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Labor Law: The Status of Organizational Picketing in Wisconsin

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COMMENTS

THE STATUS OF ORGANIZATIONAL PICKETING IN WISCONSIN

A controversial question in labor law today is whether state courts may constitutionally enjoin peaceful "organizational picketing", i.e. the peaceful picketing of an employer's place of business by a stranger or minority union for the purpose of compelling the employees to join the union.[1] The decisions are in conflict among the different jurisdictions and even within certain jurisdictions.[2]

A basic difficulty presents itself in determining whether there is a distinction between organizational picketing and "recongnition picketing". The latter is defifined as picketing an employer's place of business by a stranger or minority union for the purpose of inducing the employer to recognize the picketing union as exclusive representative of the employer's employees for collective bargaining purposes.[3] A state prohibition of such picketing has been upheld as constitutional by the United States Supreme Court in *Building Service Employees Union v. Gazzam.*[4] Thus, if organizational and recognition picketing are the same, there is no problem as to the constitutionality of a state ban on organizational picketing.

On the face of things it is difficult to see any practical difference between the two types of picketing. In recognition picketing pressure is put on the employer to induce him to compel his employees to join the union. In organizational picketing pressure is put on the employees to compel them to join the union. However, each tppe of picketing amounts to a deliberate infliction of economic harm upon *both* the employer and the employees; the picketing tends to cut off the employer from his markets, thus threatening both the employer's business and the employees' wages. Consequently, the practical effect of organizational and recognition picketing is the same: Infliction of economic harm upon the *employer,* thus inducing him to interfere with his employees' rights regarding free choice of bargaining representatives.[5] However, some courts, faced with union allegations that the

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[1] This definition is given in Petro, *Recognition and Organizational Picketing in 1952,* 3 LABOR L. J. 819, 820 (1952). See this article and Petro, *Free Speech and Organizational Picketing in 1952,* 4 LABOR L. J. 3 (1953), for an excellent analysis of the constitutional problem.

[2] Petro, *Free Speech and Organizational Picketing in 1952,* 4 LABOR L. J. 3 (1953).

[3] This definition is given in Petro, *Recognition and Organizational Picketing in 1952,* 3 LABOR L. J. 819, 820 (1952).

[4] 339 U.S. 532 (1950).

[5] Both state and federal legislation provide for free employee choice of bargaining representatives. See 29 U.S.C.A. §157, LABOR MANAGEMENT RELATIONS ACT OF 1947 §7, (Hereafter referred to as the Taft-Hartley Act);

purpose of the picketing was not to gain recognition, but solely to organize the employees, have recognized the existence of "pure" organizational picketing.[6] These decisions were handed down under statutes which did not prohibit organizational picketing. Therefore, in recognizing the existence of pure organizational picketing the courts were upholding its validity. However, it is apparent that in a state which recognizes pure organizational picketing and *prohibits* it, a constitutional question arises, since the *Gazzam* case involved recognition picketing only.

The purpose of this article is to ascertain (1) Wisconsin's position on organizational picketing; (2) the constitutionality of its position; (3) the status of organizational and recognition picketing under the Taft-Hartley Act; and (4) whether the W.E.R.B. has jurisdiction over organizational and recognition picketing where interstate commerce is involved. From the preliminary remarks above we can see that, in regard to the first two questions, the following considerations must be borne in mind: If both recognition and organizational picketing are banned in Wisconsin and they are indistinguishable, the *Gazzam* case is controlling and the prohibition is constitutional. But if Wisconsin does not identify these two types of picketing and organizational picketing is banned, we must inquire into the constitutionality of the prohibition. In such case, if Wisconsin has recognized the existence of pure organizational picketing, the constitutional inquiry will follow as a matter of course. On the other hand, if Wisconsin has not passed on the question, such inquiry will be necessary, nevertheless, since Wisconsin might conceivably recognize pure organizational picketing in the future.

Organizational Picketing as an Unfair Labor Practice in Wisconsin

Peaceful picketing for organizational and recognition purposes is not expressly forbidden by the Wisconsin Statutes. At first glance, Section 111.06(2)(e) would appear to be determinative of the question. This section makes it an unfair labor practice to engage in picketing, boycotting or other overt concomtants of a strike unless a majority of the employees have voted to strike. Since organizational and recognition picketing are directed at employees none of whom or a minority of whom are members of the picketing union, this provision apparently negates any possibility of such picketing. How-

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Wis. Stats. (1951), sec. 111.04. Also, state and federal legislation alike make employer interference with such right an unfair labor practice. See Taft-Hartley Act §8 (a) (1); Wis. Stats. (1951), sec. 111.06(1)(a).

