceeding may be initiated by an employer or by a union or by rival unions, one of the effects of the *Goodwins* decision has been to outlaw the recognition strike, during the pendency of any representation proceeding irrespective of who initiates it, a purpose which Congress expressly rejected when it enacted the Taft-Hartley Law,[88] except in the case where another union was certified. The decision in the *Goodwins*[89] case, after it was later tried on the merits, furnishes an apt illustration of some of the confusion which exists in the present state of the law.

85a. *Id.* at 305, 101 N.E.2d at 699.

85b. *Id.* at 307, 308, 101 N.E.2d at 700, 701.

86. 61 STAT. 143, 29 U.S.C.A. § 159 (c) (1) (B) (1947).

87. Matter of Kappel, 13 S.L.R.B. 611 (1950).

88. SEN. REP. No. 105, 80th Cong., 1st Sess. 22 (1947):
"It is to be observed that the primary strike for recognition (without a Board certification) is not proscribed";
H. R. CONF. REP. No. 510, 80th Cong., 1st Sess. 43 (1947):
"It is to be observed that the primary strike for recognition (without a Board certification) was not prohibited."

89. 30 LAB. REL. REP. (Ref. Man.) 2057 (1952).

Starting with the premise that the Court of Appeals had outlawed "picketing for recognition, by an *uncertified* union, while rival claims are pending,"—a principle which the Court of Appeals had limited to cases *where a representation proceeding involving rival unions is pending,* the trial justice announced the dictum "that a fairly respectable case can be made out that the decision stands for the proposition that all minority picketing for recognition, *even in the absence of rival claims,* is likewise unlawful and enjoinable." He then proceeded to the defendant's contention that it sought merely a "members only" contract, a form of recognition long recognized as valid by the National Labor Relations Board, even when granted during the pendency of a representation proceeding involving rival unions. Holding that a representation proceeding must necessarily result in a certification of one of the unions as the exclusive bargaining agent, or none at all, he believed that the filing of a petition for representation contradicted the union's contention that it was seeking "a members only" contract. He obviously failed to grasp the distinction between the end sought by a union in a representation proceeding (certification as exclusive bargaining agent) and its demand for recognition (prior to certification) for the sole purpose of making a contract for only such members as it represented.

In any event, he held that the defendant union had not established that it represented any employees of plaintiff—although the record contained proof to the contrary—and that "whether the picketing was for members only representation or for exclusive or sole representation, the rule of law is the same, on the basis of the reading by this Court of the opinion of the Court of Appeals."[90]

90. In this respect, the trial judge's views are at complete variance with the decisions theretofore rendered by the National Labor Relations Board. The holdings of the Court of Appeals and the trial judge stem from the determination of the National Labor Relations Board in the Matter of Midwest Piping & Supply Co., 63 N.L.R.B. 1060 (1945), that the recognition by an employer of one of several rival unions as exclusive bargaining agent during the pendency of a representation proceeding constitutes an unfair labor practice. But the *Midwest Piping* doctrine has recently been subject to much limitation and modification. In Matter of The Hoover Co., 90 N.L.R.B. 1614, 1618 (1950), the Board held:

"Under the doctrine of the *Midwest Piping* case the employer's exclusive recognition of one of the two rival unions violates the Act only if at the time such recognition is granted the question concerning representation raised by the rival petition still is pending. However, before recognition is granted many things might occur which would remove that question and would render exclusive recognition of a majority representative perfectly lawful: Thus, for example, the rival union might withdraw its petition, or the Board, for any number of reasons, might dismiss it. Again, the employer faced with rival demands may, without violating the *Midwest Piping* doctrine, grant recognition to each of the claimants on a members-only basis."

This principle was reaffirmed by the Board in Matter of Electronics Equipment Co., 94 N.L.R.B. 62 (1951). See the most recent pronouncement of the Board in Matter of Spitzer Motor Sales, 102 N.L.R.B. No. 39 (Jan. 21, 1953).

He granted a permanent omnibus injunction of such scope that the union has been forbidden to publicize its controversy with the plaintiff either by mail, in the public press, through advertisements, or on the radio, or to solicit membership in the union at the employees' entrances to the store.[91] Although he discussed the distinction between recognition picketing and organizational picketing and concluded that the ruling of the Court of Appeals did not and should not "in the interests of good labor relations" bar organizational picketing, nevertheless, he refused to make this distinction in the final decree, even though requested by defendants to do so.

The New York lower courts have gone much further, however, than the decision of the Court of Appeals in the *Goodwins* case warrants and many of their decisions are in conflict with each other.

Generally speaking, the decided cases fall within the following categories:

1. *Recognition picketing by a union against an employer who has entered into a collective agreement with a rival union which has been certified by either the State or National Labor Relations Board.* The courts, since the *Goodwins* case, have enjoined all picketing under these circumstances.[92]

2. *Recognition picketing by a union after it has been rejected in an election, conducted by either the State or National Labor Relations Board, of its employees who voted in favor of "No Union" representing them.* The courts have been uniform in granting injunctions against such picketing but are divided upon the question of permitting picketing with signs bearing truthful legends, i.e., publicity picketing.[93]

3. *Recognition picketing by a union against an employer where*

91. An interesting and illuminating sidelight on the practical effect of this injunction may be observed from the events which preceded and followed its issuance; the unfair labor practices filed by both unions were unilaterally settled by the N.L.R.B. with the employer; later, when an election was on the verge of being ordered, the rival union, which had initiated the representation proceeding withdrew its petition; thereupon, the defendant union's intervention fell also. As the matter now stands the defendant is subject to a *permanent* restraint even though no *rival* unions are involved and *no* representation proceeding is pending and even though the doctrine established by the Court of Appeals no longer has any application to the case.

92. Jones v. Levine, 127 N.Y.L.J. 529, col. 3 (Sup. Ct. Feb. 7, 1952). *Contra:* Florsheim Shoe Store Co. *et al.* v. Retail Shoe Salesmen's Union *et al.*, 269 App. Div. 850, 54 N.Y.S.2d 788 (2d Dep't 1945).

93. *Accord,* LaMana v. O'Grady *et al.*, 278 App. Div. 77, 103 N.Y.S. 2d 476 (1st Dep't 1950); Saperstein *et al.* v. Rich *et al.*, 114 N.Y.S.2d 779 (Sup. Ct. 1952). See Markowitz v. Retail Food and Grocery Clerks' Union *et al.*, 111 N.Y.S. 2d 885 (Sup. Ct. 1952). *Contra:* Haber and Fink, Inc. v. "Jones" etc., 277 App. Div. 176, 98 N.Y.S.2d 393 (1st Dep't 1950).

representation proceedings, instituted by a union and which may or may not involve rival unions, are pending before either the State or National Labor Relations Board. The courts have been uniform in enjoining recognition picketing but are divided on the question of permitting organizational picketing.[94]

4. *Recognition picketing by a union against an employer who thereupon files a representation proceeding with either the State or National Labor Relations Board.* The courts have held that the pendency of the employer's representation proceeding is sufficient to enjoin all picketing.[95]

5. *Recognition picketing by a union which has instituted a representation proceeding which is still pending before either the State or National Labor Relations Board and where an election has already been held in which the picketing union received a majority vote, but where it has not yet been certified because of the long delays involved in the Board's processing of objections, filed by the employer and a rival union, to the conduct of the election and the results thereof.* The courts, since the *Goodwins* case, have enjoined all picketing in this kind of a situation.[96]

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94. *Accord,* Lotmar Corp. v. Norton *et al.,* 117 N.Y.S.2d 607 (Sup. Ct. 1952). *Contra*: Goodwins, Inc. *et al.* v. Hagedorn *et al.,* 30 LAB. REL. REP. (Ref. Man.) 2057 (1952); Mayer v. Doe, 128 N.Y.L.J. 832, col. 4 (Sup. Ct. Oct. 16, 1952). See also Shenker Displays Inc. v. Stankowitz, 127 N.Y.L.J. 1384, col 5 (Sup. Ct. Apr. 7, 1952). In Strauss Stores Corp. v. District 65, 129 N.Y.L.J. 437, col. 1 (Sup. Ct. Feb. 6, 1953), the court enjoined picketing even before it started, upon the theory that "the situation should remain in status quo until the (representation) proceedings before the administrative agencies are completed." The temporary injunction was made permanent by Official Referee Steinbrink, in a somewhat lengthy opinion in 129 N.Y.L.J. 661, col. 4 (Sup. Ct. Feb. 27, 1953). The opinion of the official referee brings the case squarely within Goodwins Inc. *et al.* v. Hagedorn *et al.*

95. Sheey's West Side Restaurant, Inc. v. Townsend, 112 N.Y.S.2d 200 (Sup. Ct. 1952); Rose Embroidery Corp. v. Freedman, 128 N.Y.L.J. 1330, col. 1 (Sup. Ct. Dec. 1, 1952), *affd,*—App. Div.—(March 3, 1953).

