Labor Law—Picketing—Secondary Boycott—Closed Shop

"What is peculiar to Anglo-American legal thinking," once observed Dean Pound, "and above all to American legal thinking, is an ultra individualism; an uncompromising insistence upon individual interest and individual property as the focal point of our jurisprudence."[1] In the field of labor law, have the courts particularly safeguarded property rights against the "aggressions" of the "collectivist" worker? It is the purpose of this note to consider the qualifications made upon, and the deviations made from, this early position of the courts.

I

One instance of a radical change by the courts from their early position is in the field of picketing. Picketing has generally been defined as the marching to and fro before the premises of an establishment involved in a labor dispute, generally accompanied by the carrying and display of a sign, placard or banner bearing statements in connection with the dispute.[2] The early attitude of the New Jersey courts on picketing was definitely anti-labor. In the case of *Jonas Glass Co. v. Glass Bottle Blowers' Assoc.*,[3] the court characterized its use as follows: "In its mildest form it is a nuisance, and to compel a manufacturer to have the natural flow of labor to his employment sifted by a self-constituted antagonistic committee, whose very presence upon the highway for such purpose is deterrent, is just as destructive of his property as is a boycott which prevents the sale of his product." And, if more concise language were needed, it was found in a statement by Mr. Justice McPherson who, speaking for the United States Circuit Court, said: "There is and can be no such thing as peaceful picketing, anymore than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching."[4]

A point of cleavage was subsequently marked when the New Jersey legislature passed a statute in 1926 which, in effect, allowed peaceful

1. POUND, THE SPIRIT OF THE COMMON LAW, 37.
2. TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING (1st ed. 1940).
3. 72 N.J.Eq. 653, 66 A. 953 (Ch. 1907).
4. Atchison, Topeka, and Sante Fe Ry. Co. v. Gee, 139 F. 582 (1905).

picketing "in a case involving or growing out of a dispute concerning terms or conditions of labor."[5] The interpretation of the statute soon became the focal point in arising labor decisions. In *Elkind & Sons v. Retail Clerks' International Protective Ass'n*,[6] the court stated: "But picketing which was unlawful before the act is still unlawful. The legislature cannot legalize a private nuisance—to do so would be violative of the constitutional guarantee of security of person and property." And, generally, picketing was regarded as a legitimate means of economic coercion if it were confined to persuasion, if it were free from molestation or threat of physical injury or annoyance, and if there existed some lawful justification for its exercise.[7]

By far the most significant restraint imposed upon the right to picket was that relating to the strike. In the absence of a strike, the New Jersey courts outlawed picketing.[8] In the case of *Mitnick v. Furniture Workers' Union*,[9] the fact situation disclosed no dispute between the

5. R. S. 2:29-77, N. J. S. A. 2:29-77. "No restraining order or writ of injunction shall be granted or issued out of any court of this state in a case involving or growing out of a dispute concerning terms or conditions of employment, enjoining or restraining any person or persons, either singly or in concert:

a. From terminating any relation of employment, or from ceasing to perform any work or labor, or from peaceably and without threats or intimidation recommending, advising or persuading others so to do; or

b. From peaceably and without threats or intimidation being upon any public street, highway or thoroughfare for the purpose of obtaining or communicating information, or to peaceably and without threats or intimidation persuade any person or persons to work or abstain from working, or to employ or cease to employ any party to a labor dispute or to peaceably and without threats or intimidation recommend, advise or persuade others so to do, provided such persons remain separated one from the other at intervals of 10 paces or more."

6. 114 N.J.Eq. 586, 169 A. 494 (Ch. 1933).

7. 31 Am. Jur. 944.

8. Mitnick v. Furniture Workers' Union, 124 N.J.Eq. 147, 200 A. 553 (Ch. 1938); Stead & Co. v. Local No. 7, International Molders' Union of North America, 103 N.J.Eq. 332, 143 A. 331 (E. & A. 1928); Feller v. Local 144, International Ladies Garment Workers Union, 121 N.J.Eq.

employer and employees. However, the picketing was being carried on by outsiders. The court, on such a set of facts, ruled that the picketing was illegal. The rationale of this rule is based upon the view that social welfare does not demand that non-related persons or organizations shall have the right, even by peaceable picketing, to attempt to break down and destroy a satisfactory relationship between an employer and its employees in order to supplant it by another whose terms are satisfactory only to the dictators of it.[10] On the other hand, the rationale of those cases which permitted picketing in the absence of a strike has been that the labor organization may be as interested in the wages of those not members or in the conditions under which they work as in its own members because of the influence of one upon the other. All engaged in a trade are affected by the prevailing rate of wages.[11] New Jersey, despite the cogency of the latter argument, consistently restricted the labor dispute to the confines of employer-employee altercations.

