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A Social and Legal Analysis of the Secondary Boycott in Labor Disputes

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A SOCIAL AND LEGAL ANALYSIS OF THE SECONDARY BOYCOTT IN LABOR DISPUTES

by

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LIFE

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CHAPTER I

HISTORICAL ASPECT OF THE BOYCOTT

The term "boycott" belongs to contemporary history but the practice and use was familiar to ancient civilization. The word "boycott" today is frequently used in association with disputes between labor and management but the method was well known, in many variations, to the societies of old. An example thereof was the Pharisees shunning the Publicans as being socially inferior. After the rule of Clisthenes of Greece, unsuccessful political claimants were ostracized by the people as a method of indicating party preference. In a sense, those who were excommunicated from the Roman Church during the middle ages were also boycotted. [1] A boycott was imposed in the year 1327 by the people residing in Canterbury, England, against the local monks, being determined not to frequent or inhabit the prior's home nor to purchase any of the food or drink sold upon monastery property. [2]

By tracing the earlier forms of the contemporary boycott back to the beginning of modern industry, it can be readily noted that the punishment inflicted upon masters, journeymen and apprentices for the violations of guild rules was similar to the present day boycott. If a master was guilty

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1 Harry W. Laidler, Boycotts and the Labor Struggle, New York, 1914, 27-30.

2 Leo Wolman, The Boycott in American Trade Unions, Baltimore, 1910, 16.

of breaking a guild rule, the hired help was forbidden to labor for him. The master was denied the privilege to appear at meetings and was forced to sell his products at a distance from the other members in good standing. If journeymen were found guilty of rule infractions, they could not be employed and were pursued by circulars (or unfair lists) announcing the breaches of rules, thus preventing the offenders from obtaining gainful employment. [3] It should be noted that the boycott was used to maintain discipline within the guild whereas the modern day weapon is used to benefit the hired hand.

From about 1700 to the nineteenth century, in northern France, the boycott was a popular weapon of the farmer to be reckoned with. Farm tenants in the Picardy area would pay the landlords a premium as rental, and because of the increased rent, claimed the privilege to occupy and sell the occupancy right at will. The landlords were denied the right to lease, sell, or evict tenants against their will. Although this right was in conflict with French law, the farm tenants felt justified because they paid certain premiums for the land, many times against the desires of the owners. If the landlord refused to recognize the unwritten law, the aggrieved renter would inform all of his neighbors and the farm was boycotted by the entire countryside. Farms could not be rented and a new tenant was denounced as a landgrabber. In many instances, physical attacks were made upon the property. [4]

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3 Ibid., 17.

4 R. E. Prothero, "French Boycott and Its Cure", Nineteenth Century, XXVIII, November, 1890, 778-785.
"Boycott", The New Larned History, Springfield, Mass., 1922, 11, 1109-1112.

There are reports of boycotts in the early history of the United States and examples thereof are the Boston Tea Party, slave-made products marketed by the abolitionists, temperance societies and consumer leagues.

The origin of the term "boycott" is interesting. For many years, the peasant population of Ireland had been unjustly and heavily burdened by the British nobility and land owning class. The land confiscations and settlements in Ireland which followed the revolutions of 1640 and 1688 left the landlords in Ireland the absolute masters of the soil. There being no mode of livelihood but agriculture open to the working population, they were glad to get a farm at any rent without the legal benefit of the usual covenants protecting the lessee in accordance with established British precedent. Holding as a tenant-at-will, the occupant was completely at the mercy of the landlord or his agent. He was constantly subjected to many rules which controlled his life, family relations, land enclosure and other arbitrary dogma in which he had little or no voice. The Irish stock had furnished British politics and the British civil and military service with many capable and hard-working servants. Yet, prior to the Boycott incident, no improvement had been made in the condition of the Irish Catholics since the use of "Molly Maguirism" and the assassination of landlords and bailiffs.[5] The fundamental defect of the Irish land tenure was that it placed the great bulk of Ireland under the arbitrary government of a small class of citizens

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5 "The Genesis of Boycotting", The Nation, XXXI, December 23, 1880, 437-38.

who had no responsibility to the peasant by custom or law.

Many farms were confiscated, the payment of starvation wages a common practice and homes taken away by legal sanction. From 1872 to 1877, there was an average of 500 evictions a year. During 1879, the total doubled and 1,000 people were driven from their homes and livelihood without any other industry available that could absorb this economic group. The plight of those concerned, born to the soil and without the necessary education to pursue another occupation, linked together with the inertia of society in general showing little desire to move, was intense. And the famine of 1878 gave the land-owning class an opportunity to clear their estates of the occupants, especially the peasant who was outspoken.

With such historical background in mind, one can rationally explain the conduct of Captain Boycott with greater understanding and clarity. He has become a figure representing unjust exploitation and yet he is merely a symbol for thought and action which had existed on a national level. Captain Boycott was a land agent for Lord Erne in County Mayo, Ireland, in the district of Connemara.[6] He is described as being brutal, foul-mouthed and arrogant. All of his tenants were compelled to stand with hats in their hand when passing on a road. Inside his office, the worker was told to stand as far as possible from Boycott's desk.[7] Evidently, the Captain held the peasant

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6 Harry W. Laidler, op.cit., 33-36.

7 Arthur D. Vinton, "The History of Boycotting", Magazine of Western History, V, December, 1886, 211-224.

in utter contempt.

During the summer of 1880, the prevailing market wage for farm labor was sixty-two cents per day for the male and thirty-seven cents for the female. Captain Boycott offered the wage of thirty-two cents for the male and twenty-four cents for the female. The peasantry refused to accept and for all practical purposes forced Captain Boycott together with his family and servants to attempt the harvest of the crops prior to spoilage. With but a few hours of labor, the newly recruited farm hands were exhausted and forced to quit since the rigorous labor was far too difficult, especially for those not conditioned by physical labor.[8] Mrs. Boycott, who was respected by the tenants and farm hands, pleaded with them and the peasants were finally induced to return to the fields. On the very next day, the tenants were presented with notices of eviction by a formidable array of eighteen constables. With enthusiasm, the constabulary managed to serve three notices of eviction, after which the outraged tenants called a large mass meeting to stop Captain Boycott and his legal aids. The leaders of the peasantry managed to induce the servants, herders and drivers for the Captain to dessert, probably indicating that their economic interests were one and the same and that force would be used if necessary.

Because of the influence of the landed gentry, the British government sent a relief expedition consisting of seven regiments of troops and an additional group of fifty hands were hired at the request of Boycott. Thus,

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8 Harry W. Laidler, Boycotts and the Labor Struggle, 23-26.

the crop was harvested at a cost many times in excess of the actual cash value.

To aid the cause, local storekeepers were enlisted in support of the peasants. For example, when Mrs. Boycott went into town to purchase bread, the storekeeper refused to make the sale because the people could not stand that "baste of a husband of hers any longer." [9] Thus the early development of aiding the principles engaged in the controversy through secondary sources (the local storekeepers) can be readily seen.

It is interesting to note that only the influence of an Irish priest, Father John O'Malley, kept Captain Boycott from death at the hands of the peasants. Father O'Mally managed to conceal Boycott at his parish until the necessary arrangements were made to secretly remove the latter. [10]

James Redpath and the same Father O'Malley are credited with being the first to use "boycott" as a descriptive term. [11] While the two were in a horse and carriage during the year 1880, Father O'Malley, in casual conversation, mentioned that social ostracism, as applied to a land-grabber, was not a fitting descriptive phrase. He supposedly stated that the action taken against land-grabbers should be called a "boycott." Thus, a word was coined that has since become famous in labor annals, although originally intended to apply to the land-owning group.

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9 Arthur D. Vinton, Magazine of Western History, 214.

10 Ibid, 215.

11 Ibid, 215-16.

Redpath appears to be the first person to use "boycott" as a noun in writing. He described the use thereof as follows:

> If a landgrabber comes to town and wants to sell anything, don't do him any bodily harm. If you see a landgrabber going to a shop to buy bread, or clothing, or even whiskey, go you to the shopkeeper at once, don't threaten him - Just say to him that under British law he has the undoubted right to sell his goods to anyone, but that there is no British law to compel you to buy another penny's worth from him, and that you will never do it as long as you live. [12]

The famous Parnell gave similar advice to other groups during the same historical period. [13]

The mechanics of the boycott were simple. The so-called obnoxious person was placed under a ban and servants and other types of laborers refused to toil for the guilty person. He couldn't get livery services, herders nor blacksmiths. Cattle and other types of stock were sometimes driven from his land. Another aid to the boycott proper took shape in the form of threatening and abusive letters making life miserable and intolerable for the landowner, sometimes requiring legal protection. Police can often dispel violence but they obviously cannot farm the land. [14]

Shortly after the dispute with Captain Boycott, the weapon was used by the Irish Land League and it was contemplated that there would be difficulty in controlling this tactic. [15]

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12 Ibid, 213.

13 Richard Barry O'Brien, Life of Parnell, London, 1899, 236-37.

14 "The Genesis of Boycotting", The Nation, XXXI, 437-38.

15 Ibid, 438.

In 1885, on the American scene, the first reports are available concerning secondary boycotts after the origin of the term. Many concerns doing business with the New York Tribune were boycotted during the year to force them to desist from advertising in the Tribune. Amongst those concerns boycotted were Rogers, Peet and Company, R. H. Macy and Company, the Royal Baking Powder Company and many others too numerous to mention. In Pittsburgh, the boycott took an opposite turn when sundry newspapers were boycotted for publishing advertisements of J. Kaufman and Brothers, with whom the union had a dispute. The Fifth Avenue Hotel was boycotted when disinterested third persons were waylaid and requested to go elsewhere at the penalty of being boycotted in their various businesses. In addition, circulars were also distributed. [16]

The primary boycott has been permitted whereas the secondary boycott has been restrained and declared illegal by courts. Often the distinction between the two is difficult. Essentially, the primary boycott is directed against the employer with whom the union has a dispute whereas the secondary boycott is used against companies who engage in commerce with the primary employer. For the sake of clarity and common understanding, it is now necessary to define a secondary boycott. Charles O. Gregory has stated that, "A secondary boycott occurs when a group of employees refuse to remain at work for an employer, not because of any complaint over their standards

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16 The Nation, XXXV, December 24, 1885, 526-27.

under him but because he persists in dealing with a third person against whom they have some grievance." [17] Millis and Montgomery have said that, "The primary or simple boycott is one in which the aggrieved party resolves not to patronize a firm or firms or its product and appeals to its friends to withhold their patronage. The usual boycott is one in which, in addition to the above, coercion, loss of business, etc., are resorted to or threatened to cause third parties to sever business relations." [18] Websters International Dictionary (2nd Edition, Unabridged), defines a secondary boycott as, "The boycott of (A) by an organized group (B) to compel a third party (C) to abstain from doing a thing for which (A) has no direct responsibility." Seligman says, "A boycott in labor disputes may be defined as a combination of workmen to cease all dealings with another, an employer or, at times, a fellow worker, and, usually, also to induce or coerce third parties to cease such dealings, the purpose being to persuade or force such others to comply with some demand or to punish him for non-compliance in the past." [19] Wolman calls a secondary boycott, "a combination to withdraw patronage from a person in order to force that person in turn to withdraw patronage from a person or firm with whom the union was primarily at odds." [20] Rothenberg

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17 Charles O. Gregory, Labor and the Law, New York, 1946, 120.

18 Harry A. Millis and Royal E. Montgomery, Organized Labor, III, New York, 1945, 583.

19 Edwin R. A. Seligman, Principles of Economics, New York, 1929, 440.

20 Leo Wolman, The Boycott in American Trade Unions, 14.

states that a secondary boycott is "a movement by which an individual or group of persons seeks to compel an employer to whom they may or may not stand in the proximate relationship of employees, to accede to their demands in matters affecting or arising from the reciprocal relations or dealings between the employer, employees and demandants by seeking to induce persons dealing with the employer to discontinue their commerce with him." [21] Many times, the secondary boycott is similar to other industrial weapons used by labor organizations, such as the sympathy strike. There isn't any clear distinction between a sympathy strike and a secondary boycott when there is a sympathy strike being conducted against an employer having no direct interest in the dispute and a secondary boycott prosecuted by pickets who are not employees of the primary employer.

Many secondary boycotts are waged by picketing. Under such conditions, one can discover human picket lines, sometimes public rallies, an occasional meeting, many signs, posters and other similar devices being used. Should a group of employees walk out against an employer being picketed to aid another labering group, this would be correctly termed a sympathy strike. Thus, it becomes important to correctly define the exact type of union pressure being invoked.

Boycotts, in early American history, appear to be a device used as a supplement to strikes who success were in doubt. In 1809, a cordwainers

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21 I. Herbert Rothenberg, Rothenberg on Labor Relations, Buffalo, 1949, 96-97.

strike in New York was precipitated by employers who attempted to have their goods manufactured in other shops and consequently there were many strikes instigated by the employees of other employers who had refused to perform services upon the "unfair" goods. [22] In Philadelphia, during the year 1827, the tailors called a strike, causing the master tailors to subcontract their work to others. In sheer desperation, the strikers managed to persuade the employees of other master tailors to refuse to perform any services upon the orders received from "unfair" firms. [23] The journeymen stonecutters of New York in 1830 imposed a boycott upon convict-cut stone when they refused to work upon such material. [24] A boycott was used against the master hatters of Baltimore in the year 1833 because of a cut in wages, although this was a primary boycott imposed upon a particular commodity. [25]

Prior to the year 1880, the use of the boycott was sporadic and of minute importance. The first concentration as an effective weapon of labor was under the sponsorship of the Knights of Labor. [26] From 1880, the popularity of the weapon grew by leaps and bounds because of many new labor gains. First, there was solidarity within the Knights of Labor so that the

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22 Leo Wolman, The Boycott in American Trade Unions, 43-72.

23 "Third Annual Report of the United States Commissioner of Labor", House Executive Documents, XIIII, No. 1, Part 5, 50th Congress, 1st Session, 1122.

24 New York Sentinel and Workingman's Advocate, July 3, 1830, 3.

25 J. R. Commons, H. L. Summer and others, Documentary History of American Industrial Society, VI, Cleveland, 1910, 100.

26 Leo Wolman, The Boycott in American Trade Unions, 24.

boycott could be applied extensively and by a large group. On a semi-political level, within the various unions, leaders were hesitant to call a strike since dues collected from members had to be used to support a strike which was distasteful to the rank and file. Then again, a boycott was becoming simple to administer because of the growing urbanization. In addition, there was an increasing division of labor making it easier for employers to replace strikers - semi-skilled and unskilled workers could be employed as skilled hands were no longer in such great need. Thus, through lack of choice, the boycott was brought to the front as an effective weapon. On the dramatic plane, attention was drawn to the power wielded by labor through solidarity by disclosing the effectiveness of the boycott. And last but not least, the cost of a boycott was negligible in comparison to a strike.

During the year 1880, boycotts were called by local organizations belonging to the Knights of Labor. [27] Recognizing the power of such an industrial weapon, the Knights of Labor convened in the year 1885, and adopted two rules granting local, district and state assemblies the right to initiate boycotts that did not affect other areas. If other localities were affected, the Executive Board of the Knights of Labor could initiate the boycott. In the year 1887 the Knights of Labor established a separate entity within its framework to exclusively develop matters concerning the boycott. Although

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27 Ibid, 27-28.

no tangible written proof can be found, the Knights probably employed the boycott as their principle means of aggression.

The New York Bureau of Labor Statistics recorded 1,352 boycotts between the years 1885 to 1892. [28] It appears that most of these boycotts were called by the Knights of Labor with a high degree of success.

From 1892 to 1900, the Knights of Labor, as an organization, lost much of its power and as a result the use of the boycott was not as extensive.[29] After 1892, organized labor had obtained a substantial following and found it necessary to wield the weapon with caution as courts were generally enjoining its use. Although the boycott was not used as frequently against the usual adversaries, a new foe had arisen and boycotts were imposed upon products made by trade unions affiliated with the American Federation of Labor. Here, we find the forerunner of the present day jurisdictional dispute. Thus, the Knights of Labor, in 1888, boycotted the Fuller, Warren Stove Company because the employees belonged to the Iron Molders' Union. A dispute also arose between the Knights and the Cigar Makers International Union in 1886 when the Knights ordered all cigar makers who were members of the Knights of Labor to withdraw from the Cigar Maker's Union. [30] After the order, the Cigar Maker's Union boycotted the cigars bearing the label of the Knights of Labor and the Knights retaliated by boycotting the cigars which

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28 The New Larned History, II, 1109-1112.

29 Leo Wolman, The Boycott in American Trade Unions, 29-30.

30 E. R. Spedden, "The Trade Union Label", John Hopkins University Studies, II, ser. XXVIII, no. 2, 17-19.

bore the label of the Cigar Makers. When a clothing firm in 1896 replaced cutters belonging to the Knights of Labor with members of the Garment Workers Union, the Knights of Labor imposed a boycott upon the products manufactured by the clothing concern. [31] When the Brewery Workmen's Union boycotted a Rochester brewery because the company employed members of the Knights of Labor, the Knights, in 1887, boycotted those breweries employing members of the Brewery Workmen's Union. [32]

The boycott was made use of in the railroad industry during the years 1885 to 1895. [33] In 1885, the Knights of Labor refused to move any of the rolling stock belonging to the Union Pacific. In 1894, during the famous strike of the American Railway Union, Debs, the leader, was imprisoned. The union was an organization consisting of all branches of employees in the railway service. When the employees of the Pullman Palace Car Company went on strike, the American Railway Union supported the strike, and ordered all of its members not to work upon any train where a Pullman car was attached. Soon, strikes arose in other companies because of contracts to haul Pullman trains. When Debs was imprisoned, the union was shortly thereafter dissolved and the railroad boycott became an inconspicuous weapon.

From 1881 to 1890, the American Federation of Labor played a minor

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31 Journal of Knights of Labor, April 9, 1896, 2.

32 Ibid, April 29, 1887.

33 Leo Wolman, The Boycott in American Trade Unions, 32-33.

role in the use of the boycott. [34] After 1890, the AFL spearheaded the drive that forced the Knights of Labor into oblivion using the boycott as a principle means of aggression. With the virtual disappearance of the Knights of Labor in 1895, the boycott was seldom used. The AFL was now a major influence and was extremely conservative in the use of the boycott. In fact, the Executive Council of the AFL during the 1895 convention, noted the shortcomings of the boycott. [35] The AFL foresaw a marked loss in the effectiveness of the boycott if it remained uncontrolled because of the increased opposition to the use thereof by the public and adverse court decisions.

Strike statistics available in the United States between 1881 and 1905 disclose an increase in the total number of strikes during this period but a slower increase in proportion to the growth of industry in general. [36] As the boycott is often an auxiliary weapon to the strike, it can be assumed that the use of the boycott increased when the number of strikes increased.

From the data available, several conclusions can be drawn with reference to the historical aspects of the boycott. Where unions experienced difficulty in gaining new members or where a vast supply of non-union labor

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34 Ibid, 33-35.

35 Proceedings of the Fourteenth Annual Convention, 1894, 25.

36 "The Statistical Aspect of the Strike," Bureau of Labor Statistics, Twelfth Report, Wisconsin, 1905-1906, 75.

is available and a strike is called, the boycott was also used. With the inability of unions to regulate conditions concerning the employees of manufacturers, the boycott was applied to prevent the sale of the product. The boycott historically emerged when the organization of the labor force was difficult and when the breaking of a strike was simple.

CHAPTER II

AN ECONOMIC AND SOCIAL EVALUATION OF THE BOYCOTT

The boycott, as conducted by organized labor, has been practised almost exclusively in the United States. A study of the boycott in Germany disclosed that it was most frequently used for political purposes. For example, inns were boycotted because rooms were refused for meetings to the Social Democratic party. In England and Switzerland "unfair lists" were published in labor disputes. [1] Although there are instances of secondary boycotts in Europe, the weapon became an American institution because of the frequent use by labor. Due to immature union leadership, individualistic peoples, and adamant employers, one can understand why the boycott became a part of the American heritage. Maturity, in labor relations, was and is far more evident upon the continent than here.

A. Characteristics of the Secondary Boycott

The boycott was seldom used in the United States in such channels of industry as engineering, iron manufacturing or in those trades which chiefly concerned themselves with contacts and were not for the general or

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1 Leo Wolman, The Boycott in American Trade Unions, 41.

retail market. According to available evidence, most of the boycotts were practised in the fields of mass consumption. And since the boycott could only be effectively used where large populations gathered, most of the action occurred in the highly industrialized areas. During the year 1885, one hundred and ninety-six boycotts were recorded of which the state of New York alone had fifty-nine. [2] The boycott is definitely an urban characteristic.

To be effective, the working population must be well organized (except when used for organizational purposes), numerous, and as already indicated, highly localized. Where the laboring community is a closely knit intimate assembly, the boycott is waged by collective efforts motivated by a collective conscience. Of course, this is an ideal situation and such homogeneity of purpose is seldom attained. Where labor is scattered, the secondary boycott is characterized by weak individual effort and is seldom successful. For example, mining towns contain a large percentage of organized labor composed of people in close contact with one another. One can see such solidarity by noting the strong demand for products with union labels. Here, a secondary boycott would be successful. [3]

To effectively promote the secondary boycott, unions, in many instances, will appeal to specialized groups for their aid. In 1895, in a

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2 John Burnett, "The Boycott as an Element in Trade Disputes", Economic Journal I, 1894, 163-173.

3 American Federationist, June, 1900, 172.

dispute involving the Rand-McNally Printing Company, the union concerned discovered that the largest purchasing class of the company's products were public officials and educational institutions. [4] A boycott appealing to the public appeared to be useless, thus forcing the union officials to exert pressure upon the political organizations who had the necessary influence or were doing business with Rand-McNally. Upon occasion, the labor movement will seek the aid of organized farmers as great service can be rendered against such firms as the International Harvester Company who manufacture farm implements. When a boycott was declared against the Studebaker Manufacturing Company, engaged in assembling wagons used on farms, it was suggested that farmers could aid by demanding fair wages for those employed by the company. [5] Today, the appeal by unions would possibly be met with resistance.

The information cited leads to the conclusion that boycotts, in general, are most effective when a large portion of the products produced by the primary or secondary employer are consumed by communities of laborers and where there are large special groups of consumers who feel that labor can bring effective pressure of a political or economic nature upon them.

A further analysis of the character of the market is necessary to explain when the boycott can be used successfully. If the market or

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4 Ibid, June, 1895, 64.

5 Ibid, June, 1895, 63.

consumers consist primarily of union people and sympathizers, the secondary boycott has a greater chance of success. Thus merchandisers selling bread, newspapers, hats, cigars, beer, clothing and other necessities and inexpensive luxuries to the public have been frequently and effectively boycotted. [6] Commodities primarily sold to the upper middle classes and the higher income echelon are generally bypassed because there can be little sympathy for others unless the action taken has publicity or is considered a social duty.