[6] Peters v. Central Labor Council, 179 Ore. 1, 169 P. 2d 870 (1946); Park & Tilford Import Corp. v. International Brotherhood of Teamsters, 27 Cal. 2d 599, 165 P. 2d 891 (1946).

ever, by court interpretation Section 111.06(2)(e) does not refer to peaceful picketing.[7] Thus, this provision does not mean exactly what it says. Also, it is difficult to determine just what activities might be considered unfair labor practices under it. In various Wisconsin Supreme Court decisions under this section, the activities proscribed would likewise have been prohibited under other definitions of unfair labor practices, such as mass picketing, interference with the use of streets, or picketing and boycotting for unlawful purposes.[8]

The sections of the Wisconsin Employment Peace Act which do have application are 111.06(2)(a) and (b). Section 111.06(2)(a) makes it an unfair labor practice on the part of employees or unions to coerce or intimidate employees in the excercise of their right to engage in or refrain from union activities. Section 111.06(2)(b) makes it an unfair labor practice to coerce, intimidate, or induce an employer to interfere with such right. The question is whether the terms "coercion" and "intimidation" include peaceful picketing. If they do, organizational picketing is prohibited by Section 111.06(2)(a) and recognition picketing by Section 111.06(2)(b).

A Wisconsin Supreme Court decision directly in point is *Retail Clerks' Union v. W.E.R.B.*[9] In that case there was picketing of a retail store, the employees of which had declined to join the union. The court upheld an order of the W.E.R.B. which had found the union guilty of unfair labor practices under both Sections 111.06(2)(a) and (b). On the question of coercion and intimidation, the court remarked:

> "It is generally held that coercion or intimidation is not necessarily limited to threats of violence to person or property. A man may be coerced into doing or refraining from doing by fear of the loss of his business or wages as well as by the dread of physical violence or force."[10]

Therefore, the court concluded that the peaceful picketing constituted an attempt to coerce the employees into joining the union and the employer into interfering with rights of the employees to refrain from joining the union. Consequently, it is clear that these two types of picketing are unfair labor practices under the Wisconsin Employment Peace Act.

In regard to the question of the identification of organizational and recognition picketing, the Wisconsin Supreme Court in the *Re-*

[7] Hotel & R. Employees' International Alliance v. W.E.R.B., 236 Wis. 329, 294 N.W. 632 (1941), *aff'd.*, 315 U.S. 437 (1942).

[8] Retail Clerks' Union v. W.E.R.B., 242 Wis. 21, 6 N.W. 2d 698, 149 A.L.R. 452 (1942); W.E.R.B. v. International Assoc. etc., 241 Wis. 286, 6 N.W. 2d 339 (1942); Appleton Chair Corp. v. United Brotherhood, 239 Wis. 337, 1 N.W. 2d 188 (1941); W.E.R.B. v. Milk Etc. Union, 238 Wis. 379, 299 N.W. 31 (1941).

[9] Retail Clerks' Union v. W.E.R.B., *ibid.*

[10] Retail Clerks' Union v. W.E.R.B., *supra*, note 8, at 36.

tail Clerks' case made no positive identification of them. Rather, the cour held that both Sectons 111.06(2)(a) and (b) were violated, so they seem to indicate a distinction, if anything. However, neither the Wisconsin Supreme Court, the Wisconsin Circuit Courts, nor the W.E.R.B. have ever expressly declared the existence of pure organizational picketing. On the contrary, in every proceeding in which Section 111.06(2)(a) has been violated, the tribunal has also declared a violation of Section 111.06(2)(b).[11] So, Wisconsin is in the position of never having positively identified organizational and recognition picketing, and never having recognized an absolute distinction between them. Consequently, there is a possibility that the Wisconsin Supreme Court might recognize such a distinction in the future. If this were to happen, *pure* organizational picketing would then be proscribed in Wisconsin under Section 111.06(2)(a). It therefore behooves us to consider the constitutional status of such a proscription.

