Coercion of Third Parties In Labor Disputes--The Secondary Boycott

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If $A$ assaults $B$ while the latter is walking down the street, ordinarily no one but $B$ can complain. However, if $B$ is on his way to $C$'s store to make a purchase and $A$'s assault causes $C$ to lose a sale, the latter's position must be considered. The mere fact that the wrong committed against the prospective customer results in the store owner's losing a sale would, we may agree, not be a sufficient showing to entitle the latter to any relief, but a different situation would be presented if the owner could show that the act directed against the third party was used as a means of injuring him. If we assume, therefore, that a labor union is having a legitimate dispute with an employer, and, believing that if it can divert his patronage it may force him to accede to the union demands, successfully commits a personal attack on a prospective customer, the question is, does this attack on the customer infringe the employer's legal rights? Before seeking an answer to this question, let us suppose that, instead of resorting to violence, the union undertakes peacefully to persuade the customer not to favor the employer with his patronage. We must then inquire whether peaceful persuasion will violate the latter's legal rights. In proceeding to solve these problems two primary questions arise. First, is the matter of compulsion directed at the employer, and second, compulsion directed at the third party.

Undoubtedly, any compulsion directed at the employer may result in a serious interference with his liberty of action. But we now know that the liberty which he enjoys in the conduct of his business is not unlimited with respect to labor. Merely that he may be compelled by the conduct of the union to grant concessions which otherwise he would not grant is not enough to entitle him to any relief. This means, of course, that the union is legally

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1. For a discussion of the significance of motive see Holmes, Privilege, Malice and Intent (1894) 8 Harv. L. Rev. 1; Ames, How Far an Act may be a Tort because of Wrongful Motive of the Actor (1905) 18 Harv. L. Rev. 411; Walton, Motive as an Element in Torts in the Common and in the Civil Law (1909) 22 Harv. L. Rev. 501; Lewis, Should the Motive of the Defendant Affect the Question of his Liability (1905) 5 Col. L. Rev. 107.
privileged to destroy, if it can, the employer's freedom of choice between granting its legitimate demands or rejecting them, a privilege which rests on the feeling that the struggle between employers and employees is but one aspect of the theory of free competition to which any individual's liberty to conduct his business as he sees fit is constantly subjected.\(^2\)

If conduct which may compel an employer to act against his will may be justifiable, this raises the question whether there are any limits to the manner in which such compulsion may be brought about. More particularly the inquiry would be whether in seeking to compel the employer the union may undertake to divert his customers. However, to avoid an unnecessary limitation, other attacks on his business should be included, for having customers is not the only contact necessary to its successful prosecution. For him to have available sources from which he can draw his raw materials and his labor is perhaps just as necessary, and a thrust at these sources may interfere with his business and his liberty just as much as diversion of his patronage. The attack, in all these cases, would be centered on his business contacts, his markets, and would constitute an effort to stifle them. In keeping with the practice where attempts to cut off patronage are involved, the term "boycott" may be applied appropriately to conduct of the kind indicated, for he is "boycotted" just as clearly when an effort is made to destroy his labor market or the source on which he depends for raw materials as he is when the attempt is to cut off his supply of customers.\(^3\)

Returning to the question concerning the kind of compulsion that may be used against the employer, the legality of peaceful persuasion, whether it is directed at employees or those having other business dealings with him, present or prospective, is no longer open to serious question.\(^4\) If peaceful persuasion is thus

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\(^2\) See Frankfurter and Greene, The Labor Injunction (1930) ch. 1, where the authorities are collected.

\(^3\) "The boycott may, therefore, be defined as a combination formed for the purpose of restricting the markets of an individual or group of individuals." Wolman, The Boycott in American Trade Unions, 34 Johns Hopkins University Studies (1915) 9, 12. For a consideration of other definitions of the term see, id. at 10, 11; Frankfurter and Greene, op. cit. supra note 2 at 42, 43; Sayre, Labor and the Courts (1930) 39 Yale L. J. 682, 699. In Gill Engraving Co. v. Doerr, 214 Fed. 111, 119 (D. C. S. D. N. Y. 1914), Hough, J., remarked, "I do not perceive any distinction upon which a legal difference of treatment should be based between a lockout, a strike, and a boycott. They often look very unlike, but this litigation illustrates their basic identity. All are voluntary abstentions from acts which normal persons usually perform for mutual benefit..."

\(^4\) See, particularly, American Steel Foundries v. Tri-City Central Trades
eliminated our question is reduced to the legality of an attempt to compel third parties to act against the employer. In the light of the finding that the latter is not free from coercive practices, why his case should be any different if the third person is compelled, rather than persuaded, not to deal with him, may be wondered. Clearly, as far as the employer is concerned, whether peaceful persuasion or personal assault is employed, the result, if accomplished, will be exactly the same. He will lose a sale. However, the obvious difference between persuasion and compulsion is that in the first case nothing occurs to deprive the customer of voluntarily choosing between buying and not buying from the offending employer, whereas in the second the assault is an obstacle to the exercise by the former of a free will in the matter. In short, peaceful persuasion does not interfere with the customer's liberty but compulsion does. Yet how does this concern the employer?

Granting that, in order for a court of equity to be justified in issuing an injunction to restrain a combined attempt to interfere with one's liberty, there must be a finding that the end sought is unlawful or the means employed are unlawful, then, if the employer is allowed to complain of the union's assault on the customer, one of these elements must be present. The scope of this paper does not permit of a general inquiry concerning the ends for which labor may employ its weapons. The lawfulness of the end with respect to the party with whom the dispute exists will therefore, in general, be assumed. The present inquiry is thus narrowed to the legal nature of the means. Although a personal assault has been used in the illustration, it may be well to recognize at this time that violence of any kind has no proper place in a labor dispute as is generally true of the whole field of the law. The same, of course, can be said of fraud or misrepresentation. The removal of these methods of attack leaves available for consideration only conduct that is honest and peaceful. In order, therefore, to make the illustrative case more useful the assault must be elim-
inated and some form of non-violent compulsion substituted. Obviously, the third party may be compelled to pursue a certain course of conduct if the alternative is to suffer some loss. Such a loss may result from interference with his normal relations and contacts. Therefore we may assume instead that the union undertakes to compel him to act against the offending employer by interfering through peaceful means with his normal business relations, such as by undertaking peacefully to divert also his patronage. Having in mind the statement previously made that peaceful persuasion is legal, if peaceful persuasion of the neutral's customers is attempted, may it fairly be said that the union is using unfair means against the employer? It is believed that this question can and should be answered in the affirmative.

Viewing the problem solely from the standpoint of the neutral, the effort on the part of the union to dissuade prospective customers from dealing with him constitutes, under the definition mentioned above, an illegal conspiracy. This is so, because although, as to him, peaceful persuasion of his customers is a lawful means, the combined interference with his patronage by whatever means, since he is a neutral, cannot be justified. In short, the conduct lacks a lawful end because there is an absence of any relationship between him and the union members which would justify them in undertaking to coerce him to do their bidding. And since interference with his liberty of choice is at once the end of the attempt to destroy his patronage and the means used to force compliance by the employer, the end from the standpoint of the neutral is the means as to the employer. Therefore, that which is illegal as an end against the neutral remains illegal as a means against the employer.


6. This form of analysis, although not clearly stated, may be discovered in the opinion of Shaw, J., in J. F. Parkinson Co. v. Building Trades Council, 154 Cal. 581, 98 Pac. 1027, 1044, 21 L.R.A. (N.S.) 550 (1908) "... the use of undue influence to compel or bring about the action of one person to the injury of a third person is the use of illegal means to that end (i.e., coercion of the customer is an illegal means against the employer) ... The principle settled by the cases cited, however, is that, while men have a right by that (lawful) means to coerce their employers (customers of the struck employer) so as to compel them to act to the injury of a third person ... it is the control of another's conduct against his will that is the unlawful element in the proposition (i.e., the end is unlawful). This being unlawful, the resulting injury to a third person is unlawful, although every other act in the trans-
The foregoing, of course, is the legalistic way of saying that, according to generally prevailing notions, it is socially undesirable for the employer to have to suffer such tactics and also socially undesirable for the third party to be laid open to such attacks. Perhaps the feeling is that as long as the fight is a fair fight between the union and the employer, may the better man win, but that non-disputants should be left free to choose their side and should not be forced to aid in the fight against their will. Freedom to choose is the life of competition for the choice; without it competition cannot exist. At any rate, that deprivation on the part of a neutral of freedom of choice, untrammelled by compulsion, is the essential ingredient of that practice to which the term "secondary boycott" ought to be applied, should here be emphasized. This is the practice that the law generally does not countenance. To approach the problem in such fashion should help to focus the attention on the character of the acts themselves rather than on the symbol under which they are outlawed. The law condemns a particular kind of conduct, whatever its name, not the name itself.

There does not follow from the foregoing, however, the proposition that whenever pressure is brought to bear on a neutral, in

action is lawful in itself" (i.e., since controlling the conduct of the customer against his will is unlawful, the resulting injury to the employer is unlawful, although the conduct involved is lawful per se). It was also used in Parker Paint and Wall Paper Co. v. Local Union No. 813, 87 W. Va. 631, 105 S.E. 911, 914, 16 A.L.R. 223 (1921): "And the use of such means (peaceful bannering) against one's customers in order to coerce them to compel him to comply with demands made on him by the union is an unjustifiable interference with the rights of such customers. Martin's Mod. Law on Labor Unions 77." See also, Casey v. Cincinnati Typographical Union No. 3, 45 Fed. 135 (C.C.S.D. Ohio, 1891); Thomas v. Cincinnati, N. O. & T. P. Ry. Co., 62 Fed. 803 (C.C.S.D. Ohio, 1894); Albro J. Newton Co. v. Erickson, 70 Misc. Rep. 291, 128 N.Y. Supp. 949 (1911). (Matter in parenthesis and italics supplied.)


