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LABOR LAW—USE OF THE INJUNCTION IN LABOR DISPUTES IN KENTUCKY

The injunction has long been recognized as the most important and effective means by which employers have been able to regulate and curtail labor activities. Unfortunately, it is still true that, "The development of the law in respect to labor disputes and the use of injunctive processes has become rather complex." However, a consistent public policy in regard to labor activities is discernible in the decisions of the Court of Appeals of Kentucky. It is the purpose of this note to discuss the basis and implications of this policy as reflected by its application to various factual situations, and to delineate the area within which the State is not excluded from acting because of federal pre-emption in the field.

The basis of the Kentucky law governing labor activities is readily traced to nineteenth century concepts of free competition, a concept expressed by Holmes in his famous dissent in *Vegelahn v. Guntner*:

> It has been the law for centuries that a man may set up a business in a small country town, too small to support more than one, although thereby he expects and intends to ruin some one already there, and succeeds in his intent. . . . The reason, of course, is that the doctrine generally has been accepted that free competition is worth more to society than it costs, and that on this ground the infliction of the damage is privileged. . . .

> [T]he policy of allowing free competition justifies the intentional infliction of temporal damages, including the damage of interference with a man's business by some means, when the damage is done, not for its own sake, but as an instrumentality in reaching the end of victory in the battle of trade. . . .

Although this concept of economic self-interest as justification for the actions of capital was applied most freely, many American courts applied a different standard when judging labor activities. The courts felt free to determine for themselves whether a certain labor objective constituted justification, and more often than not, the particular labor activity was held not to be justified. This, Holmes felt, was neither a fair nor proper application of the concept of competition as justification:

I have seen the suggestion made that the conflict between employers and employed was not competition. . . . If the policy on which our law is founded is too narrowly expressed in the term 'free competition,' we may substitute 'free struggle for life.' Certainly, the policy is not limited to the struggles between persons of the same class, competing for the same end. It applies to all conflicts of temporal interests.

Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way.

If it be true that working-men may combine with a view . . . to getting as much as they can for their labor, just as capital may combine with a view of getting the greatest possible return, it must be true that, when combined, they have the same liberty that combined capital has, to support their interests by argument, persuasion, and the bestowal or refusal of those advantages which they otherwise lawfully control . . . The fact that the immediate object of the act by which the benefit to themselves is to be gained is to injure their antagonist does not necessarily make it unlawful, any more than when a great house lowers the prices of goods for the purpose and with the effect of driving a smaller antagonist from the business.4

Under this doctrine, injury to business resulting from labor activities was justified by economic self-interest so long as the means used in conducting the activity were not unlawful.5

Labor's right to organize to secure higher wages, shorter hours, and improved conditions of employment was recognized very early in Kentucky,6 although it has been said that all labor activity was prima facie a tort under the common law.7 An examination of the Kentucky decisions clearly shows that the Holmes concept of competition as justification has been the basis from which the Court of Appeals has judged various labor activities. The court acknowledged that a business man, singly or in combination with others, could engage in a course of conduct which would necessarily injure another, but which would be justified by his economic interests.8 Moreover, Kentucky did not apply a double standard to business and labor activity. The court stated:

A man's labor is his own, and he has a right to dispose of it upon the best terms he can secure. . . . The exercise of a legal right by one in a proper manner will not be denied, although damage

4 Vegelahn v. Guntner, supra note 2, 44 N.E. at 1081-82.
5 For a historical development of this doctrine in America, see Gregory, supra note 3 at 52-82.
6 Saulsberry v. Coopers' International Union, 147 Ky. 170, 143 S.W. 1018 (1912); Diamond Block Coal Co. v. United Mine Workers, 138 Ky. 477, 222 S.W. 1079 (1920).
7 Blue Boar Cafeteria v. Hotel & Restaurant & Bartenders International, 254 S.W. 2d 335 at 337 (Ky. 1953).
8 Diamond Block Coal Co. v. United Mine Workers, supra note 6 at 490, 222 S.W. 1084.
or loss may result to another as a necessary consequence thereof. . . .
If the same principle applies to a union, which is but an organization of men for mutual benefit and protection, the plaintiff is remediless, even though his business is ruined.9