Another market characteristic to be considered is whether the article is purchased by the male or the female member of a household. It has been said that women, being closer to the home and not directly engaged in the business world, would not have as great emotional solidarity as that found among males who are "in the same boat." [7] The proof of this theory would be difficult as many more women today, even those married, are supplementing family income in the business area and education is accorded in almost equal doses to both sexes, which was not in evidence in earlier years.

Another element to consider is the frequency and regularity with which the unfair articles are consumed. If an article of popular consumption enters into daily conversation, there will soon emerge a strong support by the general public for the union cause, since the consumers are generally

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6 Harry W. Laidler, Boycotts and the Labor Struggle, 160.

7 Ibid, 161.

people in the same economic status and receptive to pleas from unions.[8]

The monopolistic characteristic of the unfair product is another element to be accounted for as part of the market analysis. If there is difficulty in obtaining a duplicate of the article made or marketed by the primary or secondary employer, it becomes difficult to appeal to the sympathy of the general public, especially if the article is a necessity.[9]

An additional aspect is the packaging and distinguishing features of the article in question. If a product does not carry the name or brand of the organization with which the union has the primary dispute, it becomes more difficult to trace the goods and obtain public sympathy. For example, should a union have a dispute with the Whirlpool Company, manufacturers of washing machines, secondary picketing of the Sears-Roebuck stores, who carry the Whirlpool washer under the Sears-Roebuck trade name of Kenmore, might be ineffective.

The final market characteristic indicated herein concerns the type of competitive products. If there are two producers of the same item, one made by the unfair employer with whom there is a labor dispute and the other, for example, by prison labor, the general public many be reluctant to purchase the alternate product made by the prisoners. Here again, price is an important factor. Prison-made products, todsy, are of little importance and

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8 New York Bureau of Statistics of Labor, Third Annual Report, 1885, 334.

9 Harry W. Laidler, Boycotts and the Labor Struggle, 163.

hence there is little necessity to explore the problem further and the example was only intended to indicate that an acceptable substitute must be offered to the public before the boycott will have a possibility of success. Otherwise, the public may continue to purchase the boycotted article.

There are many other factors to be reckoned with when considering the use of a secondary boycott. First, the union must be strong. As a tactical problem, the union leader must consider his strength as compared with the opponent as does any professional soldier. As an example, witness the success of secondary boycotts conducted by the powerful building trades unions upon items not sold directly to the masses of working people.[10] Here, success can only be achieved if the union is powerful as the products involved are not directly consumed by the general public. Then, the union leader must consider the sympathies of the secondary employer. If, for example, the secondary boycott is being conducted against the use of child labor, the neutral employer would have to capitulate more quickly to union demands because the sympathy of the public would lie with the union. Should the boycott be conducted for a reduction in working hours from eight to five a day, the secondary employer will find public opinion against the union goal and he will tend to hold out longer before acceding to the demands made by organized labor. Another item to consider is the general business conditions at the time the secondary action is being contemplated. If there is a

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10 Ibid, 161.

ready or expanding market, the secondary employer is not concerned with one customer and seeks to produce and sell as much as possible. Thus, he wants no union interference and is more psychologically ready to comply with union demands. If business is bad and there is no ready market for his product, the neutral employer can financially afford to wait longer before capitulating to union demands. Another factor is whether there is favorable publicity for the secondary boycott. Using child labor again as an example, newspapers, radio and television, even though generally prejudiced in favor of employers and prospective advertisors, would be more sympathetic in the reporting. The attitude of courts and legislators is an important element and this problem will be more thoroughly reviewed in later chapters. Then, the longer a boycott lasts, the less possibility there is for success. [11] After a lengthy period of time has elapsed, supporters become lukewarm, especially if there is a personal inconvenience attached to the union action. The last factor considered concerns the strength of employers associations. For example, the Stove Founder's National Defense Association agreed that, amongst its members, none would give employment to another member of a union originating a boycott. [12] There are also other means and methods available to capital to control the devestating effects of boycotts.

Historically, unions were weak and the threat of or an actual

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11 Ibid, 165.

12 Leo Wolman, The Boycott in American Trade Unions, 39,

strike failed to disturb the serenity of many an employer. If a strike was called, it was generally a simple problem to replace the strikers with new employees. Slowly, labor organizations realized that they had utterly neglected to use their powers as consumers and the effect of pressure upon persons and industry not directly involved in the dispute. The burden of calling a strike to improve legitimate working conditions is psychologically and factually placed in the hands of labor. Thus, all public repercussion and rancor will be let loose upon union organizations, though possibly not at fault. If primary boycotts are resorted to, the employers' profits can usually be reduced without public resentment against unions. The secondary boycott involves the same form of argument, although in all probability, there will be greater resentment than that found when a union conducts a primary boycott.

Organized labor, as any other type of enterprise, is cognizant of cost. In comparison to a strike, which often involves union membership subsidy and loss of dues, the boycott is an inexpensive weapon, having as good or better an effect than the strike. During an economic crisis, irrespective of the cost, the boycott is a better choice than a strike since unions are generally less powerful than during periods of economic prosperity and the employees will not have fear of the loss of their jobs should the boycott fail. Many strikes fail because neither the union nor its members can afford to continue a lengthy period of unemployment or possibly could not even financially afford the initial monetary outlay to promote the strike. In a

boycott, the union members continue to work and the union has less expense and less antagonism from the rank and file union member. Today, under the Taft-Hartley, there are specific circumstances under which the union would be guilty of an unfair labor practice should a strike or boycott be used. Often, the advice of legal counsel will guide a union in the determination of whether to use a strike or boycott, the salient feature being which tactic would possibly be permissable under the federal law. There are also many state laws to consider in the decision as to when to boycott or when to use a strike.

B. The Need for the Secondary Boycott

Most industry is conducted because of a social need, real or stimulated by advertisement. When persons supplying such demands violate a social law having greater importance than the manufactured article, then, upon occasion, the demand ceases and society attempts to put the offender in place. Thus, the public is a partially effective damper upon offensive or greedy organizations.[13] The boycott, primary or secondary, in such instances, has an educational aspect, acquainting people with the issues or the infringement of rights. The secondary boycott, in most instances, must be carefully used as an advertising medium because the press generally advances the employer's position and the facts will be portrayed sympatheti-

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13 "Boycotts", Illinois Bureau of Statistics of Labor, 1886, 446-453.

cally to picture the invasion of the rights of an innocent neutral employer, not a party to the dispute, who has been greatly wronged.

The secondary boycott is essentially the same as the blacklist which had been used by employers to keep union men or women from securing renumerative employment with other business concerns than that which the union had a dispute with. [14] Although the blacklist is of little importance today, it was once an employers weapon to be reckoned with and superior to the secondary boycott because of its secrecy, whereas the boycott is more or less dependent upon favorable public opinion. Furthermore, although the secondary boycott may be malicious in that the union is seeking revenge for a real or fancied wrong, experience, as indicated in legal decisions, has found such a motive exceptional. Not seldom, the objective is a legitimate labor achievement, although the means used, the secondary action,may be illegal. When the employer uses the blacklist, the purpose is to drive the worker out of industry as a lesson to the individual or more often as an example to other workmen. The element of malice is perhaps more prevalent in the blacklist than in the secondary boycott.

Many studies have advanced the theory that when newspapers were few and the coverage given to labors point of view scant, the use of pickets, primary or secondary, served a useful purpose by informing the public that there was a dispute, maintained group morale and aided strikers in keeping

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14 Millis and Montgomery, Organized Labor, Vol. III, 596.

their jobs.[15] It is currently argued that coverage by newspapers, radios and television are today unbiased and fair to labor making the use of picketing an obsolete labor maneuver, especially where the action is secondary. A recent investigation, conducted by the Federal Communications Commission for almost four years, disclosed great room for doubt as to the unbiased reporting by the advertising media.[16] When a radio license is issued, there are specific stipulations made, one being the impartial presentation of news. The late G. A. Richards, who died several weeks before the Commission rendered a decision concerning the revocation of his radio licenses, owned three 50,000 watt stations in Los Angeles, Cleveland and Detroit. Clete Roberts, a news commentator, was appointed head of the KMPC newsroom in Los Angeles in 1947 and was subsequently fired because he had stated that General Douglas MacArthur had a tremor in his hands at a time when the General was being boomed as a presidential candidate. A charge was brought by Roberts that Richards had always issued instructions to slant and distort the news in order to promote his private views. Evidence disclosed that Richards once wrote to one of his station managers that the CIO was a menace to society. Should there be a depression or a great change in political philosophy, there is a strong possibility that unions will be even more unfairly blasted by a large

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15 Herman Feldman and Harry P. Bell, "Picketing: Its Use and Abuse", Annals of the American Academy Vol. 248, November, 1946, 97-109.

16 Edmund Lawrence, "Radio and the Richards Case", Harper's Magazine, July, 1952, 82-87.

segment of the agencies pruveying "unbiased" news. Under such conditions, only time will tell whether the secondary boycott should be outlawed as being an obsolete tactic and no longer necessary to the welfare of unions.

C. Material or Commodity Secondary Actions

Secondary boycotts can be classifed as material or commodity actions. The essential difference between boycotts on materials and that on commodities is that the former can be used effectively by organized labor whereas the latter is essentially an appeal to heterogenous assemblies of consumers. [17] The salient characteristic of the boycott on materials is its appeal to unions, the purpose being the organized disapproval of certain implements and materials with which men and women work, supposedly constituting a menace to the welfare of labor. Here, union men will refuse to use, handle, or work upon unfair materials. For example, those employed in the construction industry will frequently refuse to install certain articles manufactured by non-union shops. The boycott, in such an instance, helps to provide work for union members or is in sympathy with fellow workmen. Historically, the material boycott manifested itself in such fields of commerce as prison-made goods, goods or tasks made or finished by new machinery and in embargos upon products made by competitive unions or imported from foreign

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17 Leo Wolman, The Boycott in American Trade Unions, 73-74.

countries. [18] The boycott on commodities is applied when the article is ready for consumption by the general public and is not intended for further productive use. As a practical matter, most of the latter type boycotts until the AFL-CIO schism, were of little importance since laws were passed regulating the use and sale of prison-made products; the strength of unions and education has, in many instances, disclosed a more liberal attitude toward the adoption of machinery; and the growth of the national union has done away, to some degree, with boundary lines when material is transported from another locality.

However, not all of the material boycotts can be traced to these sources. Frequently, union members will boycott articles manufactured by workmen receiving low wages and who are unorganized. In New York City, carpenters employed in the building trade industry are complete organized and usually well-paid and protected. The woodwork shops, on the other hand, until recently, were far from being completely unionized. If a general contractor purchased doors and window frames from a non-union mill, the building trade union officials would notify the contractor that the non-union product would not be installed. Because of union strength and the general work-together policy, the contractors would capitulate to union demands. The woodwork mill can only preserve its established market by

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18 Ibid, 44-47.

employing union help and the general contractor faces business difficulties should he resist the union. The carpenters union, could show that the non-union mill, by operating on lower than union standards, presented a continuous competitive hazard to unionized woodwork mills and employees directly engaged in the building trades because of a wage differential, fringe benefits, hours, etc. In most instances, wages and benefits are less in the unorganized shops than those which are unionized. The union then concludes that the contractor who purchases non-union trim profits by supporting sub-union labor standards. A further economic interest is indicated since many of the older carpenters will seek employment in the woodwork shops for such reasons as less travel, weather, year round employment, etc. These reasons are frequently cited by the United Brotherhood of Carpenters and Joiners to justify secondary action. [19]

It is only fair to note that the building trades unions have used material boycotts for such diversified reasons as a display of power, union expansion and a fear of competitive organizations. For example, the prefabricated home which is made piecemeal in a factory and shipped and assembled at the construction site, presents a problem of loss of work for the established AFL building trades unions and a shift in power, in some instances, to another competitive union. By politically controlling building codes, the use of prefabricated homes has been stopped in many large

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19 Charles O. Gregory, Labor and the Law, 123.

cities where the need for housing remains acute. Of course, local builders seeking to keep competition out of the market aid the unions in their efforts. In Chicago, dry-wall construction is limited and the plastered wall remains in use though the former process is successfully used throughout other parts of the United States, including suburbs of Chicago. Thus, the union is able to keep its members employed and another competitive organization is kept from gaining power and membership.

Unions sometimes request other labor organizations to use the material boycott. The International Coopers Union requested the Painters and Decorators Union and Typographical Union to bar the use of paints, oils and inks contained in non-union barrels. [20] The Metal Polishers Union in 1911 requested the American Federation of Musicians to use instruments bearing the union label. [21] The Textile Workers of Danville, Virginia, requested unionized garment workers in overall and shirt factories to boycott the products of an unfair southern mill. [22] However, all of these requests were disregarded and it appears that the boycott only flourishes between unions whose work is more or less intimately connected, such as in the construction trades, or if the other union will be in a similar position to

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20 Proceedings of the Nineteenth Annual Convention of the A. F. of L., 1899, 99.

21 The Journal (Metal Polishers), November, 1911, 17.

22 The Garment Worker, August, 1901, 17.

extend such aid at a later date. [23]

D. The Community of Interest Between the Primary and Secondary Employer

Another problem to consider in evaluating the use of the boycott is the community of interest between the principal and secondary employer. It should be noted that the forthcoming discussion is one of economics and legal definition and precedent is not being weighed. In the examples cited below, courts would possibly not find a sufficient relationship and degree of control between the primary and so-called neutral employers so that a secondary boycott could not be justified.

The Allis-Chalmers foundry, in an attempt to defeat a strike called by its molders, subcontracted many molding jobs to different foundries in the Middle West. Employees of the subcontractors, members of the same international union to which the strikers belonged, refused to work on any of the items sublet by the Allis-Chalmers Company. It has been argued that the action of the union should not be classified as a typical secondary boycott because there is a real community of interest since the labor standards adopted by the principal employer was being promoted by the subcontractors. [24] Furthermore, the subcontractors become primary employers in the dispute by

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23 Leo Wolman, The Boycott in American Trade Unions, 57.

24 Charles O. Gregory, Labor and the Law, 125.

completing the molding jobs. An organization as large as Allis-Chalmers, in its negotiations, tends to affect the wages of others in the same industry employed by other concerns.

A similar situation might exist when a large non-union printing establishment such as the Donnelly Printing Company in Chicago would seek the aid of unionized competitors in completing contracts during the seasonal peaks. If the union ordered its members in unionized shops not to complete the work sublet by Donnelly's, one could present a valid argument for the justification of a boycott. Donnelly has, for many years, avoided unionization by many means although many people employed are union members. There is an obvious threat to the well-being of all union printing members should an organized shop accept contracts from Donnelly. During periods of depression, with work being scarce and unemployment high, there is a definite corollation between the amount of work let to non-unionized shops, increased because of substandard employment conditions, and the number of unemployed or part-time workers in the union plant.

E. Cooperation Between Unions

Another category of secondary pressure included in the realm of the secondary boycott is that action undertaken by labor-union councils.[25] The

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25 Ibid, 127.

building trades councils, such as found in Denver, Colorado, composed of all of the craft unions ordinarily engaged in the building industry, including bricklayers, electricians, plumbers, painters, metal workers, etc., are a good example of the labor-union council. Although each is generally a separate craft entity, by agreement, should the electricians call a strike, the other associated crafts will not work if a strike is called or should non-union electricians be employed. The tactic described is not the conventional type of secondary boycott as the action called by the council is similar to a sympathy strike. Courts have prevented such action by union councils on the theory that all of the unions composing the building trades councils have no economic interest of their own to promote. In theory and in practice, there is a definite community of interest between the craft unions in the building trades since any single group may be in need of similar aid at a later date and are often engaged in labor upon the same site. Today, it is true that most building trade unions are organized on a craft basis but there is always a possibility that at a future date a reorganization may take place on an industrial basis. Suppose that a C.I.O. industrial union controlled the labor market in the building trades and the electricians were involved in a dispute over a legitimate labor gain. Then, the dispute would involve all construction workers irrespective of the particular skill since all would belong to the same union. Then, any boycott action taken at the construction site would be primary and hence permissable in various jurisdictions.

For the sake of argument, assume that an electricians strike was called to prevent the general contractor from installing electrical fixtures made by a non-union plant. Such action would, in most jurisdictions, be contrary to law or public policy. Yet the interest of the building trades electricians to which the shop electricians belong could justify the union's use of economic pressure. As long as unions in the building trades remain associated along craft lines in councils, it would be difficult to legally justify the use of a boycott. Yet, using the industrial form of organization, the same type of union coercion would be permissable as being primary activity.

F. The Labor Trend and the Secondary Boycott

An investigation of the trend of industrial disputes is necessary to fully explain the secondary boycott. During the years 1916 to 1921, an average of 105,625 persons annually out of each million of our industrial wage earning population either struck or was locked out by employers. From 1926 to 1930, the number was reduced to 11,841 per million persons. The explanation for the reduction is simple - the prosperity between the years of 1923 to 1929 was accompanied by relative price stability and an increase in real wages. In addition, the 20's saw the emergence of a new and subtle form of industrial relations. For example, witness the growth of company unions, old-age pension plans, stock ownership by employees, recreational activities and many other such similar devices. During this decade, the labor movement itself was less aggressive. The direct organizational activity

of the AFL had slowed down and unions, generally, were content to merely hold that which they had achieved. In fact, it appears that prosperity and company programs had robbed the labor movement of its emotional appeal. On the opposite side of the ledger, the 1920's disclosed a highly concentrated business drive greatly enhancing the power of capital with relative less importance being attached to the labor movement. In addition, laws governing the various jurisdictions and the federal government were more favorable to capital and it became apparent that labor giants were necessary to organize workmen in similar gigantic structures. [26] The secondary boycott became necessary to permit unions to grow and equal the power wielded by industry.

From 1930 to the effective reorganization undertaken by the Roosevelt administration, both industry and labor suffered. The Norris-LaGuardia and Wagner Acts greatly aided labor and the membership increased tremendously. With the advent of the CIO, many of the basic industries and industrial giants were organized for the first time. When World War II came, by necessity, labor difficulty was at a minimum. There were so few active labor disputes that they are hardly worth mentioning. Although John L. Lewis and his coal miners were involved in one fracas which received a great deal of unfavorable publicity, most of the unions and their leaders cooperated. After the war, due to many factors, the truce between labor and management

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26 H. M. Doty, "The Trend of Industrial Disputes", Journal of the American Statistical Association, XXVII, June, 1932, 168-172.

was at an end and the secondary boycott was used, in many instances, unwisely. With the 1947 amendments to the Wagner Act, a new era in labor history had begun and the secondary boycotts were now prohibited as being an unfair practice in industries effecting interstate commerce. Many states passed similar and even more restrictive regulations.

The necessity for labor legislation, including the regulation of secondary action, was an indication of the tremendous gains made by labor. Economically, it became questionable if labor needed the use of such a tactic as the secondary boycott. In most instances, it was argued, there appeared to be other means available to unions to achieve legitimate labor gains with greater social acceptability than secondary action. With favorable laws and fair administration, there appears, in most instances, little need for the unregulated secondary boycott. However, should there be a less favorable administration and an economic crisis, it is possible that labor could again find itself in the same position it occupied prior to the Wagner Act. Under such conditions, there may again be need to equalize the power between labor and management and the secondary boycott would become socially desirable to aid the union cause and generally increase purchasing power.

CHAPTER III

STATE AND FEDERAL LAWS AND DECISIONS

A. Introduction

The change in social conduct during the past few generations has been great and became necessary because of numerous technological developments. Although machine improvement was rapid and constant, social development tended to be slower and many communities were confronted with the necessity of formulating new rules of conduct. There was and remains a definite lag between technology and the social sciences.

As a general proposition, society, as observed in world history, has been able to control the behavior of its members by the formation and development of informal regulations. The body of rules, often called custom, has been large and the division between informal regulation and the law has often been imperceptible. So rapid has the rate of change been during the past few generations that the communities have been unable to await the development of informal controls and customs as a method of controlling human behavior and business relations. Consequently, an enormous development of formalized legal codes became necessary which, in turn, increased the number of court decisions and their influence. The first half

of the twentieth century has been one of the great law-making periods in history. The United States, being a young country by comparison with others, would naturally be in the forefront in the total sum of statutory regulation. However, it is important to note a change from previous historical eras. Instead of laws developing from accepted custom, which is the usual procedure, many statutes were enacted before society had time to reach an opinion as to the necessity for control and the most acceptable means. The field of labor law in general has been one specific area in which such hurried and irrational action is most evident. Earlier theory, generally formulated by economists and accepted by the legal profession, was laissez faire, the thought being that the groups or individuals concerned would best provide for themselves and a strict "hands-off" policy would achieve the best results. With union growth through the span of years, the thought was that collective bargaining would provide the necessary informal regulation and control so that legislatures continued with the "hands-off" policy. A very important factor often overlooked or ignored was that collective bargaining could not develop a code of equality and moral justice until the bargainers themselves had some standard criteria developed as a guide which in turn must become generally acceptable in the community.

Turning from abstract thought, society, often overlooked by the contestants, has a definite interest in labor disputes and particularly in boycotts since the settlement of disputes is often at public expense. Thus, formalized control became necessary since adequate social controls in the

field of labor relations, and specifically of secondary boycotts, were never developed or even attempted in some instances. Although the general pulse today is one of informal regulation over labor difficulties by allowing the development of collective bargaining, by necessity, many areas in labor must be controlled through legislation and court decisions. Since Americans are considered to be an individualistic group, it is a paradox that such aversion to regulation necessitated the development of stronger controls, over such labor tactics as the boycott, than are found in less individualistic nations. By necessity, state and federal legislatures stepped into the arena early in American history and controls were attempted over many weapons used by unions, amongst them being the secondary boycott.

Many individuals have felt that the "hodge-podge" known as labor law could have been more realistic had the courts of law attempted to understand the problems of labor economics instead of using formalistic theory in rendering opinions. As an example, many courts formerly denied the existence of trade unions through the use of established legal dogma and suits had to be brought against individual members. Even today, the courts and legislators conveniently forget or deny the basic conflict between management and labor. Neither side has been very scrupulous in the choice of weapons during an open conflict and periods of peace are nothing more than an armed truce. Employers have used such instruments of persuasion as the blacklist, the lockout and advertising against employees and their unions. The unions, in turn, have their few ineffectual newspapers and radio stations, the

strike and the boycott. Unfortunately, the courts failed to understand the basic cause of the difficulty and instead of reaching the carcinoma through radical surgery, it was allowed to metastisize.

B. The Doctrine of Conspiracy

1. England

The laws governing boycotts can be traced back to English law, as is true in all legal jurisdictions in the United States with the exception of Louisiana and California. From necessity, the following discussion will apply to general legal principles and labor problems and not the boycott proper although the same rules apply. The doctrine of conspiracy was used as a method of controlling union growth. The theory provides that acts, lawful when done by an individual, could become illegal when committed by two or more persons. The basic idea behind this doctrine was that concerted action by an organized group might have an ill effect upon society. In several cases that arose in the tailoring industry, individuals were indicted for criminal conspiracy against a master tailor and the illegal combination was the gist of action. [1] The courts in effect held that every man may work at what price he pleases but a combination setting the price was a crime.