8. "A boycott may be defined to be a combination of several persons to cause a loss to a third person by causing others against their will to withdraw from him their beneficial business intercourse through threats that, unless a compliance with their demands be made, the persons forming this combination, will cause loss or injury to him. . . . Intimidation and coercion are essential elements of a boycott. It must appear that the means used are threatening and intended to overcome the will of others and compel them to do or refrain from doing that which they would or would not otherwise have done." Gray v. Building Trades Council, 91 Minn. 171, 97 N.W. 663, 668, 68 L.R.A. 753, 103 Am. St. Rep. 477 (1903). See also, Meler v. Speer, 96 Ark. 618, 182 S.W. 988, 990-991, 32 L.R.A. (N.S.) 792 (1910); Bricklayer's, etc. Union v. Seymour Ruff & Sons, Inc., 160 Md. 483, 154 Atl. 52, 83 A.L.R. 448 (1931); and Pickett v. Walsh, 192 Mass. 572, 78 N.E. 753, 6 L.R.A. (N.S.) 1067 (1906).

9. "Names are not things. It is the thing done or threatened to be done that determines the quality of the act, and this quality is not changed by applying to the acts an opprobrious name or epithet." Caldwell, J., dissenting, in Hopkins v. Oxley Slave Co., 83 Fed. 912, 924 (C.C.A. 8th, 1897).
order indirectly to compel action by an employer, an illegal secondary boycott is involved. The simple case of an individual withholding his patronage from a retailer because the retailer deals with a manufacturer with whom the individual has a grievance is an illustration. Clearly, if an individual does not choose to deal with a retailer because he feels that the support which the retailer is giving to a manufacturer is an aid to the latter in successfully resisting demands made upon him, or indeed, for whatever reason, the individual acts with legal freedom. But, granting that this is true, by expanding this method of attack, two principal questions are raised: First, how far may labor combine in a withdrawal of its own patronage, and secondly, how far may labor go in inducing others to withdraw their patronage? These questions, of course, involve the common law conspiracy.

The conspiracy problem cannot be solved by simple logic. Because one individual may be privileged to buy or not to buy from a particular person, that a number of individuals acting in combination are likewise free to withhold patronage, does not necessarily follow. The question here considered is an old one and has been much discussed since the time when the indictment for criminal conspiracy was the chief weapon of employers to prevent concerted action on the part of employees. The problem always is: how can conduct lawful as to an individual become unlawful merely because participated in by a group or combination of individuals? Discarding the logical mirage which beckons, the reason for this is simple enough. Freedom of the individual to deal or not to deal with whom he chooses, to favor with his patronage or to withhold it, is the bulwark of our philosophy. So

10. To pursue such logic will lead to holding a secondary boycott lawful [Empire Theatre v. Cloke, 53 Mont. 153, 163 Pac. 107, L.R.A. 1917E 383 (1917)], or to an even less tenable position [Alfred W. Booth & Bro. v. Burgess, 72 N.J. Eq. 181, 65 Atl. 226 (1909)].

11. See generally, Brigham, Strikes and Boycotts as Indictable Conspiracies at Common Law (1887) 21 Am. L. Rev. 41; Wyman, The Law as to Boycott (1903) 15 Green Bag 208; McWilliams, Evolution of the Law Relating to Boycotts (1907) 41 Am. L. Rev. 338; Sayre, Criminal Conspiracy (1922) 35 Harv. L. Rev. 383; Hellerstein, supra note 4, at 166; Sayre, Labor and the Courts, supra note 4; Jaffin, Theorems in Anglo-American Law (1931) 31 Col. L. Rev. 1104; Pollock, The Law of Torts (10th ed. 1916) 334 et seq.; Note (1920) 6 A. L. R. 905, where a large number of the cases are collected and discussed.

12. Notice that the reference here is to negative conduct, not affirmative. As to the individual's position with regard to the latter see, Carpenters' Union v. Citizens' Committee, 333 Ill. 225, 164 N.E. 393, 63 A.L.R. 157 (1928); Harvey v. Chapman, 226 Mass. 191, 115 N.E. 304, L.R.A. 1917E 399 (1917); Roraback v. Motion Picture Machine Operators' Union of Minneapolis, 140 Minn. 481, 168 N.W. 766, 3 A.L.R. 1290 (1918); Seubert, Inc. v. Reiff, 98 Misc. 402, 164 N.Y. Supp. 522 (1917); Delk v. Winfree, 80 Tex. 400, 16 S.W. 111, 26 Am. St. Rep. 755 (1891). See also Tuttle v. Buck, 107 Minn. 145, 119 N.W. 946,
essential is it considered that its exercise is open to no inquiry. Whether the motives which direct the individual’s choice would appeal to the run of men as reasonable or unreasonable, fair or unfair, is of no importance. They are not to be judged by any jural standard. Because of this philosophy the individual is said to enjoy a personal privilege in this regard. But this is a privilege to act individually. Consequently its existence does not solve the question of privilege in respect of a combination of individuals. When concerted action occurs great damage may be done, the injurious effect of which on society makes necessary a limitation on the exercise of group freedom. It is quite unnecessary and logically unsound to identify the individual with the group, to find in the group nothing but individuals in isolation. Is the bite of a rattlesnake only the personal conduct of an atom? The harm which may result from a societal standpoint as a consequence of action by an individual may be so trifling when weighed against the individual’s personal freedom as not to cause any judicial alarm, but concerted action may so enlarge its extent that it can no longer be treated as socially inconsequential. Then an aroused judiciary begins to establish limits. The additional ingredient which may be isolated under the term “conspiracy” or “combination” is an aid to delineation but the judicial problem necessarily calls for a balancing of interests.

Interference with the Third Party’s Patronage

Since the problem is one where the interests of labor are to be weighed against the harm which may occur to another directly,

\[22\text{ L.R.A. (N.S.) 599 (1909); Dunshee v. Standard Oil Co., 152 Iowa 618, 132 N.W. 371, 36 L.R.A. (N.S.) 263 (1911).}\]

13. “Individuals may work for whom they please, and quit work when they please, provided they do not violate their contract of employment. Combinations of individuals have similar rights, but the liability to injury from the concerted action of numbers has placed upon their freedom to quit work these additional qualifications: That their action must be taken for their own interest, and not for the primary purpose of injuring another or others, and neither in end sought, nor in means adopted to secure that end, must it be prohibited by law nor in contravention of public policy.” Cohn & Roth Electric Co. v. Bricklayers', Masons' & Plasterers' Local Union No. 1, 92 Conn. 151, 101 Atl. 659, 661, 6 A.L.R. 887 (1917).

The opinion in Alfred W. Booth & Bro. v. Burgess, 72 N.J. Eq. 181, 65 Atl. 226 (1906) constitutes almost a reductio ad absurdum of the theory that conduct which is lawful when pursued by one person cannot be unlawful when pursued by many in combination. The court was convinced that coercion of a neutral was unfair as to the employer but under the theory it was forced to uphold, without regard to motive, strikes and threats thereof against a neutral. However, the court then proceeded to find that it was unlawful for a union agent to notify union men of a rule which required them to quit work under the circumstances on the ground that such notification constituted coercion of the union men.

and society indirectly, as a consequence of combined action, it is not surprising that there should be a lack of uniformity in the decisions. At the same time, this lack of uniformity is generally traceable to a difference in emphasis given to one factor over another by the courts which have considered the problem, rather than to a disagreement on legal fundamentals. As far as the offending employer is concerned, the refusal of organized labor to give him its patronage or to purchase his product is a necessary incident of the labor dispute. The difficulty arises when there is a combined withdrawal of patronage from a third person as a consequence of his dealings with the employer.

Here it is necessary to recognize two notions that, although not inconsistent in theory, sometimes draw close to conflict in practice. One is that laborers should be privileged to refrain from doing anything that may be injurious to their cause—that they are entitled to act in self-defense for their own protection. The other is that they should not be permitted by force of combination to injure others outside the immediate dispute in order to compel assistance in the struggle. In short, on the one hand the belief that the conduct of labor is necessary to the protection of the organization prevails over the feeling that it is designed to coerce non-disputants, while on the other its coercive aspect is considered as its motivating factor. Of course the line is often a shadowy one, but the principle, that labor is not to be permitted to inflict injury on a third party to force action detrimental to the employer where its conduct stems from such intention, is generally recognized. With this difference between negative and positive interference with the third party's liberty in mind, one may easily see that to justify a combined withdrawal by labor of general patronage which a retailer would normally enjoy, because the retailer purchases some of his goods for resale from the dis-

15. The principle is concisely stated in the opinion of Beatty, C. J., in J. F. Parkinson v. Building Trades Council, 154 Cal. 583, 95 Pac. 1027, 1038, 21 L.R.A. (N.S.) 550, 16 Ann. Cas. 1165 (1908): "Any injury to a lawful business, whether the result of a conspiracy or not, is prima facie actionable, but may be defended upon the ground that it was merely the result of a lawful effort of the defendants to promote their own welfare."