Since business men could join together to make themselves stronger and their profits greater, laborers could unite for the same purpose; "What capital may lawfully do, labor may do with equal right."10 It is not surprising that this concept has led us to refer to employer-employee struggles as "industrial warfare" and to the use of such military terms as 'picketing.' Although this approach to the problem is not totally acceptable in mid-twentieth century, it still remains that so long as the purpose of a particular activity is "to promote the legitimate interests of the participants, and means employed are not unlawful, the party injured thereby is without remedy."11

An action at law exists as a remedy for injuries which are the result of illegal labor conduct, but the injunction is clearly the most popular remedy of the employer. Since labor unions were usually voluntary associations, it was originally very difficult to secure a judgment against a union, and individual workmen were seldom in a financial position to respond in damages.12 Today, it is not difficult to bring an action against a labor union,13 and the number of such damage suits will probably increase.14 However, the main reason for the popularity of the injunction as a remedy in labor disputes still exists. The injunction is a quick and efficient means of controlling the labor activity involved before any damage to the employer has occurred. However, this remedy has been subject to great abuse in the past to the detriment of labor. History has shown that a temporary restraining order usually terminates the activity as well as the controversy in court,

9 Saulsberry v. Coopers' International Union, supra note 6 at 172-73, 143 S.W. 1019-20.
10 Diamond Block Coal Co. v. United Mine Workers, supra note 6 at 490, 222 S.W. 1084.
12 Gregory, supra note 3 at 94-95.
13 In Kentucky, an unincorporated voluntary association, such as a labor union, is not suable in its own name. Sanders v. International Association of Bridge, Structural & Ornamental Iron Workers, 120 F. Supp. 390 at 392 (W.D. Ky. 1954); United Mine Workers v. Cromer, 159 Ky. 608, 167 S.W. 891 (1914); Diamond Block Coal Co. v. United Mine Workers, supra note 6. Such associations are suable in Kentucky by means of a class action against representatives of the association. Sanders v. International Association of Bridge, Structural & Ornamental Iron Workers, supra this note; Jackson v. International Union of Operating Engineers, 307 Ky. 485, 211 S.W. 2d 138 (1948); International Union of Operating Engineers v. Bryan, 255 S.W. 2d 471 (Ky. 1953). In federal courts, labor unions may sue or be sued in their own name. 29 U.S.C. Sec. 185(b).
and often such orders were granted as a matter of course by judges friendly to business.\textsuperscript{16} Even today in Kentucky, an employer may obtain a temporary restraining order without notice to the union, merely by showing by affidavit that he will suffer immediate and irreparable injury if the union's alleged conduct is allowed to continue.\textsuperscript{16} It is easy to understand labor's hostility toward injunctive relief, but the fact remains that in the absence of a statute providing otherwise, the injunction is held to be a proper remedy to prevent threatened irreparable injury through unlawful labor conduct when there is no adequate remedy at law.\textsuperscript{17}

\textbf{The Legality of Various Labor Techniques}

As has been seen, a person cannot engage in a course of conduct which will injure another unless he can show justification. Usually, this requirement is satisfied by showing economic self-interest. However, a course of conduct may have as its end the achievement of an unlawful purpose, and in such case, economic self-interest does not justify the injury.\textsuperscript{18} The purpose of this section will be to examine the application of this principle to various labor activities, viz., strikes, picketing, and boycotts.