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1 King v. Eccles, 1 Lea Cr. Cas. 274, 1783.
Rex v. Journeymen Tailors of Cambridge, 8 Mod. 10, 1721.

The English Parliament in 1799 and 1800 passed the Combinations Acts which clearly embodied the principles of criminal conspiracy. [2] Due to the change in the industrial climate and the doctrine of laissez faire, the English laws relating to trade and labor associations were changed during the years 1824 and 1825. [3] The 1824 legislation [4] repealed the Combinations Acts and permitted workmen to organize without the fear of prosecution for conspiracy. Due to a series of strikes, the Act of 1825 restored the common law doctrines, although not all of the controls, and criminal law conspiracy charges were again being filed. [5] In the case of King v. Bykerdike, [6] a charge of conspiracy was made in that injury was intended to the owners of a colliery and employees were prevented from working. The workers, it appears, had threatened a strike unless certain men were discharged from the mine. The court held that the action taken by the employees was a criminal conspiracy and persons had been deprived of their privilege to remain gainfully employed.

In summary, the English law, prior to 1824, held that combinations

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2 39 George III, Chapter 81.

3 6 George IV, Chapter 129.

4 A. G. Taylor, Labor Problems and Labor Law, New York, 1950, 374.

5 6 George IV, Chapter 129.

6 I M & Rob. 179, 1832.

of workers for legitimate union purposes was illegal and criminal. From 1824, unions were legitimate. A conspiracy at common law being a combination of two or more to effect an illegal purpose, the illegality of such purpose or means being found in the cooperative effort of the laboring element. Since 1825, the statutory law has not specifically stated that attempts to better working conditions were illegal. However, such acts remained illegal in the purpose before 1825 and in the means used from 1825. The reasons generally advanced for the illegality of concerted action by organized groups was that these were a violation of personal rights; a direct injury to society; trade was restrained; and the use of large numbers coerced others to agree to many unfair stipulations. There appears little doubt that the use of a secondary boycott would have been criminal because the combination and then the means would not have been permissible.

Legislation in England sponsored during 1859 legalized the peaceful persuasion of others to abstain from or to cease work. The law in 1871 provided that combinations were not illegal merely because of a restraint of trade and the act of 1875 held that the test of illegality of a combination was whether the acts, if done, would be illegal if committed by an individual. [7] Thus, unions could no longer be held criminally liable although civil suits were permitted. [8]

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7 Clifford Brigham, "Strikes and Boycotts as Indictable Conspiracies at Common Law", American Law Review, January-February, 1887, 41-69.

8 Taff-Vale Ry. Co. v. Amalgamated Society of Railway Servants, A. C. 426, 1901.

The English common law also developed the doctrine of restraint of trade as certain agreements were held to be illegal if they restrained competition or created a monopoly. Such contracts were generally held to be against the best interests of society and eventually the theory was applied to unions. This concept was embodied in the statutes of a number of states as well as in the Sherman Anti-Trust Act in the United States.

2. United States

In the United States, legal decisions followed the English common law closely. In People v. Melvin et al, [9] the state of New York convicted the defendants under the doctrine of conspiracy when a combination of journeymen cordwainers agreed not to work for any person who would employ non-union members. A strike had been threatened and the court made a finding of a criminal conspiracy. In People v. Trequier, [10] journeymen hatters were held criminally liable on the charge of conspiracy because a single hatter was prevented from working and because of a refusal to work for an employer unless a non-union hatter was discharged. Forceful opinions concerning conspiracy were written in the cases of Master Stevedores Association v. Walsh [11] and State v. Donaldson. [12] In Commonwealth v. Hunt the first important

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9 2 Wheeler's Cr. Cas. 262, 1810.

10 1 Wheeler's Cr. Cas. 142, New York, 1823.

11 2 Daly 1, New York, 1887.

12 32 N.J. 151, 1867.

decision was rendered holding that associations of workmen were not a criminal conspiracy per se. [13] However, the means and the end result attained had to be justified legally.

In 1872 and 1876, statutes were enacted in the state of Pennsylvania which did away with the theory of criminal conspiracy. [14] In 1881, the state of Illinois as part of the penal code stated that it was a crime to commit any act injurious to commerce and the boycott, if used, would be a crime. [15] At this particular period of history, boycotts were specifically outlawed as a common law conspiracy. Other courts had admitted that the ultimate object of the boycott might be legal but the immediate result was injury so that the law could not go beyond the immediate effect. Other judges pronounced the boycott illegal not merely because of injury but because the injury was accompanied by malice without justifiable cause. It was argued that a combination of two or more greatly increased the power for evil and made malicious action possible. [16] The first case in which the word "boycott" was used in an American legal decision was that of State v.

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13 4 Met. 111 (Mass), 1842.

14 Brightly's Purdon's Digest, I, Section 213, and II, Section 3.

15 Digest Laws, Chapter 69, Section 13, 1881.

16 Commonwealth v. Judd, 2 Mass. 329, 1807.
State v. Glidden, 8 Atl. 890 (Conn), 1887.
State v. Rowley, 12 Conn. 101, 1837.

Glidden, decided by the Supreme Court of Errors of Connecticut. [17] The defendants were members of a printers union and had attempted to compel a publishing company to discharge certain nonunion men so that there was a strict union shop. Other unions aided and the complainant lost a great deal of patronage. The court held that the union invaded the right of a person to engage in a business and was, in addition, an unlawful infringement upon the rights of non-union workmen since the defendants action deprived the laboring element of employment. The law of criminal conspiracy was applied because actual force or threats or intimidation was used.

Because of irreparable injury, a suit for damages could be brought or a court of equity could issue an injunction or both remedies were available. In a parallel case to State v. Glidden, the defendants had circulated handbills requesting all persons to withdraw patronage from the plaintiff's newspaper and, in addition, sent letters to patrons requesting them to withdraw all advertisements. [18] The court permitted a suit because the action taken constituted a conspiracy.

In the case of Hopkins v. Oxley Stave Company, the defendants, members of a coopers' union, requested a manufacturer of barrels and casks used to pack meats and other commodities to stop using a certain machine for

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17 8 Atl. 890, 1887.

18 Casey v. Cincinnati Typographical Union No. 3, 45 Fed. Rep. 135, 1891.

looping barrels.[19] When the request was refused, the defendants, together with other members of the Trades Assembly, a federated labor organization in Kansas City, boycotted the manufacturer. The news of the boycott was published and Swift and Company was given notice. The court held that action taken by the union was a conspiracy and issued an injunction because an attempt to stop the use of machinery was illegal since progress was hindered.

The elements of combination and malicious intent were necessary to hold a boycott illegal as a criminal conspiracy. To establish the element of malice, the desire to injure the boycotted business should be legally conspicuous and perhaps the primary motive. Here, the court had to look to the intent of the union although it was often admitted that there was present an element to better working conditions. In the Glidden and Oxley Stave cases, the respective courts found elements of malice even though questions of improving the conditions of labor were involved, the courts holding that the primary objectives were to destroy going concerns. Obviously, it is difficult to decide in any particular case whether the element of malice was present and especially whether it was paramount to the legitimate motive of bettering working conditions.

C. Coercion

Another condition which caused the courts embarrassment was that

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19 83 Fed. Rep. 912, 1897.

of coercion. A man's business is a property right and entitled to the protection of the law. [20] Thus, a person can carry on a business in a lawful manner as he sees fit. And if a person is put in reasonable fear of his business, the law allows him redress if an unlawful action was perpetrated or threatened.

Most of the earlier decisions found the use of violence, threats of violence or physical force. However, it was not necessary to prove actual violence - intimidation was present if good reasoning by the ordinary person in a similar situation was overcome. [21] Some courts held that an actual threat need not be made if the attitude assumed by a union was intimidating and could be established by the circumstances. [22] The use of the word "boycott" was held to be sufficient evidence of coercion. [23] Other courts have gone so far as to hold that the imposition of fines upon union members who refuse to engage in a secondary boycott was coercion. [24] Because unions soon discovered that courts would not tolerate violence and force, they attempted to resort to intimidation and coercion without any use of force and

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20 Barr v. Essex Trades Council, 30 Atl. Rep. 881 (New Jersey), 1894.

21 Beck v. Railway Protective Teamsters Union, 77 N. W. 13 (Mich), 1898

Plant v. Woods, 176 Mass. 492, 1900.

22 Foster v. Retail Clerks International Protective Assn., 78 N.Y. Supp. 860, 1902.

23 Brace v. Evans, 5 Pa. Co. Ct. 163, 171, 1888.

24 Boutwell v. Marr, 71 Vt. 1, 1899.

peaceful boycotts were substituted. As the person boycotted was compelled because of a fear of injury to his business to accede to terms, the Courts held that coercion and intimidation supplied the illegal means. In a sense, coercion was present but it was of the type which compelled one merchant to low his prices in order to meet the competition of his competitor. It was not the type of force which, under the law of conspiracy, was regarded as an "illegal means" in reference to boycotts because the best legal authority considered such means illegal only when the acts were a tort per se. [25]

It has already been stated that the mere act of combining constituted an illegal means because the old criminal law cases held that the mere combination was the gist of the action. Although it was true that acts when committed by a combination of persons may change their character to the extent of making them more offensive and harder to resist, it was also true that the individual worker was ineffective and, under some circumstances, one individual could cause more harm than any number of persons combined for that purpose. However, in neither case is legal coercion or intimidation present and there was no reason to find a combination ipso facto changing the character of an act which would be legal if done by one person. Many author-

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25 Joel Bishop, Bishop's Criminal Law, I, 1913, Chicago, Section 178.

Hon. O. M. Hilton, Wharton's Criminal Evidence, III, 1912, Rochester, Section 1337.

ities held that the mere existance of a combination was not a conspiracy. [26] In Vegelahn v. Guntner, [27] Justice Holmes, prior to his elevation to the United States Supreme Court, stated in a dissenting opinion:

> It is plain from the slightest consideration of practical affairs, or the most superficial reading of industrial history, that free competition means combination and that the organization of the world, now going on so fast, means an ever increasing might and scope of combination. It seems to me futile to set our faces against this tendency. Whether beneficial on the whole, as I think, or detrimental, it is inevitable, unless the fundamental axiom of society, and even the fundamental conditions of life, are to be changed. One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the other is necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way.

In New York, a court refused to issue an injunction against the distribution of circulars when there was no proof of violence [28] although the use of violence could be enjoined. [29]

D. The Constitutional Protection of Business

Thus, the gradual disappearance of the illegal combination theory

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26 Bohn Manufacturing Co. v. Hollis, 54 Minn. 223, 1893. Ertz v. Produce Exchange of Minneapolis, 79 Minn. 140, 1900. Vegelahn v. Guntner, 167 Mass. 92, 1896.

27 167 Mass. 92, 1896.

28 Cohen v. United Garment Workers of America, 72 N. Y. Suppl. 341, 1901

29 Rourke v. Elk Drug Co., 77 N. Y. Supp. 373, 1902.

led the courts to further search for a new method of controlling the boycott, which could injure business. It is interesting to compare such doctrines as caveat emptor and free competition with the law controlling the labor boycott at this period. Although unrestricted business and the purchase at one's risk short of legal fraud could spell ruin to a business man, the courts accepted that as being healthy for the national economy, whereas the general welfare of the masses, who are generally the working population and in need of protection, could not use the secondary boycott because it ruined business. Many casual observors upon the American scene, of foreign extraction, have noted that we Americans have an aristocracy of business men who are generally worshipped and protected whereas an aristocracy of hereditary nobility, often no different, is frowned upon. The decisions rendered by courts to the end of the nineteenth century would generally bear out such a contention. Dictum began to appear in a number of cases expressing the thought that property was entitled to protection as guaranteed by the constitution and the courts owed a duty to protect this right. [30] Thus, although the unions were no longer illegal as an entity, the notion developed that the end to be attained was not socially desirable.

Although it can be conceded that a right to property and the corresponding need for protection does exist, it never did follow that the

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30 Davis v. Zimmerman, 36 N. Y. Supp. 303, 1895.
Gray v. Building Trades Council, 91 Minn. 171, 1903.

right was absolute. Any business suffers injury through competition and hence to show that a union inflicted injury upon a business, it should have been shown that the means used or the end sought was not justified by trade competition. If a person exercises his rights properly, his action is legally permissable although another person may suffer a loss thereby. On this ground, "trade boycotts" used by business men and corporations were regarded as lawful. There are many instances in which a wholesaler or an association of manufacturers refused to supply good to a retail dealer for one reason or another. [31] The same reasoning should have applied to boycotts at this turbulent period of history when benefits were being secured for members and unions were fighting for their existence. Although third persons were requested to aid, this alone should not have been outlawed, because, using an analogy, business men are always taking away customers from another and the boycott had the same effect.

In addition, many business men filed complaints in courts of equity requesting injunctions. In most jurisdictions, a request for extraordinary relief was to be denied without looking at the merits of the case if the plaintiff did not come to court with "clean hands" and there was no irreparable injury. As many concerns used any means available to stop the organiza-

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31 Bohn Mfg. Co. v. Hollis, 54 Minn. 223, 1893.
Macaulay v. Tierney, 19 R. I. 255, 1895.
Brewster v. Miller's Sons Co., 101 Ky. 368, 1897.
Webb v. Drake, 52 La. Ann. Rep. 290, 1899.

tion of their employees, including violence, it seems inconceivable that the complainant should have "clean hands".

The law, as it generally existed in 1907, was that the rights of business were not absolute and any damage done as the result of a boycott was not unlawful per se. [32] However, such protection disappeared when unlawful means were used and a cause of action accrued to the person or corporation suffering a loss. [33] When there was no legitimate labor interest but a boycott was used maliciously, an action could be brought by the injured party regardless of the use of legal means.

E. The Anti-Trust Laws

With the passage of the Sherman Anti-Trust law in 1890, another phase had begun in labor relations which has been thoroughly reviewed by many experts. However, some discussion is necessary as the secondary boycott was legally stopped by a doctrine which is generally conceded today was intended for large business organizations who stifled the competitive sales market. The first attempt to enforce the Sherman Act against a union came before the

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32 Murdock, Kerr & Co. v. Walker, 152 Pa. St. 595, 1893.
My Maryland Lodge No. 186 v. Adt, 59 Atl. 721, 1905.
Mayer v. Journeymen Stonecutter's Ass'n., 47 N. J. Eq. 519, 1890.
Karges Furniture Co., v. Amalgamated W. L. U. No. 131, 75 N. E. 877 (Ind.), 1905.

33 Walker v. Cronin, 107 Mass. 555, 1871.
Ertz v. Products Exchange of Minneapolis, 79 Minn. 140, 1900.
Dickson v. Dickson, 33 La. Ann. Rep. 1261, 1881.
Graham v. St. Charles Street Ry. Co., 47 La. Ann. Rep. 214, 1895.
Doremus v. Hennessy, 176 Ill 608, 1898.
Loewe v. California State Fed. of Labor, 139 Fed. 71, 1905.

federal court in Boston. [34] The court decided that Congress did not intend to suppress boycotts and strikes through the Anti-Trust law. In one of the most famous cases, the Danbury Hatters, [35] the unanimous opinion was delivered by Chief Justice Fuller, to the effect that labor unions came within the purview of the Sherman Act. The decision has been legally analyzed many times but the social aspect has been often neglected. D. E. Loewe and Company were manufacturers of hats. The proprietor, Mr. Loewe, had risen in social prestige from that of a wage earner to that of a small business operator. His factory was not unionized but union men were supposedly employed on the same basis as non-union help. Technically, such policy is termed an open shop. When the union unsuccessfully demanded a closed shop, Loewe and Company was boycotted and other concerns, because of union pressure, refused to engage in business with Loewe's. The American Anti-Boycott Association, organized in 1902 for the purpose of stopping the use of boycotts, financed the court expenses to bring the case before a legal tribunal. [36] After the court held the union liable under the Sherman Anti-Trust law, Lyman Beecher Stowe visited Danbury, Connecticut, and interviewed ten of the men who were found guilty of a restraint of trade. [37] One elderly person, whose home had

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34 U. S. v. Patterson, 55 Fed. Rep. 605, 1893.

35 Loewe v. Lawlor, 208 US 274, 1908.

36 The Outlook, Vol. 75, Sept., 1903, 191-193.

37 Stowe, "Paying the Penalty in Danbury", The Outlook, Vol. 110, July 14, 1915, 616.

been attached to satisfy the judgment, could not raise sufficient funds to send his daughter away for tubercular treatment. When the suit was brought, the union men selected as defendants were those who owned some property and consisted mainly of the older members who were more industrious and frugal. It is interesting to note that the bank accounts and property of the defendants were attached for a period of twelve years before the final decision was rendered.

When Woodrow Wilson was nominated as the Democratic candidate for president of the United States, one of his campaign pledges was to modify the Sherman Act so that labor unions would not fall within the restraint of trade law. The result was the Clayton Act passed in 1914 which was hailed by labor leaders as the emancipation of unions from legal shackles. The joy, however, was short-lived. In the case of Duplex Printing Press Company v. Deering, [38] the Machinists union was held to have violated the Sherman Anti-Trust law irrespective of the Clayton Act. The plaintiff sought injunctive relief and was one of four companies manufacturing printing presses in direct competition with one another. Three of these concerns had accepted the terms proposed by the union, granting a closed shop, whereas the plaintiff continued to operate an open shop, with the employees working longer hours than those who had been employed in the closed union shops. Because of

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38 254 US 443, 1921.

the unequal competitive features, two of the companies who had agreed to the closed-shop and other union terms served notice that the contract would be terminated unless the plaintiff was forced to accept the same terms. The union called a strike against the plaintiff but only fourteen employees heeded the call. The union then declared a boycott in New York City and customers were warned that the plaintiffs products should not be purchased, threatened a trucking company not to haul the plaintiff's products and notified repair companies not to repair the plaintiff's presses. In 1914, the plaintiff requested an injunction and was denied equitable relief by the lower court and the Circuit Court of Appeals. These courts made a specific finding that secondary boycotts and other labor disputes no longer came under the Sherman Act because of Section 20 of the Clayton Act passed in 1914. The Supreme Court reversed the decisions given by the lower courts, holding that secondary boycotts were illegal and not protected by the Clayton Act. Justice Brandeis, in a dissenting opinion concurred with by Justices Holmes and Clarke, held that the Clayton Act was intended to aid working people by equalizing the power between the unions and the employers. Justice Brandeis noted that those with a common interest can band together and refuse to support any business which attacks their standard of living. He was careful to distinguish between illegal boycotts which were conducted against a person and not a product and not united by a common interest but only by sympathy and those in which all members of a union by whomever employed refuse to handle materials which production weakens the union.

The view that the Sherman Act applied to unions irrespective of the

Clayton Act continued until the Apex decision when the court held that labor activity did not constitute a violation of the Anti-Trust law unless competition was suppressed or national markets controlled. [39] Here, the court found that the union activity could not possibly have a substantial effect upon the entire industry. United States v. Hutcheson also held that the Sherman Act did not apply to unions. [40]

For purposes of organization, several union officials ordered the use of violence against three fur-dyeing firms whose place of business was in New Jersey although the violence was directed against customers residing in New York. [41] Although the union activity was admittedly illegal, the indictment under the Sherman Act was dismissed because the operators of the New Jersey firms did not have a sufficient amount of business to substantially effect commerce. The government had contended that all secondary boycotts were prohibited under the Sherman Act and reference was made to the Danbury Hatter and Duplex cases. Since the union ordered the use of violence, the prosecution contended that the Clayton and Norris-LaGuardia Acts did not apply. However, the court rejected this view and followed the reasoning set forth in the Apex Case. Thus, there seems to be required a substantial

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39 Apex Hosiery Co. v. Leader, 310 US 469, 1940.

40 U. S. v. Hutcheson, 312 US 219, 1941.

41 U. S. v. Gold, 115 F.(2) 236, 1940.

effect upon the market should the courts ever abandon the findings in the Apex and Hutcheson cases that unions were not intended to come within the laws restricting trade. The cases under Section 8 (b) (4) of the Taft-Hartley, later reviewed, such as in the construction industry where the "de minimis" rule has been cast aside, would be contrary to the Gold case in the consideration of federal jurisdiction. The principal objection to decisions of this type is that a judicial or administrative tribunal decides whether there has been an effect upon interstate commerce and such a determination is often an empirical question involving such variables as markets, prices, number of competitors, average amount of business done before and after competition, public pressure and the personal views of the judiciary. For sake of uniformity, it appears that a more definite standard should be created that will apply to all labor problems.

F. State Law

Most of the state courts prior to the Wagner Act declared that the secondary boycott was unlawful either upon the ground that the means constituted coercion or upon the broad principle that one not a party to industrial strife cannot, against his will, be made an ally of the union for the purpose of destroying the primary employer. [42] The rule so enunciated was not

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42 Wilson v. Hey, 232 Ill. 389, 1908.
Haverhill Strand Theatre Inc., v. Gillen, 118 N. E. 671 (Mass), 1918.
Purvis v. Local No. 500, U. B. C. J., 63 Atl. 585 (Pa), 1906.

affected by the Clayton Act which only applied to interstate commerce.

The minority rule permitted a peaceful secondary boycott holding that those on strike have a right to induce others to withhold their business patronage from the employer by threatening a boycott against those who fail to do so. [43] In the Empire theatre case, the court held lawful a publication stating that all who patronize a theatre in defiance of a boycott would themselves be classed as unfriendly and subjected to a boycott in turn.

Most of the strikes against secondary employers have occurred in three general types of situations. In the first category, there are those strikes against the use of non-union materials in the same or related crafts. The great majority of the cases falling under this classification have held that striking against "unfair" materials (not made by organized labor) by union members in the same or related crafts are contrary to law. [44] These

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43 Empire Theatre Co. v. Cloke, 163 Pac. 107 (Montana), 1917.
Lindsay & Co. v. Montana Federation of Labor, 96 Pac. 127 (Montana), 1908.

44 Anderson & Lind Mfg. Co. v. The Carpenters District Council, 308 Ill. 488, 1923.
Mears Slayton Lumber Co. v. United Brotherhood of Carpenter & Joiners Union, 156 Ill. App. 327, 1910.
Stearns Lumber Co. v. Howlett, 157 N. E. 82 (Mass), 1927.
Lohse Patent Door Co. v. Fuelle, 114 S. W. 997 (Mo.), 1908.
Booth & Bros. v. Burgess, 65 Atl. 226 (N. J.), 1906.
Purvis v. Local No. 500, U. B. C. J., 63 Atl. 585 (Pa), 1906.
Pacific Typesetting Co. v. International Typographical Union, 216 Pac. 358 (Wash), 1923.
Huttig Sash & Door Co. v. Fuelle, 143 Fed. 363, 1906.
Shine v. Fox Bros. Mfg. Co., 156 Fed. 357, 1907.
Irving v. Joint District Council, 180 Fed. 896, 1910.

courts have concluded that the strike supposedly called against non-union material was rather a strike against a neutral who was only remotely connected with the controversy. It should be noted that the primary employer, more often than not, brought suit - the neutral seldom complained. There are a few jurisdictions which have classified such secondary pressure as being legally permissable recognizing the close economic relationship and unity of interest between members in the same or related crafts. [45]

Another classification concerns strikes against an intermediate employer because of the presence of a non-union contractor on the site. Today, with industrial unions, there is a right to strike regardless of the occupation because all employees belong to the same union. But where membership is on a craft basis, such as in the construction trades, most of the courts permitted such strikes. [46] There are, as usual, opinions to the contrary. [47] The New York Courts have been the leaders in permitting cooperative

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45 Meier v. Speer, 132 S. W. 988 (Ark), 1910.
Parkinson v. Building Trades Council of Santa Clara County, 154 Cal. 581, 1908.
State v. Van Pelt, 136 N. C. 633, 1904.