17. There are exceptional cases where this distinction is not taken and action against a neutral which is admitted to be coercive, not merely defensive, is approved. Empire Theatre v. Cloke, 53 Mont. 183, 163 Pac. 107, L.R.A. 1917E 383 (1917); See Truax v. Bisbee Local No. 380 C. & W. A., 19 Ariz. 379, 171 Pac. 121 (1918); Pierce v. Stableman's Union, Local No. 8760, 156 Cal. 70, 103 Pac. 324 (1909).
putant employer, would be exceedingly more difficult than to justify a combined refusal on the part of labor to purchase any product of the employer's factory. This is so, simply because a refusal by labor to purchase "unfair" goods cannot be labelled as designed to coerce anyone other than the employer. But if labor combines to withhold general patronage from a retailer because he carries in stock "unfair" goods, it is not difficult to believe that labor has more in mind than self-protection, more in mind than merely that patronizing the retailer would be injurious to the cause. This distinction has been frequently applied and is the basis of most cases holding the use of "Unfair" and "We Don't Patronize" lists illegal. In fine, condemnation of the practice rests on the feeling that the general retailer does not make himself a party to the dispute by stocking the manufacturer's product, and is not thus brought within the permissible area of conflict so that injury to his business can be justified by the theory of competition.

18. In Wilson v. Hey, 232 Ill. 389, 83 N.E. 928, 929, 16 L.R.A. (N.S.) 85 (1908) it is said: "It is not wrong for members of a union to cease patronizing anyone when they regard it for their interest to do so, but they have no right to compel others to break off business relations with the one from whom they have withdrawn their patronage, and to do this by unlawful means, with the motive of injuring such person." And in People v. McFarlin, 43 Misc. 591, 89 N.Y. Supp. 527, 529 (1904) the court said: "... I apprehend that in each case, as it arises, a question for the jury is likely to be presented, whether the persons accused were only doing what they had the right to do in bestowing their favor upon their friends, and withholding their business and beneficial intercourse from those whom they believed to be unfriendly, or whether, on the other hand, their immediate object and intent were to injure another in his trade or business...." These courts are talking about the same thing which was expressed by Van Orsdel, J., in American Federation of Labor v. Buck's Stove and Range Co., 33 App. D.C. 83, 32 L.R.A. (N.S.) 748, 768 (1909), as follows: "No one doubts, I think, the right of the members of the American Federation of Labor to refuse to patronize employers whom it regards as unfair to labor. It may procure and keep a list of such employers not only for the use of its members, but as notice to their friends that the employers whose names appear thereon are regarded as unfair to labor. This list may not only be procured and kept available for the members of the association and its friends, but it may be published in a newspaper or series of papers.... But as soon as, by threats or coercion, they attempt to prevent others from patronizing a person whose name appears on the list it then becomes an unlawful conspiracy—a boycott."

A similar problem is presented when picketing at the place of business of a third party is resorted to. As previously stated, there is general agreement that picketing, per se, is lawful as a mode of peaceful persuasion.\(^{19}\) Although in many cases the buying public may be appealed to effectively at the establishment where the dispute is in progress, in the case of a manufacturing plant, picketing at the factory may be utterly fruitless in affecting the sale of the product manufactured. If the goods manufactured are being retailed to the public elsewhere, then as a matter of common sense, to be more effective the attack on such goods should center at the place where the retailing is going on. This may lead the union to establish pickets at the retailer's place of business. If such picketing amounts to no more than an attempt to notify the public of the dispute with the manufacturer and an appeal not to buy his product, it may easily and appropriately be considered as merely designed to enlighten prospective purchasers in the hope that they may see fit to pass up the product. But the objection to this practice is that it may have a coercive effect on the retailer. Here again, however, a distinction is necessary between the incidental and the intentional. Obviously enough, if the picketing is successful, the retailer may be compelled in self-protection to cease stocking the manufacturer's product. However, exactly the same thing would happen if picketing at the manufacturer alone should be sufficient. Yet no one would suppose in the latter case that the manufacturer would be entitled to relief merely because the picketing at the factory was successful in stopping retail sales elsewhere. Therefore, those courts that recognize the legality of picketing of this kind at the place where the goods are retailed are taking the proper view of the matter.\(^{20}\)

When, however, the picketing at the retailer's place of business goes beyond an effort merely to acquaint the public with the fact that a particular product which is there being sold is unfair, and takes on the color of an effort to dissuade the public from dealing generally with the retailer, the coercive effect is not merely incidental.\(^{21}\) Here the union is seeking to compel him to

\(^{19}\) See note 4, supra.
\(^{21}\) See for example, Evening Times Printing & Publishing Co. v. American Newspaper Guild, 122 N.J. Eq. 545, 195 Atl. 378 (1937), Mitnick v. Furniture Workers' Union Local No. 66, C.I.O. of City of Newark, 200 Atl. 553 (N.J. Ch. 1938), and A. Pink & Son v. Butcher's Union No. 422, of Newark, 84 N.J. Eq. 639, 95 Atl. 132 (1915), where such practices were resorted to. See also, Seattle Brewing & Malting Co. v. Hansen, 144 Fed. 1011 (C.C.N.D. Cal. 1905); Parker Paint & Wall Paper Co. v. Local Union No. 813, 87 W. Va. 631, 105
SECONDARY BOYCOTT

1939

stop dealing with the manufacturer by threatening him with financial ruin if he persists. It is undertaking by compulsion to force the retailer to actually take its side in the conflict. Even liberal courts, such as those of New York, balk at favoring such tactics with their approval. The essential kinship between action of this kind and picketing of such a nature as to intimidate prospective customers is readily perceptible. That is, violent picketing deprives prospective customers of the ability to choose freely between buying and not buying, just like the threatened injury to the retailer's business by the general picketing of his establishment is calculated to destroy his free choice. And herein rests the real foundation, such as it is, for those decisions that have found picketing itself—such as in front of a restaurant—unlawful. Such courts have been ready to believe that any pick-

S.E. 911, 16 A.L.R. 222 (1921), in the latter of which picketing a store because it contracted with a nonunion master painter to paint the building was enjoined as unfair.

22. Commercial House and Window Cleaning Co. v. Awerkin, 138 Misc. 512, 240 N.Y. Supp. 797 (1930); George F. Stuhmer & Co. v. Kroman, 241 App. Div. 702, 269 N.Y. Supp. 783 (1934), aff'd without opinion 265 N.Y. 481, 193 N.E. 281 (1934); Grandview Dairy v. O'Leary, 155 Misc. 791, 285 N.Y. Supp. 841 (Sup. Ct. 1936); Mile Reif, Inc. v. Randau, 166 Misc. 247, 1 N.Y. Supp. (2d) 519 (Sup. Ct. 1937); B. Gertz, Inc. v. Randau, 162 Misc. 786, 295 N.Y. Supp. 871 (Sup. Ct. 1937); See Goldfinger v. Feintuch, 276 N.Y. 281, 282, 11 N.E. (2d) 910, 912 (1937); "Likewise it is illegal to picket the place of business of one who is not himself a party to an industrial dispute to persuade the public to withdraw its patronage generally from the business for the purpose of causing the owner to take sides in a controversy in which he has no interest." (Italics supplied.) Cf. Nann v. Raimist, 255 N.Y. 307, 174 N.E. 690, 73 A.L.R. 699 (1931). The distinction between this case and the Awerkin case is that the dispute in the latter was not with the owner of the establishment being picketed but was with the employer of the window cleaners over his refusal to hire union men on his contracts, whereas in the Nann case the dispute was with the owner of the picketed store. Contra: Hydrox Ice Cream Co. v. Doe, 293 N.Y. Supp. 1013 (1937); Manhattan Steam Bakery v. Schindler, 250 App. Div. 467, 294 N.Y. Supp. 753 (1937); Davey-City Radio, Inc. v. Randau, 166 Misc. 246, 1 N.Y. Supp. (2d) 514 (Sup. Ct. 1937).

Obviously, if picketing a store generally because it stocks a nonunion product is unlawful, picketing an establishment because it has erected a nonunion sign would be unlawful. Canepa v. "John Doe", 277 N.Y. 52, 12 N.E. (2d) 790 (1938); Well & Co. v. Doe, 5 N.Y.S. (2d) 599 (Sup. Ct. 1938). Contra: American Gas Stations Inc. v. Doe, 250 App. Div. 227, 293 N.Y. Supp. 1019 (Sup. Ct. 1937). Nor would the fact that the placard stated only that the sign was unfair—not the store—make any difference because merely announcing the sign as unfair, it not being for sale, could have no other purpose than to injure the store owner.


eting destroys the possibility of the customer's deciding for himself which side he will favor.\(^2\) However, courts that give substance and weight to the belief that a prospective customer might be unable to stand the publicity which might attend patronizing a place being picketed are overlooking the fact that this kind of coercion, if existent, is merely a necessary incident of any effort to acquaint the public, by picketing—which is perhaps the only available means—of the labor controversy. And when weighed against the interests of the union the possible or obvious coercive effect of picketing without suggestion of violence or retaliation should not be allowed to control.