\textbf{a. strikes}

The strike has long been labor's most effective means of securing its objectives. Labor's use of the strike has never been effectively hampered in Kentucky, as the Court of Appeals has never upheld an order enjoining a strike. Kentucky decisions have spoken of labor's right to strike,\textsuperscript{19} a right confirmed by statute.\textsuperscript{20} Although it has been asserted that the right to strike falls within the protection of the federal Constitution under certain circumstances,\textsuperscript{21} it is generally accepted that the right to strike is founded upon economic self-interest rather than upon a Constitutional right.\textsuperscript{22} Under either interpretation, a strike would be unlawful and enjoinable if its object was to coerce an em-

\textsuperscript{16} Frankfurter and Greene, supra note 3 at 368-80.
\textsuperscript{17} Rule 65.05, Kentucky Rules of Civil Procedure.
\textsuperscript{18} 31 Am. Jur., Labor, sec. 321 at 991.
\textsuperscript{19} Id., sec. 181 at 921.
\textsuperscript{20} Saulsberry v. Coopers' International Union, supra note 6 at 174-75, 143 S.W. at 1020-21; Commonwealth v. Ramey, 279 Ky. 810 at 818-19, 132 S.W. 2d 342 at 346 (1939).
\textsuperscript{21} Ky. Rev. Stat. 336.130(1) (Hereinafter referred to as KRS).
\textsuperscript{22} See the opinion of Justice Brandeis in Dorchy v. Kansas, 272 U.S. 306 (1926) and his dissent in Duplex Co. v. Deering, 254 U.S. 443 at 480-81; also, International Union v. Wisconsin Employment Relations Board, 250 Wis. 550, 27 N.W. 2d 875 at 880-81 (1947).
ployer to commit an act which was itself unlawful, and the Court of Appeals has so indicated by way of dictum.23

b. picketing

Where picketing has been the labor technique involved, the Constitutional question has had great importance. Beginning with dictum in the Senn case in 193724 and culminating in the Thornhill25 and Swing26 decisions of 1940-41, the Supreme Court evolved the doctrine that peaceful picketing was the laborer's means of communication. As such, it was said to be within the area of speech protected by the due process clause of the Fourteenth Amendment.27 However, the Supreme Court did not contend that all peaceful picketing was necessarily beyond regulation by the states.28 It was soon established that:

As a means of communicating the facts of a labor dispute, peaceful picketing may be a phase of the constitutional right of free utterance. But recognition of peaceful picketing as an exercise of free speech does not imply that the states must be without power to confine the sphere of communication to that directly related to the dispute. . . .29

In 1949, the so-called retreat from Thornhill-Swing began with the application of the illegal purpose doctrine.30 It was held that a state could enjoin picketing which had the purpose of inducing an act by the employer which would be a violation of a state statute30a or state policy as declared by the legislature,31 or if its purpose in any way violated the public policy of the state as expressed by statute32 or judicial determination.33

23 Broadway & Fourth Avenue Realty Co. v. Local No. 181, 244 S.W. 2d 746 at 748 (Ky. 1951).
24 "Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute [by picketing], for freedom of speech is guaranteed by the Federal Constitution." Senn v. Tile Layers Union, 301 U.S. 468 at 478 (1937).
25 "In the circumstances of our time, the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution." Thornhill v. Alabama, 310 U.S. 88 at 102 (1940).
27 See also, Bakery & Pastry Drivers v. Wohl, 315 U.S. 769 (1942); Cafeteria Employees Union v. Angelos, 320 U.S. 293 (1943).
28 Supra note 25 at 103-05.
From these decisions, it is not at all clear to what degree peaceful picketing is constitutionally protected. On the one hand, it is recognized by supporters of the Thornhill-Swing doctrine that:

Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. . . . 34

At the same time, those least influenced by the concept of picketing as free speech recognize that under certain circumstances picketing is protected under the fourteenth amendment because of the element of communication involved. 35 Possibly the clearest indication of the Supreme Court's attitude can be found in Frankfurter's statement that:

The effort in the [picketing] cases has been to strike a balance between the constitutional protection of the element of communication in picketing and 'the power of the State to set the limits of permissible contest open to industrial combatants.' 36

The facts of each individual case must be examined to determine whether the restraint placed upon picketing is related to some reasonable public policy rather than arbitrary and capricious under modern circumstances. 37