Constitutionality of a Prohibition of Pure Organizational Picketing

Whenever peaceful picketing is regulated or prohibited a constitutional question arises, because of the United States Supreme Court's identification of peaceful picketing and free speech in the *Thornhill* and *Carlson* case.[12] In the latter case the court said:

> "Publicizing the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth, or by banner, must now be regarded as within that liberty of communication which is secured to every person by the Fourteenth Amendment against abridgment by a State."[13]

Of course, the right to peacefully picket is no greater than that accorded other means of speech. For example, picketing accompanied by false statements or misrepresentation is not given constitutional protection.[14]

Out of the *Thornhill* and *Carlson* cases has arisen much judicial uncertainty and academic disputation as to whether peaceful picketing is an excercise of free speech or *more* than free speech.[15] Pro-

[11] Retail Clerks' Union v. W.E.R.B., *supra,* note 8; W.E.R.B. v. Retail Clerks' International Union, 30 Labor Rel. Ref. Manual 2693 (Wis. Cir. Ct., Kenosha County 1952); Amalgamated Clothing Workers of America v. W.E.R.B., 25 Labor Rel. Ref. Manual 2659 (Wis. Cir. Ct., Milw. County 1950).

[12] Thornhill v. Alabama, 310 U.S. 88 (1940); Carlson v. California, 310 U.S. 106 (1940).

[13] Carlson v. California, *ibid.,* at 113.

[14] *Supra,* note 12; Cafeteria Employees Union v. Angelos, 320 U.S. 293 (1943).

[15] GREGORY, LABOR AND THE LAW (rev. ed. 1949); Cox, *Strikes, Picketing and the Constitution,* 4 VAND. L. REV. 574 (1951); Gregory, *Peaceful Picketing and Freedom of Speech,* 26 A.B.A.J. 709 (1940); Teller, *Picketing and Free Speech,* 56 HARV. L. REV. 180 (1942); Dodd, *Picketing and Free Speech: A Dissent,* 56 HARV. L. REV. 513 (1943); Teller, *Picketing and Free Speech: A Reply,* 56 HARV. L. REV. 532 (1943).

fessor Cox divides peaceful picketing into "signal" picketing and "publicity" picketing, and advocates constitutional protection for the latter only.[16] He defines signal picketing as:

> ". . . picketing which has as its primary and often exclusive purpose the notifying of union members and members of affiliated unions that they must not work in the picketed establishment, or pick up or deliver goods because their unions are engaged in bringing economic weapons to bear on the employer. Despite its element of publicity and propaganda, therefore, such picketing may be fairly described as the signal by which the union invokes its economic power . . . In such cases the picketing line is not a method of securing publicity nor are the pickets seeking to secure adherents by persuading others of the truth of what they say. The picket's reliance in such a case is on the sanctions inherent in the discipline and organized economic power of their union."[17]

Professor Cox defines publicity picketing as that which appeals only to reason, loyalty and other emotions and which:

> ". . . is addressed to the public, and the members of the public decide chiefly as individuals whether to patronize the establishment or to support the picket's cause. Thus, the publicizing is the primary element and the disciplined economic power of the union is an insignificant factor."[18]

Professor Cox concedes that the same picket line will often contain elements of both signal and publicity picketing, but he contends that the distinction is practicable, and that an important factor in determining the constitutional status of picketing is whether the "publicity" or "signal" aspect predominates.[19]

Other writers are in favor of complete abandonment of the identification of picketing and free speech, thereby giving to the states the right to regulate or prohibit picketing as they desire.[20] A statement by Professor Gregory can be used as illustrative of their position:

> "It is hard to believe that the reactions here encountered (respect for a picket line) are all expressions of intellectual conviction as to the worth of the picketing union's several causes. In the first place, no real attempt is made on the picketing lines to describe what grudge the union has against the employment or commercial policies of the picketed employer. And there is usually no attempt to define what the picketers want, and why. What even peaceful picketing usually boils down to is a simple process of proscription . . . such a procedure is, indeed, a dubious venture into the world of ideas and opinions . . . Rather,

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[16] Cox, *supra,* note 15.
[17] Cox, *supra,* note 15, at 595 and 596.
[18] Cox, *supra,* note 15, at 595.
[19] Cox, *supra,* note 15, at 595.
[20] GREGORY, *op. cit. supra,* note 15; Gregory, *supra,* note 15; Teller, *supra,* note 15.