This is also believed to be the underlying consideration that fathered the "unity of interest" idea found in a leading and recent New York case which involved picketing at a retailer's place of business.\(^2\) This case, however, is not the first where this theory has found expression. It had previously been employed to justify striking against an establishment other than the one involved in the dispute because the offender was having some of his work done at the establishment in question.\(^2\) The New York court undoubtedly had in mind the coercive effect on the retailer of such


25. This statement is applicable also to picketing designed to interfere with the flow of labor. But some courts seem to make a distinction between the two types which is of doubtful validity. Compare Cooks', Waiters' and Waitresses' Local Union v. Papageorge, 230 S.W. 1086 (Tex. Civ. App. 1921), with International Ladies' Garment Worker's Local Union No. 123 v. Dorothy Frock, 95 S.W. (2d) 1346 (Tex. Civ. App. 1936), and International Ass'n of Machinists Union, Local No. 1488 v. Federated Ass'n of Accessory Workers, 109 S.W. (2d) 301 (Tex. Civ. App. 1937). See also, Robison v. Hotel Restaurant Employees Local No. 782, 35 Idaho 418, 207 Pac. 132 (1922).

26. Goldfinger v. Feintuch, 276 N.Y. 251, 11 N.E. (2d) 910 (1937). The act considered in the opinion may have had some bearing on this theory.

picketing and, in order to justify the union's conduct notwithstanding, it emphasized the connection or relationship between manufacturer and retailer. The court's realism in recognizing the possibility of coercion is hardly open to question, but admitting its propriety by means of the suggested theory is of doubtful advisability. The principle applied seems to be that coercion directed at others than the immediate employer may be permissible in some cases, the test to consist of a finding of "unity of interest." If there is validity to this concept, however, it should justify direct coercion of the retailer, not only coercion which may be a necessary incident of a direct attack on the goods of the manufacturer at the point of absorption by the public. Yet the court was clear enough in indicating that it would not approve direct coercion. 28 This being so, the sounder view would be to justify such picketing as merely a necessary attempt to center the attack on the employer's goods at the point where it would have the greatest effect on the buying public. 29

Interference with the Third Party's Employment Relations

When the "buying public" happens to be other industrialists who utilize the manufactured product in their trades, the method usually resorted to for the purpose of destroying the employer's market has as its prime factor the provoking of labor troubles. The problems which result from activity of this kind are counterparts of those just considered. The difficulty always comes in trying to separate conduct which, in the light of the existing dispute, may be considered as reasonably necessary for the protection of the policy initiated against the offending employer, from that which goes beyond cooperation and amounts to the attempted

28. "We do not hold more than that, where a retailer is in unity of interest with the manufacturer, the union may follow the nonunion goods and seek by peaceful picketing to persuade the consuming public to refrain from purchasing the nonunion product, whether that is at the plant of the manufacturer or at the store of the retailer in the same line of business and in unity of interest with the manufacturer." Goldfinger v. Feintuch, 276 N.Y. 281, 11 N.E. (2d) 910, 913 (1937). (Italics supplied.)

29. The concurring opinion of Judge Lehman, with which Judge Loughran was in accord, seems the sounder: "I agree that peaceful picketing of the plaintiff's place of business by the defendant union for the purpose of inducing the plaintiff's customers to refrain from buying nonunion products of a manufacturer, which are on sale by the plaintiff, is lawful. That is not a 'secondary boycott'. . . . I agree, too, that the union would be acting unlawfully if it picketed the plaintiff's place of business in manner calculated to impede or intimidate customers of the plaintiff, or if the union attempted to coerce the plaintiff, by other unlawful acts or by threat of injury to his business, except as such injury might result by the use, by the union, of lawful means to achieve a lawful end." Goldfinger v. Feintuch, 276 N.Y. 281, 11 N.E. (2d) 910, 914-915 (1937). (Italics supplied.)
Coercion of third parties. No progress is made by thinking in terms of "sympathetic strikes."

Coercion in cases of this kind may occur, at least theoretically, in two ways. For example, as a consequence of a dispute between members of a teamsters' union and an employer using nonunion teamsters, union men on a construction job may refuse to handle material hauled thereto by the nonunion teamsters. The only way that any element of coercion directed at a third party can be found in this situation is to assume either that the members of the construction crafts are coerced into refusing to handle the materials, or that the conduct of these crafts is coercive of those who seek to make use of the materials.

The matter of coercion of its own members by the union has, perhaps strangely, been used more than once to support the issuance of an injunction to restrain a walk-out of the employees of a neutral. Although frequently there may be realism in finding that contented employees have been compelled by the rules of their union to leave their jobs and thus to aid in a dispute in which they have scant personal interest, if any, nevertheless the realities of such a situation should hardly be allowed to control. Sometimes, also, individuals may be virtually forced to become union men to avoid consequences that would be undesirable if not unbearable, yet this is not a matter of direct concern to courts considering, with regard to third persons, the operation of a union rule on its members. A sufficient answer to coercion of union members seems to lie in the fact that the organization of trade unions has been given legal approval. And, as has been pointed out in a well considered opinion, if unions are permitted to organize, that such permission carries with it the power to adopt rules for the control of the organization and its members necessarily follows. To say that the union should have an unabridged privilege to adopt rules and enforce them without regard to the circumstances which may justify their adoption would not be wise. But if the members of a union are recognized as enjoying

the privilege, acting in combination, to refrain from conduct that will be a blow to the very organization itself. The fact that in a given case their actions result from the force of legitimate union rules should not justify a finding of unlawful coercion by the union representatives charged with their enforcement. The justification for organization itself is at stake in such a case. The suggestion that a third party may become so intimately associated with the disputant employer as to justify measures which operate coercively as to him is obviously applicable to the situation between a union and its members, if resort to any such theory is necessary.

Concerning coercion of the user by the operation of such rules, a sharp distinction must be made between conduct which is primarily self-protective and that which is designed to coerce. Obviously, if the members of one craft by handling or working with or upon an article manufactured by, or destined for, an unfair employer make it possible for him to carry on his business and successfully resist the demands of the union, they are thus helping to break the backs of their fellows and to destroy unionism itself. If the law denies to them freedom of action and by the use of legal process compels them to handle the product in question, it is thus doing for the disputant employer what it generally


will not permit a union to do for itself, that is, to force another to join in the fight against his will.

At the same time, self-protection is one thing, coercion of third parties another. Perhaps there is more than a theoretical difference between a refusal by union members to handle non-union material, and a blanket notification to members of the building trades that they will have "labor troubles" if they use products of a certain manufacturer. According to one view, if union men are privileged to refuse to handle nonunion materials, they should not be denied the privilege of notifying their employers of such an intention. Indeed, this procedure is certainly fairer to everyone concerned. But to notify the one for whom they are working as well as other interested parties that "labor troubles" will follow under certain circumstances may well mean more than the facts justify. Such notification has the color of a direct attempt to control the conduct of these parties, with a possible suggestion of the militant, rather than a mere thoughtful endeavor to notify them of the policy of the union. In reality, the effect generally may be the same in both cases, but sometimes an actual difference is perceptible. Thus a refusal of union labor to work on a union job for a subcontractor because the principal contractor has another job where nonunion men are employed seems primarily coercive. In the same category fall cases where there is a refusal to handle supplies sold by a manufacturer because he has furnished other supplies to one who has been declared unfair, or where a union threatens to withdraw from a job—not merely to refuse to handle nonunion material—if the employer continues to purchase nonunion goods, or the goods of

35. See however, Bossert v. Dhuy, 221 N.Y. 342, 117 N.E. 582, Ann. Cas. 1918D 661 (1917), where the court said that the use of this expression simply meant that if nonunion made materials are used the members of the Brotherhood will refuse to install the same.


one who also sells to a nonunion employer.\textsuperscript{39} Although not always clearly stated or perhaps recognized, the split in cases of this kind must rest on the question whether the conduct of the union or its members is reasonably necessary for the protection or advancement of union interests so that its coercive effect may be treated as incidental, or whether these elements would be so remote without coercion that the latter must be considered the primary desire and intention.\textsuperscript{40} With this in mind the tendency should be in favor of recognizing a privilege in labor to refrain from advancing the cause of those forces inimical to the best interests of the group and to promote the cause of unionism by refusing to handle or work with or upon materials manufactured by nonunion labor,\textsuperscript{41} by refusing to work for a subcontractor on a

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\textsuperscript{39} The Sherman Act) aff'd 23 F. (2d) 426 (1928), cert. denied, 277 U.S. 594, 48 S.Ct. 550, 72 L.Ed. 1005 (1928).