46 Grant Construction Co. v. St. Paul Building Trades Council, 161 N. W. 520 (Minn), 1917.
Cohn & Roth Electric Co. v. Bricklayer's Union, 101 ATL 659 (Conn), 1917.
Jetton-Delke Lumber Co. v. Mather, 43 So. 590 (Fla), 1907.
Seymour-Ruff & Sons, Inc. v. Bricklayer's Union No. 41, 164 Atl. 752 (Md.), 1933.
Levering & Garrigues Co. v. Morrin, 71 (F) (2) 284, 1934.

47 Lehigh Structural Steel Co. v. Atlantic Smelting & Refining Works, 111 Atl. 376 (N. J.), 1920.
Snow Iron Works v. Chadwick, 116 N. E. 801 (Mass), 1917.
R. R. Kitchen & Co.v. Local Union No. 141, I.B.E.W., 112 S. E. 198 (W.Va.), 1922.

activity amongst trade unions in closely allied crafts. For example, in Willson and Adams Company v. Pearce, the building trades unions joined the teamsters in refusing to work on materials transported to the job by non-union teamsters. [48] The court, by sanctioning the strike, held that the loading in the supply yard and the unloading at the point where the building was being constructed was a necessary part of the construction work.

The third category of strikes are those against a secondary employer by union members in unrelated crafts. Here, there is almost unanimous opinion that such strikes are contrary to law and good policy. In the Auburn case, [49] the Teamsters had placed the plaintiff on an "unfair list" when it had refused to agree to a closed shop. The customers reached as secondary aids were such diverse groups as packers, butchers, ice dealers, plumbers, etc. The court held that a united front of unrelated unions will not be tolerated, the mere advantage to all of unionism was not a sufficient relationship. However, if there are direct dealings with the employees of the unfair manufacturer or contractor, boycott is permissable.

With respect to secondary picketing, labor unions in the past, engaged in controversies with the primary employer, have found it necessary to secure public support and extend activities beyond the premises of the employer. The innumerable legal problems which stem from the recognition of

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48 191 N. E. 545 (N. Y.), 1934.

49 Auburn Draying Co. v. Wardell, 124 N. E. 97 (N. Y.), 1919.

labors right to strike and bargain collectively has caused legal confusion and many social problems. When labor has the right to strike, it follows that labor may picket to publicize its point of view and gain popular support for the end result contemplated. But with the right to picket, such controversial questions have arisen as against whom may the picketing be directed, what is the area protected by the constitutional guarantee of free speech, and what are the rights of third parties? Thus, unions, especially in New York state, have picketed retailers who have no other interest in the dispute than the selling, amongst other products, those items produced by the primary employer. Often, the picketing will be directed against a neutral employer without calling a strike at the plant of the primary employer and the New York courts have sanctioned such picketing. [50] In Bossert v. Dhuy, [51] two employers doing business with one another in the same industry, found the union employees of one employer refusing to handle the goods produced by the non-union shop. The refusal to work did not extend to the employer of the unionized shop but only to the non-union product. The court held that under the circumstances, the refusal to handle the non-union material was not directed against the neutral employer but at the specific product and, therefore, permissable. In another case, there was a cessation of business dealings between the primary and secondary employers in which the

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50 Exchange Bakery v. Rifkin, 157 N. E. 130 (N. Y.), 1927.

51 117 N. E. 582 (N. Y.), 1917.

union activity was not limited to the product of the primary employer but the picketing extended to all of the neutrals business. [52] The court enjoined the picketing, stating that the action was secondary. These two cases would seem to illustrate the general rule in New York that if picketing and other methods of union pressure is limited to the product of the primary employer, then such pressure is legally condoned. If the secondary employer is picketed or otherwise harrassed by union pressure without specific limitation to the product of the primary employer, then the action taken is secondary and not permissable.

In the case of Commercial Window Cleaning Company v. Awerkin, [53] the union picketed various theatres which had entered into a contract to use the plaintiff's window cleaning services. The court enjoined the picketing because it was secondary and the adverse publicity might result in forcing the theatres to break a contract with the plaintiff. In Stuhmer v. Korman, [54] the union picketed with the placards carried omitting the name of the secondary employer. The union had attempted to induce the neutral dealer to stop purchasing bread made at the boycotted bakery and appealed to the public for support by posting pickets in front of the non-complying stores. The decision in several earlier cases had held that picketing the products of an unfair

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52 Auburn Draying Co. v. Wardell, 124 N. E. 947 (N. Y.), 1919.

53 240 N. Y. 797, 1930.

54 193 N. E. 281 (N. Y.), 1934.

employer was permissable when the placards merely extol the merits of union-made goods and ask patrons to look for the union label and avoid the purchase of non-union products. [55] The Stuhmer case didn(t fall within the category of permissable picketing because the street meetings and union attitude, contended the court, indicated that the whole proceeding was not directed at the primary employer but rather against the neutral stores. In the Blumenthal cases, [56] the court found that the union activity was directed against the product and not the dealer against whom the union had picketed. Since the union has the right to persuade the dealer to discontinue relations with the primary employer, said the court, then there is no reason why peaceful picketing should be enjoined since the union is merely using means to persuade prospective customers and generally that is the only effective means available to the union.

In the final analysis, both the employer and the union must turn for support to the public and specifically the consumer of the product involved in the dispute. Therefore, if picketing is to be successful, it must be applied at the critical point, the place of sale. But when the picketing is turned so as to cause havoc against one with whom the union has no just dispute, then the action is unnecessary and should be restrained.

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55 Public Baking Co. v. Stern, 215 N. Y. Supp. 537, 1926.
Englemeyer v. Simon, 265 N. Y. Supp. 636, 1933.

56 Blumenthal v. Feintuch, 273 N. Y. Supp. 660, 1934.
Blumenthal v. Weikman, 277 N. Y. Supp. 895, 1934.

A novel and interesting situation was presented in the now famous case of Goldfinger v. Feintuch. [57] The union had not been successful in organizing the poorly paid workers of a New York concern manufacturing the "Ukor" meat products. The union began to picket the retail distributor of these products, the banners only referring to the "Ukor" products. The manufacturer had attempted to get a restraining order but the court denied equitable relief. The case arose when Goldfinger, a retail distributor, sought an injunction. The Court of Appeals of New York held in favor of the union stating that:

> Within the limits of peaceful picketing...picketing may be carried on not only against the manufacturer but against a non-union product sold by one in unity of interest with the manufacturer who is in the same business for profit. Where a manufacturer pays less than union wages both it and the retailers who sell its products are in a position to undersell competitors and this may result in an unfair reduction of the wages of union members. Where the manufacturer disposes of the product through retailers in unity of interest with it, unless the union may follow the product to the place where it is sold and peacefully ask the public to refrain from purchasing it, the union would be deprived of a fair and proper means of bringing its plea to the attention of the public.

Here, the boycott was held to be allowable as only the "Ukor" meats was placed on the "unfair" advertisements. Although it was admitted that the picketing would injure other parts of the retailers business, the boycott itself was not extended to the entire business of the plaintiff and that was a risk that he took.

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57 276 N. Y. 281, 1937.

The law of New York appears to allow the use of banners carried by pickets if merely directed against the unfair product; but if the retailer himself is called unfair, then the courts have enjoined the picketing.

As previously noted, most jurisdictions are contrary and would call the picketing of a retailer with whom there was no dispute an enjoinable secondary action, irrespective of what was said upon the banners carried by the pickets. In addition, New York is one of the few states in which the "unity of interest" test has been applied. The only other states which have paid "lip service" to the view as expressed by the New York Court of Appeals were Illinois, [58] Louisiana, [59] and Pennsylvania. [60] However, the California courts have taken a most liberal attitude in the use of the boycott. In an early case, the plaintiff operated a hardware store and a building materials mill. [61] The unions, because of labor difficulty, boycotted the mill and hardware store. The court held that the refusal to use the plaintiff's building materials, though already contracted for, was lawful. In a later case, the California Superior Court permitted the carrying of banners by pickets

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58 Wagner v. Milk Wagon Driver's Union, Local 753, 50 N. E. (2) 865, 1943.

59 Johnson v. Milk Drivers & Dairy Employees Union, Local No. 854, 195 So. 791 (La.), 1940.

60 Alliance Auto Service v. Cohen, 19 Atl. (2) 152, (Penn.), 1941.

61 Parkinson Co. v. Building Trades Council of Santa Clara County, 154 Cal. 581, 1908.

which called the distributor "unfair." [62] The court pointed out that a retailer could not be an innocent third party because through the purchase of non-union goods, he was placed at a competitive advantage. The retailer wasn't helpless in a situation such as indicated since he could merely refuse to handle the disputed product.

Even though the New York courts have been liberal in their interpretation of a secondary labor dispute, there is often criticism in light of stare decisis. In the case of Stuhmer v. Korman, previously reviewed, 1500 bakeries had been selling "unfair" bread. The banner stated, "Demand Bread with the International Union Label." The Court granted an injunction stopping the picketing because of coercion and the overall intent appeared to be the destruction of the plaintiff's business. This decision appears to be contrary to New York law as the coercion was not violent or fraudulent and the banner merely requested the plaintiff's customers to purchase bread carrying a union label. The sole purpose of the picketing was to organize the non-union bakeries about the city of New York which is a legitimate purpose.

In People v. Mueller, the Electrical Worker's Union Local Number 3, was involved in a labor dispute with a firm specializing in the installation of burglar alarm systems. [63] The complainant operated a retail men's furnish-

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62 Fortenbury v. Superior Court, 106 Pac. (2) 411 (Cal), 1940.

63 36 N. E. (2) 206 (N. Y.), 1941.

ing store and leased the alarm system from the firm with which the union was having labor difficulty. The union picketed the haberdashery shop and in a four to three decision, the court held that there was a legitimate labor dispute and the picketing was not secondary. The issue was whether a retailer who leases a burglary alarm system from a manufacturer becomes a party in interest to the labor dispute? The court found the necessary "unity of interest" because of the maintenance contract between the store keeper and the manufacturer. The court found that the system had always been serviced by union help and peaceful picketing was guaranteed by the constitution regardless of the degree of interest of the secondary party being picketed. It must be admitted that the New York court was going far to find a "unity of interest."

In a similar case, there was a sale plus a servicing agreement of a non-union product. [64] The court did not find the necessary "unity of interest" and differentiated this case from the Mueller decision because there the alarm system was only leased whereas in the present case the "unfair" product was sold outright. It appears that the passage of title is sufficient to take away any claim of "unity of interest" between the primary and neutral employers though services are subsequently performed by the primary employer for the disinterested party.

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64 People v. Bellows, 22 N. E. (2) 238 (N. Y.), 1939.

In a more recent case, the union concerned, during the year 1933, was permanently enjoined from picketing the customers of a firm which operated a non-union window cleaning service.[65] Fourteen years later, the union sought to have the injunction vacated because the law of picketing had changed. The New York Court of Appeals dissolved the order quoting the cases of Goldfinger v. Feintuch and People v. Mueller, indicating that it would enlarge the area of picketing when there was evidence disclosing that the picketing of the primary employer at his place of business was ineffective. This case extended the principle to include third persons who are more loosely connected with the primary employer than found in most of the "unity of interest" cases because the original theory required that the two parties be in the same line of business. There seems to be little if any common bond between a window washing concern and a building under contract that needs its windows washed.

Although most writers have given credit for the development of the "unity of interest" doctrine to the state of New York, the expression had been used by Mr. Justice Brandeis in the Duplex Printing Company decision concerning the anti-trust law. The difficulty with the theory is defining the area of union activity and applying the doctrine to a given set of facts. It is obvious that many different conclusions can be reached.

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65 Enterprise Window Cleaning Co. v. Slowata, 86 N. E. (2) 750 (N. Y.), 1949.

A new view has been presented by the California Courts which may spread to other jurisdictions and tends to show the regressive attitude in courts concerning the use of secondary boycotts since World War II. [66] The plaintiff was a railroad and engaged in hauling lumber and logs for various mills. The court upheld the issuance of an injunction when the union picketed the railroad many miles away from the lumber mills with whom the union had a labor dispute. This case is interesting because it was the first time that a California court recognized the rights of the general public as a party in interest when a union uses the secondary boycott. It should be emphasized again that California has always been extremely liberal in its attitude toward the use of secondary boycotts. The regression may be due to the fact that unions are currently strong enough without such a tactic and may be a view that will be nationally accepted one day.

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66 Northwestern Pacific Railroad Co. v. Lumber & Sawmill Workers Union, 189 Pac. (2) 277 (Cal), 1948.

CHAPTER IV

A SOCIAL ANALYSIS OF LEGISLATION TO THE WAGNER ACT

A review is necessary setting forth the course of modern labor history from the beginning of the twentieth century and the philosophy behind the new legislation due to changes in the economy. At the turn of the twentieth century, many employers became alarmed at the increasing strength of the labor movement. Such employer's organizations as the National Association of Manufacturers, the National Metal Trades Association and the American Anti-Boycott Association spearheaded drives to maintain open shops, blacklists, assisted employers engaged in industrial disputes and opposed legislation sponsored by labor. Public opinion was successfully molded against the union movement, as was the present day attitude. Under such pressure, one can rationalize decisions exemplified by the Danbury Hatter's case. With World War I, conditions became favorable to the growth of unions and the membership increased rapidly. Labor had agreed not to use strikes and boycotts and the wedding was completed when employers permitted union organization and collective bargaining. Following World War I, union membership was at a historical peak. However, the rising cost of living, lagging wage rates, a tendency of some employers to withdraw their recognition of unions and the

general reconversion from a wartime to a peacetime economy caused social unrest. There was a changed public attitude toward the unions, related in part to the fear of communism from 1919 to 1921. [1] By 1923, union membership had dropped due to such factors as technological improvements, the growth of mass production and giant corporations, an increase in real wages and the welfare programs conducted by capital. The courts, and in particular the injunction issued by them, accelerated the union disintegration.

Nevertheless, there was one industry in which the unions were aided and abetted by the federal government. In 1926, the Railway Labor Act, due to the political power of railway unions in the west and the cooperation of the railroad industry, was made the law of the land and emphasized collective bargaining without governmental regulation. [2] The law encouraged collective bargaining, union organization and protected union members, being the forerunner of Section 7 (a) of the National Industrial Recovery Act and the Wagner Act.

The Great Depression started in 1929 and unemployment grew. Those employed were insecure and there was a declining standard of living. As a result, there was a widespread loss of confidence in the free enterprise system. Many experts felt that an increase was necessary in consumer purchasing power before increased production and employment could be sustained. If

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1 Millis & Montgomery, Organized Labor, Vol. III, 140-149.

2 44 U. S. Stat. 577.

so, then unions had to be supported and collective bargaining promoted to equalize the power attained by large corporations. Thus, a new governmental policy was incorporated whereby the use of the labor injunction was restricted, positive rights of organization were granted, collective bargaining was promoted, which, finally, resulted in a great increase in union membership. The depression led Congress to pass the Norris-LaGuardia Anti-Injunction Act in 1932.[3] For the first time there was a federal labor policy which permitted full freedom of association for workers and freedom from interference when organizing. The Act severely limited the power of federal courts to issue injunctions. A labor dispute was broadly defined thus, in effect, permitting strikes, boycotts and picketing; safeguards were provided limiting the issuance of temporary restraining orders; union liability for damages was limited; and "yellow-dog" contracts were no longer enforceable. The Norris-LaGuardia Act became necessary because the substantive law, initially provided by the Sherman Anti-Trust law, had not been changed by the Clayton Act of 1914. The previous restrictions placed upon boycotting activities was removed as enunciated in Section 4. Section 13 defined a labor dispute in broad language so that the use of the labor injunction was practically at an end. By 1943, many states had anti-injunction laws based upon the Norris-LaGuardia Act including Colorado, Connecticut, Idaho, Louisiana, Maryland, Massachusetts, Minnesota, New Jersey, New York, North Dakota, Pennsylvania,

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3 47 U. S. Stat. 70.

Utah, Washington, Wisconsin and Wyoming. [4]

The secondary boycott was no longer subject to injunctive procedure in most of the heavy industrial states. Among the reasons advanced for permitting the secondary boycott were:

1. The well-being of society depended upon the economic condition of the working class and consequently labor must be given every available means to achieve success.
2. The good accomplished outweighed the evil effect.
3. Restricting the use of the boycott would only cause its continuance in defiance of the law when there was a real need. As an example, prohibition did not stop drinking and greater social problems arose.
4. Prohibiting boycotts, when peacefully conducted, deprived labor of a human right guaranteed by the constitution.
5. The union is generally at a disadvantage should it call a strike because men are easy to replace, unfavorable publicity, loss of wages by union members, etc.
6. The employer used such weapons as labor spies, blacklists, lockouts, and other devices so that labor was in need of a strong counter weapon.
7. Many employer's associations such as the National Association of Manufacturers, whose sole purpose was to stop the growth of unions, were financially powerful in waging educative programs and legislative campaigns so that the secondary boycott became a necessity as a counter measure.
8. Many of the so-called neutral employers were directly interested in the primary dispute when contracts were sublet by a primary employer during a strike.

Many felt that the use of the secondary boycott should be permitted, among them being Professor Commons, a foremost authority from the University of Wisconsin. [5] However, much of the case presented in favor of the boycott as

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4 Millis & Montgomery, Organized Labor, Vol. III, 593.

5 Ibid, 596.

indicated above, was questionable. The blacklist was a weapon which had been discarded by management; secondary boycotts received as much or more unfavorable publicity than a strike; if not used conservatively, the secondary boycott would hinder collective bargaining; and the public would suffer in many instances.

The decisions rendered under the Norris-LaGuardia Act with respect to the permissability of the secondary boycott are in conflict. The majority held that secondary boycotts came within the meaning of a "labor dispute" [6] although others held that such action did not constitute a "labor dispute" so that injunctive relief was permitted. [7] When the United States Supreme Court decisions interpreted the law, it became clear that labor was finally freed from many restrictions placed upon them by the older legal interpreta-

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6 Taxi Drivers Local Union No. 889 v. Yellow Cab Operating Co., 123 Fed. (2) 262, 1941.
International Ass'n. of Bridge Workers v. Pauly Jail Building Co., 29 F. Supp. 15, 1939.
Wilson & Co. v. Birl, 105 F. (2) 948, 1939.
Cole v. Atlanta Terminal Co., 15 F. Supp. 131, 1936.
United Packing House Workers Union v. Wilson & Co., 80 F. Supp. 563, 1948.
Amal. Ass. of Street etc. Railway Employees v. Dixie Motor Coach Corp., 170 F. (2) 902, 1948.

7 Fehr Baking Co. v. Baker's Union et al, 20 F. Supp. 691, 1937.
Gomez v. Office Workers Union, 73 F. Supp. 679, 1947.
Communication Workers of America v. Mountain State Tel & Tel Co., 81 F. Supp. 397, 1948.
Illinois Central R. R. Co. v. International Brotherhood of Teamsters, etc., 90 F. Supp. 640, 1950.

tions such as found under the anti-trust laws and statutes. [8]

One test applied to determine whether an injunction should be granted by the court was whether there was a "labor dispute". In Bakery Sales Drivers Union v. Wagshall, the court found that the picketing was being carried on to force a restaurant owner to pay a debt which, it was claimed, had already been paid. [9] It appears that a bakery had requested to change the time of delivery of bread from the lunch hour of most employed people to a more suitable time. Because of the inability to comply with the request, deliveries were stopped. The union's agent then visited the proprietor and demanded payment for the bakery goods already delivered. The bill had been paid directly to the bakery concern and payment to the business agent was refused. The court said that there was not a "labor dispute" and issued an injunction. In another case, a union whose members were on strike in New York city, against the operator of a dance hall, picketed the dance studio operated by the plaintiff in Washington, D.C., to facilitate matters. [10] The court held that there was no labor dispute because the only connection between the Washington studio and the New York employer was that they were both

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8 Lauf v. E. G. Shinner & Co., 303 US 323, 1937.
Milk Wagon Drivers Union v. Lake Valley Farm Products, 311 US 91, 1940.

9 333 US 437, 1948.

10 Gomez v. United Office & Professional Workers, 73 F. Supp. 679, 1947.

operated under the same name by a different party and there was no affiliation between the two except that the right to operate the studio was given by the New York proprietor to the plaintiff. The court held that the Norris-LaGuardia Act did not apply because there wasn't a "labor dispute" and the court could issue an injunction.

The "unity of interest" theory, already discussed, is also important when requesting an injunction. If there is a "unity of interest", then there is a "labor dispute" and neither an injunction nor damages can be secured. If the court does not find a "unity of interest", then injunctive relief is in order.

Another criteria applied is whether the means used cannot be condoned. Generally, the courts will enjoin secondary picketing when violence is used. [11]

After the election of 1932 upon a national level, a new philosophy was presented wherein labor attained great favor. The National Industrial Recovery Act became the law in 1933 and agreements were permitted between employers to promote the public welfare so that the protection of organized labor became a necessary corollary. [12] Thus, many of the heavy industries

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11 Milk Wagon Drivers Union of Chicago, Local 763 v. Meadowmoor Dairies, 312 US 287, 1941.

12 48 U. S. Stat. 195.

were organized, a heretofore unknown phenomena. On the other hand, many company unions were organized, believed permissable under Section 7 (a) by experts in the field. [13] A National Labor Board was established to settle disputes and eventually assumed the quasi-judicial function of interpreting Section 7 (a). The Board experienced great difficulty because it had no means of obtaining compliance with an order except to remove the Blue Eagle. Public Resolution Number 44 allowed the President to establish boards to investigate any controversy arising under Section 7 (a) which obstructed interstate commerce. Thereafter, a National Labor Relations Board was established consisting of three full-time members. In 1935, the NRA was declared unconstitutional because of an unlawful delegation of legislative powers to an administrative board. [14] Then, the National Labor Relations Act became the law of the land. [15] Although the National Association of Manufacturers was extremely active in promoting opposition to the Wagner Act, there was surprisingly little controversy in Congress, undoubtedly due to the gravity of the economic situation and the uncertainty accentuated by the unconstitutionality of the NRA. Prior to the passage of the bill, Senator Wagner had testified that it was necessary to include all persons in the definition of a

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13 Millis-Brown, From the Wagner Act to Taft-Hartley, Chicago, 1950, 22.