This appears to be a very convenient way for an employer to resist unionization of his plant. In the first place, he immediately obtains an injunction to stop all picketing. In the second place, since it takes time for the Board to process a representation case, i.e., to determine the appropriate unit (a question which may be disputed and therefore require a hearing) and thereafter determine the eligibility of voters and give adequate notice of the election, he can maneuver delays and gain time to undermine the morale of his workers and to discourage their joining or continuing their affiliation with the union. Thus, obtaining an injunction, the employer effectively "uses" the court as an instrumentality for preventing union organization.

96. Union News Co. v. Davis *et al.,* 201 Misc. 1062, 108 N.Y.S.2d 554 (Sup. Ct. 1951). Inasmuch as an employer may, in any case, file objections, even where only a single union is involved, and, in this fashion delay certification, the labor relations acts, which were enacted for the purpose of facilitating collective bargaining, have been

6. *Recognition picketing by a union which has instituted a representation proceeding which is still pending before either the State or National Labor Relations Board and where no election has as yet been held but where the proof, after trial, or the affidavits in opposition to a motion for a temporary injunction show that the union actually represents a majority.*[96a]

Selton Service, Inc. v. Dioguardi et al.[97] shows the extreme to which *Goodwins Inc.* et al. *v. Hagedorn* et al. has been pushed by the lower courts. In that case, the defendant union demanded that plaintiffs recognize it as the collective bargaining agent. Upon the refusal of the plaintiffs to accede to this request, the union initiated a series of intermittent strikes and picketing demonstrations. While these strikes were in progress, the union filed a petition for representation with the National Labor Relations Board. *Because of the opposition of the plaintiff employer, no election had been held at the time of trial.*

The evidence established that a majority of plaintiffs' employees had authorized the union to bargain for it. No other union was involved. Nevertheless, the court held, "that any effort to bring economic pressure, such as through picketing or striking, to compel an employer to require his employees to be represented by a union in advance of certification by the National Labor Relations Board, was unlawful and that such unlawfulness was subject to injunction." This, in the face of an express declaration by Congress "that the primary strike for recognition (without a Board certification) is not proscribed" by the Taft-Hartley Law. This, in the face of an express indication by the court that the union represented a majority of the employees. This, in the face of a holding by the Fifth Circuit Court of Appeals[98] that it is an unfair labor practice under the Taft-Hartley Law for an employer

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perverted into an instrumentality for the *prevention* of collective bargaining. *Contra*: Mele Mfg. Co. v. Doe, 125 N.Y.L.J. 1530, col. 3 (Sup. Ct. Apr. 26, 1951), decided prior to the *Goodwins* case.

96a. A variation from this category may be found in situations where an election under the auspices of either the State or National Labor Relations Board has been held, but the results thereof are inconclusive and must await the processing of challenged ballots by the Board. Such a situation was present in Alter v. Jones, 129 N.Y.L.J. 721, col. 2 (Sup. Ct. Mar. 4, 1953). However, the picketing which occurred in that case was not for exclusive recognition but to compel the employer to reinstate four (4) workers who had previously been on strike and who were promised reinstatement by the employer before the consent election agreement was executed. The court denied injunctive relief upon the ground that the pendency of the representation proceeding did not negate the existence of a labor dispute under Section 876-a.

97. 116 N.Y.S.2d 36 (Sup. Ct. 1952).

98. N.L.R.B. v. American Thread Co., 31 LAB. REL. REP. (Ref. Man.) 2053, 198 F.2d 137 (5th Cir. 1952), *cert. den.*,—U.S.—(Feb. 2, 1953).

to refuse to recognize and to refuse to bargain collectively with the representative of a majority of his employees even in the absence of a certification by the National Labor Relations Board.

Interestingly enough, in *Klein v. Freedman*,[99] Special Term reached a conclusion diametrically opposed to that in *Selton Service, Inc. v. Dioguardi* et al. In the *Klein* case, the court found that, inasmuch as the union represented a majority of the employer's workers, the demand of the union for recognition followed by peaceful picketing, during the pendency of a representation proceeding, was not unlawful.

7. *Recognition picketing by a union which has instituted a representation proceeding which is still pending before either the State or National Labor Relations Board, and the Board, without an election, determines at a preliminary hearing, at which all of the employees testified, that the employees do not desire the union as their bargaining agent.* The court has enjoined all picketing.[100]

8. *Recognition picketing by a union which has instituted a representation proceeding which is pending before either the State or National Labor Relations Board but where neither Board has processed the petition because of lack of policy as to whether the state or national Board has jurisdiction over the industry involved.* The court has enjoined recognition picketing but permitted organizational and publicity picketing.[101]

9. *Recognition picketing by a union against an employer who instituted a representation proceeding which was dismissed by the National Labor Relations Board because the officers of the union have failed or refused to file non-communist affidavits as required by the Taft-Hartley Law.* The court has held that Section 876-a of the Civil Practice Act was inapplicable and granted an injunction against all picketing.[102]

10. *Organizational or publicity picketing by a union which dis-*

99. 129 N.Y.L.J. 8, col. 5 (Sup. Ct. Jan. 2, 1953). But in Amorosi v. Sager, 200 Misc. 315, 106 N.Y.S.2d 121 (Sup. Ct. 1951), decided before the *Goodwins* case, the court refused to consider, on a motion for a temporary injunction, affidavits of the plaintiff's employees that they wished to remain non-union. The court wrote "The employees' affidavits do not have the same force as a secret election under the statute."

100. Sheey's West Side Restaurant, Inc. v. Townsend, 112 N.Y.S.2d 200 (Sup. Ct. 1952).

101. Bon-Flo Taxi Corp. v. Norton, 128 N.Y.L.J. 1060, col. 3 (Sup. Ct. Nov. 5, 1952). The court said, *inter alia*, "While sympathetic with the union in its predicament and its endeavor to combat the abuses alleged to exist in the industry, the Court is constrained to follow the precedents heretofore recited and enjoin picketing that has for its purpose the compulsion of recognition while proceedings are pending before the State Labor Relations Board. The remedy for the situation lies with the appropriate legislative body."

102. Bickford's, Inc. v. Mesevich, 107 N.Y.S.2d 369 (Sup. Ct. 1951).

claimed majority status, and by reason of whose disclaimer a representation proceeding instituted by an employer before either the State or National Labor Relations Board had been dismissed. The court, in one case, after trial refused to enjoin the picketing.[103] In another case, the court, upon affidavits on a motion for a temporary injunction, enjoined all picketing on the ground that the "union had made no serious effort to organize the plaintiff's employees" and that the primary objective of the picketing "was not to organize plaintiff's employees, but to disorganize the plaintiff under economic pressure, to the end that the plaintiff would recognize or cause recognition to be given to the defendant union."[104] In still another case,[105] the court, on affidavits, held that where the union does not claim to represent a majority, but is engaged in publicity picketing with signs stating plaintiff is "unfair to and does not employ" members of defendant union and "help us gain better conditions in the . . . industry," picketing may not be enjoined whether or not a labor dispute exists.[106] The court distinguished the *Goodwins* case by showing that three essential elements present there were absent here. In this case (a) there were no representation proceedings pending, (b) there were no rival unions involved, (c) there was no *avowed* purpose of forcing recognition of defendant union as collective bargaining agent despite competing claims of a rival union. It distinguished the *Pennock* case by showing that there was absent here any finding that the picketing was part of a plan to *avoid* an election to choose a bargaining representative.