Auburn Draying Co. v. Wardell, 227 N.Y. 1, 124 N.E. 97 (1919), and Willson & Adams Co. v. Pearce, 155 Misc. 426, 237 N.Y. Supp. 601 (1929), reversed, 265 N.Y. Supp. 624 (Sup. Ct. App. Div. 1933), aff'd without opinion, 264 N.Y. 521, 191 N.E. 545 (1934), should be compared with the Bossert case. In the latter the court was very specific in pointing out that there was involved no more than a refusal of members of the United Brotherhood of Carpenters and Joiners to install or handle nonunion made materials in order to protect their position as workingmen. In the Auburn case it was found that members of the Central Labor Union threatened to strike and did strike against the customers of the plaintiff, and threatened to withdraw and did withdraw patronage from them because of their business dealings with the plaintiff, in short, that they purposed to bring loss and injury to such customers unless the latter discontinued all dealings with the plaintiff. Such findings definitely show that the court was objecting to that practice generally known as the "secondary boycott," i.e., intentional coercion of disinterested third persons, a practice vastly different from refusing to aid the enemy by handling his products, which the Bossert case involved. Furthermore, the court in the Auburn case indicated very definitely that it considered the end un-
job where the principal contractor is nonunion, by refusing to work on the same job with nonunion men, or by refusing to handle work for customers of their employers who are in dispute with union labor. The tendency to scrutinize carefully the relationship between the various crafts that may combine in action of this sort springs from a feeling that there are reasonable limits to the necessity for such a program, and that when these limits are passed the coercive design becomes plainly visible. Further-

lawful. The case might be compared with Plant v. Woods, 176 Mass. 492, 57 N.E. 1011, 51 L.R.A. 339, 79 Am. St. Rep. 530 (1900), in this respect. The Willson & Adams case, however, is by no means as easy to explain. There were a number of plaintiffs, all using nonunion teamsters. The defendants included the Building Trades Council consisting of all trades. It was found that members of the building trades council were frequently called from jobs because nonunion teamsters were used in the hauling of materials to the jobs although such members were not called upon to handle such materials, and that they were called off one job simply because materials were hauled to other jobs of the same contractor by nonunion teamsters. Apparently in all cases the materials were union made. The lower court took the view that the end, which it found to be to compel the nonunion teamsters in the employ of the plaintiffs to join the union, was unlawful. The Appellate Division reversed, saying very briefly, that the end and means were lawful. It disposed of the Wardell case in a sentence, suggesting that the union conduct there was “inconsistent with the public interests, or hurtful to the public order, or detrimental to the public good,” an amazing way to handle a question of such moment to employers and employees alike. Very difficult is it to believe that self-protection required the kind of conduct as that found by the court. Intentional coercion of third parties was manifest. The only reasonable distinction between this case and the Wardell case is that the former involved merely a refusal of union men to work on a job where materials hauled by nonunion teamsters were used, and a refusal to work for a contractor who on any job, whether the one where the strike occurred or not, undertook to use materials delivered by nonunion teamsters, that such conduct was required in order to protect their positions as workingmen, and that any resulting coercion was incidental. Such a position would seem tenuous indeed. It is particularly unfortunate that the Court of Appeals did not take the opportunity to express itself more definitely on the problem.


more, where widespread activity occurs the public interest is felt more keenly.\textsuperscript{45}

The courts sometimes lay emphasis on the existence of a threat to withhold services or to strike against materials. This judicial practice has provoked criticism on the theory that what an individual is legally privileged to do he is likewise legally privileged to threaten to do.\textsuperscript{46} But this matter is not quite as simple as it sounds. To approach a business man with the announced intention of striking against him because of his dealings with another smacks strongly of an effort to compel him to do one's bidding—action of a darker shade than merely supporting the organization by refusing to be of assistance to the enemy. On the one hand, there is action directed at accomplishing a specific object; on the other, there is no stated direction. There is a suggestion in the first case that the primary effort and intention are to compel assistance in one's fight with another, conduct that amounts to more than merely refraining from doing that which may be detrimental to one's own interests. The difference here is between the punitive and the defensive, between negative or affirmative coercion of neutrals.\textsuperscript{47} If conduct of this kind is mere-
ly protective support of the organization, the fact that it may interfere with the neutral's exercise of a free will is inconsequential because incidental. But the case is different when the incident becomes the primary and undisguised endeavor.

If we grant that only notification of an intention to do an unlawful act can properly be considered as a threat within the law, our problem is not necessarily solved. As has previously been shown, where there is lacking a sufficient interest to serve as legal justification, it is generally considered unlawful for a combination to engage in a general suspension of business contacts for the purpose of coercing an individual to accept the dictates of the group. And the difference between warning before acting and acting without warning may characterize conduct as punitive or intimidating where otherwise it would go as protective. Those courts that repeat the formula that what one is privileged to do one may threaten, are usually confronted with situations where labor's efforts to bring its policies to the attention of those who might be affected by them do not appear to spring from a punitive design. Sometimes it is very difficult to determine whether labor is merely following a policy designed as defensive, or is seeking to compel a neutral to act in its favor. This difficulty, however, is perhaps not too great to require condonation of the program in every case. In solving this problem a showing that the plan is a part of settled and general union policy as contradistinguished from a determination to cover the specific case, should be given weight. But, of course, coercion of neutrals may be a part of such policy, and who can say whether a particular union rule was adopted as a necessary defensive measure apart from the desire to force neutrals to sever their contacts with the employer? The only safe guide must be the demonstrated necessities of each case. Therefore, in the last analysis the problem for the courts is to determine just how far it is necessary for labor to implicate neutrals in its struggle in order adequately to advance or protect its legitimate interests. If there should come a settled feeling that action


49. See the concurring opinion of Sloss, J. in J. F. Parkinson Co. v. Building Trades Council of Santa Clara County, 154 Cal. 581, 98 Pac. at 1037 (1908).

50. See Aeolian Co. v. Fischer, 35 F. (2d) 34 (D.C.S.D. N.Y. 1929), reversed on authority of Sherman Act, 49 F. (2d) 189 (C.C.A. 2nd, 1930). The sociological aspects are considered in Notes: (1917) 31 Harv. L. Rev. 482; (1920) 34 Harv. L. Rev. 880; (1920) 30 Yale L. J. 280.
against a neutral is necessary to the adequate protection of these interests, the coercive aspect of such conduct would be entitled to no weight, just as the coercive aspect of a strike against an employer is now considered immaterial in the light of a broader vision concerning labor's privilege to engage in economic conflict with employers. 51

51. A reasonable distinction between the doctrines of Plant v. Wood, 176 Mass. 492, 57 N.E. 1011, 51 L.R.A. 339, 49 Am. St. Rep. 330 (1900), and Pickett v. Walsh, 192 Mass. 572, 78 N.E. 753, 6 L.R.A. (N.S.) 1067, 116 Am. St. Rep. 272, 7 Ann. Cas. 638 (1906), can be seen by viewing these cases from the standpoint of the secondary boycott. In both the plaintiff's were employees, not employers, and the defendants were union men. In both the claim was that the defendants were acting unlawfully with respect to the plaintiffs in undertaking to secure their discharge because they were nonunion men. In the first case the court found that the sole effort on the part of the defendants was to force the plaintiffs to become members of the union and that they had threatened to strike against the employer in order to compel him to force the plaintiffs to join the union by threatening in turn to discharge them if they refused. This was found unlawful. In the second case the court found that the defendants were trying to get all of the employer's work for themselves, which purpose was lawful notwithstanding that the discharge of the plaintiff's nonunion men might result. Unfortunately, the result of Plant v. Woods has been the adoption by the Massachusetts courts of the view that a strike to secure a closed shop is illegal. This view was not required by the decision in that case because striking to secure a closed shop may very likely mean striking to secure all of the work in the shop for union men, rather than striking to compel outsiders to join the union, and the fact that membership in the union would be open to nonunion men should not militate against such a result. Shinsky v. O'Neill, 232 Mass. 99, 121 N.E. 790 (1919). In fact, in the Plant case the plaintiffs were the victims of that practice usually called a secondary boycott. The real end was to compel the plaintiffs to join the union. With respect to this end the employer was a third party yet the defendants were threatening to damage him by a strike in order to compel him to act against the plaintiffs. In the Pickett case the end was getting all the work for union men, something the employer could give them, and the union men were trying to force him to do so by means of a strike. If nonunion men were injured in this effort such injury was incidental, not intentional.


The problem in Plant v. Woods was recently before the Supreme Court of the United States in Lauf v. E. G. Shinner & Co., 58 S.Ct. 578 (1938). In an effort to compel the employer to force his employees against their wishes to join the defendant union, on pain of their discharge, picketing the employer's meat markets was resorted to. None of the employees were members of the union and none were on strike. Contrary to the District Court and the Circuit Court of Appeals (82 F. (2d) 68 (C.C.A. 7th, 1936), 90 F. (2d) 250 (C.C.A. 7th, 1937)), the Court found the existence of a "labor dispute" within the Norris-LaGuardia Act (Act of March 23, 1932, c. 90, 47 Stat. 70, [U.S.C. tit. 29 § 101 et seq.,] 29 U.S.C.A. § 101 et seq.) and the Wisconsin Act (Wis. Stat. 1937, § 103.62) modelled on the Federal Act. There was a vigorous dissenting opinion by Mr. Justice Butler in which Mr. Justice McReynolds concurred. Although the Court said that the case being considered was indistinguishable from the earlier case of Senn v. Tile Layers Protective Union, Local No. 3,
THE EFFECT OF THE ANTI-TRUST ACTS

Primarily, to turn from a consideration of the common law aspects of combined action by labor against an employer, to the legality of such action under the Anti-Trust Acts, is to turn from a balancing of competing interests with economic superiority on one side and the weight of concerted action on the other, to a determination of whether the conduct being considered is contrary to the applicable statute. However, this examination also should involve a balancing of interests, yet because attention is centered on the encouragement of unrestricted trading and the unwholesomeness of combinations which tend to restrain trade, the relative strength of the opposing factions may not be given its due weight.