14 Schechter Poultry Co. v. U. S., 295 US 495, 1935.

15 49 U. S. Stat. 449.

labor dispute, regardless of whether the participants stood in the proximate relationship of employer and employee. [16] Section 2 (9) of this Act incorporated this attitude stating:

> The term "labor dispute" includes any controversy concerning terms, tenure 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, regardless of whether the disputants stand in the proximate relation of employer and employee.

One of the most important results of the Wagner Act was the effect upon state labor legislation, the federal laws almost always seeming to set the fashion for the states. A few "Baby" Wagner Acts followed the federal legislation and guaranteed employees the right to organize and bargain collectively. And with the legislation came a shift in previous legal philosophy and early statutory thought concerning boycott activity. What should be emphasized is that most of the comprehensive laws shifted the initial determination in a labor dispute from a court and were now under the control of administrative agencies which had been created and assigned specialized duties in the field of labor. [17] As previously noted, courts of law, often formalistic and with little knowledge of labor history, caused difficulty in promoting industrial peace and collective bargaining. To have experts, chosen

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16 Legislative History of National Labor Relations Act, II, 1935, 1827.

17 Harry A. Millis & Harold A. Katz, "A Decade of State Labor Legislation, 1937-1947", University of Chicago Law Review, XV, 1947-1948, 282.

for merit in the field of labor law and relations, is a great improvement. It would be naive to assume that only the most qualified were chosen to man the boards as most are political appointees and "to the victor belongs the spoils" still applies. But at least, the basic thought was there and many excellent boards functioned, such as in the State of New York.

With the advent of World War II, many states began programs designed to regulate union activity. What is surprising is that most of the regressive regulatory programs were not found in the east and middle west, where industry is heavily concentrated, but in the so-called non-industrial areas of the United States. Undeniably, the reason for such seemingly unnecessary legislation was that if unions could be kept out, industry would be attracted to such areas. The history of the organization of the Textile Workers Union is filled with the movement of industry from the east to the southern geographic portion of the United States and the subsequent inevitable organizational drives. Farmers and business men can generally be expected to join the anti-union drives causing considerable labor difficulty in areas that are now inviting industry. A review will be made of state attitudes as expressed by legislation in the following chapter, concerning the effect of World War II and the Taft-Hartley.

CHAPTER V

THE TAFT-HARTLEY ACT

A. Discussions in the United States Congress

The testimony presented prior to the 1947 amendments to the Wagner Act was voluminous, repetitive, sometimes prejudiced and unnecessary. By noting the name of the person presenting evidence or the organization which he represented, one could be positive without reading the testimony as to whether he was for or against the proposed secondary boycott provisions. Although such biased testimony is definitely desirable, the complete lack of opinion by impartial observors was evident with the exception of Mr. Ludwig Teller, a labor expert from the city of New York. The cost of preparing labor legislation is enormous and the consequences are grave. Yet, little or no attempt was made to get the opinions of persons who could be classified as experts. For example, when Mr. Green of the AFL or Philip Murray of the CIO testified, both now deceased, one can be assured that the serious consequences and the use of the secondary boycott will be minimized. When representatives of employers' appear, by the same token, one can be certain that the abuse by labor in using the secondary boycott will be overemphasized. But the so-called expert and impartial witness, with a knowledge and understanding of labor law and labor economics, was missing.

As previously noted, the evidence and testimony was lengthy and often without purpose. To grant equal weight to the claims of both labor and management, the highlights of the material will be presented and classified in accordance with the views expressed by management, unions, public officials and the lonely Mr. Teller.

1. Abuses Noted by Management

Robert S. Edwards, President of the National Electrical Manufacturer's Association, testified of instances of abuse in the use of the secondary boycott prevalent in the construction trades and associated industries. [1] The AFL International Brotherhood of Electrical Workers, New York, completely controls the labor market in the installation of electrical equipment of all types. The union had refused to install electrical gadgets unless they were manufactured by the I. B. E. W. members in the manufacturing plants. Upon occasion should the employees of the manufacturer choose to affiliate with a union other than the I. B. E. W., the market was taken away from the employer though the latter had nothing to do with the choice of his employees. Mr. Edwards felt that the use of the boycott, in most instances, was for jurisdictional purposes as the CIO and AFL were engaged in competitive membership drives. The objective of these boycotts were illegitimate, Mr. Edwards said,

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1 "Hearings Before Committee on Labor and Public Welfare", U. S. Senate, 80th Congress, First Session on S. 55 and S. J. R. 22, 176-204.

as the purpose did not affect hours, wages and working conditions. Mr. Edwards further noted that the CIO was actively engaged in an organizational drive during the year 1934 and Local Number 3 of the I. B. E. W. in New York City wanted to change affiliation. Manufacturers in New York city were told to influence their employees to remain affiliated with the AFL. (This evidence, incidentally, appears to be erroneous as the CIO was not officially organized in 1934.) Another example was the products manufactured by the General Electric Company and Westinghouse concern as their equipment could not be installed in New York because the employees were members of a CIO union.

Some of the information given concerned the Benjamin Electric Manufacturing Company in Chicago whose employees voted for CIO representation. This concern sells lighting fixtures throughout the United States and the I. B. E. W. threatened a nationwide boycott on the products made by the Benjamin Company unless they agreed to have their fixtures wired by an electrical contractor (generally, wiring is done by the manufacturer) who employed I. B. E. W. labor. For a time, the company complied with the union order. However, the electrical contractor designated to do the wiring by Benjamin could not meet production quotas and a request was made by Benjamin for permission to do some of the wiring at his factory. The I. B. E. W. refused. As a result, the company lost many orders and revenue when it notified dealers throughout the country that fixtures could not be supplied with I. B. E. W. labels.

Mr. Edwards contended that such boycotts (really jurisdictional disputes) make for higher prices, employees lose their right to choose a representative for collective bargaining purposes, men are laid off because orders cannot be filled containing certain union labels, and the manufacturer, though complying with the provisions of the Wagner Act, looses business because of the inter-union squabbles.

Senator Pepper, in questioning Mr. Edwards, asked if the electrical manufacturers themselves did not channel products through certain wholesale distributors, thus creating a monopoly. A definite answer was not given by Mr. Edwards. Senator Pepper mentioned that the electrical manufacturers were also found guilty of violating the Sherman Anti-Trust Act in the case of Allen-Bradley v. Local Union No. 3. [2] The ex-congressional representative from Florida then asked if the abuses pointed out by Mr. Edwards could not be corrected by strengthening the anti-trust laws since union monopoly is often due to industrial monopoly. In the Allen-Bradley case, the United States Supreme Court found that both the manufacturers and the unions had conspired to restrain trade. The court further said that had the union acted alone, the Sherman Act would not have been violated under the Clayton and Norris-LaGuardia provisions. Mr. Edwards was not briefed on a proper reply to Senator Pepper's query.

Statements were presented by Roland Rice and Ben R. Miller of the

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2 325 US 797, 1945.

American Trucking Association [3] to the effect that secondary boycotts should be outlawed because of the damage done to innocent third parties and the public. Because of the strategic position of the trucking industry, an "unfair" ban can be placed upon any employer and the truckers union will not permit the delivery of materials or merchandise to the secondary employer. The point was made that if an employer is prohibited by law from compelling his employees to join a union, then, by the same token, the unions should be prohibited from trying to force him into an illegal act. It also appeared that the trucking unions had notified employers with whom they have contracts that they no longer will interchange business with other freight lines whose employees were not unionized. When the Machinist's union left the AFL, the Teamster's had attempted to organize their members which added to the strife.

John R. Van Arnum, Secretary, National League of Wholesale Fruit and Vegetable Distributors, Washington, D.C., stated that the Joint Council of Teamsters, No. 40, and the Commission House and Produce Drivers, Local 944, of Pittsburgh, Pennsylvania, undertook to organize all people buying and delivering though they were self-employed with no employees (street peddlars). [4] These unions had a contract with the fresh fruit industry wherein the former had agreed to allow the delivery of fresh fruits and vegetables.

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3 "Hearings Before Committee on Labor and Public Welfare", U. S. Senate, 383-389.

4 Ibid, 494-497.

They violated the agreement and boycotted all members to the contract in their organizational efforts. Support was obtained from the other locals in the city so that the unloading and handling of perishable items which were struck in Pittsburgh were reconsigned to dealers in other cities such as Philadelphia and Cincinnati.

In Indianapolis, Indiana, the teamsters local Number 233, AFL, had undertaken to organize the truck drivers, helpers and other employees of wholesale produce dealers. Because not more than twenty-five percent of the employees concerned belonged to the union, employees were ordered not to load or unload any merchandise to or from Indianapolis.

Local 929, AFL, Teamsters, Philadelphia, demanded certain conditions before signing a contract with jobbers in the produce market. To exert pressure so that the union demands were met, car lot receivers on the railroad lines were boycotted when refrigerator cars were not unloaded, even though they were not a party to the dispute.

Because of the perishable quality of foods not canned or frozen, labors most effective weapon to gain its demands is the boycott, especially when the transportation is controlled.

In Kansas City, milk producers had been sending their product to market by contracts with independent haulers. [5] Some of the truckers were

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5 Ibid, 1644-1647. Statement by Charles Holman, Secretary, National Cooperative Milk Producers Association.

also milk producers, picking up milk belonging to their neighbors. Local 207, Teamsters, AFL, Kansas, undertook to organize these truckers. To aid the union drive, employees of dairy companies were instructed to refuse to unload milk brought in by independent truckers. The result was a great milk spoilage because the independents had to return the milk to the farms, causing great loss. Thus, the losers were milk producers, with whom the union had no dispute.

The Walker-Gordon Company, New Jersey, produced and bottled certified milk commonly prescribed by physicians for infant feeding formulas and invalids. The Teamsters, Local 680, requested that the company make the union bargaining representative for the men employed on the farm. The company refused to comply with the union demand because of a possible violation of the law. In retaliation, the unions in distributing plants refused to handle the milk processed by the Walker-Gordon Company and drivers of trucks were not allowed to haul the "contraband".

Fentriss Hill, President of the Northern Redwood Lumber Company, Korbel, California, told of picketing in California, hundreds of miles from the scene of a strike, those projects using redwood lumber because of disobeying a boycott against the products of the struck plants. [6] Supposedly eighty percent of all carpenters in the United States, belonging to the Carpenter Brotherhood, AFL, had agreed not to use wood cut by concerns whose

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6 Ibid, 1718.

employees were not members of the Brotherhood.

A written document was made a part of the record, submitted by Charles Wilson, President, at that time, of the General Motors Corporation. [7] The essence thereof was that secondary boycotts should be prohibited because free enterprise was hampered.

The Chamber of Commerce of the United States [8] and Harold Stassen, former governor of Minnesota, college president and currently on the executive staff of President Eisenhower, [9] contended that jurisdictional disputes should be outlawed as should the picketing of innocent third persons.

Ira Mosher of the Executive Committee of the National Association of Manufacturers emphasized the fact that secondary boycotts destroy collective bargaining and are particularly harmful to smaller companies. When secondary boycotts are combined with industry-wide bargaining and closed shops, a few men and unions have the power to play havoc with the entire nation. [10] The general counsel for the N. A. M., in a prepared document, alleged that unions justify the use of secondary boycotts as a means of quarantining substandard labor conditions. However, the unions then become the judge of what substandard conditions are and consequently secondary boycotts

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7 Ibid., 485-486.

8 Ibid., 538-540.

9 Ibid., 568-569.

10 Ibid., 935-936.

should be made illegal. [11]

2. Labors Position

The following contains the evidence submitted by unions, their leaders and attorneys to substantiate the contention that the secondary boycott was necessary to American unions and were not harmful to the national economy. G. L. Patterson, general counsel for the United Rubber, Cork, Linoleum and Plastic Workers of America, CIO, stated the secondary boycott is a legal weapon necessary, in many instances, to attain a legitimate end.[12] He emphasized that boycotts become necessary against employers who engage in the operation of a plant under sweatshop conditions, selling upon a competitive market with other employers whose employees are organized.

Walter R. Batezal, editor of the Progressive Labor World, stated that some secondary boycotts were justified. [13] He made specific reference to the printing industry where work is often sublet to non-union shops.

William Green, former President of the AFL, was naturally for the continued legitimacy of the secondary boycott. [14] He alleged that in many instances, it was impractical or impossible to establish decent work standards

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11 Ibid., 1814.

12 Ibid., 1552-1553.

13 Ibid., 1838.

14 Ibid., 981-992.

save by pressure brought to bear upon customers of the unfair employer. He stated that the AFL was against boycotts where another union had been certified by the National Labor Relations Board and when boycotts are conducted merely because certain products are produced in another area. However, secondary boycotts are often necessary to alleviate sweatshop conditions.

Philip Murray, until recently President of the CIO, presented similar evidence. [15] He added that less than one percent of the workers involved in strikes during 1946 engaged in secondary boycotts. Where the boycott was used in jurisdictional disputes, the AFL, the CIO, and other independent unions should enter into agreements and solve their own difficulties. It is interesting to note that a member representing labor openly admitted that the jurisdictional boycott was a problem.

The president of the Oil Workers International Union, CIO, Mr. O. A. Knight, stated that if company A is struck and company B ships gasoline to A, then B can be picketed since he is no longer a disinterested party. [16]

A. F. Whitney, president of the Brotherhood of Railroad Trainmen, gave testimony upholding the view presented by Mr. Murray. He was against jurisdictional disputes and the secondary boycott as associated therewith. However, he felt that it would be an error to make all secondary boycotts illegal. [17]

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15 Ibid., 1114-1115 and 1157-1159.

16 Ibid., 1496-1497.

17 Ibid., 2117-2118.

Mr. Harvey W. Brown, International President of the International Association of Machinists, presented an interesting view. [18] He stated that a distinction should be made between boycotts that definitely operate against the best interests of the public and a boycott about which there is a reasonable doubt as to its value to society. Boycotts against goods made by "outside firms" (those not manufactured within a given area) should be made illegal and is consistent with the purpose of the anti-monopoly laws even though the union concerned was acting without the aid of a going business. Evidently, Mr. Brown had the Allen-Bradley case in mind. His reason was that unions were not organized to increase prices.

3. The Congressional Outlook

The views of those representing the public will now be reviewed. In a minority report submitted by Senator Thomas of Utah, he clearly stated that new legislation was necessary to ban unjustifiable forms of labor abuse. [19] Although some forms of secondary boycotts should be made illegal, others were necessary. The jurisdictional disputes should be outlawed but secondary boycotts intended to protect wage rates and working conditions should not be prohibited. The appropriate goal he indicated was legislation which prohibited secondary boycotts in pursuance of unjustifiable objectives

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18 Ibid., 1614-1616.

19 "Legislative History of the Labor Management Relations Act", I, Senate Minority Report Number 105, Part II, on S. 1126, 80th Congress, First Session, 1948, 481-482.

but did not impair the unions right to preserve its own existence. He further added that the law, as proposed, was confusing and failed to take cognizance of the trend in courts of law. The judiciary were beginning to turn from the practice of considering secondary boycotts in terms of the old common law conspiracy doctrine and were determining the legality of particular factual situations on the basis of the tort doctrine. Using such an approach, there was a growing acceptance of certain forms of action directed against parties who are not immediately involved in a law dispute where there was a "unity of interest" between such a party and the disputing employer. Evidently, Senator Thomas felt that the doctrine enunciated in Goldfinger v. Feintuch [20] was sound and necessary to promote legitimate unionism. The Senator from Utah felt that the legislation proposed would reverse the trend indicated above. A refusal by one union to handle a product made by other non-union labor would be an unfair labor practice and Section 8 (b) (4) as prepared (and eventually enacted) should be more precisely defined and limited.

Mr. Gerald W. Landis of Indiana presented another view. [21] He felt that the secondary boycott throws many innocent people out of work and many disinterested parties were deprived of the necessities of life. He

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20 276 N. Y. 281, 1937.

21 "Legislative History of the Labor Management Relations Act", I, Senate Minority Report Number 105, 583-584.

stated that the lettuce strike at Salinas in 1936 caused a loss of 2,000 cars of lettuce because of a secondary boycott. In LosAngeles in 1946, 20,000 gallons of "hot milk" were dumped in front of the city hall. "Hot milk" here refers to a secondary boycott against the delivery of any milk in which the union involved thought that union milkers should be employed or the truckers delivering should be union members. Mr. Landis felt that the secondary boycott has hurt the innocent farmer badly since non-union trucks are threatened as are the dairy men themselves should they attempt to do their own hauling.

He referred to a situation in Philadelphia when Local 929 of the Teamster's attempted to organize the female clerks of wholesale produce dealers and the dealers were powerless before the union demands.

Senator Ellender submitted evidence that a CIO union was certified as bargaining representative of the employees neon sign manufacturers. [22] When these signs were distributed in various states, the AFL craft union members refused to install the signs because they bore CIO labels. When the CIO attempted to organize the cannery workers in California, the haulers belonging to the AFL allowed the fruits and vegetables to waste in the fields, the teamsters refusing to carry them. In Oregon, Washington and California, CIO longshoremen refused to unload lumber carried in ships manned by AFL

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22 Ibid., 1054.

seamen.

Senator Robert A. Taft noted unions failed to submit any evidence of when a secondary boycott was necessary and for the general benefit of the community. [23]

Senator Morse from Oregon felt that the purpose of Secion 8 (b) (4) was to clog the federal courts with petty litigation, having no object but that of weakening the labor movement. [24]

Mr. Pepper, then a Senator from Florida, stated that not only was the secondary boycott outlawed by the proposed legislation but that there was added the arbitrary and mandatory requirement that a National Labor Relation Board Regional Attorney, upon nothing more than what he considered reasonable cause, seek an injunction. [25] Senator Pepper thought this unfair because a similar requirement was not put into the law when an employer commits an unfair labor practice under Section 8(a).

The United States Secretary of Labor at that time, Schwellenbach, stated that when an industrial organization violates the law and commits an unfair labor practice, the use of the secondary boycott should be legally permissable. [26] Other forms of enumerated justifiable secondary boycotts

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23 Ibid., 1106.

24 Ibid., 1370.

25 Ibid., 4200.

26 "Hearings Before Committee on Labor and Public Welfare", U. S. Senate, 1958-1960.

would allow, as an example, carpenters on construction jobs to refuse to install any millwork made by nonunion labor working for lower wages. He would also permit the picketing of a retail store selling products of an unfair employer providing the placards carried by the pickets refer only to the products in which there is a labor dispute.

4. The Expert Viewpoint

Ludwig Teller, attorney from New York, arbitrator and labor relations consultant, felt that secondary boycotts should be regulated and innocent third parties should be protected. [27] However, protection should not be given to those who aid employers during a labor dispute. He felt that any retailer, purchasing merchandise with the knowledge of a labor dispute, is no longer an innocent third party but becomes a person in interest economically and the union should be permitted to proceed against the retailer selling the unfair product providing banners are carried enumerating only the unfair employer or struck plant.

5. A Summary

A few general observations can be safely made that would cover the entire proceedings prior to the passage of the 1947 additions. The most

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27 Ibid., 254-256.

obvious point concerns the difference in preparation between those representing management and those "carrying the ball" for labor. Management definitely advanced a far better argument than labor by citing enumerable examples of unnecessary, unscrupulous and indefensible secondary boycotts. Labor on the other hand was unable to offer more than "there are good and there are bad boycotts". Yet, even then, most of the evidence submitted in behalf of Section 8(b)(4) concerned the jurisdictional boycott which is not the only type of secondary boycott. The handwriting was already on the wall as labor difficulties were accentuated due to the end of the war, rising prices, scarce materials and a general reconversion to a peacetime economy. By being well prepared and offering legislation against those aspects receiving the most unfavorable publicity, unions might have been able to avoid the restriction of all secondary activity.

Due to the press and radio publicity, the atmosphere of the entire hearing definitely favored managements point of view. Here again, labor failed miserably by not having adequate public relations. Men in Congress, dependent upon votes for future popularity and reelection, only expressed that which was "fashionable" shortly after World War II. It is interesting to note that when President Truman was given the Taft-Hartley bill for approval, George Gallup, director of the American Institute of Public Opinion, conducted a poll amongst the voting population consisting of white collar workers, laborers, farmers, professionals and business people. [28]

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28 Iron Age, Vol. 159, Part III, June 5, 1947, 123.

The majority of those polled wanted the President to sign the new law. However, manual laborers, skilled, semi-skilled or unskilled wanted the President to veto the bill. By party denomination, thirty-five percent of those considering themselves as Democrats were for the bill, forty-nine percent wanted the legislation vetoed and sixteen percent had no opinion. Of those professing Republican affiliation, sixty-three percent of those polled wanted the President to sign the bill whereas only twenty-three percent desired that President Truman veto the Act. Only fourteen percent were non-committal.

As previously mentioned, the jurisdictional dispute received a great deal of adverse publicity. Yet, in 1946, jurisdictional disputes only accounted for 3.5% of the total number of work stoppages and only .5% of the total number of idle man-hours. [29] An analysis of this important issue discloses that the jurisdictional dispute falls into two classifications. The first problem involves the existance of craft unions and the limited jurisdiction of workers with definite occupations, usually of a highly skilled craft and often found in the construction trades. Because of the impossibility of devising exhaustive job classifications, duty designations and the forseeability of industrial changes, there are always areas of uncertainty and overlapping. In the building industry, there are many squabbles over which trade shall attach metal trim, etc. The dispute is generally between

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29 Monthly Labor Review, Vol. 64, May, 1947, 795.

two craft unions, each claiming control over the particular task to be performed. The second problem involves a conflict between two unions over the right to act as the collective bargaining representative for a specific group of workers. Despite the overlapping between the two types of so-called jurisdictional disputes, there were different methods available for settling each. In the first, an administrative action was necessary since no method was available by which workers could express their views. In the second, it was possible to settle the dispute by having the N. L. R. B. conduct an election. It should be noted that a jurisdictional row is not necessarily a secondary boycott, as defined.

Again one should note the lack of impartial and expert testimony with the exception of Ludwig Teller. For this, labor, management and the 80th Congress must share the blame. Because they are representing the public, the congressional committees should have been far more selective and requested more impartial experts to present views before passing laws designed to affect the entire nation.

B. The Constitutional Aspect

When the Taft-Hartley was enacted, many authorities doubted the constitutionality of several of the provisions contained therein. Whenever the constitutional question of Section 8 (b) (4) was raised before the respective Courts of Appeal in various circuits, such as the issuance of a

temporary injunction under Section 10 (1), [30] or upon the Boards petition for a review or enforcement of orders under Section 10 (e) and (f), [31] the courts consistently upheld the secondary boycott provision against the argument that the curtailment of the right to picket violated the First Amendment of the United States Constitution.

Long before Section 8 (b) (4) reached the Supreme Court, the question of the constitutional protection of free speech when a union picketed was "batted" about. In the Giboney case, the court upheld the right of a state to regulate picketing when used in an attempt to achieve a result in conflict with the public policy of a state as enunciated in a statute. [32] Here, the union had picketed a supplier of ice to compel him, contrary to the Missouri Anti-Trust Law, to sell ice only to those drivers who were members of the union and to stop the sale to the non-union drivers or independent contractors, whom the union was trying to organize. The Court specifically stated that the United States constitution cannot be used as a shield to break a state law. There was nothing in the constitution under the First Amendment granting a union the right to express itself contrary to

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30 Printing Specialties & Paper Converters Union v. LeBaron (Sealright), 171 F.(2) 331, 1948.
United Brotherhood of Carpenters v. Sperry (Wadworth), 170 F. (2) 863, 1948.