Much of the confusion arises from the two fundamentally different approaches taken toward picketing. One school of thought has conceived picketing to be a form of economic coercion or pressure rather than speech or the dissemination of information. To speak of picketing as speech is said to be mere "sentimentality." 38 Picketing is viewed as only another weapon in the economic struggle between labor and business, and as such, it is said to be limited by the same considerations that govern every other labor technique. It is pointed out that no real attempt is made at the picket line to explain the basis of the particular controversy. Instead, it is the mere presence of the picket line itself that will bring about the desired end. The picket line rather than any information or banners will cause others to react as desired because of fear, sympathy, or pure self-interest. 39 Although admitting

35 See Frankfurter, J., in Hughes v. Superior Court, supra note 33 at 464-65.
36 International Brotherhood v. Hanke, supra note 33 at 474.
37 Id. at 479-80.
38 Gregory, supra note 3 at 348.
39 "In fact, it has now come to be judicially recognized that picketing is, or at least may be, a form of economic pressure, that many people refuse to cross a picket line merely because it is a picket line and
that picketing may be coercive when accompanied by violence or even a "black look," the other school of thought strongly resents the implication that all picketing is coercive. They argue that it is to damn by labeling to call all picketing coercive solely because people often react to picketing by exerting economic pressure on the employer without regard to the actual facts of the controversy. Picketing may be for no other purpose than communication, and, therefore, it is felt to be entitled to constitutional protection. The more rational approach would recognize that there may be both an element of communication and an element of economic coercion present. On the one hand, picketing will communicate the fact that a controversy exists if nothing more. At the same time, picketing can cause the employer great economic loss whether intended or not. The legality of particular picketing should be judged by considering whether the economic pressure exerted is justified by self-interest and by the degree to which there is actual communication of facts and ideas. Where there is little or no communication involved, the picketing certainly should be subject to reasonable restraint.

Picketing was associated with freedom of speech as early as 1904 in Kentucky. As expressed somewhat later:

The law recognizes the right of peaceful picketing. . . . Labor has the recognized legal right to acquaint the public with the facts which it regards as unfair, to give notoriety to its cause, and to use persuasive inducements to bring its own policies to triumph.

However, the Kentucky cases involving injunctions against picketing have seemingly evidenced a contradictory line of thought. In order

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"[P]eaceful picketing is a form of free speech and as such protected by constitutional guaranty. To hold otherwise would be to fix a limitation on the right to express views concerning a labor relationship, and, as we think, invade the right of freedom of speech. . . ."


Underhill v. Murphy, 117 Ky. 640 at 650, 78 S.W. 482 at 484 (1904).

Music Hall Theater v. Moving Picture Machine Operators, supra note 1 at 642-43, 61 S.W. 2d at 285.
to reconcile these cases, a rather detailed historical approach is necessary.

The Miller case\(^4^4\) decided in 1938 was the first instance in which the Court of Appeals of Kentucky affirmed a decree enjoining all picketing. Local 181 solicited membership among Miller's employees. The employees elected to form their own independent union, and through the independent union, they signed a collective bargaining agreement with Miller. When Miller subsequently refused to sign a closed shop agreement with Local 181, that union began peaceful picketing of Miller's restaurant. The Court formulated the following narrow issue:

Where the employees of a business or industry have organized and concluded a collective contract with the employer in relation to their wages, hours of labor, and working conditions, may a general labor union, to which none of the employees have belonged, picket the place of business?\(^4^5\)

The court answered the question "No," emphasizing that this was not a case of an employer who had refused to unionize but rather a case where no industrial dispute existed. Although all further picketing was enjoined under the decree, the court made no reference to its earlier statements on the relationship of picketing to free speech. Under the specific facts involved, the economic self-interest of Local 181 did not justify the infliction of economic injury to Miller by means of peaceful picketing.