11. *Recognition picketing by a union against an employer where no representation proceeding ever had been instituted with either the State or National Labor Relations Board, but where a consent election was conducted by the New York State Mediation Board which resulted in a tie vote and no run-off election ever had been held.* The court enjoined all picketing.[107] Although the union contended that the vote taken was not binding since the Labor Relations Board had exclusive jurisdiction to determine the appropriate bargaining unit and to conduct the election and that in any event the union was only engaged in organizational picketing the court held, on affidavits submitted on

103. Larson Buick Co. v. U.A.W. *et al.*, 113 N.Y.S.2d 905 (Sup. Ct. 1952).

104. Metropolis Country Club, Inc. v. Lewis *et al.*, 114 N.Y.S.2d 620 (Sup. Ct.), *aff'd*, 280 App. Div. 816, 113 N.Y.S.2d 923 (2d Dep't 1952).

105. Wykagyl Country Club v. Lewis *et al.*, 109 N.Y.S.2d 594, 596 (Sup. Ct. 1951).

106. Citing May's Furs and Ready-To-Wear, Inc. *et al.* v. Bauer, 282 N.Y. 331, 340, 26 N.E.2d 279, 283 (1940); Silver Dollar Bake Shop v. Weissman, 27 N.Y.S.2d 744 (Sup. Ct. 1940).

107. Chic Maid Hat Mfg. Co. v. Korba (Sup. Ct. Sept. 12, 1952) (unreported).

the motion for a temporary injunction and without a hearing, that "the picketing . . . (was) directed entirely toward compelling the plaintiff to enter into a contract with the defendant union as the sole collective bargaining agent of the employees of the plaintiff, although it has not been established that the defendant union represents a majority of such employees."

12. *Recognition picketing, where no representation proceedings ever had been instituted before either the State or National Labor Relations Board by a union against an employer who had previously entered into a collective agreement with a rival uncertified union.* In earlier decisions, the courts permitted picketing with truthful signs. The most recent decisions have enjoined all picketing.[108]

13. *Recognition or organizational picketing, in the absence of any pending representation proceeding before either the State or National Labor Relations Board where no contract with a rival union exists, and where no determination has been made that the union does not represent a majority of the employees.* The courts, upon affidavits, have dismissed the complaint for failure to comply with Section 876-a and denied injunctive relief.[109]

14. *Where a representation proceeding is pending but the union contends that it is engaged merely in organizational picketing, or where no representation proceedings are pending and the employer contends the union is picketing for an unlawful purpose.*

In *Rose Embroidery Corp. v. Freedman,*[110] the plaintiff's papers on the application for a temporary injunction asserted that the union was picketing the plaintiff to compel it to coerce its employees to join the union while a representation proceeding, instituted by the *employer,* was pending before the National Labor Relations Board. The defendant's affidavit asserted that the union was merely engaged in organizational picketing. The court, unable to determine on affidavits which party was entitled to prevail, granted the injunction on the theory that greater harm would result to plaintiff from a denial of the injunction than would result to defendant from issuance of it. This is, indeed, a far cry from the hitherto well established principle that the provi-

108. Brookshire's Inc. v. Werner, 128 N.Y.L.J. 872, col. 5 (Sup. Ct. Oct. 20, 1952); Feldshuh v. Bergman, 127 N.Y.L.J. 2421, col. 6 (Sup. Ct. June 18, 1952); Gluckstern's Restaurant, Inc. v. Tepper, 127 N.Y.L.J. 2363, col. 1 (Sup. Ct. June 13, 1952); Bobolia v. Teamsters Union, 126 N.Y.L.J. 528, col. 3 (Sup. Ct. Sept. 18, 1951).

109. Wood v. O'Grady, 127 N.Y.L.J. 1682, col. 2 (Sup. Ct. Apr. 28, 1952); Vezza v. Paluda, 127 N.Y.L.J. 1617, col. 3 (Sup. Ct. April 23, 1952).

110. 128 N.Y.L.J. 1330, col. 1 (Sup. Ct. Dec. 1, 1952), *aff'd,* App. Div. (March 3, 1953).

sional remedy of injunction *pendente lite* is an extraordinary remedy to be granted only when a clear right thereto has been established.

So also in *Schumacher & Sons, Inc. v. Horowitz,*[111] the plaintiff employer contended that the union was picketing for the purpose of compelling the employer to enter into a closed shop agreement. This the court declared to be violative of the public policy of the United States under the Taft-Hartley Law (which, concededly, it is) and of the State of New York (which it is not).[112] The union categorically denied the claim of the employer and contended that it was picketing for organizational purposes. The court, unable to resolve the question of fact from the affidavits, ordered a hearing before an official referee. Then, apparently on the theory that when in doubt grant the injunction, the court enjoined the picketing pending the official referee's report.

15. *Where no representation proceeding is pending but the union is engaged in picketing in retaliation for conduct of the employer denominated as an unfair labor practice act in the Taft-Hartley Law.*

In *Tarrytown Road Restaurant, Inc. v. Hotel, Restaurant & Beverage Dispensers Union, Local 178* et al.,[113] there were no representation proceedings pending before either the State or National Labor Relations Board. The plaintiff alleged that the union was engaged in recognition picketing. The union claimed that it was picketing because plaintiff discharged certain workers as a result of their union activities in connection with which the union had filed unfair labor practice charges with the National Labor Relations Board. In reply, plaintiff asserted that the discharged workers were in fact members of the union and that they provoked their discharge so as to create a feigned labor dispute in order to justify the picketing, and that the picketing was an act of reprisal and retaliation against plaintiff because it refused to recognize the defendant union, notwithstanding it did not and could not claim to represent a majority of plaintiff's employees. The court had signed an *ex parte* order granting a preliminary injunction. After the hearing of the motion, the court granted an injunction *pendente lite,* for all purposes, except peaceful, reasonable and truthful picketing in behalf of the claim of the discharged employees for reinstatement. It enjoined recognition picketing upon the ground that the *Goodwins* case stood for the proposition that "where a union pickets with the objective of

111. 114 N.Y.S.2d 886 (Sup. Ct. 1952). See also S-M News Co. v. Simons, 279 App. Div. 364, 110 N.Y.S.2d 174 (1st Dep't 1952), also 114 N.Y.S.2d 462 (Sup. Ct. 1952) after trial.

112. Williams v. Quill, 277 N.Y. 1, 12 N.E.2d 547 (1938).

113. 115 N.Y.S.2d 626 (Sup. Ct. 1952). *Cf.* Costaro *et al.* v. Simons *et al.,* 302 N.Y. 318, 98 N.E.2d 454 (1951).

forcing an employer to recognize it as the bargaining agent and the representative of employees who have not chosen a bargaining agent, the provisions of 876-a are not applicable." This is clearly an unwarranted extension of the rule established by the Court of Appeals in a case where rival unions were involved, where representation proceedings were pending, and where one of the unions was picketing with the *avowed* purpose of forcing the employer to recognize it as the exclusive bargaining agent.

Thus, it is abundantly clear that the New York courts have fully abandoned their traditional policy of allowing picketing in labor disputes as a means of enhancing the interests of labor, except in cases made unlawful by statute, and have fully accepted the doctrine of "illegality of objective" a "convenient device whereby a judge might outlaw union conduct which was contrary to his own economic and social philosophy."[114] It is equally clear that Section 876-a of the Civil Practice Act has been shorn of all practical significance since it is now applicable only to situations in which the courts deem the purpose of union activity to be for a "lawful labor objective"—situations in which no injunction would issue, because constitutionally protected, even if Section 876-a had never been enacted.