This dogmatic stance of the New Jersey courts was subsequently repudiated by the utterances of the United States Supreme Court in the cases of *Thornhill v. State of Alabama,*[12] and *Carlson v. People of State of California.*[13] These cases involved the constitutionality of state statutes which made picketing a misdemeanor without distinguishing between legal and illegal picketing. The court construed the statutes as outlawing both types and, consequently, held them unconstitutional. Yet the court did not dispose of the cases without pronouncements which were to have far-reaching effects. Per Mr. Justice Murphy it said: "Free discussion [by picketing] concerning the conditions in industry and the causes of labor disputes appear to us as indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society. The issues raised by regulations, such as are challenged here, infringing upon the right

452, 191 A. 111 (E. & A. 1936); Mode Novelty Co. v. Taylor, 122 N.J.Eq. 593, 195 A. 819 (Ch. 1937).

9. *Supra,* note 8.

10. Keith Theater v. Vachon, 134 Me. 392, 187 A. 692 (1936).

11. Exchange Bakery v. Rifkin, 245 N.Y. 260, 157 N.E. 130 (1927), reargument den. 245 N.Y. 651, 157 N.E. 895 (1927).

12. 310 U.S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 (1940).

13. 310 U.S. 106, 60 S. Ct. 746, 84 L. Ed. 1104 (1940).

of employees effectively to inform the public of the fact of a labor dispute are part of this larger problem."[14]. But the case of *American Federation of Labor v. Swing*,[15] also a Supreme Court decision, extended the freedom of speech doctrine to a set of facts in which an outside union was picketing a beauty parlor where there was no employer-employee dispute. The court stated: "It is not essential that the employer's own employees be in controversy with him. A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become commonplace. The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ. Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in Thornhill's case."

Through the medium of the constitutional guarantee of freedom of speech the New Jersey decisions soon repudiated the "no strike, no picketing rule."[16] And, to make judicial interpretation more conclusive, the New Jersey Anti-Injunction Act of March, 1941 provides for peaceful picketing "whether the persons stand in the proximate position of employer and employee or not."[17]

The invoking of the constitutional guarantee of freedom of speech while serving as a rationalization for a new rule has, at the same time, introduced the doctrine of property rights in the labor arena. The courts have reasoned that the right to acquire and protect property is an inherent right not given but declared by the constitution. And the privilege of free speech cannot be used to the exclusion of other con-

14. *Supra*, note 12.

15. 310 U.S. 620, 60 S. Ct. 108, 84 L. Ed. 1393 (1940).

16. Heine v. Truck Drivers' Union, 129 N.J.Eq. 308, 19 A. 2d 204 (E. & A. 1941).

17. R. S. 2:29-77.8; N. J. S. A. 2:29-77.8.

stitutional rights nor as an excuse for unlawful activities.[18] Here is a *ratio decidendi* whose subtlety has heretofore escaped the most speculative of natural law theorists. If the publicity of a labor dispute inflicts injury upon the employer, should it be enjoined? The *Kerns* case in New Jersey disclosed a set of facts in which the defendant union offered a contract to the complainant in which it was to be the proper bargaining representative on behalf of the complainant's employees.[19] Upon complainant's refusal to accept such agreement, the defendant union, although the complainant's employees were not on strike, commenced to distribute circulars among the customers and prospective customers of complainant. These circulars recited that the beverages of complainant were non-union made, and that the union would appreciate patronage of drinks made only under union hours and wages. The majority of the court, citing the recent Supreme Court decisions, held the acts of the union non-enjoinable. The dissent, however, proceeded by holding that such statements as contained in the circulars were construable as indicating that the complainant's rate of wages were below those of the union. And so in similar cases the court has held that a conclusion recited on a placard that the employer is "unfair" to the employees without stating the reasons is going beyond the proper ambit of freedom of speech and invading the "sacred" property rights of the employer.[20] Some decisions liken such "advertising of union labor against non-union" to ordinary business competition evidenced in the form of newspaper advertisements.[21] Yet this competition not only

18. Meadowmoor Dairies, Inc. v. Milk Wagon Drivers' Union, 371 Ill. 377, 21 N.E. 2d 308 (1939). The court in Mitnick v. Furniture Union, *supra*, note 8, held to the same effect. To illustrate the range of restraint a court may place upon the freedom of speech doctrine, in the Evening Times Printing and Publishing Co. v. American Newspaper Guild, 124 N.J.Eq. 71, 199 A. 598 (E. & A. 1938) in which the pickets were using a loud speaker mounted on a truck and the word "scab" was being shouted, the court ruled that the use of such a word was opprobrious.