In the Blanford case,\(^4^6\) non-employee union members conducted a secondary boycott by means of handbills, newspaper advertisements, and interviews with the employer's customers. The case did not involve stranger or non-employee picketing, but dictum in the case led to a radical change in the status of picketing in Kentucky. In determining the legality of the boycott involved, the Court of Appeals examined the legality of other non-employee labor activity, such as stranger picketing. Despite the narrow holding which the court had delineated in the Miller case, the court interpreted that case as holding that all stranger picketing was illegal as against the public policy of the State. Citing the Thornhill and Swing decisions as holding that picketing was a protected right under the federal Constitution, the Court of Appeals stated:

\(^4^4\) Hotel, Restaurant & Soda Fountain Employees v. Miller, 272 Ky. 466, 114 S.W. 2d 501 (1938).
\(^4^5\) Id. at 469, 114 S.W. 2d at 503.
Since the Supreme Court is the final interpreter of the Federal Constitution, no distinction may hereafter be drawn by a state court between the acts which may be committed by employees in furtherance of their interests and those which may be committed by non-employee members of a labor union in the furtherance of its interests. Hence, members of any labor union, so long as they refrain from acts of violence, may not be enjoined from picketing the premises of any person against whom the union has a grievance, or from conducting a boycott against his business, notwithstanding the consequences to him, his accord with his own employees, or his inability to grant the demands made upon him by the union.\textsuperscript{47} (emphasis added)

Although the effect of this strong dictum was great, it was not recognized as being dictum. The \textit{Blanford} case has been cited erroneously as a case involving stranger picketing,\textsuperscript{48} and the total absence of cases involving picketing from 1941 to 1951 would indicate that all peaceful picketing was considered lawful on the basis of the \textit{Blanford} dictum.

In 1951, the Court of Appeals made its first reference to the Supreme Court decisions which, by applying the illegal purpose doctrine, restricted the right to picket peacefully.\textsuperscript{49} It was pointed out in the \textit{Broadway} case\textsuperscript{50} that a Kentucky statute\textsuperscript{51} prohibited an employer from interfering with an employee in the choice of his bargaining agent. The employer had argued that if there was picketing by a union to secure recognition as sole bargaining agent for all employees at a time when the union did not represent all employees, the picketing was illegal since its purpose was to compel the employer to violate the statute. The court agreed that “an act by an employer which would be a crime or a violation of a legislative enactment or contrary to a defined public policy is not a proper object of concerted action against him by workers,”\textsuperscript{52} but found that the union was not in fact seeking to compel an unlawful act. It was not until 1953 in the \textit{Blue Boar} case\textsuperscript{53} that the court found that the picketing was for the illegal purpose of compelling the employer to coerce his employees in the choice of their bargaining agent and upheld an injunction prohibiting all peaceful picketing. The \textit{Blue Boar} decision was followed in two subsequent cases in which recognition picketing was enjoined.\textsuperscript{54} As at least one employee was involved in the picketing in one instance,

\textsuperscript{47} Id. at 664, 151 S.W. 2d at 444.  
\textsuperscript{48} Whitt v. Stephens, 246 S.W. 2d 996, at 997 (Ky. 1951); Blue Boar Cafeteria v. Hotel & Restaurant & Bartenders International, supra note 7 at 338.  
\textsuperscript{49} Boyd v. Deena Artware Inc., 239 S.W. 2d 86 at 90 (Ky. 1951).  
\textsuperscript{50} Broadway & Fourth Avenue Realty Co. v. Local No. 181, supra note 23.  
\textsuperscript{51} KRS 336.130(1).  
\textsuperscript{52} Id. at 748.  
\textsuperscript{53} Blue Boar Cafeteria v. Hotel & Restaurant & Bartenders International, supra note 7.  
\textsuperscript{54} Hotel & Restaurant Employees v. Lambert, 258 S.W. 2d 694 (Ky. 1953); Local No. 227 v. F. B. Purnell Sausage Co., 264 S.W. 2d 870 (Ky. 1953).
it would seem that the illegal purpose doctrine is applicable to employee or primary picketing as well as stranger picketing, but this point was not clearly stated by the court.\textsuperscript{55} The \textit{Blue Boar} decision raises two serious questions which will be discussed: (1) the present validity of the \textit{Miller} holding and (2) the circumstances under which picketing is in fact to force the employer to coerce his employees in violation of state statute.