Although not involving any problem of picketing during the pendency of representation proceedings, two recent decisions of the Court of Appeals should be noted at this point.

In *American President Lines* et al. *v. King* et al.,[115] the plaintiff employer was in collective agreement with a rival of defendant union. The defendant picketed plaintiff for the alleged purpose of peacefully recruiting and organizing the members of the rival union. The lower court found that in fact such picketing was in retaliation for economic action taken by the rival union against the defendant union. Accordingly, when it reached the Court of Appeals the injunction was affirmed. Judge Desmond, who dissented, pointed out it was not the function of the courts to make *ad hoc* declarations of economic policy.

In *Nash v. Mennan* et al.,[116] the Court of Appeals affirmed, without opinion, a decision rendered by the Appellate Division, Second Department. In that case, plaintiff employed members of a union with which it had entered into a collective agreement. The wage scales were substantially lower than in the collective agreements made by the defendant union with other employers. The defendant never attempted to become the bargaining agent for plaintiff's workers and, indeed, was not in-

114. Matter of American News Co. *et al.*, 55 N.L.R.B. 1302, 1319 (1944).
115. 304 N.Y. 708, 107 N.E.2d 654 (1952).
116. 303 N.Y. 956, 106 N.E.2d 51 (1952).

terested in doing so. It did attempt, however, to obtain from plaintiff an agreement that work in erecting commercial fences, over which defendant had jurisdiction and in connection with which plaintiff's competitors employed members of defendant union, be given to members of defendant union. When this was refused, defendant union informed the general contractor that, if plaintiff's employees engaged in fence erection on the job, members of defendant union engaged in other iron work on the job might walk off. There was also some evidence of a threat of strike if plaintiff's employees were allowed to proceed with fence erection which had already been commenced by plaintiff pursuant to a contract. No strike or picketing actually occurred. The Appellate Division[117] had held that a labor dispute existed within the meaning of Section 876-a. Citing *May's Furs and Ready-To-Wear, Inc.* et al. *v. Bauer,*[118] the court determined that—

"Although the members of the defendant union are not employees of the plaintiff . . . defendants had, nevertheless, a direct interest in the labor policies of plaintiff, who was engaged in the same industry as were the members of the defendant union, and whose wage scale was lower than that of the defendant union, for the work of erecting fences. All engaged in a trade are affected by the prevailing rate of wages. . . . The dispute involved, although jurisdictional in nature, concerned terms and conditions of employment which directly affected the interests of the members of the defendant union. . . ."[118a]

Citing *National Protective Association v. Cumming* et al.[119] as authority, the court further held that:

"The members of defendant union had the right to refuse to work on any ground which they might consider sufficient, and to act individually, or, as an organization, if they had no unlawful object in view. . . . Under the circumstances disclosed by this record, it was not unlawful for the members of defendant union to refuse to work on jobs upon which plaintiff's employees were erecting fences, or for defendants to threaten to call a strike of such members, if such conditions should continue."[119a]

Despite the numerous *ad hoc* declarations of policy made by the courts of this state as to the applicability of Section 876-a to labor controversies—declarations which have often been in conflict with each other—there are numerous questions which still remain unresolved and must await decision by the appellate courts. These include, among others, the following:

1. The applicability of *Goodwins, Inc.* et al. *v. Hagedorn* et al.[119b] to a situation

117. 279 App. Div. 609, 107 N.Y.S.2d 645 (2d Dep't 1951).
118. 282 N.Y. 331, 26 N.E.2d 279 (1940).
118a. See note 117 *supra,* at 609, 610, 107 N.Y.S.2d at 647.
119. 170 N.Y. 315, 63 N.E. 369 (1902).
119a. See note 117 *supra,* at 610, 107 N.Y.S.2d at 647.
119b. 199 Misc. 518, 106 N.Y.S.2d 865 (Sup. Ct. 1951).

(a) which involves only one union and in which a representation proceeding, instituted by the union or the employer, is pending;

(b) which involves only one union and in which no representation proceeding is pending;

(c) which involves rival unions and in which no representation proceeding is pending;

(d) which involves only one union and in which no representation proceeding can be brought because of the failure of the union to comply with the filing requirements of the Taft-Hartley Law;[120]

(e) which involves rival unions and in which no representation proceeding can be brought because of the failure of the rival unions to comply with the filing requirements of the Taft-Hartley Law.

2. May the court itself assume the function of determining major ity or minority status (a function over which the Labor Boards have exclusive jurisdiction), whether or not a representation proceeding is pending?

3. If so, may the court, as a necessary corollary, determine the preliminary underlying question of appropriate bargaining unit (also a function over which the Labor Boards have exclusive jurisdiction)?

4. If so, may the court determine the majority status, if established,

(a) by a check of authorization cards? or

(b) by union records which show that a majority of the employers workers actually have been and are paying dues to the union? or

(c) by an Honest Ballot Association or other unofficial election? or

(d) by affidavits of the workers showing that they are members of and desire to be members of the union? or

(e) by direct testimony of the workers? or

(f) by a Labor Board election which is not followed by immediate certification?

5. May the court adopt the procedural safeguards of the National and State Labor Relations Boards of refusing to disclose to the employer or a rival union the names of workers who signed authorization cards or affidavits or who are dues paying members of the union, in order to avoid possible recriminations against such workers? If so, what becomes of the right of confrontation and cross-examination of witnesses?

6. If majority status in the appropriate bargaining unit may be determined by the court and is found to exist, will the court permit recognition picketing, in the absence of Board certification,

120. 61 STAT. 143, 29 U.S.C.A. § 159 (1951).

(a) if rival unions are involved and a representation proceeding is pending?

(b) if only one union is involved and a representation proceeding is pending?

(c) if rival unions are involved and no representation proceeding is pending?

(d) if only one union is involved and no representation proceeding is pending?

(e) if rival unions are involved and no representation proceeding can be brought because of the failure of the unions to comply with the filing requirements of the Taft-Hartley Law?

(f) if only one union is involved and no representation proceeding can be brought because of the failure of that union to comply with the filing requirements of the Taft-Hartley Law?

7. May a union, in the absence of certification of a rival union, ever be enjoined from peaceful picketing for a "members only" contract, (a) whether or not it represents a majority of the workers in the appropriate bargaining unit and (b) whether or not representation proceedings are pending before either the state or national Labor Relations Board?

8. What interpretation shall be accorded to the provisions of the Taft-Hartley Law and the New York State Labor Relations Act safeguarding the right to strike?

9. May peaceful organizational picketing ever be enjoined? What protection must be given to organizational picketing under Section 876-a and under the First and Fourteenth Amendments to the Federal Constitution? What juridical formula shall be applied to distinguish organizational from recognition picketing?

10. May the court, on an application for a temporary injunction, determine on affidavits the question of whether or not a "labor dispute" within the meaning of Section 876-a exists and the objective for which the strike or picketing is conducted, or must the court hold a hearing to determine these questions?

11. If a hearing is required, may the court issue a preliminary injunction pending the hearing?

12. What is the status of stranger picketing? Does it continue to have constitutional protection and under what circumstances?

VI

But, by far the most important question still to be resolved is whether state courts have the authority to concern themselves with the objectives of any peaceful strike or of peaceful picketing against an em-

ployer in interstate commerce or whether Congress by enactment of the Taft-Hartley Law has, under the federal supremacy clause of the United States Constitution, preempted the field and closed the door to any state action, legislative or judicial.