19. Kerns v. Landgraf, 128 N.J.Eq. 441, 16 A. 2d 623, 131 A.L.R. 1063, (E. & A. 1940).

20. *Supra*, note 8.

21. Vim Electric Co. v. Retail Employes Union, 128 N.J.Eq. 450, 16 A. 2d 798 (Ch. 1940).

inflicts injury against the non-union worker but also the employer. Nevertheless, the uncertainty remains. Where the courts must wrangle with such forms of publicity as innuendos and subtle statements, and must determine whether the circulars go beyond the proper limits of freedom of speech, the state of the law is indeed in a condition quite unpredictable.

II

The secondary boycott in New Jersey, unlike picketing, is still subject to its initial interpretation of being illegal, but at the same time is not without offering difficult problems. A secondary boycott is said to exist when a buyer or a seller or other person economically related to the allegedly unfair employer is threatened with strike, picketing, or boycotting if he fails to discontinue his relationship with the employer involved in the primary labor dispute.[22] In New Jersey such a boycott has been held illegal, either on the ground that it constitutes unlawful coercion or upon the broad principle that one not a party to industrial strife cannot, against his will, be made an ally of one of the parties for the purpose of accomplishing the destruction of the other.[23] On the other hand, some jurisdictions have upheld it, adopting labor's point of view that one who takes advantage of, or profits by, the unfair labor condition of another should not be permitted to argue that he is a stranger to the primary dispute.[24]

22. Bedford Cut Stone Co. v. Journeyman Stone Cutters' Asso., 274 U.S. 37, 47 S. Ct. 522, 71 L. Ed. 916 (1927); Duplex Printing Press Co. v. Deering, 254 U.S. 443, 41 S. Ct. 172, 65 L. Ed. 349 (1920); Van Bushkirk v. Sign Painters, 127 N.J.Eq. 533, 14 A. 2d 45 (E. & A. 1940).

23. Kitty Kelly Shoe Corp. v. United Retail Employees of Newark, 125 N.J.Eq. 250, 5 A. 2d 682 (Ch. 1939); Auburn Draying Co. v. Wardell, 227 N.Y. 1, 124 N.E. 97, 6 A.L.R. 901 (1919); Haverhill Strand Theater v. Gillen, 229 Mass. 413, 118 N.E. 671, L.R.A. 1918 C 813, Ann. Cas. 1918 D 650 (1918); Wilson v. Hey, 232 Ill. 389, 83 N.E. 928, 16 L.R.A. (N.S.) 85, 122 Am. Rep. 119, 13 Ann. Cas. 82 (1918).

24. Empire Theater Co. v. Cloke, 53 Mont. 183, 163 P. 107, L.R.A. 1917 E 383 (1917); Lindsay v. Montana Federation of Labor, 37 Mont. 264, 96 P. 127, 18 L.R.A. (N.S.) 707 (1908); Teller, *Federal Intervention in Labor Disputes and Collective Bargaining—The Hutcheson Case*, 40 MICH. L. REV. 24 (1941).

However, the term secondary boycott has been the function of a desired result rather than a functional characteristic of any given fact situation or situations. Identical fact situations have been found to be, and not to be, a secondary boycott, and their legality has varied with this nominalism. In *Kitty Kelly Shoe Corp. v. United Retail Employees of Newark*,[25] a union was attempting through leaflets to influence customers and prospective customers of the complainant not to buy its product. The leaflets were being distributed by and near complainant's store. The court disposed of the case in a matter-of-fact way by saying that "where there is coercive pressure upon actual or prospective customers to cause them to withdraw or withhold patronage through fear of loss or damage to themselves, a secondary boycott exists." Yet in the *Kerns* case where circulars were also distributed, the court viewed the practice as constituting not a secondary boycott but rather a primary boycott and hence legal.[26] However not all decisions illustrate such an incongruity. For example, a true secondary boycott was found to exist in the case of *Evening Times Printing and Publishing Co. v. American Newspaper Guild*.[27] Here there was mass picketing of a newspaper plant, and the advertisers' places of business were patroled by individuals carrying placards saying: "This store advertises in the Bayonne Times which is unfair to its reporters." The court finding a secondary boycott to be present stated: "If the place of one who advertises in a newspaper against which there is a strike is subject to be picketed, why not that of the newsdealer who sells it, of him who buys it, or even of him who reads it? The loss of the readers is as fatal to a newspaper as the loss of advertisers." By such argument *reductio ad absurdum* the court submitted the logical rationale of the rule.