> it suggests a sort of psychological embargo around the picketed premises, depending for its persuasiveness on the associations most people have in mind when they think about picketing. Hence, it is likely that people hesitate to cross picket lines more because they wish to avoid trouble and to escape any possible scorn that might be directed toward them for being anti union, than because they are persuaded intellectually by the worth of the picketing unions cause."[21]

In the same work Gregory later says of picketing:

> "The fact is that it is simply a species of coercion travelling under the guise of speech for the purpose of enjoying constitutional immunity . . . Any candid labor leader would, in all probability, confess this off the record."[22]

Thus, these writers are of the opinion that *all* picketing is essentially coercive and not entitled to constitutional protection from abridgment by the states. Cogent as their position may be, however, the United States Supreme Court maintains its pickting—free speech assimilation.[23] At first glance, *Empire Storage & Ice Co. v. Gibiney*[24] would appear to be a holding that "Signal" picketing is not free speech, but the Supreme Court, in upholding an injunction against the picketing, based its decision on the ground that the purpose of the picketing was unlawful, i.e., that it was used to effectuate a boycott made unlawful by state statute. Thus, the Supreme Court merely held that picketing is not entitled to *more* protection than other kinds of speech, that an unlawful boycott is no more legalized because it is brought about by "picketing-speech" than it would be if caused by the speech or communications of businessmen.

However, though the *Giboney* case refuses to abandon the picketing free speech identification, its holding is extremely important in that it advances for the first time in the United States Supreme Court the theory that picketing may be enjoined when it is for an unlawful labor purpose as proclaimed by a state's public policy. The state courts had maintained this position for some time,[25] and the Supreme Court finally followed suit in the *Giboney* case and three subsequent cases, *Hughes v. Superior Court*,[26] *International Brotherhood of Teamsters v. Hanke*,[27] and the *Gazzam* case discussed above. In the *Gibony* and *Gazzam* cases the public policy contravened was set up by statute; in the *Hanke* and *Hughes* cases it was set up by judicial decision. Thus, the holding of these cases may be epitomized as follows: peaceful

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[21] GREGORY, *op. cit. supra*, note 15, at 347 and 348.
[22] GREGORY, *op. cit. supra*, note 15, at 360 and 361.
[23] See Petro, *Effects and Purposes of Picketing*, 2 LABOR L. J. 323 (1951).
[24] 336 U.S. 490 (1949).
[25] See Note, 174 A.L.R. 593 (1948), at 595, and cases cited.
[26] 339 U.S. 460 (1950).
[27] 339 U.S. 470 (1950).

picketing may be prohibited when its objective is unlawful in the sense that it violates a state public policy declared by the legislature or the courts.

These cases are decisive in regard to a state's right to regulate or prohibit peaceful organizational picketing. There is, of course, a question as to how far a state may go in proscribing certain purposes as unlawful,[28] but the *Hanke* case points out that a state's policy, though not conclusive, is entitled to great weight.[29] Yet the *Gazzam* case presents a problem, by reason of Justice Minton's seeming approval of organizational picketing. He implies that at least *he* would have decided the case differently had the state statute prohibited organizational picketing:

> "Respondents do not contend that picketing per se has been enjoined but only that picketing which has as its purpose violation of the policy of the state. There is no contention that picketing directed at employees for organizational purposes would be violative of that policy. The decree does not have that effect."[30]

Therefore, it becomes necessary to determine whether a state policy against organizational picketing should be accorded the same weight as one against recognition picketing. The main reason supporting a policy against recognition picketing is that the effect of the picketing is to cause employer interference with employee freedom of choice of bargaining repersentatives, which freedom of choice is protected by both state and federal legislation.[31] Such interference in induced by the economic harm inflicted upon employer's business by the use of picketing. Since the practical effect of organizational picketing is to cause the same economic harm, thereby inducing the same interference, this reason is also applicable to organizational picketing. Furthermore both recognition and organizational picketing result in economic harm to the *employees*, and this harm clearly operates against their freedom of choice of bargaining representatives. To strengthen the argument that organizational picketing interfers unduly with free employee choice it may be pointed out that both state and federal labor laws have given unions comprehensively protected rights

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[28] Prohibitions of picketing have been considered too broad in Bakery & P. Drivers & Helpers, I.B.T. v. Wohl, 315 U.S. 769 (1942); and American Federation of Labor v. Swing, 312 U.S. 321 (1941). Thus, a question arises as to whether a ban on organizational picketing might be struck down under these cases. However, attempts have been made to distinguish these cases on the ground that they were not decided on the basis of the unlawful purpose of the picketing. See Teller, *Picketing and Free Speech*, 56 HARV. L. REV. 180, 193 (1942); Note, 94 L.ed. 973, 975 (1950).

[29] *Supra*, note 27, at 475.

[30] *Supra*, note 4, at 539, 540.