Although the decision in *Goodwins* went far beyond the issue of jurisdiction, that was the sole question presented to the court. The sharply divided majority required two separate bases to sustain state jurisdiction. Whether either basis will stand can be decided only by the Supreme Court of the United States when the requisite fact situations are presented to it. Prior determinations of the Supreme Court lead to the belief that it will sustain neither basis and that it will hold that state courts have been divested of power. If that should come to pass, New York and all other state courts, when confronted with a prayer for injunctive relief in a labor controversy, would be limited exclusively to adjudicating cases involving intrastate commerce and to all cases, whether involving intra or interstate commerce, where the techniques employed include violence, breach of the peace, fraud or their equivalent. All other cases would become subject to the exclusive jurisdiction of the National Labor Relations Board, and of the federal courts as provided in the Taft-Hartley Law.

In the *Goodwins* case, the union attacked the jurisdiction of the court to grant the relief sought upon the ground that, under Article 1, Section 8, of the Federal Constitution, Congress, in enacting the Taft-Hartley Law, had exercised its full power to regulate commerce among the several states, and had, with specified exceptions, placed the administration and enforcement of that Act in the hands of the National Labor Relations Board and the federal courts; that under Article 6 of the Federal Constitution such law became "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding"; and that by reason thereof Congress had preempted the field of labor relations affecting commerce among the several states thereby depriving state courts of jurisdiction to pass thereon. Special Term sustained the defendant's plea to the jurisdiction[121] and dismissed the action without passing on the merits. The Appellate Division affirmed,[122] two of the justices dissenting.

The Court of Appeals reversed by a divided court.[122a] Although the majority of four judges were of the opinion that the state courts were possessed of jurisdiction over the case, they divided evenly as to the

121. 199 Misc. 518, 106 N.Y.S.2d 865 (Sup. Ct. 1951).
122. 278 App. Div. 936, 105 N.Y.S.2d 857 (1st Dep't 1951).
122a. 303 N.Y. 300, 101 N.E.2d 697 (1951).

reason therefor. Chief Judge Loughran, with whom Judge Lewis concurred, predicated state jurisdiction upon the fact that "the picketing in which the union was engaged was not expressly denominated an unfair union labor practice in the Taft-Hartley Law and that such picketing was not a protected concerted activity under Section 7 of that law inasmuch as its purpose was to coerce the employer into committing an act which is denounced as an employer unfair labor practice under subdivision (a) of section 8 of the act." Judge Froessel, with whom Judge Conway concurred, predicated jurisdiction upon the fact that the Taft-Hartley Law was silent on stranger picketing as an unfair labor practice, and therefore the state was free to act. He stated, "In my view the Taft-Hartley Act does not deprive the Supreme Court of this State of jurisdiction of the subject matter, which is 'governable by the state or it is entirely ungoverned.' "[123]

The dissenting judges likewise rendered two opinions. Judge Dye, with whom Judge Desmond concurred, held that Congress, by its enactment of the Taft-Hartley Law, had preempted the field of labor relations affecting interstate commerce where the picketing was peaceful and orderly and not fraudulent nor misleading. Answering Judge Froessel's contention, Judge Dye examined into the legislative history of the Act to show that Congress had considered and rejected an express proviso making stranger picketing an unlawful concerted activity subject to injunction in the federal courts at the behest of an employer. "Silence," he said, "under such circumstances is not tantamount to creating an exception in a field otherwise preempted by Congress."[123a] Judge Fuld, with whom the other dissenting judges concurred, based his dissent upon the fact that the picketing complained of, even though not the precise conduct designated as an unfair labor practice, was so closely related to it as to be within "that 'peripheral area . . . into which the states may not intrude without federal authorization.' " Inasmuch as Congress had manifested a design to formulate a uniform policy in the field of labor relations and had comprehensively regulated the field "there is no place for the application of state law or policy or for the exercise of state jurisdiction even though the precise activity complained of may not be covered by Congressional provision."[123b]

The conflict between federal and state jurisdiction and the question of preemption is not unique to labor relations. It has arisen, under the federal supremacy provision[124] of the United States Constitution in

123. *Id.* at 308, 101 N.E.2d at 701.
123a. *Id.* at 309, 101 N.E.2d at 701.
123b. *Id.* at 310, 101 N.E.2d at 702.
124. U.S. CONST. Art. VI.

the numerous areas where dual sovereignty may be exercised. Thus, the issue of conflicting jurisdiction has been the subject of litigation in rate cases,[125] in food and drug cases,[126] in the transportation from one state to another of livestock affected with communicable diseases,[127] in limitation of railroad liability,[128] in navigation inspection matters,[129] in civil rights matters,[130] and in a host of other situations. As a matter of fact, the issue is now arising in connection with the problems stemming from the control of subversion,[131] a field clearly within the police power of the state and hitherto thought to be immune from preemption in the absence of express exclusion of state jurisdiction.

The accommodations inherent in our federal system have created many problems in federal-state jurisdiction. Where nation-wide uniformity of regulation is not imperative, even though the activities involved affect interstate commerce, the Commerce Clause, standing alone does not bar state regulation. However, where Congress clearly manifests its intention to preclude state action because nation-wide regulation of the activities involved is imperative, the constitutional grant of power to regulate interstate commerce coupled with the Supremacy Clause of the Constitution effectively shuts the door to concurrent state regulation. As stated by Mr. Justice Holmes, "When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a State Law is not to be declared a help because it goes further than Congress has seen fit to go."[132] Where Congress, while undertaking to regulate a field which the states had previously been free to regulate, is silent with respect to the survival of state regulatory powers, "It long has been the rule that exclusion of state action may be implied from the nature of the legislation and the subject matter although express declaration of such result is wanting."[133] The will of Congress "is to be discovered as well by what the legislature has not declared, as by what they have expressed."[134] Where Congress has preempted the field, the states are powerless to act concurrently, even though the national

125. Missouri *et al.* v. Kansas Natural Gas Co., 265 U.S. 298 (1924); Simpson *et al.* v. Shepard, 230 U.S. 352 (1913).

126. Savage v. Jones, 225 U.S. 501 (1912).

127. Mintz *et al.* v. Baldwin, 289 U.S. 346 (1933); Reid v. Colorado, 187 U.S. 137 (1902).

128. Missouri Pac. R.R. Co. v. Porter *et al.*, 273 U.S. 341 (1927).

129. Kelly *et al.* v. Washington, 302 U.S. 1 (1937).

130. Hall v. DeCuir, 95 U.S. 485 (1877).

131. Note, *State Control of Subversion: A Problem of Federalism*, 66 HARV. L. REV. 327 (1952).

132. Charleston and W. C. Ry. Co. v. Varnville Co., 237 U.S. 597, 604 (1915).

133. Bethlehem Steel Co. *et al.* v. N.Y.S.L.R.B., 330 U.S. 767, 772 (1947).

134. Houston v. Moore, 5 Wheat. 1, 20 (U.S. 1820).

legislation involved is deemed defective because "important provisions have been omitted, or that others which might have been made might have been more extended, or more wisely devised."[135]

In the original Wagner Act, Congress dealt only with certain aspects of labor relations affecting interstate commerce. It "left outside the scope" of its regulation "other closely related matters," such as employee or union conduct.[136] "Congress has not seen fit to lay down even the most general of guides to construction of the Act, as it sometimes does, by saying that its regulation either shall or shall not exclude state action."[137]

But the Taft-Hartley Law supplied what was missing in the Wagner Act. The latter dealt only with the problems of protecting the rights of employees to organize and to engage in concerted activities for mutual aid or protection, in connection with which it established a series of unfair employer practices. The former is a comprehensive code which governs the entire field of labor-management relations in industries affecting interstate commerce.