The passage of the New Jersey Anti-Injunction Statute in March, 1941 has brought to fore the query of whether the secondary boycott has been made a valid practice. The germane section of the statute to this problem (after allowing the giving of publicity to labor disputes) provides: "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association

25. *Supra*, note 23.
26. *Supra*, note 19.
27. *Supra*, note 18.

or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment or concerning employment relations, or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the *disputants stand in the proximate relation of employer and employee.*[28] Does this section apply to the secondary boycott or only to picketing? Cases involving an interpretation of this point are wanting in New Jersey. As concerns the interpretation by the federal courts of the Norris La-Guardia Act,[29] of which the New Jersey Anti-Injunction statute is a prototype, something definite is at hand. In a case where a milk wagon drivers' union, in order to protect the jobs of its members, picketed stores which sold milk at prices below the standard prices charged by dairies for milk delivered to consumers by wagon drivers, the question of the secondary boycott was considered.[30] Mr. Justice Black, who delivered the opinion in which the secondary boycott was upheld as valid, gave a perusal of the background of the Norris La-Guardia Act which revealed that the Senate Judiciary Committee had been of opinion that the granting of the injunction in the past had been too numerous and the practice was in abuse; further, that the act was passed to remedy the misinterpretations of the Sherman Anti-Trust[31] and Clayton Acts.[32] He concluded

28. R. S. 2:29-77.8; N. J. S. A. 2:29-77.8. This section is preceeded by section 2:29-77.1 which provides: "No court of the state of New Jersey, nor any judge or judges thereof, shall issue any restraining order or temporary or permanent injunction to prohibit any person or persons (as these terms are hereinafter defined) from doing whether singly or in concert, any of the following acts: (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, picketing without fraud or violence or by any other method not involving fraud or violence and not in violation of any other law of the State of New Jersey."

29. Act of March 23rd, 1932, c. 90, 47 Stat. 70; 29 U.S.C.A., secs. 101-115.

30. Milk Wagon Drivers' Union v. Lake Valley Farm Products, 311 U.S. 91, 61 S. Ct. 122, 85 L. Ed. 63 (1940).

31. Act of July 2nd, 1890, c. 647, sec. 1, 26 Stat. 209, as amended by Act of March 3d, 1911, c. 231, sec. 291, 36 Stat. 1167, 15 U.S.C.A., secs. 1, 7, 15.

the decision by saying: "To hold the injunction valid because of the Sherman Act would run counter to the plain mandate of the Act, and reverse the declared purpose of Congress." This decision throws some light on the future view of the New Jersey courts on the subject, although it may not be followed. But in view of the fact of the identical wording of the statutes, the Supreme Court's decision is relatively important.

Other jurisdictions with statutes practically identical with New Jersey's have generally refused to hold the secondary boycott as legal and have only considered the "proximate relation of employer and employee or not" statement in relation to picketing without a strike.[33] Thus, the states of Wisconsin, Oregon and Pennsylvania in 1939 amended their anti-injunction statutes to redefine the words "labor dispute" in terms of a quarrel between an employer and a majority of his employees, the obvious purposes of these amendments being to render illegal the act of picketing in the absence of a strike, and picketing and striking generally unless a majority of the employees take part therein. Whether New Jersey will follow the course of the other states despite the contrary ruling of the United States Supreme Court is left to conjecture.

However, it is only the New York courts which have examined in any detail the secondary boycott doctrine resulting in the promulgation of the "unity in interest" rule. The essence of this rule is that picketing of a retailer's place of business is permitted if he purchases a non-union product or a product serviced by non-union labor from a manufacturer involved in the primary dispute. However, the banners carried by the pickets can refer only to the manufacturer or his products and not to the retailer himself. The rationale of the "unity in interest" rule as expounded in the leading New York case of *Goldfinger v. Feintuch*[34] is that where a manufacturer pays less than union wages,

32. Act of October 15th, 1914, c. 323, sec. 1, 38 Stat. 730, 15 U.S.C.A., section 12-27, 44; 18 U.S.C.A., sec. 412; 28 U.S.C.A., sections 381-383, 386-390; 29 U.S.C.A., sec. 52.

33. *Supra,* note 2.