[31] See TAFT-HARTLEY ACT §7; WIS. STATS. (1951), sec. 111.04.

in regard to solicitation of membership,[32] which rights preclude the necessity of the additional privilege of picketing. For example, employers may not mistreat organizers or threaten reprisal against those who participate in organizational activities; unions are generally free to solicite membership even on the employers' business premises, subject to qualifications as to time and place;[33] where the employer owns all convenient meeting places, as in a company owned town, he has a duty to permit the use of such meeting places by unions desiring to organize his employees;[34] and finally, unions naturally have the same rights as all other solicitors, *i.e.,* they may approach employees in their homes, on the streets, or anywhere else. The existence of these genuinely persuasive techniques indicates that picketing is restored to only because it goes beyond ordinary persuasion and solicitation; it exerts a pressure they lack, thereby encroaching upon the area of free choice.

The second basis for a policy against recognition picketing is incidental to the first one. Because the employer cannot give in to the union's demands without committing the unfair labor practice of interfering with free employee choice of bargaining representatives,[35] the harm caused to his business is unjustified. For the same reason the harm resulting to an employer's business by reason of organizational picketing is likewise injustified.

It is therefore submitted that, since the reasons supporting a state policy against organizational picketing are identical to those supporting a policy against recognition picketing, the United States Supreme Court should give the same approval to a state prohibition of organizational picketing as was given in the *Gazzam* case to a state ban on recognition picketing.

Concluding this discussion of the constitutional status of organizational picketing, this writer is of the opinion that, although such picketing should be amenable to state regulation by reason of the "unlawful purpose" doctrine advanced in the *Giboney, Gazzam, Hughes,* and *Hanke* cases, the identification of picketing and free speech should be abandoned by the United States Supreme Court. It is hoped that before long the court will recognize the cogency of the arguments in favor of the abandonment, so as to obviate the necessity whenever a state prohibits peaceful picketing of determining the sufficiency of the policy supporting the prohibition.

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[32] For a collection of authorities regarding the organizational rights which are mentioned here, see 2 CCH LAB. LAW REP. (4th ed.) 3700-3840.
[33] Republic Aviation Corp. v. N.L.R.B., 324 U.S. 793 (1945).
[34] N.L.R.B. v. Stowe Spinning Co., 336 U.S. 226 (1949).
[35] See TAFT-HARTLEY ACT §8 (a) (1); WIS. STATS. (1951), sec. 111.06(1)(a).

Status of Organizational and Recognition Picketing Under the Taft-Hartley Act—Jurisdiction of W.E.R.B. Where Interstate Commerce Involved.

Where the employer involved in organizational or recognition pickekting is engaged in interstate commerce or in business which affects interstate commerce, the Taft-Hartley Act is applicable. Sections 7 and 8(b)(1)(A) of the national act are quite similar to Sections 111.04 and 111.06(2)(a) of the Wisconsin Employment Peace Act, which sections proclaim organizational picketing an unfair labor practice in Wisconsin. Section 7 declares the right of employees to either participate or refuse to participate in organization and concerted action, and Section 8(b)(1)(A) outlaws union "restraint or coercion" of employees exercising that right. Under the Wisconsin construction of the term "coercion" organizational picketing would be banned by the Taft-Hartley Act. However, the National Labor Relations Board has construed "coercion" as used in Section 8(b)(1)(A) so as not to include *peaceful* picketing. The Board has held that Section 8(b)(1)(A) is intended to outlaw only conduct involving physical violence or, at most, direct, personal threats of economic reprisal.[36] In regard to recognition picketing, the National Act has no provision corresponding to Section 111.06(2)(b), and, except where a union has already been certified,[37] recognition picketing is not banned.[38] Thus, neither organizational picketing nor the type of recognition picketing with which we have been concerned is made an unfair labor practice under the Taft-Hartley Act.

Although the National Act does not prohibit such picketing, it does not necessarily follow that the states may assume jurisdiction over organizational and recognition picketing where interstate commerce is involved. An extremely important current issue is the extent to which the Taft-Hartley Act pre-empts jurisdiction in the labor law area. We have no United States Supreme Court decision directly in point regarding organizational or recognition picketing,[39] so it will be necessary to examine cases which are closely analogous in determining whether the states have jurisdiction.

The general problem of state versus federal jurisdiction arises out of several different factors, which are as follows: (1) the Supremacy

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[36] Perry Norvell Company, 80 N.L.R.B. 47 (1948); *In re* International Typographical Union, Woodruff Randolph et al. and American Newspaper Publishers Association, 86 N.L.R.B. 115 (1949).

[37] See TAFT-HARTLEY ACT §8 (b) (4) (c).