The very preamble to the Taft-Hartley Law declares that it is the "purpose and policy of this chapter, . . . to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce."[138]

Moreover, the legislative history of the Taft-Hartley Law shows that Congress concerned itself with and investigated the entire field of labor-management relations, from one end to the other; it considered innumerable proposals reaching virtually every practice and problem which had arisen in the field. It held extensive committee hearings and debates. Finally, Congress arrived at the approach which it considered most sound and workable. Adopting some proposals, modifying others, and rejecting more, it finally formulated its own definition of the rights, duties, liabilities and immunities which should exist, and selected, in

135. *Ibid.*

136. Bethlehem Steel Co. *et al.* v. N.Y.S.L.R.B., 330 U.S. 767, 773 (1947). In this connection see Allen-Bradley Local 111 *et al.* v. W.E.R.B. *et al.*, 315 U.S. 740 (1942). *Cf.* Hill *et al.* v. Florida, 325 U.S. 538 (1945).

137. Bethlehem Steel Co. *et al.*, v. N.Y.S.L.R.B., 330 U.S. 767, 771 (1947).

138. 61 STAT. 136, 29 U.S.C.A. § 141 (b) (1947).

each instance, what it considered to be the appropriate remedies and forums for their vindication.[139]

It would require much time and space to list all of the regulatory proposals which Congress rejected as undesirable. Attention, however, may be called to some of them, contained in the Hartley Bill which passed the House, but which were rejected by the Senate and by the Congress as a whole. The Hartley Bill made it an unfair labor practice for employees to engage in a strike unless the objective was within a limited category defined in the Bill as proper.[140] It made it an unfair labor practice for minorities to strike by requiring a majority strike vote as a condition precedent to the calling of any strike. It defined a long list of "unlawful concerted activities" in which were included: (1) "picketing an employer's premises for the purpose of leading persons to believe that there exists a labor dispute involving such employer in any case in which the employees are not involved in a labor dispute with their employer"; (2) any strike designed to compel an employer to recognize a union not certified by the Board; (3) any strike designed to remedy an unfair labor practice; and (4) any strike designed to compel an employer to violate any law, regulation or order issued pursuant to law. It provided that persons injured by any of these unlawful acts could sue for damages and injunctive relief in the Federal courts, and that persons found to have engaged in such activity should be deprived of rights under the Act.

The Taft-Hartley Law rejected all of these proposals. Instead of defining permissible strike objectives and outlawing all others, the Act set forth the labor objectives which Congress deemed unlawful and declared it to be an unfair labor practice for a union to strike or to induce or encourage a strike for any of these objects. It denied to private parties, and vested only in the Board, power to obtain injunctive relief against such practices. Instead of prohibiting strikes designed to remedy unfair labor practices, as did the House Bill, the Act continues to protect such strikes. Instead of flatly prohibiting minority strikes and stranger picketing, the Act illegalizes such conduct only if its object is to compel an employer to recognize a union other than the one certified as exclusive bargaining agent of his employees, or to induce a secondary boycott. Instead of outlawing strikes designed to compel an employer to violate any other obligation imposed by law, the Act treats such strikes as unprotected concerted activities, leaving the employer free to use economic weapons to cope with them. The same

139. Ratner, *Problems of Federal-State Jurisdiction in Labor Relations,* N.Y.U. FIFTH ANNUAL CONFERENCE ON LABOR 77 *et seq.* (1950).

140. H.R. REP. No. 3020, 80th Cong., 1st Sess. (1947).

approach was used to insure compliance with the provisions of the Act which require the giving of notice before a strike may be called upon termination of a contract.[141] In addition, Congress authorized the Board to continue to determine whether particular types of concerted activities were entitled to protection under the Act by applying the normal tests of justification employed by the Board and the federal courts when reviewing.[142]

Moreover, Congress, when it enacted the Taft-Hartley Law, demonstrated that it "knew full well that its labor legislation 'preempts the field that the Act covers insofar as commerce within the meaning of the Act is concerned.' "[143]

Because it intended to preempt the field, Congress took care to reserve to the states in clear-cut terms "those areas in which it desired state regulation to be operative."[144] It decided, after extensive debate,[145] that states should be free to prohibit union security agreements altogether.[146]

Congress also knew that if it required dispute notices to be filed only with a federal conciliator, the effect would be to bar state conciliation and mediation services from the field entirely.[147] To avoid this result, it provided for notices to be served on state as well as federal officials, and set forth the respective roles which federal and state officials are to play in the area of conciliation and mediation.[148]

It made provision for state participation in the effectuation and administration of the national labor policy, to the extent that it considered such participation desirable. It authorized the National Board to cede jurisdiction to state agencies over limited classes of local industry, but only if the state law was consistent with the federal law.[149]

It conferred upon any person injured, "in his business or property," by stated types of conduct made unlawful, the right to recover damages

141. See note 139 *supra*, at 88.

142. See In the Matter of Harnishfeger Corp. *et al.*, 9 N.L.R.B. 676, 686 (1938), quoted with approval in International Union *et al.* v. W.E.R.B., 336 U.S. 245, 255-6 (1949); American News Co. *et al.*, 55 N.L.R.B. 1302, 1312 (1944).

143. Amalgamated Ass'n *et al.* v. W.E.R.B., 340 U.S. 383, 398 (1951); H.R. REP. No. 245, 80th Cong., 1st Sess. 44 (1947).

144. Amalgamated Ass'n *et al.* v. W.E.R.B., 340 U.S. 383, 398 (1951).

145. 93 CONG. REC. 3453-4, 6519-20, 6532 (1947).

146. 61 STAT. 151, 29 U.S.C.A. § 164 (b) (1947).

147. Hearings before the Senate Committee on Education and Labor, 80th Cong., 1st Sess. 563 (1947).

148. 61 STAT. 153, 29 U.S.C.A. § 172(c)(1947); 61 STAT. 154, 29 U.S.C.A. § 173 (b)(1947); 61 STAT. 140, 29 U.S.C.A. § 158(d)(3)(1947).

149. 62 STAT. 991, 29 U.S.C.A. § 160(a)(1948).

therefor and vested concurrent jurisdiction over such suits in the federal and state courts.[150]

It deliberately omitted other items in the labor relations field from the area of federal regulation. It excluded from its definition of "employer," under the Act, any "state or political subdivision thereof," and hospitals operated not for profit. From the definition of "employee," it excluded agricultural and domestic labor, independent contractors and supervisors.

It provided expressly that no employer should be compelled to consider persons defined as supervisors to be employees under any law, local or national, relating to collective bargaining.[151]

Thus the legislative history of the Taft-Hartley Law provides the clearest evidence that Congress not only intended to preempt the field of labor management relations but was thoroughly aware of the sweep and limitations of the preemption doctrine.

Under this doctrine, the propriety of state court relief does not turn on whether the claim is predicated upon state law or upon the National Labor Relations Act. The test is whether the transaction involved is in the "field" covered by the National Act. If so, the rights to which it gives rise flow exclusively from federal law; substantive rights as well as remedies flowing from state authority are superseded.[152]

The question of preemption has been passed upon by the Supreme Court of the United States in nine separate cases. Four of these cases[153] involved the effect of the Wagner Act on state jurisdiction; five[154] involved the effect of the Taft-Hartley Law. Of the four cases which dealt with the Wagner Act, in only one, *Allen Bradley Local 111* et al. *v. W.E.R.B.* et al., did the Court conclude that the door to state action had not been closed. There the Wisconsin Employment Relations Board had found, after a hearing, that the union was guilty of violence, assault and mass picketing. An order was entered by the Board against the union. In sustaining the Board's jurisdiction, Mr. Justice Douglas

150. 61 STAT. 140, 29 U.S.C.A. § 158(b)(4)(1947).

151. 61 STAT. 151, 29 U.S.C.A. § 164(a)(1947).

152. See note 139 *supra.* Plankinton Packing Co. *et al.* v. W.E.R.B., 338 U.S. 953 (1950); Direct Transit Lines v. Teamsters' Union, 29 LAB. REL. REP. (Ref. Man.) 2492 (D.C. Mich. 1952); Pocahontas Terminal Corp. v. Portland Bldg. Trades Council *et al.*, 93 F. Supp. 217 (D.C. Me. 1950).