34. 276 N.Y. 281, 11 N.E. 2d 910 (1937); In Feldman v. Weiner, 17 N.Y.S. 2d 730, 173 Misc. 461 (1940), the court remarked that it would limit the doctrine in the Goldfinger case to its facts and would not broaden the doctrine.

both it and the retailer who sells its products are in a position to undersell competitors who pay the higher scale and this, it is contended, may result in unfair reduction of the wages of union members. New Jersey has cited this case with approval.[35]

A final point will conclude the discussion on the secondary boycott. If New Jersey should interpret its statute as have other jurisdictions, may the reaffirmation of the constitutional right of free speech as expressed in the Thornhill case be applied to a case of the secondary boycott? The status of our courts' view on this point seems that it would not since in a recent case Mr. Justice Heher, speaking for the New Jersey Court of Errors and Appeals, still considered the secondary boycott as illegal.[36]

III

Until recently, closed shop agreements in New Jersey were held legal or illegal depending upon such factors as motive, compulsion, and monopoly.[37] In a situation where the union desired a closed shop for the purpose of providing a cushion against a future exigency, the court held the object of the motive as too speculative.[38] By far the more important factor in determining the validity of a closed shop agreement was the one of monopoly. The early view considered monopoly a sufficient reason to declare the closed shop illegal even

35. The case of Newark Ladder Co. v. Furniture Workers' Union, 125 N.J.Eq. 99, 4 A. 2d 49 (Ch. 1939), cited the Goldfinger case with approval, and held that striking employees of the manufacturing department of a business could picket the sales department of the business conducted at some distance from the manufacturing department. *However,* the presence of the element of common ownership of the manufacturing and sales departments, militates against citation of the case as one supporting even a qualified approval of secondary picketing.

36. Kingston Trap Rock Co. v. International, 129 N.J.Eq. 570, 19 A. 2d 661 (E. & A. 1941).

37. The closed shop agreement in New Jersey prior to the N. J. Anti-Injunction Act is discussed comprehensively in VII UNIVERSITY OF NEWARK LAW REVIEW 120 (March, 1941).

38. Miller v. Fishworkers' Union, 170 Misc. 713, 11 N.Y.S. 2d 278 (1939).

though it was effective in only one factory.[39] Subsequently labor triumphed somewhat when Vice-Chancellor Bigelow remarked: "Whoever attacks such a contract (closed shop agreement) must show that it unreasonably restrains trade or tends to create a monopoly. Only when it appears that the contract by itself or in conjunction with other similar contracts or understandings or customs impose a closed shop in substantially an entire industry throughout a considerable area, does the contract become *prima facie* void and the burden arises of justifying it by showing special circumstances."[40] Of course, the reasoning behind this liberal attitude was that where an entire industry was subject to the closed shop the non-union worker was definitely at a disadvantage, and his admission into a union depended upon union rules and regulations. But as regarded the closed shop in a single factory, no substantial harm could reach the non-union labor since it could find work in other factories. However, the cases could not be categorically classified so easily with the factors of monopoly and the motive of self-protection of the union being used as the bases for decisions.[41]

The problem has, however, reached a solution through the medium of the New Jersey Anti-Injunction Act which provides that no court may enjoin any person or persons from requiring as a condition of employment that all employees of a particular employer or group of employers shall be members of a particular union.[42] Following this statute, there came up for decision the case of *East Co., Inc. v. United Oystermen's Union* where a closed shop agreement attempted to include 95% of an industry. The court, construing the statute, held that the closed shop agreement in this case was valid.[43] Thus while the legislature has offered its enactment to reconcile the law, it has at the same time validated the unions' action of forsaking kinship with the workers' world.

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39. Wasilewski v. Bakers Union, 118 N.J.Eq. 349, 179 A. 284 (Ch. 1935).

40. Carl Christiansen *et al.* v. Local 680 of the Milk Drivers and Dairy Employees of N. J. *et al.*, 126 N.J.Eq. 508, 10 A 2d 168 (Ch. 1940).

41. *Supra*, note 37.

42. R.S. 2:29-77.1; N.J.S.A. 2:29-77.1.

43. 130 N.J.Eq. 292, 21 A. 2d 779 (E. & A. 1941).

The conclusion following from the review of these cases reveals that labor has made many inroads on the early holdings of the courts. Through the medium of legislative enactments and constitutional doctrines it has accomplished these results. As of date, picketing in the absence of a strike, and the closed shop, have become legal weapons of labor. The secondary boycott, however, remains in its original status. Only remnants of Dean Pound's statement remain.