The Supreme Court has made fairly clear how cases arising under the Sherman Act and involving coercion of third parties are to be handled. Foremost among its decisions is the Danbury Hatters case. The facts of the conflict there under scrutiny of the Court leave little to debate concerning the presence of injury to free trade. Indeed, they show that the program followed by

301 U.S. 468, 57 S.Ct. 857, 81 L.Ed. 1229 (1937), the issue there was whether or not peaceful picketing was permissible under the Wisconsin Act where the object was to compel the plaintiff, against his wishes, because of a limiting rule of the union and against his personal interest, to operate his shop as a union shop. That is, the primary purpose of the picketing was not to compel Senn to compel his employees to join the union—thus attempting to destroy the liberty of the employees through coercion of a third person—but to compel Senn to employ union labor. In Schuster v. International Association of Machinists, Auto Mechanics Lodge No. 701, 293 Ill. App. 177, 12 N.E. (2d) 50 (1938), a similar practice was approved, while in Blanchard v. Golden Age Brewing Co., 188 Wash. 396, 63 P. (2d) 397 (1936) a contrary view was taken. See also, Safeway Stores v. Retail Clerks' Union, Local No. 148, 184 Wash. 322, 51 P. (2d) 372 (1935), and cf. Union Premier Food Stores, Inc. v. Retail Food C. & M. Union, Local No. 1357, 98 F. (2d) 821 (C.C.A. 3rd, 1938), and John F. Trommer, Inc. v. Brotherhood of Brewery Workers of Greater New York, 167 Misc. 167, 3 N.Y. Supp. (2d) 782 (Sup. Ct. 1938).

52. Only the cases arising under the Sherman Act (Act of July 2, 1890, 26 Stat. 209 (1890), 15 U.S.C.A. § 1 (1929), and the Clayton Act (Act of October 15, 1914, 38 Stat. 738 (1890), 29 U.S.C.A. § 52 (1927)) will be here examined. It is not necessary to consider whether the Sherman Act was designed to apply to labor unions or their conduct. That question has been very completely discussed elsewhere. See Berman, Labor and the Sherman Act (1930) 3-54; Witte, The Government in Labor Disputes (1932) 61-74; Frankfurter and Greene, op. cit. supra note 2, at 8, 139n; Landis, Book Review (1931) 44 Harv. L. Rev. 875.


55. Wholesalers and retailers in many parts of the country were waited upon by representatives of the union who let them know that further dealings with the manufacturer or his product would result in the power of the
labor did not merely amount to a combined refusal by union men generally to purchase the product of the manufacturer but also involved a determined attempt to compel the manufacturer's vendees, wholesalers and retailers, to act detrimentally to the interests of the employer by threatening them with like injury to their businesses if they did not oblige. In brief, economic pressure on the wholesalers and retailers throughout the country was not a mere necessary incident of labor's attempt to abstain from promoting the interests of the manufacturer by buying its hats, but, on the contrary, was the specific endeavor as manifested by the efforts to destroy the general patronage of such concerns. This is the program that the court found inherent in the publication and dissemination of the "Unfair" and "We Don't Patronize" lists as shown by the specific acts against middlemen committed by the union representatives.

In the famous Duplex case the Court made very specific its opinion that under the Sherman Act the question at issue did not concern the legality or illegality of the end or the means but was

union being focused upon them, and in some instances their names were added to the "unfair" lists.

56. Nowhere has the distinction here considered received clearer statement than in the concurring opinion of Van Orsdel, J., in the similar case of American Federation of Labor v. Buck's Stove and Range Co., 33 App. D. C. 83, 32 L.R.A. (N.S.) 748 (1909), appeal dismissed as moot, 219 U.S. 551, 31 S. Ct. 472, 55 L.Ed. 345 (1910): "The word 'boycott' is here used as referring to what is usually understood as the 'secondary boycott'; and when used in this opinion, it is intended to be applied exclusively in that sense. . . . From this clear distinction it will be observed that there is no boycott until the members of the organization have passed the point of refusing to patronize the person or corporation themselves, and have entered the field where, by coercion or threats, they prevent others from dealing with such persons or corporation. . . . So long, then, as the American Federation of Labor, and those acting under its advice, refused to patronize complainant, the combination had not arisen to the dignity of an unlawful conspiracy or a boycott. . . . The unlawful conspiracy here consists in the membership of the American Federation of Labor banding together, not to cease dealing with the complainant or purchasing or using its products, but by threats to coerce others not to patronize the complainant, on penalty of the destruction of their business." 32 L.R.A. (N.S.) at 765-766. The language of Robb, J., who wrote the principal opinion in which Van Orsdel, J., concurred shows what Van Orsdel, J., meant by referring to "threats to coerce": "That no physical coercion was practiced in this case does not alter our conclusion, since restraint of the mind, as the evidence in this case clearly demonstrates, is just as potent as a threat of physical violence." 32 L.R.A. (N.S.) at 781. See also, Gompers v. Buck's Stove and Range Co., 221 U.S. 418, 437, 31 S.Ct. 482, 496, 55 L.Ed. 797, 34 L.R.A. (N.S.) 874 (1911) (a contempt proceeding under the injunction issued by the lower court); Loewe v. California State Federation of Labor, 139 Fed. 71 (N. D. Cal. 1905); Sailors' Union of the Pacific v. Hammon Lumber Co., 158 Fed. 459 (C.C.A. 9th, 1907).

solely whether or not the conduct of the union was intended to restrain and did restrain commerce among the states. This position, of course, effectively ruled out of consideration the question that would have been of primary importance under an application of common law principles, namely, whether the program in the light of the common interest between the members of the affiliated unions involved in the contest could be properly viewed as self-defensive rather than coercive. The majority opinion, without a detailed statement of the particular acts complained of, that is, without addressing itself to the problem of whether the conduct involved more than a refusal to handle the complainant's product, ruled that the purpose of the union was to coerce customers of the complainant into withholding their patronage. This was properly characterized, if the finding be accepted, as a secondary boycott, which, in turn, was found to be beyond the protection of the Clayton amendment. Indeed, in the light of the view entertained by the majority concerning the applicability and scope of the act, the distinction between incidental and intentional coercion of third parties would be unimportant. The dissenters, however, felt that such a distinction was important and undertook to show the community of interest in the dispute with the manufacturer between the trades involved, and that the program amounted to no more than a refusal of the members of such trades to lend their services to the support of the manufacturer's cause and to the destruction of the cause of union labor.

Although in the Duplex case the union program was based on the sympathetic assistance of different crafts, and therefore might with some reason have been viewed more as an effort to compel


59. See note 52, supra.

60. The dissenting opinion was written by Mr. Justice Brandeis, and was concurred in by Mr. Justice Holmes and Mr. Justice Clarke. This opinion should be very carefully compared with the same Justice's dissenting opinion in Bedford Cut Stone Co. v. Journeymen Stone Cutter's Assn., 274 U.S. 37, 63, 47 S.Ct. 522, 71 L.Ed. 916, 54 L.R.A. 791 (1927), where he said, in referring to the union conduct in the Duplex case, "It was the institution of a general boycott, not only of the business of the employer, but of the businesses of all who should participate in the marketing, installing or exhibition of its product."
the cooperation of neutrals, only one craft was involved in the case of *Bedford Cut Stone Company v. Journeymen Stone Cutters' Association*\(^6\) which followed six years later. There the Court reiterated its opinion that the sole question was whether the conduct of the union constituted an interference with interstate commerce under the act, and found that the countrywide refusal of the Association's members to work with or on the plaintiff's stone—in keeping with a provision of the constitution of the Association—was a violation of the Sherman Act.\(^6\) The dissenting opinion of Mr. Justice Brandeis was based on the view that the rule of the Association's constitution and the cooperation between members required thereby, constituted a policy necessary to the protection of the interests of the craft and to avoid self-destruction. This was followed by the position that if from action of this character a restraint of interstate commerce resulted, such restraint could not be classed as "unreasonable" under the settled jurisprudence of the Court.

Whatever may be said of the *Duplex* case concerning the existence of a purpose on the part of the union to directly coerce third parties into discontinuing or withholding their patronage, that such a finding would not have been justified by the facts of the *Bedford* case seems clear. This means, of course, that the latter case did not involve the so-called secondary boycott, and therefore demonstrates that, in fact as well as in statement, the Supreme Court does not consider that the finding of an attempt by labor to compel the assistance of neutrals is necessary to a proper application of the Sherman Act.\(^6\)

**THE EFFECT OF THE ANTI-INJUNCTION ACTS**

The Norris-LaGuardia Act\(^6\) was largely the result of the concern felt by labor over the treatment received by the Clayton Act

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\(^6\) For a collection of cases dealing with similar State Acts, see Note (1923) 27 A.L.R. 656.

at the hands of the Supreme Court in the *Duplex* case.\(^6\) Although this act deals with more than the problem presented in the *Duplex* case, the following discussion will be directed solely at its effect on practices designed to coerce third parties into action detrimental to the party with whom a labor dispute exists.\(^6\) This statute and similar statutes enacted by a number of the states, with the exception of the Wisconsin Act which confers legality on the conduct covered therein, prohibit only the issuance of injunctions in labor disputes.\(^7\) The result is that, except in Wisconsin, conduct on the part of a labor union or its members which was of such a nature as to permit recovery of damages, prior to enactment of such legislation, is unchanged in this respect. The legislation merely withholds injunctive relief.