153. Allen Bradley Local 111 *et al.* v. W.E.R.B. *et al.*, 315 U.S. 740 (1942); Hill *et al.* v. Florida, 325 U.S. 538 (1945); Bethlehem Steel Co. *et al.* v. N.Y.S.L.R.B., 330 U.S. 767 (1947); Lacrosse Tel. Co. v. W.E.R.B. *et al.*, 336 U.S. 18 (1949).

154. Amalgamated Ass'n *et al.* v. W.E.R.B., 340 U.S. 383 (1951); International Union *et al.* v. O'Brien *et al.*, 339 U.S. 454 (1950); Plankinton Packing Co. *et al. v.* W.E.R.B. *et al.*, 338 U.S. 953 (1950); Algoma Plywood v. W.E.R.B., 336 U.S. 301 (1949); International Union *et al.* v. W.E.R.B. *et al.*, 336 U.S. 245 (1949).

pointed out that what was there involved was a matter so traditionally local as public order and safety. The mere passage of the Wagner Act, he held, was ineffective to impair "the traditional sovereignty of the several States in that regard." In the other three cases, the first of which involved a Florida statute requiring all business agents and representatives of unions to be licensed by the state, and the second of which involved an order of the New York State Labor Relations Board under which it had undertaken to certify bargaining agents for units of supervisors, and the third of which involved an order of certification issued by the Wisconsin Relations Board, the Court held that Congress had preempted the field and had divested the state of jurisdiction over these matters in industries affecting interstate commerce.

The first cases to be decided by the Supreme Court after the passage of the Taft-Hartley Law involved its provisions as well as those of the Wagner Act. In *Algoma Plywood v. W.E.R.B.*, the Court dealt with the validity of a union security provision. Inasmuch as Congress in Section 14(b) of the Taft-Hartley Law had expressly conferred concurrent jurisdiction upon the states and federal government over union security provisions, the Court held that Wisconsin was not prevented from determining its own policy in a field wherein jurisdiction expressly had been granted to it.

In *International Union v. W.E.R.B.*, the Court again sustained state action. It clarified its own thinking and restated its rule on the question of preemption. Methods and policing in picketing cases were left to the states. "While the Federal Board," said the Court, "is empowered to forbid a strike, when and because its purpose is one that the Federal Act made illegal, it has been given no power to forbid one because its method is illegal—even if the illegality were to consist of actual or threatened violence to persons or destruction of property. Policing of such conduct is left wholly to the states."[154a] Citing the *Allen Bradley* case, Mr. Justice Jackson pointed out that "as to coercive tactics in labor controversies, we have said of the National Labor Relations Act what is equally true of the Labor Management Act of 1947, that 'Congress designedly left open an area for state control.' "[154b] Purpose and objectives in picketing cases, however, were declared to be within the exclusive province of the federal government. As the Court said, ". . . it is the objectives only and not the tactics of a strike which bring it within the power of the Federal Board."[154c]

Having once spelled out the doctrine of preemption in its application

154a. 336 U.S. 245, 253 (1949).
154b. *Ibid.*
154c. *Id.* at 263.

to the field of labor relations, the Supreme Court found no difficulty in adapting it to specific situations. In *International Union* et al. *v. O'Brien* et al. it struck down a Michigan statute which placed limitations on the right to strike. In *Amalgamated Association* et al. *v. W.E.R.B.* it declared unconstitutional a statute which forbade strikes among public utility workers. In both cases, the Court held that Congress by its action had expressly safeguarded the right to engage in concerted activities including the right to strike. Lest undue emphasis be placed on the phrase "peaceful strikes," the Supreme Court subsequently held that stranger picketing, under the provisions of Section 7 and 13 of the Taft-Hartley Law, was entitled to the same protection.[155] The Supreme Court, reformulated its rationale as expressed in *Plankinton Packing Co.* et al. *v. W.E.R.B.* et al. and *International Union* et al. *v. O'Brien* et al., in the following language:

"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. Plankinton and O'Brien both show that states may not regulate in respect to rights guaranteed by Congress in § 7."[156]

The question of preemption is one upon which the states are in sharp conflict. California,[157] Utah,[158] Minnesota[159] and Pennsylvania[159a] have all ruled that the field of labor relations in interstate commerce has been occupied by Congress and the states are powerless to exercise any jurisdiction absent violence, or its equivalent. New York,[160] Missouri,[161] Alabama,[162] Oregon,[163] Arkansas,[163a] Louisiana,[163b] Michigan,[163c] and

155. N.L.R.B. v. International Rice Milling Co. *et al.*, 341 U.S. 665 (1951).

156. Amalgamated Ass'n *et al.* v. W.E.R.B., 340 U.S. 383, 390 n. 12 (1951).

157. Matter of DeSilva, 33 Cal.2d 76, 199 P.2d 6 (1948); Gerry v. Superior Court, 32 Cal.2d 119, 194 P.2d 689 (1948).

158. Utah v. Montgomery Ward & Co., 233 P.2d 685 (Utah), *cert. den.*, 342 U.S. 869 (1951).

159. Faribault Daily News Inc. v. International Typographical Union, 53 N.W.2d 36 (Minn. 1952); Norris Grain Co. v. Nordaas, 46 N.W.2d 94 (Minn. 1950).

159a. Garner v. Teamsters Union, — Pa. — (Feb. 13, 1953); Wilkes Sportswear Inc. v. I.L.G.W.U., 29 LAB. REL. REP. (Ref. Man.) 2300 (1951).

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

161. Kincaid-Webber Motor Co. v. Quinn *et al.*, 241 S.W.2d 886 (Mo. 1951).

162. Montgomery Bldg. & Construction Trades Council *et al* v. Ledbetter Erection Co., 256 Ala. 678, 57 So.2d 112 (1951), *cert. granted*, 343 U.S. 962 (1952). Writ dismissed upon ground that judgment sought to be reviewed was not final. 97 L. Ed. Advance 127 (1952). However, in Russell v. U.A.W., 31 LAB. REL. REP. (Ref. Man.) 2214 (1952), the Alabama Circuit Court, Morgan County, held that a state

other states have all ruled that, despite the action of Congress, in adopting the Taft-Hartley Law, there remain areas to which state jurisdiction attaches. Delaware has taken the position that where an unfair labor practice charge has been filed by an employer with the National Labor Relations Board, which thereafter informed the employer that there was no basis for the charge, jurisdiction should be declined as a matter of discretion.[163d]

In the first cases to arise in New York involving the question of preemption, the Court of Appeals in *Costaro* et al. *v. Simons* et al.,[164] held that it had no jurisdiction to grant relief where the acts complained of were specifically set forth in the Taft-Hartley Law as unfair labor practices.

However, when the issue of preemption was again presented in *Goodwins,* the court sought to carve out an area into which the exercise of Congressional power had not flowed and to reserve this area for state regulation.

It is perhaps sufficient to say of the *Goodwins* decision that, since the illegality found by the court to exist, lay within the sphere of objectives, the court had no jurisdiction (under the *International Union* et al. *v. W.E.R.B.* et al. case) over the subject-matter of the action. There is another reason for believing that the concerted activity of the kind involved in the *Goodwins* case is well within the field which Congress occupied to the exclusion of the States. The nature of the illegality which concerned the court—compelling an employer to commit an unfair labor practice—seems peculiarly a problem of federal rather than state concern. Certainly, picketing under those circumstances is as much a matter of federal concern as picketing for the purpose of com-

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court had no jurisdiction over an action brought by a worker to recover damages from a union for interference with the right to work and alleged violence, inasmuch as such conduct constituted an unfair labor practice under the provisions of Section 8 (b) (1) of the Taft-Hartley Law.

163. Oregon v. Dobson, 245 P.2d 903 (Ore. 1952).

163a. Lion Oil Co. v. Marsh, 30 LAB. REL. REP. (Ref. Man.) 2284 (Ark. Sup. Ct. 1952).