31 NLRB v. International Brotherhood of Electrical Workers (Langer) 181 F.(2) 54, 1950.
Local 74, United Brotherhood of Carpenters (Wadsworth), 184 F. (2) 60, 1950; certiorari denied 341 US 490, 1949.

32 Giboney v. Empire Storage & Ice Co., 336 US 490, 1949.

public policy. Although the Ritters Cafe case [33] had also restricted the union picketing, many felt that these situations were confined to the specific factual cases and that the basic right to picket, unrestrained, remained unchanged. [34] In a five to four decision, the court, in the Ritter case, upheld the issuance of an injunction to prevent the picketing of a restaurant by a union whose only grievance was that the owner had let a contract to a non-union contractor to construct a building which was in no way connected with the restaurant business. In the Wohl case, a state court had enjoined the picketing of suppliers of independent peddlars with whom the union had a dispute. [35] Union members distributing bakery goods had attempted to induce independent peddlars to work six days a week and to hire an unemployed union member one day a week. The union picketed the customers purchasing from the peddlars because no other means were available. The Supreme Court held that there was no unconstitutional invasion because of the right of free speech granted to unions and others. The Ritter and Wohl cases could be distinguished on the theory that the former involved secondary picketing of a different industry than that with which the union was engaged in a labor dispute whereas the Wohl case concerned a dispute in the same industry. It can readily be seen that the issue was subject to doubt and the

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33 315 U. S. 722, 1942.

34 Carpenter's & Joiners Union v. Ritter's Cafe, 315 US 722, 1942.

35 Bakery & Pastry Drivers Union v. Wohl, 315 US 769, 1942.

effect of these decisions upon Section (8) (b) (4) placed the outlawing of the secondary boycott in the speculative area.

With the decision rendered by the Supreme Court in Thornhill v. Alabama, [36] the expert in the field of labor law felt that picketing was entitled to protection as a right of free speech although there was considerable doubt as to the extent to which this right could be limited.

Later, the Supreme Court rendered decisions in three cases definitely setting forth the doctrine that picketing was something more than free speech and a state could regulate picketing whenever it was contrary to reasonable public policy as enunciated by court decisions or statutes. [37] As a result of these decisions, the United States highest court's opinion determining the constitutionality of Section (8) (b) (4) came as an anti-climax. In the Langer case, [38] the court discussed the contention that Section (8) (b) (4) violated the constitution by citing the Giboney, Hanke, Gazzam and Hughes cases. If picketing was proscribed in furtherance of an unlawful object, then the guarantee of free speech did not apply to the present issue.

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36 310 US 88, 1940.

37 International Brotherhood of Teamsters v. Hanke, 339 US 470, 1950.
Building Service Union v. Gazzam, 339 US 532, 1950.
Hughes v. Superior Court of California, 339 US 460, 1950.

38 I. B. E. W. v. NLRB, 341 US 694, 1951.

Although the right of free speech and Section 8 (c) [39] is a subject apart, mention is made herein as unions had contended that Section 8 (b) (4) and Section 8 (c) must be considered together. Unions argued that conduct which merely consisted of peacefully persuading or inducing action was not a violation of Section 8 (b) (4) providing that the requirements of Section 8 (c) were complied with. However, the courts have consistently held that Congress did not intend that Section 8 (b) (4) should be subject to the "free speech" clause. [40] The reasons given were that to exempt peaceful secondary picketing from the prohibitory clause of Section 8 (b) (4) would in effect permit secondary boycotts contrary to the intent of Congress and the door would be opened to customary secondary means of enlisting the support of "disinterested" employees in use prior to the present Act to bring economic pressure to bear on employers, contrary to the legislative history of the Taft-Hartley. Therefore, the purpose of Section 8 (c) was to protect non-coercive speech in the furtherance of a lawful object and was not intended that it be extended to unfair labor practices.

In contrast to the constitutional protection which had been granted

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39 Sec. 8 (c), "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

40 NLRB v. Denver Building Trades Council (Gould & Preisner), 341 US 675, 1951.

to picketing as an exercise of the right of free speech, the right to strike is not protected by common law nor the federal constitution. [41] No argument has been advanced that the prohibition of strikes as enunciated in Section 8 (b) (4) was unconstitutional. However, in the Rice Milling case, [42] the court noted that Congress did not intend to outlaw the primary strike when conducted for legitimate labor goals.

C. The Act and Its Interpretation

The interpretive problems regarding secondary boycotts confronting the National Labor Relations Board and the federal courts are many and varied. An explanation of the procedural questions is necessary before the substantive law is analyzed and reviewed.

The Act, in Section 10 (e), [43] contains the necessary constitutional provision which provides for court review after a decision is rendered by the Board and such determinations are enforced upon petition to the Court of

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41 Dorchy v. Kansas, 272 US 306, 1926.

42 NLRB v. International Rice Milling Co., 341 US 665, 1951.

43 Section 10 (e) ..."shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided and by the Supreme Court of the United States upon writ of certiorari...".

Appeals in the proper appellate district. Section 10 (1) [44] makes it mandatory for the Regional Attorney of the Board to secure a temporary injunction in a United States district court when there is reasonable cause to believe that Section 8 (b) (4) (A), (B) or (C) has been violated after a preliminary investigation has been conducted.

The Board is charged with the interpretation and enforcement of Section 8 (b) (4) and issues of constitutionality are to be determined by the courts alone. [45] The reports and recommendations of the Examiners are final under Section 10 (c) unless a disputant files an exception within twenty days after the opinion by the examiner is officially rendered. [46] It should be noted that opinions rendered by Trial Examiners are only of value until the Board or the federal courts have passed upon the exact question in issue. A source of confusion concerning the substantive provisions of Section 8 (b) (4) lies in inconsistent court decisions and Board rulings between various jurisdictions and individual cases. As already indicated,

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44 Section 10 (1). "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph 4 (A), (B), or (C), of Section 8 (b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except... If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States...".

45 Rite-Form Corset Co., Inc., 75 NLRB 174, 1947.

46 Section 10 (c). "...and if no exceptions are filed within twenty days after service thereof upon such parties,...".

the Regional Attorney, under Section 10 (l) is required to seek a temporary restraining order when there is sufficient evidence available disclosing a union violation of the secondary boycott provisions. As a result, federal district courts frequently pass upon issues which the Board has not yet decided. The Board has taken the position, with good reason, that decisions rendered on petitions for temporary injunctions are not binding upon the Board and are not res adjudicata.[47] The Gould and Preisner case, which will be subsequently discussed, went to the Supreme Court and the position advanced by the Board was upheld since a petition for an injunction is not decided upon a full hearing nor are all the merits and arguments presented. However, all other decisions are binding upon the Board.

1. The Jurisdictional Aspect

Concerning jurisdiction, the NLRB decides the issue on a "case to case" basis and it is not bound by the determination of the General Counsel.[48] Under the Wagner Act, the power of the Board to hear disputes involving the

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47 Denver Building Trades Council (Gould & Preisner), 82 NLRB 1195, 1949.
Denver Building Trades Counsil (Grauman), 82 NLRB 93, 1949.
Le Bus v. Pacific Coast Marine Association, 23 LRRM 2027 (La.), 1948.
Evans v. I. T. U., 76 F. Supp. 881 (Ind.), 1948.
Graham v. Boeing Airplane Co., 22 LRRM 2243 (Wash.), 1948.

48 Retail Clerks International Association (A-1 Photo Service), 83 NLRB 564, 1949.
Walter J. Mentzer, 82 NLRB 389, 1949.

construction industry was never constitutionally tried. Prior to the 1947 changes, the Board had declined to take jurisdiction over disputes in the building industry because of limited resources and facilities. However, with the passage of the 1947 amendments, the Board exercised jurisdiction in the construction trades. The Board took jurisdiction in a case involving an electrical contractor, the total value of the services and materials being $325.00, because suppliers of material from another state were involved. [49] In the Gould and Preisner case, interstate commerce was affected where the subcontractor against whom the union activities were directed purchased sixty-five percent of its raw materials outside of the state and most of the finished products, though purchased within the state, were also produced outside the state. Interstate commerce was further affected where two union carpenters and one sheet-metal worker left a job three days prior to completion. [50] When the case went to the Court of Appeals, the issuance of an injunction by the lower court was upheld because the drive-in theatre business involved large sums of money though the individual contributions were small.

The Board issued a series of decisions to serve as a guide when

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49 I. B. E. W. Local 501 (Langer), 23 LRRM 1661, 1949.

50 Shore v. Building & Construction Trades Council, 173 F (2) 678 (Pa.), 1949.

jurisdiction would be taken. [51] Under the criteria cited, a good portion of the building industry would not meet the requirements spelled out and there is serious doubt that Congress intended such standards. The Supreme Court in 341 U.S., at page 684 [52] clearly held that the Board can refuse to take jurisdiction though there is a substantial effect upon commerce if the Board states that the policies of the Act will not be effected. However, in spite of such forceful language, a recent case before the Court of Appeals reversed the Board decision on the question of jurisdiction because of congressional intent. [53]

2. A Labor Organization Defined

Section 2 (5) defines the type of labor organization covered by

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51 WBSR, Inc., 91 NLRB No. 110, 1950.
Local Transit Lines, 91 NLRB No. 96, 1950.
The Borden Co., 91 NLRB No. 109, 1950.
Stanislaus Implement & Hardware Co., Ltd., 91 NLRB No. 116, 1950.
Hollow Tree Lumber Co., 91 NLRB No. 113, 1950.
Federal Dairy Co., Inc., 91 NLRB No. 107, 1950.
Dorn's House of Miracles, Inc., 91 NLRB No. 82, 1950.
The Rutledge Paper Products, Inc., 91 NLRB No. 151, 1950.
Memphis Cold Storage Warehouse Co., 91 NLRB No. 219, 1950.
Willard, Inc., 2 NLRB 1094, 98F (2) 244, 1948.

52 Denver Building Trades Council (Gould & Preisner) v. NLRB.

53 Joliet Contractors Association v. NLRB, 193 F (2) 833, 1952, (Ill.).

the Taft-Hartley. [54] The Board, in the case involving the Di Giorgio Fruit Corporation,[55] applied Section 2 (3), [56] and held that a union composed of agricultural employees was not a labor organization under the Act and, as a result, incapable of violating Section 8 (b) (4). However, a separate local of Teamsters whose membership included truck drivers of other employers as well as those employed by Di Giorgio was held to be a labor union capable of committing a secondary boycott under Section 8 (b) (4). A question arose as to whether a political subdivision, a Board of Education, came under the jurisdiction of the NLRB. [57] The Board held that the Act excluded governmental agencies.

3. The Type of Inducements Not Proscribed

Should inducements be made by a union to a supervisor, [58] or an

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54 Section 2 (5). "The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

55 International Brotherhood of Teamsters (Di Giorgio Fruit Corp.), 87 NLRB 720, 1949.

56 Section 2 (3). "..., but shall not include any individual employed as an agricultural laborer...".

57 Al J. Schneider, Inc., 89 NLRB 221, 1950.

58 Arkansas Express, Inc., 92 NLRB 255, 1950.

employer, [59] or a single employee, [60] the Act is not violated. An individual union member cannot commit an unfair labor practice unless acting as an agent for the union concerned. In the Gould case, the Board held that the withdrawal of services of one man was not a strike since there wasn't a concerted stoppage as required by statute. Presumably, a consumer's boycott is not proscribed, even if involving employees of the secondary employer, because the concerted refusal must be in the course of employment. [61]

4. Agency

An agent of a union is defined in Section 2 (13) and incorporates the common law doctrine of agency. Thus, when presented, there is always a factual question as to whether the person instituting the boycott had express or implied authority to commit an unfair labor practice, whether the acts committed were within a union agents apparent authority or whether the agents action, if not within his position scope, was ratified by the union. It becomes obvious that a mere union member, not an official nor having administrative powers, cannot ordinarily involve a union in an unfair practice. To date, the agency problem has not been considered by the Board in a case

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59 Studio Carpenters v. Loews, Inc., 182 F(2) 168 (Cal.), 1950.

60 Denver Building Trades Council (Gould & Preisner), 82 NLRB 1195, 1949.

61 NLRB v. Service Trade Chauffeurs, 191 F(2) 65, 1951.

arising under Section 8 (b) (4). However, the question of agency is not peculiar to the secondary boycott and the Board has reviewed this problem in other cases. [62]

5. The Independent Contractor

Whether the conduct with which the union is charged constitutes a secondary boycott depends upon the relationship between the two employers and the control exerted by the primary employer over the "neutral" business. If the relationship is so close that one may be regarded as the "ally" of the other, picketing or other secondary activity is permissable during a legitimate labor dispute. Generally, the relationship of contractor and sub-contractor is not sufficiently close, as evidenced in the construction industry, to call the two employers "allies", nor are the employers "allies" when one deals almost exclusively in the products of the other, where the ownership is entirely separate and distinct. In the Schenley case, [63] the union had struck several distributors of Schenley products and its members employed by other distributors had refused to handle Schenley products in an effort to compel the primary employer to settle a strike in one of its sub-

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62 Sunset Line & Twine Co., 79 NLRB 1487, 1948.
Smith Mfg. Co., Inc., 74 NLRB 544, 1947.
Perry Norvell Co., 80 NLRB 225, 1948.
The Great A & P Tea Co., 81 NLRB 880, 1949.

63 NLRB v. Wine, Liquor & Distillery Workers Union, 178 F. (2) 584, 1949.

sidiary plants. The court rejected the union's contention that there was a sufficient identity of interest between Schenley and the distributors to make them "allies" since the distributors were independent contractors who merely market large quantities of Schenley products.

The construction and needle-trade industries have always subcontracted work and the question arose whether Congress intended to protect an employer who sought to avoid the effects of a strike by subcontracting to other firms. The mere fact that the two employers are "allies" in the sense that the term is used in the business world is no defense against a secondary boycott charge. There needs to be some degree of control exercised by the primary employer over the so-called neutral employer. In the construction industry, it is well known that subcontractors are constantly employed and there appears to be little dispute with decisions holding that union picketing of a subcontractor hired by a general contractor is a secondary boycott. In the needle trades, subcontracting is only prevalent during the seasonal periods. To avoid a labor dispute, it would be a simple matter to merely subcontract as much of the work as possible, thus avoiding the effects of a union drive. Here, an equitable solution becomes difficult.

The Ebasco case was one of interest and concerned the independent contractor problem. [64] A CIO union, composed of architects, engineers and technicians called a strike against the Ebasco Services, Inc., a company

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64 Douds v. Metropolitan Federation of Architects, 75 F. Supp. 672 (N. Y.), 1948.

engaged in engineering design projects as consultants. Part of the work of this concern was sublet to the Project Engineering Company, with Ebasco supervisors closely inspecting and handling the work performed by the secondary employer. After the strike was called, Ebasco increased the amount of work subcontracted to the Project concern. The Regional Attorney, as required by Section 10 (l), sought an injunction which was denied by the District Court because of an identity of interest between the two employers. The court felt that Project Engineering was not an innocent third party because of the close supervision exercised over the employees of the former. This decision seems in line with the intent of Congress which was expressed by Senator Taft prior to the passage of the Act:

> This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees. [65]

A similar result was reached in a case involving a suit for damages. [66]

6. Suits for Damages

In Gerry v. International Ladies Garment Workers Union, [67] the court properly denied the petition of a private party for injunctive relief

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65 93 Congressional Record 4323, April 29, 1947.

66 Mills v. Plumbers Union, 23 LRRM 2559 (Mo.), 1949.

67 21 LRRM 2209 (Cal.), 1948.

under Section 303 (b). [68] Section 303 permits suits for damages by private persons in courts and not before the Board. The substantive rights provided by Section 303 and the remedies of Section 8 (b) (4) are identical. The difference is only one of procedure since Section 8 (b) (4) requires the Regional Attorney of the Board to ask for an injunction and Section 303 permits suits by private parties for damages. A number of cases tested the jurisdictional requirements under Section 303 (b). Section 301 (a) provides for suits in violation of contracts and Section 303 (b) provides for suits to be brought in the United States District courts "without respect to the amount in controversy or without regard to the citizenship of the parties". The Southern District of New York held that Section 303 creates a new federal right and there is no requirement of diversity. [69] On May 1, 1950, the Court of Appeals for the Ninth District held that there was no requirement for diversity of citizenship in a suit under Section 303, reversing a lower court opinion. [70]

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68 Section 303 (b). "Whoever shall be injured in his business or property by reason or any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of Section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

69 Baumer Mfg. Co. v. United Furniture Workers, 25 LRRM 2498 (N. Y.), 1950.

70 26 LRRM 2136, 1950. Certiorari denied by the U. S. Supreme Court, 26 LRRM 2611, 1950.

Private suits for damages under Section 303 have seldom been brought to court considering the number of charges being filed under union unfair practices. However, the recent decision in the Juneau case may change managements inertia. [71] The trial court awarded three-quarters of a million dollars in damages and the Supreme Court upheld the verdict in a jurisdictional dispute. The union had contended that the National Labor Relations Board must make a determination under Section 10 (k) [72] before a private person could sue for damages. The court held that Section 303 is a separate remedy and a determination was not necessary by the Board before damages are sought in a court of law.

7. Is There a Strike?

The Board must often determine whether the action the union is charged with constitutes a strike in violation of Section 8 (b) (4). Section 501 [73] covers the question of strikes or whether the activity constitutes the

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71 International Longshoremen's Union v. Juneau Spruce Corp., 342 US 237, 1952.

72 Section 10 (k). "..., the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen...".

73 Section 501 (2). "The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees."

exercise of the right to seek other employment. Section 502 permits an employee to quit his job in accordance with the constitutional prohibition of involuntary servitude. [74] The Watson Specialty Store case first faced this problem. [75] Here, the members of the Carpenter's union ceased work one day prior to the effective date of the Taft-Hartley and the court held that there was no evidence indicating that the workers intended to quit their jobs. In the Osterink case, [76] the Board found that the union called a strike in violation of Section 8 (b) (4) (A) when two men were removed from a job. In the Gould & Preisner decision, the Board said calling one man off a job was not a strike. [77] While the decisions rendered in cases involving walkouts by one person or by two or more have determined whether a plant is "struck", the approach appears to be unrealistic. The question is whether a strike is intended and not whether one or two men are involved.

When 114 from a total of 115 union members quit their jobs within a short period of time, the Board held that the employees had engaged in a

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74 Section 502. "Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act;...".

75 22 LRRM 2247, 1948.

76 Bricklayer's Union (Osterink Construction Co.), 82 NLRB 228, 1949.

77 82 NLRB 1195, 1949.

strike though the unions attempted to disguise the walkout. [78] Here, the Electrical Workers Brotherhood was unable to dissuade the corporation managing the atomic energy plant at Oak Ridge from letting an electrical contract for certain repairs to a non-union contractor who had submitted the lowest bid. The union members, in protest, resigned their jobs individually or in groups within several days. When the Regional Attorney secured an injunction, the employees who had "quit" their job returned. [79] The union had contended that the employees had quit for personal reasons but this view was rejected by the Board.

8. Section 8 (b) (4) (A)

Although Section 8 (b) (4) contains four subdivisions, the last (D), applies to jurisdictional disputes and will not be reviewed [80] since such proscribed activity does not constitute a secondary boycott as defined. The activities forbidden by Section 8 (b) (4)(A), (B), and (C) will be dis-

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78 Matter of Electrical Workers (Roane Anderson Co.), 82 NLRB 696, 1949.

79 Styles v. Local 760, I. B. E. W., 80 F. Supp. 119 (Tenn.), 1948

80 Section 8 (b) (4) (D). "forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work".

cussed.

Most problems have arisen under (A) [81] which was designed to stop the use of economic coercion or physical force upon any employer of self-employed person. In the Schenley Distillery case, the union was involved in a primary dispute with Stagg, a manufacturing subsidiary of Schenley. [82] The union refused to handle products of the Schenley distributors as a method of economic coercion. An unfair labor practice charge was made by Jardine, a distributor of Schenley. The union contended that Jardine was not a neutral distributor, having an interest in the Schenley products. The Board said that the facts differed from that in the Ebasco case (previously discussed) because there was no financial or other relationship that would indicate control by Schenley over its distributors. The Circuit Court subsequently affirmed this view, [83] and other Board decisions have followed suit. [84] Neither the Board nor the courts have shown any tendency to follow

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81 Section 8 (b) (4) (A). "forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person."

82 Wine, Liquor & Distillery Workers, 78 NLRB 504, 1948.

83 NLRB v. Wine, Liquor & Distillery Workers, 178F. (2) 584, CA-2, 1949.

84 Metal Polishers Union (Climax Machinery Co.), 86 NLRB 1243, 1949.

National Union of Marine Cooks (Irwin-Lyons Lumber Co.), 87 NLRB 54, 1949.

the "unity of interest" rule propounded by the New York courts in Goldfinger v. Feintuch where the two employers are completely independent of one another.

In the Schenley case, the union contended that its actions at the warehouses of the distributors were not directed against the principle but resulted from an accumulation of unresolved grievances at each of the distributors which constituted a primary dispute. The Board did not find sufficient evidence to support the unions point of view and the strike at the distributors was intended to affect Schenley's. The Board and Court said that the Act did not require that the picketing of the distributors need not be the sole union motive to be proscribed.

The use of the unfair list by unions is worthy of special mention. The Grauman case held that merely placing a primary employer on an unfair list was not a violation of subsection (A) and is similar to direct picketing even though one of the effects of such a listing might well be that some employees would withhold their services from the secondary employer. [85] In the Osterink case, previously decided, the Board held that placing the name of the primary employer on an unfair list was a violation of Section 8 (b) (4) (A) [86] and the Grauman decision specifically reversed this ruling.

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85 Denver Building & Trades Council, 87 NLRB 755, 1949.

86 Bricklayer's Union (Osterink Construction Co.), 82 NLRB 228, 1949.

Unions are also forbidden to make attempts to force an employer or self-employed person to become a member of an employer's association. This provision was intended to outlaw trade associations which act as collective bargaining agents for its members thereby imposing uniform contract provisions on an industry wide basis or by locality. [87]

In the Western Express Company decision, the union had instructed an employee of the secondary employer not to unload a trailer received from a trucker with whom the union had a dispute. [88] In defense, the union alleged that it only issued such instructions to determine whether the secondary employer's use of the trailer conflicted with a clause in the union's contract with the neutral, which reserved to the union the right to accept freight bound for struck establishments. The Board held that the object of the unions conduct was to force the secondary employer to cease doing business with the struck firm until the applicability of the clause in the contract was determined. Such action was a temporary boycott and a violation of Section 8 (b) (4) (A).