[38] See Petro, *Recognition of Picketing Under the N.L.R.A.*, 2 LABOR L. J. 803 (1951), and cases cited therein, for development of this proposition. *Contra:* N.L.R.B. v. Denver Bldg. & Const. T. C., 192 F. 2d 577 (10th Cir. 1927) (case decided under Section 8 (b) (2) of the Taft-Hartley Act).

[39] The *Gazzam* case did not involve or affect interstate commerce.

Clause of the United States Constitution;[40] (2) Section 10(a) of the Taft-Hartley Act, giving the National Labor Relations Board exclusive jurisdiction to prevent the unfair labor practices defined in the act; (3) Section 7 of the Taft-Hartley Act, which guarantees to employees the right to engage in concerted activities; and (4) the doctrine of "preemption" by "occupation of the field."[41]

The Supremacy Clause declares that in cases of conflict between state and federal laws, the state law may not be applied. However, the clause is silent where state law covers ground not covered by federal law, or where the state law is consistent with the federal law, as in the case of organizational and recognition picketing. From this silence it may be inferred that state law is applicable in the absence of complicating circumstances. Since the other three factors causing the jurisdictional problem may be considered such complicating circumstances, we proceed to dispose of them.

Section 10(a) of the Taft-Hartley Act poses no problem, since organizational and recognition picketing are not unfair labor practices under the act. But Section 7 calls for more consideration. Because organizational and recognition picketing are "concerted activities," it might be contended that prohibiting such picketing would conflict directly with Section 7 and indirectly with the Supremacy Clause. The answer to this argument in regard to recognition picketing is succinctly stated in *Goodwins, Inc., v. Hagedorns*:

> ". . . the object of the picketing is to coerce the employer into committing an act which is denounced as an employer unfair labor practice under subdivision (a) of Section 8 of the act. This kind of concerted activity cannot be supposed to be entitled to protection under Section 7 of the act."[42]

As to organizational picketing, while the picketing itself is not a Taft-Hartley unfair labor practice, the *purpose* of such picketing is violative of the fundamental policy of the National Act: free employee choice of bargaining representatives. Since it would be strange indeed if one section of a statute were to be interpreted as absolutely protecting an activity which seriously conflicts with the whole policy of the same statute, it is submitted that organizaional picketing is not a type of concerted activity protected by Section 7.

This position is strengthened by the *Briggs-Stratton* case,[43] probably the most significant United States Supreme Court decision on the scope of Section 7. In that case the Supreme Court upheld a W.E. R.B. cease and desist order against intermittent work stoppages. It

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[40] U.S. Const. Art. VI, cl. 1, 2.
[41] See Cox and Seidman, *Federalism and Labor Relations*, 64 HARV. L. REV. 211 (1950) for development of the pre-emption doctrine.
[42] 29 Labor Rel. Ref. Manual 2047, at 2050 (N.Y. Ct. of Appeals, 1951).
[43] International Union, UAWA (A.F.L.) v. W.E.R.B., 336 U.S. 245 (1949).

rejected the union's claims that Section 111.06(2)(h), providing that it is an unfair labor practice for a union to interfere with production except by ordinary, conventional strike action, is in conflict with Section 7 of the Taft-Hartley Act. The court held that Section 7 is designed to protect only the standard types of concerted action which bear no taint of illegality.[44]

The fourth factor causing the jurisdictional problem, the "pre-emption by occupation" doctrine, has been hinted at by two recent decisions of the United States Supreme Court[45] and is strongly advocated by certain law review writers.[46] The argument is that, though the Taft-Hartley Act does not forbid organizational picketing and ordinary recognition picketing *i.e.,* recognition picketing where no union has been certified, the act so thoroughly regulates other kinds of strikes and picketing, that a Congressional intent to pre-empt the entire field is evinced.

In the Supreme Court decisions which presumably support the pre-emption doctrine, the court in several instances declared that Congress had occupied the field of strike regulation to such an extent that there was no room left for state action.[47] Nevertheless, for two reasons neither of these cases stands for the proposition that the states no longer may regulate organizational or recognition picketing. In the first place, each of these cases involved a normal, peaceful strike, the circumstances of which in no way directly or indirectly conflicted with the policies or provisions of the Taft-Hartley Act. Also, the strikes were not for unlawful or even antisocial objectives. On the other hand, both organizational and recognition picketing violate the basic policy of the Taft-Hartley Act as regards free employee choice, and recognition picketing has as its objective the inducement of the employer to commit an unfair labor practice.[48] In the second place, the cases are not based essentially on the pre-emption doctrine. Rather, the court carefully noted in each case that the state statutes involved were directly in conflict with the national act.[49] Consequently, the Supremacy Clause alone would have been sufficient to sustain the decisions.