From the standpoint of coercion of third parties, the important provisions found in almost the same language in all the acts, prohibit the issuance of any restraining order or injunction "... in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute ... from ... whether singly or in concert ... Ceasing or refusing to perform any work or to remain in any relation of

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\(^{65}\) For a discussion of the legislative efforts in this connection and an analysis of the provisions of the legislation which was finally adopted as the Norris-LaGuardia Act, see Frankfurter and Greene, op. cit. supra note 2, 205-226. See also, Witte, the Government in Labor Disputes (1932).


employment... Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence... [or] Advising, urging, or otherwise causing or inducing without fraud or violence" such acts.68

At first sight, if the act protects striking and picketing or advertising in any manner free from fraud or violence, then striking against or picketing a neutral would seem to be protected. However, this kind of conduct is protected only when the case involves or grows out of a labor dispute, and, in accordance with the definition given in the act, such a case is presented if it "involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees... or when the case involves any conflicting or competing interests in a 'labor dispute'... of 'persons participating or interested' therein..."

The question is, does this definition include picketing or striking against a neutral to compel him to act against the disputant employer? Although it is not very aptly drawn, the sense must be that a case shall be held to involve or grow out of a labor dispute when it results from an existing labor dispute, that is, "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee," and "involves persons who are engaged in the same industry, trade, craft, or occupation," and so forth. The word "case" must refer to the case presented to the court, and "same industry, trade, craft, or occupation" to the industry in which the labor dispute occurs, in keeping with the definition of a person "participating or interested in a labor dispute" as one against whom relief is sought and who "is engaged in the same industry, trade,

68. The provisions herein quoted (italics supplied) are from the Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C.A. §§ 101-115 (1934). Some of the acts (e.g., the Louisiana, New York, Pennsylvania, and Utah statutes cited in note 67, supra) but not others (notably the federal act) free from injunctive control "Ceasing to patronize any person or persons" whether singly or in concert and urging others to do the same. The significance of this language will be considered later. The Wisconsin act contains such language but further provides that "nothing herein shall be construed to legalize a secondary boycott." Wis. Stat. (1935) § 103.53.
craft, or occupation in which such dispute occurs," and so forth, instead of to the possible common industry of the plaintiff and defendant in the case. 69

There are perhaps two angles to the question raised inasmuch as the complainant seeking injunctive relief may be the neutral instead of the employer in dispute with union labor. In undertaking to determine whether the act would be applicable to a case where the disputant employer is seeking an injunction to prevent the focusing of coercion on a neutral, the possibilities for construction or interpretation are reasonably narrow. In such event the definition requires only that a labor dispute exist and that the defendants be engaged in the same industry, trade, craft, or occupation in which the dispute occurs, or have direct or indirect interests therein, or be members of the same or an affiliated organization of employers or employees, or otherwise come within the definition, and that such defendants be engaged in any of the conduct covered by section 4. Clearly, then, if the employees of a third person quit work, or threaten to quit work, or are induced to quit work as a consequence of their union membership and in keeping with instructions received, because such person is having business relations with an employer who is engaged in a labor dispute, no injunction may issue as long as their organization is at least affiliated with the organization engaged in the dispute. Perhaps the only real change this may make over sound common law is that such action is not limited to that which is self-protective since the language of the act is broad enough to cover conduct which is primarily directed at coercion of a third party. Likewise, if union men belonging to the organization in dispute, or to an

69. Cf. however, Note (1938) 51 Harv. L. Rev. 746, 747, dealing with Diamond Full Fashioned Hosiery Co. v. Leader, 20 F. Supp. 467 (D. C. E. D. Pa. 1937) wherein it is said: "There was probably no labor dispute between the plaintiff and the defendant in the instant case, since the 'controversy concerning terms or conditions of employment' was between the defendant union and the Vogue Company. However, it would seem clear, in view of the fact that the plaintiff corporation and the members of the defendant union were both engaged in manufacturing hosiery, that, in the words of § 13 of the Norris-LaGuardia Act, the case involved 'persons engaged in the same industry, trade, craft or occupation; or have direct or indirect interest therein'; and hence that the case grew out of a labor dispute within the meaning of the statute."

If the action is brought by the employer having the dispute the meaning is clear enough but conceivably, of course, when the court is presented with an action by a third party to enjoin labor practices affecting his business, he and the defendants before the court might be engaged in the same industry although such industry might not be the one in which the "labor dispute" occurs. It is not believed that the interpretation employed in the above mentioned case note was intended. See infra, pp. 306.
affiliated organization, engage in a program of advertising, speaking, or patrolling in connection with the neutral establishment, the disputant employer may not prevent this by injunction, subject perhaps to one qualification: that such conduct must cover "giving publicity to the existence of, or the facts involved in" a labor dispute. Therefore, if union men picket the place of business of a retailer for the purpose of announcing to the public that the retailer is selling a nonunion product, the question is, does this amount to giving publicity to the existence of, or the facts involved in a labor dispute?

That such conduct at least goes beyond giving publicity to the existence of a labor dispute seems reasonably clear. As to whether it constitutes giving publicity to the facts involved in a labor dispute, it may be recalled that a "labor dispute" under the act is some controversy over terms or conditions of employment or union efforts to secure the right to arrange terms or conditions of employment or the privilege of arranging the latter. Although announcing that a particular product is nonunion, or unfair, would likely be within the statutory language, if the pickets should undertake to announce the retailer as unfair a more doubtful case is presented. Such conduct could not readily be considered as constituting giving publicity to the existence of a labor dispute, or to the facts involved in a labor dispute. Therefore, although the language referred to seems broad enough to cover picketing a product at the point of distribution to the public as against any demand of the manufacturer for injunctive relief, it apparently is

not broad enough to cover an attempt, by picketing or otherwise, to interfere with the general patronage of a retailer.

The next inquiry is, should the problems just considered be resolved in the same way if the suit is brought by the third party suffering from the union program? The primary issue here concerns the meaning of the expression "involve persons." As has been seen, the act prohibits the issuance of an injunction in any case "involving or growing out of a labor dispute" and such a case is one which "involves persons who are engaged in the same industry," and so forth. In determining whether the "case" which is presented to the court when a neutral seeks an injunction is covered by the act is it necessary to find that both the plaintiff and the defendants are engaged in the same industry, for example, in which the dispute occurs? Or may the case "involve persons" within the meaning of the act if it involves defendants who would fall within any of the mentioned categories without regard to the plaintiff, or vice versa? The wording of the act does not throw any great light on the matter, but if the act was prepared with a view to covering cases where the plaintiff is a third party aggrieved by union conduct and if the expression "same industry . . ." refers in such connection to the common industry of plaintiff and defendants, then whenever a third person's employees act against him their conduct would be protected without regard to the possible fact that the industry in which he may be engaged is not the industry in which the dispute occurs. This reasoning would lead one to believe that when this section was drawn the drafters were thinking about actions brought by the employer having the dispute and not about the possibility of action by an aggrieved third person.\footnote{71}

Aside from the language of the act and the possibilities of construction, there remains the question of the legislative intent in general. Using the background of this kind of legislation as a guide, there may arise a serious question concerning the presence of any intent to remove from the protection of injunctive relief the practice of focusing compulsion on a neutral in order to force him to aid the union in its struggle. The chief reasons for the adoption of the Norris-LaGuardia act are to be found in the

\footnote{71. See note 69, supra. Of course this language may mean that the act is applicable to suit by a neutral if the neutral and the defendants are engaged in the same industry, etc., as that in which the dispute occurs.}
opinions of the Supreme Court in the *Tri-City*\(^2\) and *Duplex*\(^7\) cases decided under the Clayton amendment to the Sherman Act. In the *Duplex* case the Clayton act was held to be inapplicable because the defendants included others than employees of the complainant manufacturer, notwithstanding the claim that the Clayton Act was designed to make possible a greater degree of cooperation between union organizations without regard to the absence of an employer-employee relationship. Also, the position of the union, as reflected in the dissenting opinion of Mr. Justice Brandeis, was that it was merely refraining from conduct that would be of material assistance to the manufacturer, and that any effect of such conduct on actual or prospective customers of the complainant was merely an incidental and perhaps unavoidable result of the union's efforts to protect and advance its own interests by using its combined strength against the offender. Further, as shown by the court in the *Duplex* case, the evidence is clear that the Clayton Act was not designed to protect the secondary boycott.\(^7\) Finally, the arguments in the House in favor of the Norris-LaGuardia Act by its author in that body show his position that his act was only a rewriting of the principles of the Clayton Act in terms broad enough to foreclose the employer-employee limitation imposed by the court in the *Duplex* case.\(^7\) It is not at

\(^{72}\) American Steel Foundries Co. v. Tri-City Central Trades Council, 257 U.S. 184, 42 S.Ct. 72, 66 L.Ed. 189, 27 A.L.R. 360 (1921).


\(^{74}\) Of particular significance is the following language of the spokesman for the Judiciary Committee of the House appearing in 51 Cong. Rec. 9652, 9658 (1914): Mr. Webb: "I will say frankly—when this section was drawn it was drawn with the careful purpose not to legalize the secondary boycott, and we do not think it does . . . . It does legalize the primary boycott; it does legalize the strike; it does legalize persuading others to strike, to quit work, and the other acts mentioned . . . ., but we did not intend, I will say frankly, to legalize the secondary boycott. . . ."

\(^{75}\) "I say again—and I speak for, I believe, practically every member of the Judiciary Committee—that if this section did legalize the secondary boycott there would not be a man to vote for it. It is not the purpose of the committee to authorize it and I do not think any person in this House wants to do it."

\(^{76}\) Mr. LaGuardia: "There is not an underlying principle written into this bill which Congress did not enact into law back in 1914, when the Clayton Act was passed. Gentlemen, this problem is not new. Congress struggled with it before it wrote the provisions into the Clayton Act in 1914 exactly as we are trying to do today."