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87 Barker v. United Brotherhood of Carpenters & Joiners, 21 LRRM 2406 (Ala.), 1948.
Le Baron v. Printing Specialties & Paper Converters Union, 75 F. Supp. 678 (Cal.), 1948.
Sperry v. United Brotherhood of Carpenters & Joiners, 21 LRRM 2244 (Kansas), 1948.
Douds v. Local 294, International Brotherhood of Teamsters, 75 F. Supp. 414 (New York), 1947.

88 Local 294, International Brotherhood of Teamsters, (Western Express Co.), 91 NLRB 340, 1950.

The Board has determined that a union does not violate (A) when it prevails upon customers, who are also supervisors, to abstain from purchasing the employer's products. [89] Often, the Board is called upon to determine what is "inducement or encouragement" of employees so as to fall within the proscribed activity. In a pertinent case, the Board held that there was "inducement or encouragement" when a union agent had his secretary call union members employed at various meat markets to inform them that a specific wholesale meat dealer had been placed on an "unfair" list. [90] The union relied upon the Grauman case which held that the activity was primary when the union within its own councils classified a primary employer as unfair. The Board rejected this view because relaying the information by telephone to the employees at the place of business of the secondary employer was tantamount to a specific instruction to cease work.

In a recent Board case, union members called a strike when they were required to work on shingles produced in a Canadian mill which did not bear a union label. [91] The union contended that since the product was foreign made, the action was primary so that the "inducement and encouragement" was not the

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89 Local 878, International Brotherhood of Teamsters (Arkansas Express), 92 NLRB 255, 1950.

90 Amalgamated Meat Cutters, Local No. 303 (Western, Inc.), 93 NLRB 336, 1951.

91 Washington-Oregon Weavers Council (Sound Shingle Co.), 101 NLRB No. 203, 1952.

type prescribed by the Act. The Board, in effect, said, although it did not have jurisdiction over a foreign manufacturer, it did have the power to remedy unfair practices of unions in this country and the secondary employer and the violation occurred within the Board's jurisdiction.

The Board, in another case, found that (A) was violated when union members, employed by the trucking companies, refused to handle merchandise sought to be delivered or picked up at their employers' premises by other concerns unless the driver attempting the delivery or pickup was a member of the same union. [92] In addition, the union was guilty of an unfair labor practice by preventing nonunion crews of the visiting concerns from performing services upon equipment belonging to the trucking companies because the union objective was to force the two employers to sever business relations.

9. Section 8 (b) (4) (B)

Section 8 (b) (4) (B) forbids a union from forcing another employer to bargain with a union which has not been certified. [93] This was designed to prevent a union in one plant from boycotting some other employer for whose employees a union has not been certified. Thus, it appears that sympathy

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92 Teamsters, AFL, (Irvin J. Cooper, Jr.), 101 NLRB No. 215, 1952.

93 Section 8 (b) (4) (B). "forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9".

strikes, which have as their "object" the use of force upon the unrelated employer to recognize or bargain with an uncertified union, is proscribed. However, a sympathy strike, which has some "object" other than the one previously stated or where the labor organization which it sought to compel the unrelated employer to recognize or bargain with has been certified by the NLRB, is permissable under the Act.

In a dispute involving members of the Teamsters union, a local department store was picketed to force a parcel delivery service, which had a contract with the department store, to recognize the union as the bargaining agent. [94] The Board held that (B) was violated. In the Kanawha Coal case, subsequently cited, the Board held that the union violated (B) when it sought, by secondary pressure, to compel certain independent dealers to join an employer's association with which the union had a closed shop agreement. Had the union been successful, the lumber dealer would have become subject to the union's contract and would have to recognize the union without it being certified. Bringing pressure on an employer almost two years after the right to represent the employees had been taken away by a petition for decertification violated (B). [95]

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94 International Brotherhood of Teamsters (Howland Dry Goods Co.), 85 NLRB 1037, 1949.

95 Construction Laborers Local 320 (Armco Drainage & Metal Products, Inc.), 93 NLRB 751, 1951.

10. Section 8 (b) (4) (C)

Section 8 (b) (4) (C) forbids a union to use its economic powers to force an employer to bargain with one union when another has been certified as the bargaining representative of his employees. [96] Due to the organizational drives by the CIO and AFL, many labor disputes with employers were undertaken to gain greater membership and power for the union attempting the venture. If the employer intervened prior to 1947, there was a good possibility that he would have been guilty of an unfair labor practice. If he did nothing, the employers business suffered. Another reason for banning such activity can be found in state court decisions represented by Florsheim Shoe Company v. Retail Shoe Salesmen's Union [97] and Swenson v. Central Labor Council, [98] which forbad union activity in similar situations whereas such conduct was permissable in some cases in the federal courts because of the Norris-LaGuardia Act. In the Florsheim case, the New York State Labor Board had certified an AFL union after holding an election. A CIO affiliate continued to picket the Florsheim Company after the election. The New York Court

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96 Section 8 (b) (4) (C). "forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of Section 9".

97 42 N. E. (2) 480 (N. Y.), 1942.

98 177 Pac (2) 873 (Wash.), 1947.

of Appeals upheld the issuance of an injunction by the lower court and restrained the picketing as being contrary to public policy. In the Swenson opinion, the court followed the ruling in the Florsheim case when a union had been certified by the Labor Relations Board although no contract had been signed between the certified union and the employer. However, opinions rendered in federal courts, in situations similar to that found in the cited cases, had denied injunctions because of the constitutional guarantee of free speech, [99] and the Norris-LaGuardia Act. [100] By reviewing the testimony as presented in the beginning portion of this chapter, the purpose of Congress becomes clear in enacting (C).

In a recent case, a minority union struck against an employer who had contracted with a formally certified union to compel the employer to adjust the grievances of the members of the striking minority union. [101] The Board held that (C) was not violated if the desired adjustment was not contrary to the contract between the employer and the certified union and, more important,

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99 Cafeteria Employers Union, Local 302 v. Angelos, 320 US 293, 1943.
Bakery & Pastry Drivers v. Wohl, 315 US 769, 1942.
AFL v. Swing, 312 US 321, 1941.

100 Yoerg Brewing Co. v. Brennan, 59 F. Supp. 625 (Minn.), 1945.
Fur Workers Union Local No. 72 v. Fur Workers Union No. 21238, 105 F (2) 1, 1939.

101 Perry Norvell Co., 80 NLRB 225, 1948.
Electronics Equipment Co., 94 NLRB 62, 1951.

as long as the striking union did not seek to force recognition of its "unit" representation of employees who form part of the bargaining unit represented by the majority as certified. The union sought to act as a representative for employees to exercise the right of individual adjustment of grievances which the Act assures to every employee and is permissable. [102] However, should the minority union seek to represent as a unit employees forming a part of the bargaining unit represented by the certified union, as distinguished from the agency for the adjustment of individual grievances, there is a violation of the Act. [103]

In the Oppenheim-Collins Department store opinion in New York, the union which had been the bargaining agent, had not complied with the filing requirements contained in Section 9 (f) (g) and (h), so that it was not placed on the ballot when an election was held. [104] As a result, another union was elected and the former bargaining agent picketed the premises of the employer. The picketing union contended that the purpose of the picketing was not to force the employer to recognize or bargain with it but rather to persuade the employer to reinstate certain members of its local union. Sec-

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102 Douds v. Retail & Wholesale Department Store Workers, 173 F. (2) 764, 1949.

103 Humphrey v. International Brotherhood of Teamsters, 85 F. Supp, 473, 1949.

104 Douds v. Local 1250, Retail, Wholesale Department Store Union (Oppenheim-Collins), 23 LRRM 2424, 1949.

tion 9 (a) permits employees to present their grievances and the Court of Appeals upheld the union position.

A union is prohibited, under (C), from engaging in primary strikes or boycott activities to force an employer to bargain with a particular labor organization as the representatives of his employees if another union has been certified. [105] It should be noted that subsection (C) bars primary activity when another union has been certified and is not a secondary boycott as generally defined. The Board heard a case in which a union continued to picket a plant after another union had been certified. [106] The facts disclosed that the union called a strike and another union was officially recognized by the Board during this interim. The Board held that the activity was secondary and therefore proscribed.

D. Primary or Secondary Boycott

On June 4th, 1951, the United States Supreme Court rendered decisions in four cases concerning the secondary boycott provisions of the N.L.R.A. as amended that offered an opportunity to clarify the primary, secondary situs problem. Considering that the opinions in three of the four cases were unanimous and that only two justices dissented in the fourth case it might be reasonably expected that the conflict at long last would have been decisively

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105 See footnote 96..

106 Retail Clerks Local 1179 (Western Auto Supply), 93 NLRB 1638, 1951.

settled. Unfortunately, the Court rendered opinions concerning issues of which there was already little doubt, but left unanswered the fundamental question of the primary situs doctrine.

Before discussing the decisions rendered by the United States Supreme Court, a review is necessary of the administrative and court opinions concerning similar problems. In the Ryan case, [107] construction had been undertaken by the Ryan Construction Company at the Bucyrus Company's plant. For sake of convenience, a special gate had been placed in the fence surrounding the Bucyrus firm to be used by the employees of Ryan. When the employees of Bucyrus went out on strike, the union picketed the plant including the special gate which had been erected for the use of Ryan's employees. The Board held that such activity was not a secondary boycott as the picketing was primary and the 1947 amendments only intended to outlaw union action which sought to enlarge the economic area beyond the premises of the primary employer. In the Montgomery Ward opinion, [108] the company had promulgated a rule requiring business agents to receive a pass when visiting the shipping dock. In protest, the union patrolled the trucking entrance to Ward's and instructed truck drivers, who were union members, not to make any pickups or deliveries. The Board held that such union activity was primary because the employees were

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107 U. E. W. (Ryan Construction Corp.), 85 NLRB 417, 1949.

108 87 NLRB 972, 1949. Another issue was whether there was a "labor dispute" under Section 2 (9). The Board said there was a bona fide dispute because the parties need not stand in the proximate relationship of employer-employee.

only told to stay away from the premises of the primary employer.

In the Di Giorgio Fruit Corporation case, [109] the Teamsters union had picketed an unorganized employer for the purpose of being recognized as bargaining agent. The Board held that the picketing was primary even though employees not covered by the Act refused to cross the picket line because the activity was restricted to the area of the primary employer. A Kansas District Court made a similar finding in 1948 when it refused to issue an injunction where the Building Trades unions and the Carpenter's organization had picketed the construction site of a non-union builder and members of the Teamsters union had refused to cross the picket line. [110]

In the Sealright case, [111] one of the most difficult problems was in issue. Sealright employees struck and a picket line surrounded the entire plant. When several trucks of an independent concern crossed the picket line hauling Sealright's products out of the plant, two strikers followed in a car. When the truck arrived at destination A, the strikers picketed at the tail gates of these trucks and managed to persuade the employees of A to refuse to unload the trucks. The NLRB held that the picketing was secondary and violated Section 8 (b) (4) (A) of the Act. The District Court enjoined the

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109 International Brotherhood of Teamsters (Di Giorgio Fruit Corp.) 87 NLRB 720, 1949.

110 Sperry v. Building Trades Council of Kansas City, 23 LRRM 2115, (Kansas), 1948.

111 Printing Specialties Union v. Le Baron (Sealright), 171 F (2) 331, 1948.

picketing and was affirmed on appeal. It can be seen that the problem of determining the situs of the primary labor dispute becomes more complicated when the business operations of the primary employer are not confined to a fixed area but are of a transient nature.

The Schultz decision concerned a similar problem.[112] In 1948, Schultz moved his terminal from New York City to Slackwood, New Jersey. When Schultz's contract with the Teamster's union in New York expired, the company made a contract with a New Jersey local. In retaliation, the New York teamsters picketed the trucks of Schultz every time a delivery or pick-up was attempted in New York City at the situs of neutral customers. The Board held that this picketing was primary and distinguished it from other cases because the primary employer's premises was in New Jersey and no other means of picketing was available. In addition, the picketing only took place while the trucks were being loaded and unloaded. To establish a picket line in New Jersey would have been useless since the primary employer's business was conducted in New York city. The dissenting members of the Board contended that even though the union confined its picketing activities to the employer's trucks, it was immaterial as Section 8 (b) (4) (A) does not require that a secondary boycott to be unlawful must completely disrupt the business of the secondary employer and the union's picketing was conducted upon the premises

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112 International Brotherhood of Teamsters (Schultz Refrigerated Service), 87 NLRB 502, 1949.

in the sole possession of the secondary employer.

In the Kanawha Coal case, [113] the Board found that the situs of the dispute with a specific timberman, who produced timber for mine use was at the sawmill rather than at the mines where trucks of the lumberman were making a delivery. The picketing at the mines was a secondary boycott, although the signs advertising the dispute referred to the timberman; the picketing was not confined to the period when the trucks were present.

In a case similar to the Schultz Refrigerated Service decision, the District Court of Southern New York issued an injunction. [114] Sterling Beverages, Inc., had its central office in Massachusetts, holding a contract with the Teamsters union in Massachusetts. The firm was an exclusive distributor for Rupperts and sent trucks to the warehouse in New York City for merchandise. Members of the Massachusetts local drove the trucks to the New York border where the teamsters belonging to the New York local took over. The Massachusetts Teamsters union demanded the right to have its members drive the Sterling trucks in New York city. When refused, the Massachusetts local picketed the entrance to Ruppert's in New York City whenever a Sterling truck appeared. The Court granted an injunction, admitting that the purpose of the picketing was to induce the employees of Sterling not to move trucks about Ruppert's

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113 Union Construction Workers (Kanawha Coal Operators Ass.), 94 NLRB 1731, 1951.

114 Douds v. International Brotherhood of Teamsters (Sterling Beverages), 85 F. Supp. 429, 1949.

property but held that Section 8 (b) (4) (A) was violated because the net result was that the employees of Ruppert's refused to load or unload Sterling trucks, causing Ruppert's to stop doing business with Sterling. The Board stated that this case differed from the Schultz opinion because the primary employer's trucks were, upon occasion, beyond the area patrolled by the picket and the publicity was not restricted to the trucks but to the areaway of the neutral employer.

The Santa Ana Lumber case discussed the following of trucks belonging to the primary employer to note the names of his customers.[115] The union did not picket any of the customers who were to be contacted at a later date. The Board held that there was no picketing and the mere trailing of the lumber company's trucks could not by itself be interpreted as an inducement or encouragement of the customers employees.

Many of these cases discussed are contrary to the earlier decisions or cannot be satisfactorily reconciled with later rulings made by the Board, having developed since the Pure Oil opinion. In the Pure Oil case, the NLRB set the precedent for another series of cases which held that picketing of the primary employer at his main location was not a secondary boycott though the purpose of such picketing was to force other employers to stop doing business with him by inducing their employer to strike or a "refusal to handle".[116]

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115 Lumber & Sawmill Workers Union (Santa Ana Lumber Co.), 87 NLRB 937, 1949.

116 Oil Workers International Union (Pure Oil Co.), 84 NLRB 315, 1949.

Both the Pure Oil Company and the Standard Oil Company operate petroleum refineries that adjoin each other. Standard Oil held a lease for the use of the dock facilities and operated the surrounding premises with its employees, handling shipments for themselves and the Pure Oil Company. The union involved had been certified as the representative for the Standard Oil and Pure Oil employees, although separate locals were used. Due to a prospective strike involving their employees, Standard Oil gave the Pure Oil Company the right to operate the docking facilities, Pure Oil to operate the premises with its own employees. Pure Oil sought permission from the union to operate the dock but an agreement was not reached. When the strike involving Standard Oil began, the union placed pickets at the dock. In addition, the crew of a tanker refused to load the Pure Oil cargo unless the loading was under the direction of a Standard Oil foreman. Later, the union notified the National Maritime Union representative of the dispute with Standard Oil and the fuel belonging to the Pure Oil Company became "hot cargo" as soon as it reached the dock. Evidence presented disclosed that the union had requested the employees of the Pure Oil Company to strike. The General Counsel, during the hearing, contended that the picketing of the dock was an unfair labor practice because it induced the employees of Pure Oil to refuse to handle the product of their employer so that the Pure Oil Company would be forced to stop all business dealings with the Standard Oil Company. The Board held that the picketing was confined to the primary situs and, as a result, the law was not violated since all picketing was in the immediate vicinity of Standard Oil property.

The General Counsel further alleged that the letters to the National Maritime Union had encouraged the maritime employees on the tanker to discontinue business relations with the Pure Oil Company. The Board held such action was an integral part of the unions right to take primary action in support of the demands made on Standard Oil and the right to publicize - there was nothing more than a request to honor a picket line at the place of business of the primary employer. The Board recognized that the union's pressure on the primary employer may have had a secondary effect, that of inducing and encouraging the employees of the Standard Oil Company to cease doing business. Yet, to hold otherwise than that the action was primary, would in effect outlaw every strike.

In the Moore Dry Dock opinion, [117] the Board followed the rule enunciated in the Pure Oil case. Here, the union had a dispute with the owner of a ship with a foreign registry. The ship had been tied up at an American yard so that it could be converted. The union wanted to picket the ship to secure the customary rate of pay for the seamen attached to the vessel. First, the union requested permission of the shipyard to picket the ship at the dock. When refused, the union stationed pickets at the entrance to the shipyard after ninety percent of the crew were on board. Signs were carried by the pickets naming the ship only as being unfair. The Board held the picketing to be

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117 Sailors Union of the Pacific (Moore Dry Dock Co.), 92 NLRB 547, 1950.

primary because it was limited to the situs of the dispute located on the secondary employer's premises at the time the primary employer was present; the picketing was limited to places reasonably close to the situs of the dispute (where the ship was tied to the dock); the primary employer, at the time of the picketing, was engaged in its normal business at the situs; and the banners carried by the pickets clearly disclosed that the dispute was with the primary employer. The Board here recognized that the problem was one of balancing the right of a union to picket at the site of the dispute as against the right of the secondary employer to be free from picketing. When the secondary employer is being harbored by the primary employer, neither the right of the union to picket nor the right of the secondary employer to be free from picketing is absolute.

The pertinent facts in the four cases which reached the United States Supreme Court will now be set forth. In the case of NLRB v. International Rice Milling Company, [118] the union sought to organize the employees of a cluster of rice mills surrounding the town of Crowley, Louisiana. One portion of the organizational drive was directed at the Kaplan Mill and the Teamsters' union established a picket line. None of the employees at the Kaplan mill took part in the picketing. A truck driver employed by a customer sought entrance at the mill and was persuaded by the pickets not to cross the line, Subsequently, the truck returned with the vice president of Kaplan's and the pickets stoned

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118 341 US 665, 1951.

the truck as the driver attempted to cross the picket line. The NLRB held that Section 8 (b) (4) (A) was not violated because the union's picketing had been restricted to the situs of the dispute with the primary employer. [119] The Fifth Circuit Court of Appeals reversed the NLRB and held that Section 8 (b) (4) (A) was violated. The Appellate Court felt that the union activity became secondary when the strikers attempted to induce and encourage the employees of the neutral employer, even if at the primary employer's plant, especially where there is violence. When the case came before the Supreme Court, the direct and most important problem was the primary situs doctrine. The Court could have clarified the situation by following the legislation as written and reiterated earlier decisions or it could have endorsed the primary situs doctrine as developed by the Board and made the theory binding upon lower courts and the Board. Instead, the court selected a novel ground that did not appear in the briefs as prepared by the contestants nor found in the earlier decisions. The court held that the union picketing and violence to induce two men on a single truck not to cross the picket line was not inducing the concerted activity proscribed by Section 8 (b) (4) (A). This section, contemplated the court, was intended to induce or encourage to some concert of action greater than that evidenced by the pickets request to a driver of a single truck to discontinue his trip into the picketed mill. The limitation of the picketing to the primary employer's mill was held to be significant but

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119 In re International Brotherhood of Teamsters (International Rice Milling Co.), 84 NLRB 360, 1949.

not conclusive. Thus, it appears that a union's inducements reaching the individual employees of a neutral employer only as they happen to approach the picket line of the primary employer's place of business are not aimed at concerted, as distinguished from individual, conduct by such employees and is not banned by Section 8 (b) (4) (A).

In the Rice Milling case, the court neither affirmed nor rejected the primary situs theory. The decision only seems to hold that the inducement of two employees in a single truck at the situs of the primary employer is not the type of concerted activity forbidden by Section 8 (b) (4) (A). It is not clear that such action if induced elsewhere than at the primary situs is proscribed. Nor is it clear what activity must be induced to constitute a violation.

In the Gould case, [120] the Denver Building Trades Council and the associated unions struck against a general contractor who was subletting work to a non-union contractor. The general contractor and all of the sub-contractors, with the exception of Gould and Preisner, employed union members. When Gould insisted that he complete the electrical work after being requested not to, the Council posted a picket at the building site and, in accordance with the Council by-laws, all members were informed that work was to be stopped. The picketing continued for several weeks until the general contractor terminated his contract with Gould and Preisner. When unfair union practice charges

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120 NLRB v. Denver Building Trades Council (Gould & Preisner), 341 US 675, 1951.

were filed, the NLRB General Counsel in the Denver region petitioned the federal district court for injunctive relief under Section 10 (l). The court refused to issue an injunction because the activities supposedly violating the law were not in interstate commerce so that the court lacked jurisdiction. When the case was heard by the NLRB, it decided that the building was in interstate commerce and the union had violated Section 8 (b) (4) (A). [121] Upon appeal to the Court of Appeals for the District of Columbia, the court ruled that the Board had jurisdiction but reversed the decision of the Board on the theory that the complaint and evidence merely established a primary boycott which did not violate the spirit of the secondary boycott provisions. [122] The Supreme Court reversed the Court of Appeals and held that the union had engaged in secondary activity proscribed by Section 8 (b) (4) (A). Justices Reed and Douglas, in dissenting opinions, indicated that in the construction industry, conflict is usually confined to the construction site, the only place where a union can effectively object to the hiring of non-union labor. In addition, the secondary boycott provisions were designed to protect those persons wholly disinterested in a dispute and the two dissenters felt that a sub-contractor and contractor are not disinterested parties.

In the case concerning the electrical workers, the Giorgi Construction Company, Port Chester, New York had signed a contract to construct a

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121 82 NLRB 1195, 1949.

122 Denver Building Trades Council v. NLRB (Gould & Preisner), 186 F. (2) 326, 1950.

private dwelling in Greenwich, Connecticut. Although the general contractor in question had employed union men in the past, the electrical installation was subcontracted to Samuel Langer, whose office was in Port Chester, New York, and who employed non-union labor. Local 501 of the I. B. E. W. picketed the building site and workers already on the job left. The NLRB secured a temporary injunction in New York under Section 10 (l). The Board then decided that an unfair practice had been committed violating Section 8 (b) (4) (A) [123] and the decision was affirmed by the Court of Appeals. [124] The Supreme Court upheld the Board and the Court of Appeals. [125]

The Watson case concerned the Carpenter's Union when a private home was remodeled and refurnished near the city of Chattanooga, Tennessee. [126] The Watson concern operated a department store in Chattanooga and Local 74 of the Carpenter's union had been attempting to organize this firm. A contract had been let to remodel and renovate the home and Watson's was the only store in the locality carrying a particular type of wall and floor covering that was desired. When Watson's non-union men attempted to install the covering, the carpenters on the job left at the request of the union. The Regional

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123 I. B. E. W., Local 501 (Langer), 82 NLRB 1028, 1949.