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[44] *Ibid.,* 336 U.S. at 255, 256, 257.

[45] Amalgamated Assoc. of Street Electric Railway Employees v. W.E.R.B., 340 U.S. 383 (1950); International Union, United Automobile, Aircraft & Agricultural Workers of America (C.I.O.) v. O'Brien, 339 U.S. 454 (1950).

[46] Cox and Seidman, *supra,* note 41; Feldblum, *Some Aspects of Minority Union Picketing in New York,* 20 FORD. L. REV. 176, 193-197 (1951).

[47] Amalgamated Assoc. of Street Electric Railway Employees v. W.E.R.B., *supra,* note 45 at 394; International Union, United Automobile, Aircraft & Agricultural Workers of America (C.I.O.) v. O'Brien, *supra,* note 45 at 456.

[48] See TAFT-HARTLEY ACT §7 and §8 (a) (1); WIS. STATS. (1951), sec. 111.06 (1)(a).

[49] Amalgamated Assoc. of Street Electric Railway Employees v. W.E.R.B., *supra,* note 45 at 394, 395, 396; International Union, United Automobile, Aircraft & Agricultural Workers of America (C.I.O.) v. O'Brien, *supra,* note 45 at 458, 459.

A positive argument against the applicability of the pre-emption doctrine is given in the *Briggs-Stratton* case mentioned above. The Supreme Court, speaking of the National Labor Relations Act and the Labor Management Relations Act, said:

> "Congress has not seen fit in either of these Acts to declare either a general policy or to state specific rules as to their effects on state regulation of various phases of labor relations over which the several states traditionally have exercised control . . . However, as to coercive tactics in labor controversies, we have said of the National Labor Relations Act what is equally true of the Labor Management Act of 1947, that 'Congress designedly left open an area for state control, and that 'the intention of Congress to exclude the States from exercising their police power must be clearly manifested."[50]

The court then held that intermittent stoppage of work by employees was neither forbidden by the Taft-Hartley Act nor such conduct legalized or approved thereby, and that, therefore, the state police power was not superseded by the federal legislation over a subject matter normally within the exclusive power of a state and reachable by federal regulation only because of its effects on interstate commerce. The court significantly concluded that, . . . *"This conduct is governable by the state or it is entirely ungoverend."*[51]

Another Supreme Court decision taking a position against the pre-emption doctrine is the *Algoma* Case.[52] There the court also upheld an order of the W.E.R.B., saying:

> "In seeking to show that the Wisconsin Board had no power to make the contested orders, petitioner points first to Section 10(a) of the National Labor Relations Act . . . It argues that the grant to the National Labor Relations Board of 'exclusive' power to prevent 'any unfair labor practice' thereby displaced State power to deal with such practices, provided of course that the practice was one affecting commerce. But this implies two equally untenable assumptions. One requires disregard of the parenthetical phrase '(listed in section 8)'; the other depends on attaching to the section as it stands, the clause 'and no other agency shall have power to prevent unfair labor practices not listed in section 8."[53]

Applying the principles of the *Briggs-Stratton* and *Algoma* cases to organizational and recognition picketing, it is clear that such activity falls within the area "designedly left open" to state control, and that the "pre-emption by occupation" doctrine is inapplicable.

Having considered each of the four factors causing the state-federal jurisdictional conflict, this writer respectfully submits that, when

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[50] *Supra,* note 43 at 252, 253.
[51] *Supra,* note 43 at 254. (Italics added).
[52] Algoma Plywood & Veneer Company v. W.E.R.B., 336 U.S. 301 (1948).
[53] *Ibid.,* 336 U.S. at 305.

the United States Supreme Court is faced with the jurisdictional question in regard to organizational or recognition picketing, the states should be held to have jurisdiction. This view is supported by several recent decisions by state courts and state labor relations boards, including decisions by a Wisconsin Circuit court and the W.E.R.B.[54] These decisions are all based on either the *Briggs-Stratton* case, the *Algoma* case, or both of them.

SUMMARY

Having concluded our discussion of organizational and recognition picketing, we may summarize our observations as follows:

(1) Both organizational and recognition picketing are unfair labor practices under the Wisconsin Employment Peace Act.