163b. Huff Truck Lines v. General Truck Drivers, 30 LAB. REL. REP. (Ref. Man.) 2571 (La. Dist. Ct. 1952); Southern Bell Tel. Co. v. Communications Workers Ass'n, 30 LAB. REL. REP. (Ref. Man.) 2137 (La. Dist. Ct. 1952).

163c. Winkelman Bros. Apparel, Inc. v. Local Union, 31 LAB. REL. REP. (Ref. Man.) 2016 (Mich. Cir. Ct. 1952); Hall Steel Co. v. International Brotherhood of Teamsters, 30 LAB. REL. REP. (Ref. Man.) 2717 (Mich. Cir. Ct. 1952).

163d. Corrado Bros. v. Building & Construction Trade Council, 30 LAB. REL. REP. (Ref. Man.) 2154 (Del. Ch. Ct. 1952).

164. 302 N.Y. 318, 98 N.E.2d 454 (1951); Ryan v. Simons, 277 App. Div. 1000 (2d Dep't 1950), *aff'd,* 302 N.Y. 742, 98 N.E.2d 707, *cert. den.,* 342 U.S. 897 (1951).

pelling an employer to recognize one union where another union is the certified bargaining agent—a concerted activity outlawed by the Taft-Hartley Law.[165] If Congress had desired to proscribe recognition picketing where there were rival unions and a representation proceeding was pending, it could easily have done so. Its failure to treat with this situation is an indication that Congress meant this to be one of the weapons in the arsenal of free collective bargaining. When this "failure" on the part of Congress is coupled with the statement contained both in the Senate Report and the House Conference Report that the primary strike for recognition without a Board certification is not proscribed, the intention of Congress to leave such action free and untrammelled and beyond restraint from any source becomes so clear that it is not open to dispute.

Some six months after *Goodwins*, the Appellate Division, First Department, decided *Art Steel Co. v. Velazquez.*[166] That case involved violence and picketing concededly in violation of Section 8(b)(4)(C) of the Taft-Hartley Law. The court divided sharply. Three opinions were written. The majority opinion of Mr. Justice Callahan, concurred in by Mr. Justice Dore, held that violence afforded a basis for state jurisdiction. The majority, however, were of the opinion that, once jurisdiction obtained, the state courts were free to dispose of the entire controversy. Mr. Justice Shientag dissented upon the ground that state power was limited exclusively to the question of violence. This problem must still be resolved by higher authority.

Mr. Justice Van Voorhis, with whom Mr. Justice Cohn concurred, wrote a separate opinion in which he based jurisdiction upon the fact that the cause of action set forth in the complaint preexisted the labor relations acts and were not created by them. The doctrine of preemption, he held, applied only to rights created by labor acts. It did not apply to rights antedating those acts. Inasmuch as the complaint alleged that the picketing resulted from a breach of contract, a cause of action which existed prior to the Taft-Hartley Law, the doctrine of preemption had no application at least until the National Labor Relations Board assumed jurisdiction of an unfair practice charge. This vexing problem, too, must still be resolved by higher authority.

Since the cases decided by the United States Supreme Court on the question of preemption all arose out of state statutes there is no decision dealing with the restrictions on state common law jurisdiction arising from the federal supremacy clause. However, in view of the

165. 61 STAT. 140, 29 U.S.C.A. § 158 (b) (1947).
166. 280 App. Div. 76, 111 N.Y.S.2d 198 (1st Dep't 1952).

determination by the Supreme Court in the restrictive covenant cases[167] that the Federal Constitution is as binding upon the state courts as it is upon the state legislature the path would seem to be marked.

It is difficult to hazard a guess as to what the Supreme Court will do. Yet, if the logic of its past opinions is to flower, if the patterns established by Congress are to have meaning, the Court *must* ultimately hold that Congress has preempted the entire field of purposes and objectives in labor management relations, which affect interstate commerce, and that it has entrusted the administration of this field to the NLRB and its enforcement to the federal courts.[168] Such a decision, if made, would render the state courts impotent, under the Supremacy Clause of the Constitution to apply concurrent or divergent systems of law to the same set of facts and would prohibit them from enjoining that which the federal law allows.

Under such circumstances, the NLRB alone would have jurisdiction to determine, subject to review by the federal courts at the instance of an aggrieved party, which concerted activities of the union are protected and which are unlawful under Section 7 of the Taft-Hartley Law; which activities, because unprotected, call only for employer retributive economic pressure through self-help.

Section 7 grants to employees "the right to self-organization, . . . to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities. . . ."

Section 8(a)(1) provides: "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."

Section 8(b)(1) provides: "It shall be an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of the rights guaranteed in Section 7. . . ."[169]

Since objectives of "concerted activities" are in the first instance, within "the power of the National Labor Relations Board,"[170] nothing that has been said is intended to convey the impression that the Board may not adopt the "unlawful objective" test as a basis for some of its decisions. Indeed it has already declared certain labor union objectives

167. Shelley *et ux.* v. Kraemer *et ux.*, McGhee *et ux.* v. Sipes *et ux.*, 334 U.S. 1 (1948).

168. Cox and Seidman, *Federalism and Labor Relations,* 64 HARV. L. REV. 211 (1950).

169. The word "interfere" in Section 8(a) (1) is omitted from this section.

170. International Union *et al.* v. W.E.R.B. *et al.*, 336 U.S. 245 (1949).

to be illegal in a limited number of situations.[171] In others it refused to find that the objectives were illegal.[172]

However, whatever decisions the Board may make, they will at least have the merit of uniformity in result. They will also have the advantage of uniformity in enforcement in the sense that only the Board and no private litigant would have the right to apply for injunctive relief either in the federal or state courts.

In the *Goodwins* case, the majority of the Court of Appeals passed over lightly the provisions of Section 8(b)(2) of the Taft-Hartley Law which specifically make it an unfair labor practice for a labor organization or its agents "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) . . . ," and of Section 8(a)(3) which specifically refers to "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; . . . ."

Since the complaint, in that case, alleged conduct which constituted an unfair labor practice under the Taft-Hartley Law, the court could have consistently followed its own precedent, which it had but recently established in *Costaro* et al. *v. Simons* et al., and should have held that the matters complained of had been preempted by federal law and that the door to concurrent state action had been closed.

It has been truly said that an entity within an entity is a cancer. If dual sovereignty is premitted to eat away at the roots of our federal system the price will be the erosion of our working democracy. Logic, precedent and the weight of necessity all indicate that, in the accommodations inherent in federalism, the assertion of jurisdiction by the Congress in labor-management relations has inhibited the exercise of jurisdiction by the states.

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171. Southern Steamship Co. v. N.L.R.B., 316 U.S. 31 (1942); Matter of Electronics Equipment Co. *et al.*, 94 N.L.R.B. 62 (1951); Matter of Mackay Radio and Telegraph Co., 96 N.L.R.B. 740 (1951); Matter of the Hoover Co., 90 N.L.R.B. 1614 (1950), *enforcement den. in part*, 191 F.2d 380 (6th Cir. 1951); Matter of Thompson Products, Inc. *et al.*, 72 N.L.R.B. 886 (1947), vacating prior decision in 70 N.L.R.B. 13 (1946); Matter of American News Co. *et al.*, 55 N.L.R.B. 1302 (1944); Note, *Federal and State Jurisdiction over Labor Relations*, 53 COL. L. REV. 258 (1953). *Cf.* Cox, *The Right to Engage in Concerted Activities*, 26 IND. L.J. 319 (1951).

172. Matter of Perry Norvell Co. *et al.*, 80 N.L.R.B. 225 (1948); Matter of Columbia Pictures Corp. *et al.*, 64 N.L.R.B. 490 (1945). See also Matter of Thayer Co., 99 N.L.R.B. No. 165 (1952), where the Board held that, because it had been vested with exclusive primary jurisdiction over peaceful strikes affecting interstate commerce, it is not bound by any decision of a state court as to the legality of the objectives of any strike.

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