124 I. B. E. W., Local 501 v. NLRB (Langer), 181 F. (2) 34, CA-2, 1950.

125 51 ALC 678, 1951.

126 United Brotherhood of Carpenters v. NLRB (Watson), 341 US 707, 1951.

Director of the NLRB sought an injunction under Section 10 (1) and the request was denied because the alleged unfair practice occurred prior to the passage of the Taft-Hartley so that the conduct complained of, at that time, was not unlawful. [127] The NLRB, however, issued a "cease and desist" order alleging that Section 8 (b) (4) (A) had been violated. [128] On appeal, the Court of Appeals upheld the NLRB [129] and the Supreme Court followed suit.

In a fifth case, a writ of certiorari was denied by the Supreme Court in a decision involving the building and construction industry. [130] Here, a union had attempted to force a union building contractor to stop doing business with a manufacturer of prefabricated houses who employed non-union labor. The NLRB and the Court of Appeals held that the union was guilty of an unfair labor practice because it had placed the contractor on an unfair list, placed a picket at the building site and withdrew a union member from the job.

To properly evaluate the decisions rendered by the United States Supreme Court, it is necessary to recapitulate. Shortly after the NLRA was amended, the geographical situs of the strike or the place of picketing was

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127 Styles v. Local 74, U. B. C. & J. (Watson), 74 F. Supp. 499, 1947.

128 In re United Brotherhood of Carpenters (Watson), 80 NLRB 533, 1948.

129 Local 74, U. B. C. & J. v. NLRB (Watson), 181 F (2) 126, CA-6, 1950.

130 U. B. C. & J. v. NLRB (Wadsworth), 28 LRRM 2132, CA-10, 1951

immaterial so long as there was an effect upon a secondary employer. [131] It is important to note that nowhere in Section 8 (b) (4) (A) is there any language indicating that the situs of the activity was of any importance in considering whether specific union practices should be exempted from the secondary boycott provisions. However, starting with the decision given in the Pure Oil case in 1949 and continuing to the present, the Board has rendered opinions based upon the constantly developing primary situs doctrine. The decisions prior to the Pure Oil case cannot be reconciled with the subsequent opinions as they are definitely in conflict. The Board is currently exempting from the effects of Section 8 (b) (4) (A) all activities at the situs of the dispute with the primary employer though such practices may have as an object the forcing of an employer to cease business with another.

In the Langer, Gould and Watson cases, the Supreme Court gave opinions on cases that were interpreted by the NLRB prior to the Pure Oil decision. In each of these cases, the Board had applied Section 8 (b) (4) (A) literally and held that violations had existed though the strike or picketing took place at the situs where the employees of the primary employer was located, discovering a definite secondary intent. When the Langer and the Watson cases came before the Court of Appeals in the Second and Sixth Circuits, respectively, the decisions of the NLRB were upheld. However, when the Gould case came

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131 Wine, Liquor & Distillery Workers (Schenley), 78 NLRB 504, 1948. Los Angeles Building Trades Council, 83 NLRB 477, 1949

before the Court of Appeals in Washington, D.C., the Board was reversed. During this interim, the Board had decided the Pure Oil and Ryan Construction cases which developed the primary situs theory. When the opinion in the Gould case was written by the Court of Appeals, the Pure Oil and Ryan Construction cases were discussed. By applying the primary situs theory, the Court of Appeals reversed the Board in the Gould case and concluded that an unfair union practice had not been committed by union.

When the Langer and Watson cases were reviewed by the United States Supreme Court, the decisions of the NLRB were upheld, thus confirming the rulings of the Board made prior to the Pure Oil case. When the Gould case came before the Supreme Court, the decision of the Court of Appeals was reversed and the NLRB was upheld, the court stating that the union had violated Section 8 (b) (4) (A). It would appear that the Supreme Court agreed with the opinions rendered by the NLRB prior to the Pure Oil case, but it should be noted that none of the decisions rendered in the Langer, Gould and Watson cases referred to the Ryan Construction or the Pure Oil cases.

The Supreme Court decisions can be justified by accepting the premise that the intent of Congress was to only outlaw action specifically directed against a neutral employer. It does not seem that Congress sought to prohibit primary activity. [132] Although there are many indications that the proponents of the 1947 Act and the lobbyists behind the scenes would have greatly desired

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132 93 Congressional Record 4321-4323, 1947.

the elimination of the primary boycott as well as the secondary activity, such action was not pressed because of the constitutional question. In these initial decisions construing Section 8 (b) (4) (A), the Supreme Court refused to adopt a view that would have an effect of limiting primary picketing because of a secondary effect. By reading Section 7 of the Act, which protects the right to engage in concerted pressure, and Section 13, which grants the right to strike, except as specifically prohibited by the Act, it becomes obvious that Congress only intended to outlaw the secondary boycott. The ultimate blame for the uncertainty which prevails over the interpretation of (A) must be placed upon those who drafted the provision. Section 8 (b) (4) (A) was so poorly expressed that a straightforward reading of the provisions would have led to a restriction of primary activity. The NLRB and the Supreme Court sought an interpretation which would avoid the result of hindering primary boycotts and at the same time keep the area narrow when there is economic conflict between the primary employer and a union without direct injury to the secondary employer. If the employer's place of business is stationary and geographically removed from the premises of any other employer, the test of the primary situs is merely whether the pressures are confined to the situs of the labor dispute. Obviously, there is a difficult problem of interpretation when there is no geographic separation between the premises of the primary employer and those of a neutral firm. In such common situs cases, the Board has developed the use of the following criteria for determining secondary action:

1. Did the union publicize the dispute as involving the primary employer exclusively or did the banners indicate that the dispute extended to the secondary employer?

2. Has the union indicated that the direct and immediate object was to force neutral employers to cease doing business with the primary employer or was the union activity designed to curtail the primary employer's business?

3. Did the union attempt to induce employees of the neutral employer to refuse to perform services for their own employer rather than merely refuse to render only such services for the secondary employer as assist the primary employer?

4. Was the picketing restricted as closely as practicable under the circumstances to the immediate situs of the primary dispute?

5. Did the union have another effective means available rather than the picketing action which was undertaken at or close to the secondary employer?

Without considering the legal aspect, a word of caution is necessary concerning the construction industry, which was involved in three of the four cases ruled upon by the Supreme Court. The construction industry presents a unique problem when discussing the legality of a boycott. Men employed in the construction trades may be hired by different general contractors every day of the week. Until World War II, and the post-war building boom, a great percentage of workers without education or training to move elsewhere, were unable

to do better than work on a part-time basis. As non-union men are hired, those belonging to unions stand less chance of being employed at union rates when there is a slack in the demand for building in the large industrial centers. When a union member refuses to work alongside non-union labor, it is not necessarily striking against the so-called secondary employer but against all other contractors for allowing non-union subcontractors on the job. This is especially true if the picketing is limited to the situs of the construction job.

When a general contractor engages both union and non-union help, he has created a situation which causes difficulty to union members. As partners so to speak, the general contractor and the various subcontractors, become allied for the life span of that construction job. Legally, each partner remains independent because of the lack of control by the general contractor over the employees of the subcontractor. In actual practice, the general contractor is a busy person so that each sub-contractor supervises a portion of the total project because of more experience in one phase and as a relief from the daily headaches of the construction site. The general contractor still exercises control at any point by the simple expedient of not letting work to the sub-contractor on future jobs should he become displeased. And if the union picketing is limited to the site of the construction job, there appears to be a question as to the independent contractor solution so easily arrived at by the courts.

E. Effect Upon State Law

Unquestionably, the war and the reconversion to a peacetime economy plus the influence of the N.L.R.A., as amended, paved the way for state legislation which restricted union activity to a great extent. Undoubtedly, there was a necessity for regulatory legislation and the secondary boycott, never a tactic high in public favor, had to be controlled. Delaware and Minnesota provided for injunctive relief upon petition of the injured party and permitted suits for damages. [133] Massachusetts, Colorado, Pennsylvania, Utah and Wisconsin provided for the bringing of specific boycott charges before an administrative agency with court enforcement after a hearing and a finding and order by the state labor board. [134] However, none of these states provided for the mandatory or discretionary injunctive relief upon the petition of the Board or attorney charged with prosecuting unfair union practices as provided in Section 10 (j) and (l) in the federal law. Massachusetts outlaws strikes and boycotts when used to force an employer to commit an unfair labor practice or to bargain with a union which the employees rejected in an election conducted by the state Board. The Minnesota provisions covers a multitude of

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133 Minnesota Laws, Chapter 185, 1949.
Delaware Laws, Chapter 196, Sec. 2, 6, and 10, 1947.

134 Massachusetts Acts, Chapter 150A, Sec. 4 (A) (2) (a), 1947.
Colorado Stat. Ann. (Midue Supp.), Chapter 97, Sec. 94 (6) (2) (a) (f) (g), 1946.
Penn. Stat. Ann. (Purdon), Tit. 43, Sec. 211.1, et. seq., 1941.
Wisconsin Stat (Brossard), Section 111.01, et. seq., 1951.

labor sins. The states of Alabama, Georgia, Idaho, and Missouri passed legislation specifying what activities constitute secondary boycotts and made them misdemeanors. [135] The Iowa law provided for injunctive relief on the petition of an aggrieved party. [136] North Dakota holds all boycotts and sympathy strikes to be against public policy and permits injunctive relief and damages. [137] Oregon and California have "hot cargo" statutes which prohibit the refusal by persons not directly involved in the labor dispute to work upon or refuse to handle non-union materials or suppliers. [138]

The constitutionality of several state statutes have been tested in courts. The California Act was held to be unconstitutional because of an unreasonable restraint upon the freedom of speech, press and assembly and the law failed to set up sufficient standards for conduct that could be termed unlawful. [139] The Idaho law was held to be constitutional. [140] Here, the

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135 Alabama Code, Title 26, sec. 336, Title 14, Sec. 57, 101 and 103, 1940.
Georgia Laws, Ch. 54, 1947.
Idaho Code, Ch. 44, Sec. 801 to 803, 1948.
Vernon's Missouri Ann. Stat., Ch. 295, 1947.

136 Iowa Code Ann., Ch. 7331 to 7336, 1947.

137 North Dakota Laws, Ch. 34, Sec. 0801 to 0807, 1947.

138 Oregon Comp. Laws Ann., Sections 102, 805, 1940.
Deering's California Codes, Labor I, Ch. 8, 1947.

139 In re Blaney, 184 Pac (2) 892 (Calif.), 1947.

140 State v. Casselman, 24 LRRM 2056 (Idaho), 1949.

union contended that the statute was unconstitutional because the term "labor dispute" was not defined and the right of free speech was infringed because picketing was prohibited except by the employees of the primary employer. Another statute had been passed at the same time which defined a "labor dispute" and both laws, held the court, could be read together.

The trend has been definitely established and the evidence tends to indicate that the secondary boycott in labor disputes will be even more strongly controlled by the state legislation and court orders in the future.

CHAPTER VI

AN EVALUATION OF SOLUTIONS TO THE SECONDARY BOYCOTT PROBLEM

Any solution proposed to remedy the secondary boycott laws and decisions will be a compromise measure at best. The equities in favor of the public and employers must be balanced with those of labor and admittedly all concerned may be treated unfairly on any particular occasion. However, it cannot be denied that injury to the public through the use of secondary boycotts has been slight as compared with injury suffered from direct strikes. For example, the recent strike in the steel industry had a strong effect upon the national safety because of the wartime, peacetime emergency. The prime question to be answered in arriving at any solution is whether collective bargaining will be promoted so that eventually the formal regulation of industry and labor will be cast aside in favor of informal control by the participants. As already indicated, the answer is not simple.

If one believes in strong unions, there would be little quarrel with the continued outlawing of such activities proscribed by Sections 8 (b) (4) (B) and (C), undertakings generally distasteful to the public and often associated with other more favorably received secondary action such as that conducted for organizational purposes. In addition, a small percentage of the

cases arising under Section 8 (b) (4) come within the forbidden activity of (B) and (C). During the fiscal year 1949, eighty-nine charges were filed under (B) and thirty under (C), [1] During 1950, eighty-nine violations were claimed under (B) and thirty-four under (C). [2] For the year 1951, sixty charges were made under (B) and only twenty-two under (C). [3] Compare these with the unfair labor charges made under (A), 247 for 1949, 238 for 1950, and 143 for 1951, and the entire question appears to be of little importance.

The most difficult issues are Section 8 (b) (4) (A) on a federal level and those state laws which outlaw the secondary boycott proper so that the balance of this chapter will be devoted thereto.

Unionists have strongly argued that all secondary boycotts in furtherance of legitimate labor disputes should be legally sanctioned, if peacefully conducted. They argue that to permit union men to work upon non-union materials and products would eventually result in an undercutting of union standards. Historically, the secondary boycott had as its primary purpose the extension of union control as was indicated in the Duplex Printing case - unions attempted to take work away from non-union workers. Labor leaders today emphasize that the need for the boycott is principally to enlarge its

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1 Fourteenth Annual Report of the National Labor Relations Board, For the Fiscal Year Ended June 30, 1949, Table 3 (C), 160.

2 Fifteenth Annual Report of the National Labor Relations Board, For the Fiscal Year Ended June 30, 1950, Table 3 (C), 222.

3 Sixteenth Annual Report of the National Labor Relations Board, For the Fiscal Year Ended June 30, 1951, Table 3 (C), 294.

domain. There is some evidence available which would bear out the position taken by labor leaders. Industry has been invited to the south and southwest geographic portions of the United States with an implied promise that unions will be kept out or at least sharply regulated. Statistics already available indicate that most of the regulatory type of labor legislation has been promoted in the south and southwest. Of a total of 366 charges filed under Section 8 (b) (4) during the year 1949, only thirty of the total were filed in the East North Central District which includes the states of Ohio, Illinois, Michigan and Wisconsin. [4] The Middle Atlantic territory covering New York, New Jersey and Pennsylvania totalled seventy-six charges. The Pacific area including Washington, Oregon and California disclosed fifty-six boycott violation claims. All of the areas enumerated include the most industrialized sections in the United States. The balance of the charged violations occurred in regions that were of little comparative importance, industrially wise. A total of 361 charges were filed throughout the United States during 1950. [5] The East North Central area totalled thirty-nine charges, the Middle Atlantic disclosed seventy-four complaints and the Pacific territory had sixty-five claims, the balance occuring in the relatively unimportant business areas. In 1951, the East North Central district only had nineteen charges filed, the

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4 Fourteenth Annual Report of the National Labor Relations Board, Table 4, 161.

5 Fifteenth Annual Report of the National Labor Relations Board, Table 4, 223.

Middle Atlantic fifty-four and the Pacific territory disclosed thirty-nine from a total of 225, the balance occurring in areas attracting new business.[6] Thus, the unions may have a point, especially true since state and federal legislation and court decisions have become more restrictive to labor since World War II. Should there be a general business depression and unions fought by industry with such tactics evident prior to the Norris-LaGuardia and the Wagner Acts, then the secondary boycott may have to be legalized, from a social point of view, to equalize the power between industry and labor and to generally increase the purchasing power of the mass consumers. Today, in most instances, unions are powerful and the blanket approval of all secondary activity seems unnecessary.

Of less importance is the claimed need for the secondary boycott during collective bargaining disputes. Here, the need is only crucial when the employers cannot be "bargained with" by more direct and acceptable methods. Admittedly, statistics to prove either point of view is completely lacking. It cannot be said how many strikes would have been lost but for the secondary boycott nor how many failed since the N.L.R.A. was amended and made the law of the land because of a union's inability to rely on the technique. Once again, the economic realities must be weighed. Business conditions, in general, remain excellent at the present date and unions are getting a good share of the wealth accruing to the nation as a whole for the benefit of their members.

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6 Sixteenth Annual Report of the National Labor Relations Board, Table 4, 296.

Thus, there isn't any need to legalize the secondary boycott to aid a union during a period of negotiation. Should industry fail and, the national income drop sharply, the boycott could become necessary to promote the cause of unionism and collective bargaining.

A case could be presented for permitting action, admittedly secondary, in specific industries because of peculiar problems. The difficult aspect of class legislation and constitutionality would be presented and the outcome of a court decision doubtful. For example, although the construction industry, as a class, represents a small portion of the wealth of all of the industries in the United States, a large percentage of the total number of unfair labor practice charges filed was against unions in the construction trades. [7] Since many of the court decisions concerning the construction industry applies to the independent contractor problem, it may be advisable to legalize boycotts when confined to the area of the situs of the building and the activity is directed against non-union tradesmen present on the same job. The independent contractor theory is a legal fiction in many instances and subcontractors employed are often closely allied with the general employer, more so than courts will admit.

Another proposed solution to the boycott problem is to permit

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7 Fourteenth Annual Report of the National Labor Relations Board, Table 5, 162.
Fifteenth Annual Report of the National Labor Relations Board, Table 5, 224.
Sixteenth Annual Report of the National Labor Relations Board, Table 5, 226.

secondary picketing when the primary strike is legally conducted. Should the United Auto Workers call a strike against a company for higher wages, not in violation of a contract, secondary activity would be permitted against those who deal in the products of the primary employer. Again, the general economic situation would be the prime factor. With unions strong, it is a question of balancing the equities and many small business men could be damaged should unions be permitted to engage in secondary activity. With unions powerful, as they are today, other methods of economic pressure are available without using secondary picketing. In periods of weakened and harrassed unionism, the secondary boycott might be necessary.

Some argue that secondary strikes and picketing should be permitted for organizational purposes. A few contend that the secondary boycott has never been effective to organize large industrial groups and the observation seems correct since many of the basic heavy industries never entered into collective bargaining agreements prior to the Wagner Act. However, most of the large industries are unionized today so that permitting organizational boycotting must be justified for another reason. Actually, the organizational secondary boycott is a strategy necessary today to organize the non-union fringes which are important to labor to maintain standards and to continue to better the general living conditions of the masses. Often, the secondary boycott is the only tactic that is effective. An argument against permitting organizational boycotting is that employees may be coerced into joining unions. The contention is rather weak, providing the union is chosen by a majority of

those employees within the proper bargaining unit, since many non-union employees have gained through the efforts made by unions in behalf of their members, and as a beneficiary of such union pressure, those preferring to remain individualists should be made to contribute to the cost of organizational programs. In addition, both the Wagner Act and the Taft-Hartley additions have recognized the social desirability of the positive promotion of unions and collective bargaining so that there is some merit to this point of view.

A strong argument can be presented in favor of permitting union members to refuse to work upon or otherwise refuse to handle material from "struck" companies. If the "struck" material is forced upon union labor, they are, in a sense, aiding the primary employer. Yet, whether no work should be permitted upon those articles made by companies currently engaged in a labor dispute remains debatable. Turning the tables about, the secondary employer would become the ally of the union engaged in the dispute should the secondary activity be permitted and the boycott could cause great business damage to the secondary employer.

Another solution is the "unity of interest" theory developed by the New York Courts in such opinions represented by Goldfinger v. Feintuch.[8] Thus, a retail store which serves as an outlet for non-union products might, under certain circumstances, be picketed. The problem here is whether the

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8 276 N.Y. 281, 1937.

legitimate union interest extends from an ore mining concern to the retail automobile dealer or from the Pillsbury Flour Mills to the small grocery store. In a few words, where does the interest end. As indicated in a previous chapter, the original "unity of interest" theory advanced by Goldfinger v. Feintuch has been extended by the New York courts to where the primary and secondary employer need not be engaged in the same type of business. Such a solution would be difficult to apply to factual situations and would invite administrative and court intervention, a factor not conducive to the advancement of collective bargaining. Possibly, as a solution, picketing could be permitted where the greater part of the secondary employer's business is with the primary concern. There, a definite "unity of interest" could be established.

Where a subsidiary of a large corporation is involved in a labor dispute, many argue that the legal fiction of distinct and separate entities be cast aside and picketing of the parent corporation permitted since an independent relationship does not exist in fact between the two companies. To permit the establishment of subsidiaries is within the statutory purview of each individual state. The separate entity theory is nothing more than the legal permission to establish separate corporations as an aid or attraction to business corporations. Secondary activity should be permitted against either the parent or subsidiary company. There is a definite "unity of interest" to say the least, and directors appointed to look after the "child" are often controlled by the parent company.

It is questionable whether the primary employer should be permitted administrative or legal recourse against a union guilty of a secondary boycott. The employer would claim that since he is suffering business damage because of the secondary activity, he has a direct interest in the union action and should be given a right of redress. Unions claim that most secondary boycott suits and charges are filed by the primary employer who is the cause of all of the difficulty. On many occasions, unions claim that the primary employer is subsidizing litigation since there are known incidents when funds are made available to the secondary employer for court action, a practice frowned upon by the judiciary. The employer has a definite interest in secondary union activity because of business damage and he should have the right to file a suit for damages or petition an administrative agency for relief in specific circumstances.

A few contend that the unions should be permitted to use secondary boycotts if the employer is guilty of an unfair labor practice. Since the employer has sinned, he is seeking relief without the necessary "clean hands" and thus the boycott should be permitted. The difficulty with this type of philosophy, admittedly one of "eye for eye," is that the public will eventually lose thereby and the law of the jungle will prevail. In addition, the courts will be burdened with litigation and the use of the injunction may be increased. Two wrongs are not a right and it is better to forbid the union and employers the use of questionable tactics. In addition, to equalize such a clause, it would be necessary to permit an employer to commit an unfair

labor practice if the union was found guilty of violating any portion of Section 8 (b) (4) and this unions would condemn.

In the garment industry and a few others, it is a common practice to sublet orders during the busy season to small concerns created for that purpose. Perhaps secondary boycotts should be permitted when work is let during a labor dispute because a union strike could be broken thereby. Here, unions can present acceptable evidence in favor of permitting secondary activity because the contractor is not a person wholly unconcerned. The suggestion could be tempered by permitting all boycotts unless the subcontracting is a normal occurrence within the industry and no more work has been let during a labor dispute than is the customary procedure.

Undeniably, the Taft-Hartley secondary boycott substantive and procedural provisions should be amended. The wording in Section 8 (b) (4) is ambiguous and far too restrictive if literally applied. The decisions already discussed under the primary situs doctrine is due, in part, to the poor phraseology of the Act and the NLRB and courts of law have had to circumvent the real issues in order to arrive at an equitable solution, a device which in effect turns the courts and the Board into legislative bodies as they are "writing" law. The requirement under Section 10 (1) that the Regional Attorney secure an injunction when there is sufficient evidence of a labor violation should be stricken from the records completely or equalized by granting the same relief to unions. The most obvious reason is that a similar provision was not written into the law when an employer violates the Act.

Then, courts of law with legalistic approaches and little training in labor relations should be left out of labor disputes whenever possible. Personnel is needed trained in the industrial relations field with special qualifications in labor history, economics and labor law. Only then will the problems be understood in their proper perspective.

TABLE OF CASES