(2) The prohibition of such picketing is constitutional. It is not violative of the Fourteenth Amendment insofar as that amendment gives protection against state abridgment of freedom of speech, because the picketing proscribed is for and unlawful purpose as declared by the state legislature. The United States Supreme Court has declared that picketing is not given constitutional protection where its objective is unlawful in that it contravenes a state public policy set up by the legislature or the courts. Of course, it is necessary that this state policy be important enough to warrant a restraint on freedom of speech. The *Gazzam* case approved the sufficiency of a policy against recognition picketing, and, since the reasons behind such a policy are identical to those supporting a policy against organizational picketing, it is clear that a state ban on organizational picketing should also be given approval.

(3) Picketing is *more* than free speech, so that the United States Supreme Court should abandon its free speech-picketing assimilation. The states could then regulate or prohibit picketing as required in each case without the necessity of the United States Supreme Court's sanction of the policy behind each restriction.

(4) The Taft-Hartley Act neither forbids nor approves of organizational picketing and ordinary recognition picketing *i.e.*, recognition picketing where a union has not been certified.

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[54] Hall Steel Co. v. International Brotherhood of Teamsters, 30 Labor Rel. Ref. Manual 2717 (Mich. Cir. Ct., Genesee County 1952); W.E.R.B. v. Chauffeurs, Teamsters & Helpers, 30 Labor Rel. Ref. Manual 2642 (Wis. Cir. Ct., Milw. County 1952); Central Storage & Transfer Company v. Teamsters, Chauffeurs & Helpers Local, 30 Labor Rel. Ref. Manual 2379 (Penn. Ct. of Common Pleas, Dauphin County 1951); *In re* Waterways Engineering Corporation and State Federation of Labor, 30 Labor Rel. Ref. Manual 1105 (W.E.R.B. 1952); Goodwins, Inc. v. Hagedorn, 29 Labor Rel. Ref. Manual 2047 (N.Y. Ct. of Appeals, 1951). There is no Wisconsin Supreme Court decision on the jurisdictional question, since the *Retail Clerks'* case, *supra*, note 8, was litigated prior to the Taft-Hartley Act, when *union* unfair labor practices were not prohibited by the national act.

(5) The W.E.R.B. has jurisdiction over organizational and ordinary recognition picketing even though interstate commerce is involved or affected.

WILLIAM A. GIGURE

LIABILITY OF SUCCESSIVE INSURERS UNDER WISCONSIN'S WORKMENS COMPENSATION ACT

The Wisconsin Workmens Compensation Act affixes certain obligations upon the employer and its insurer because of the existence of the employer-employee relationship.[1] The fundamental idea of the statute is to award compensation when the employment causes disability, whether total or partial, permanent or temporary.[2] The Wisconsin Court has consistently held that disability under the act means physical inability to perform the work in the usual and customary way, *i.e.*, results in a time or wage loss. Accidents which do not produce such disability are not compensable.[3] No compensation is provided for what the courts term medical disability such as is found in the case of occupational diseases where, having been exposed to its cause the employee contacts the disease, yet suffers no manifestations which impair his bodily functions so as to cause him to lose time or wages.[5]

The Act was framed with the idea that there would always be a definite date, that of the accident, which would be the basis for determing the liability of the employer and its insurance carriers.[6] Since, the employer's insurance carrier at the time of injury or accident must pay the award against the employer,[7] the time of injury as determined by the act becomes important to successive insurers as well as to successive employers because the disability must be sustained at a time when the employer-employee relation exist.

I ACCIDENTAL INJURIES

In the case of accidental injuries, as opposed to occupational diseases, the time of injury or accident and its disability does not present too difficult a problem. An accidental injury is an injury that results from a definite mishap.[9] As to accidental injuries the Act, from

[1] South Side Roofing & Material Co. v. Industrial Comm., 252 Wis. 403, 31 N.W. 2d 577 (1948).
[2] North End Foundry Co. v. Industrial Comm., 217 Wis. 363, 258 N.W. 439 (1935).
[3] *Ibid.*; Chain Belt Co. v. Industrial Comm., 220 Wis. 116, 264 N.W. 502 (1936).
[4] Odanah Iron Co. v. Industrial Comm., 235 Wis. 168, 292 N.W. 439 (1940).
[5] *Supra*, note 2.
[6] Employer's Mutual Liab. Ins. Co. v. McCormick, 195 Wis. 410, 217 N.W. 738 (1928).
[7] Maryland Casualty Co. v. Industrial Comm., 230 Wis. 363, 284 N.W. 36 (1939).
[8] Shaefer & Co. v. Industrial Comm., 220 Wis. 289, 265 N.W. 390 (1930).
[9] Andrzeczak v. Industrial Comm., 248 Wis. 12, 20 N.W. 2d 551 (1945).