In New Negro Alliance v. Sanitary Grocery Co., 58 S.Ct. 703, 707 (1938), the Court, speaking through Mr. Justice Roberts, said: "The legislative history of the act demonstrates that it was the purpose of the Congress further
all surprising that labor should feel privileged to deny its services when their effect will be to injure labor itself, and that such a denial should not be emasculated by cutting off the force of organized effort, the source of its only real power. If this was the goal for which labor was striving then it is reasonable to believe that the purpose of the legislation here considered was to give labor freedom to avoid division against itself by allowing full cooperation when a dispute with some employer arose. There need be no conflict between such a purpose and the use of direct compulsion against one not a party to the dispute. If compulsion is incidental to organized efforts against the offending employer in defense of unionism, then it must be endured. Intentional compulsion of neutrals as a part of union policy and activity is another thing.\(^7\)

The fact that there is no provision in the Norris-LaGuardia Act dealing directly with the question of patronage as a particular matter, such as may be found in certain of the state acts,\(^7\) may be a further indication of a legislative intention not to protect the secondary boycott. However, although the Wisconsin statute includes in its protection “ceasing to patronize or employ any person,” it further provides in the same section, “but nothing herein shall be construed to legalize a secondary boycott.”\(^7\) Evidently the Wisconsin lawmakers felt that ceasing to patronize or employ any person might be harmonious with the exclusion of the secondary boycott from the protection of the act.\(^7\) Indeed, such a position would be sound, for only when there is a combined effort to injure the patronage of a neutral for the purpose of forcing him to aid in the struggle is the secondary boycott involved in


\(^7\) See note 68, supra.

\(^7\) Wis. Stat. (1935) § 103.53. Although the New York act has a “ceasing to patronize” provision the New York courts have found that the secondary boycott was not made legal. See cases cited in note 76, supra.

\(^7\) The Clayton Act itself has similar language dealing with the withholding of patronage.
this kind of case. Even without language definitely excluding the secondary boycott, the view that the provision dealing with patronage was not intended to protect the coercion of neutrals by attempts to injure or divert their patronage might be supported by the fact that the acts limit the protection given to advertising, speaking, or patrolling, to conduct of this kind which is designed to give publicity to the existence of or the facts involved in any labor dispute, as we have seen.\textsuperscript{80}

There is a possibility at least that the courts may take the position that a case cannot involve or grow out of a labor dispute unless the dispute is with the plaintiff. That is to say, they may resort to the construction that if there is no labor dispute with the plaintiff the action which he brings to secure injunctive relief against striking or picketing aimed at destroying his liberty will not constitute a case involving or growing out of a labor dispute, thus interpreting the term "labor dispute" to mean such a dispute with the plaintiff in the "case." Perhaps under the broad language used the only substantial basis for such an interpretation would be the history of this type of legislation.\textsuperscript{81} However, this method of construing the act would leave available to the neutral, harassed and injured by a conflict to which he is not a party, the remedy of the injunction to safeguard his business, and at the same time would prevent the employer with whom the dispute exists from thwarting the efforts of the union to compel him to come to terms. As previously shown, the use of coercion against a neutral has generally been treated as unlawful both with respect to the neutral and also with respect to the party in dispute with the union. The construction here suggested would constitute a modification of this view, leaving available to the injured neutral the customary modes of relief and merely depriving the employer of injunctive relief to stop a program effective against him.\textsuperscript{82}


\textsuperscript{81} For a detailed discussion, see Frankfurter and Greene, op. cit. supra note 2, ch. 4, 5.

In further support of the right of the neutral, one may argue that in the definition of a "labor dispute" the legislators indicated conclusively that they intended to make legitimate the end sought when the dispute involved terms or conditions of employment or an effort to arrange them through representation or association—in short, to obtain a collective agreement. Except for disputes falling within these categories, ends considered illegitimate at common law remain so under the statutes. Now, as previously pointed out, undertaking to coerce a neutral is generally considered destitute of a legitimate end at common law because no circumstances constituting a labor dispute with him exist. This being true, the position of the neutral under the statutes might remain unchanged. Of course, the above analysis is contrary to the treatment of the Goldfinger case by the New York Court of Appeals; yet the opinion does not foreclose conjecture concerning the court's real evaluation of the case, inasmuch as the court permitted a practice which would have been valid under the common law as found in that state, namely, picketing a product, and denied validity to a practice which, ostensibly at least, would be valid under the statute, namely, general picketing of a retailer. It is believed that the real difficulty here was in treating the act as applicable to the case notwithstanding the fact that the action was brought by the neutral. The court's decision and position generally would have been perfectly sound in the ab-


See also, Union Premier Food Stores v. Retail Food C. & M. Union, etc., 98 F. (2d) 821 (C.C.A. 3rd, 1938), where the court found the absence of a labor dispute when the employer was willing to bargain with either of two rival unions which the National Labor Relations Board might choose in a pending decision as being entitled to represent the employees, and enjoined all picketing pending such decision. The dissenting opinion discloses the anomalous nature of the majority opinion and its very questionable attempt to avoid the operation of the Norris-LaGuardia Act and to distinguish Lauf v. E. G. Shinner & Co., 58 S.Ct. 578 (1938).

83. See supra, p. 250.


85. The fundamental reason for this may have been that the court does not believe that the New York anti-injunction law was designed to protect the secondary boycott. See the concurring opinion of Judge Lehman in Goldfinger v. Feintuch, 276 N.Y. 281, 11 N.E. (2d) 910, 914-915 (1937), and the cases cited in note 76, supra.
sence of the statute, for the whole question would then have been whether the conduct of the union was primarily designed to coerce the retailer into acting against the manufacturer or was simply an attempt to notify the public of the nonunion character of the manufacturer's product at the point where the buying public could best be reached. This problem could and should have been resolved in favor of the latter theory—a desirable policy to pursue whenever there is doubt.

CONCLUSION

The case history of labor's legal position in the employment of its weapons seems definitely to indicate that while in modern times the great majority of courts have been willing to protect the workingman in his efforts to organize, and, through organization, to seek the support of all others when a legitimate dispute with some employer was being waged, they have been unwilling to permit labor to force such support. Conduct designed to intimidate others outside the immediate dispute, whether morally or physically, has been disapproved almost uniformly. On the contrary, attempts at peaceful persuasion have been protected. Conflicting attitudes on the legality of picketing have resulted from different opinions concerning its effect, that is, whether or not it is intimidating. But whenever found to have this characteristic as practiced there has been uniformity in denouncing it. Similarly any other method having a like intentional effect has been treated the same. With a free people legitimate competition is sacred. To destroy competition is to strike a blow at freedom. In the economic conflict between employer and employed the support of others is essential. For it both parties to the conflict vie. It may be wooed and won but not compelled. This seems to be the moving spirit of the cases. Difficulty has been encountered in separating intentional compulsion from injury incidental to cooperative support of the organization and to reasonably effective public appeal.

From a consideration of the cases, the feeling comes that labor's major struggle has been to secure recognition of its claimed privilege to use the entire strength of its organization against an offending employer in order to bring him to terms, and that labor has not been so much concerned, as a direct endeavor, with forcing the aid of neutrals. The penalty for going beyond such a program and letting ambition impel activity aimed at direct coercion of third parties has been the legal proscription
of measures that, if carefully directed and controlled, might have been approved as defensive. It is believed that courts should be reluctant to destroy the power of organization—for what else has labor?—under the guise of protecting third parties from coercive practices. Certainly a local is no match for an employer having great resources, and labor history teaches that action to bring an objecting employer into line has frequently had its genesis in threats of other manufacturers in the industry to refuse to renew their union contracts in order to meet nonunion competition. A situation of this kind calls for full union cooperation.

The Norris-LaGuardia Act and like legislation should be readily accepted not only as protecting efforts to secure the right to bargain collectively, without regard to the employer-employee relationship, but also as making possible concert of action on the part of affiliated labor groups against an employer who does not see with the union on questions concerning terms or conditions of employment, notwithstanding incidental hardships to third parties. At the same time, direct and intentional coercion of neutrals, lacking the factors which justify coercion of an offending employer, should be denied protection—at least in favor of the neutral—until experience has clearly demonstrated that such a course is essential to the reasonable protection and advancement of legitimate union interests. That there is a great interdependency under our economic organization between productive and distributive units may be true, but unless there is common control the claimed third party neutral should not be identified with the offender for the purpose of finding legal justification for coercive practices. The proportionate interest of the individual consumer in the affairs of the nonunion manufacturer, assuming his goods may be bought more cheaply, is as great as that of the retailer, yet should the exercise of his freedom to dispose of his


88. Justice Collin refuted an attempt by counsel for defendant to identify the retailer with the manufacturer in his opinion in Goldfinger v. Feintuch, 159 Misc. 806, 288 N.Y. Supp. 855 (Sup. Ct. 1936).
patronage as he may see fit expose him to coercive practices?\textsuperscript{89} On the other hand, to incidental hardships he must submit. The final inquiry in cases involving coercion has never been more effectively suggested than by District Judge Hough: “The priest of Juggernaut may be glad that the car rolls over a personal enemy, but the car rolls primarily to glorify the god within.”\textsuperscript{90} Does the “car roll” against third party neutrals, or is damage to them merely an incident of labor’s attempt to maintain its position against the one who threatens its power or its cause?

\textsuperscript{89} Cf. Hellerstein, supra note 46, at 354.