It seems clear that stranger picketing by union \textit{A} to secure recognition as the sole bargaining representative for all employees should clearly be against public policy if the employer has entered into a collective bargaining agreement with union \textit{B} which is the duly selected representative of the employees. Although purporting to overrule the \textit{Miller} case, the \textit{Blanford} case is not in direct conflict with that holding and even recognizes the policy considerations behind the decision, the court resting its holding on Supreme Court cases deemed to be controlling.\textsuperscript{56} Under the rationale of the \textit{Blue Boar} case, the \textit{Miller} holding should be valid today since recognition of union \textit{A} by the employer would be a clear interference with his employees' statutory right to choose union \textit{B} as their representative.\textsuperscript{57} It should be noted that the basis of such a decision would be the fact that the purpose of the picketing is illegal by statute. Although the Supreme Court has upheld state decisions enjoining picketing where the object was a violation of public policy as expressed by the state judiciary,\textsuperscript{58} judicial determination of the validity or invalidity of the purpose may lead to begging the question in certain instances.\textsuperscript{59} The safest test would be whether the person picketed could comply with the object sought without violating either the common or statutory

\textsuperscript{55} Local No. 297 v. F. B. Purnell Sausage Co., supra note 54.

\textsuperscript{56} Supra note 11 at 662, 151 S.W. 2d 443.

\textsuperscript{57} "Employees may, free from restraint or coercion by the employers or their agents, associate collectively for self-organization and designate collectively representatives of their own choosing to negotiate the terms and conditions of their employment to effectively promote their own rights and general welfare. ..." KRS 336.130(1).

\textsuperscript{58} "The fact that California's policy is expressed by the judicial organ of the State rather than by the legislature we have repeatedly ruled to be immaterial."

\textsuperscript{59} Hughes v. Superior Court, supra note 33 at 466-67; International Brotherhood v. Hanke, supra note 33 at 479.

An example of such judicial reasoning is an Idaho decision in which peaceful picketing was enjoined because it had the illegal purpose "to intimidate, coerce and compel plaintiff to enter into an agreement with defendant union, and by use of economic coercion by defendants, to destroy plaintiff's freedom of contracting." J. J. Newberry Co. v. Retail Clerk's International Association, .... Ida. ...., 298 P. 2d 375 at 377, 379 (1956), reversed per curiam, Retail Clerks International Association v. J. J. Newberry Co. ....... U.S. ......., 1 L. Ed. 2d 367 (1957) on the ground that the state was without jurisdiction in the case.
law of the state.\textsuperscript{60} However, the fact remains that state courts have declared the purpose of picketing to be illegal under some circumstances in the absence of statute, even though the person picketed would not have been subject to legal sanctions had he acquiesced in the purpose of the picketing.\textsuperscript{61}

The \textit{Blue Boar} case did not provide an adequate test by which to determine whether particular picketing has as its purpose the illegal coercion of employees by means of pressure upon the employer. Subsequent Kentucky decisions and similar cases in other jurisdictions also fail to provide a workable approach to the problem. Some courts doubt that it is possible to make any rational distinction between picketing which is directed at informing and appealing to employees and that in which the objective is illegal coercion.\textsuperscript{62} It is argued that any picketing will result in economic loss to the employer, and that the employer tends to exert strong pressure on the employees to recognize the union as their bargaining representative in order to avoid such injury.\textsuperscript{63} It is also felt that employees are cognizant of the economic peril of picketing to their employer's business and, hence, to their jobs. Such pressures make it impossible for the employees to make a free choice of bargaining representatives.\textsuperscript{64} Therefore, the effect of all organizational picketing is felt to be coercive, and at least one state has declared all such picketing to be illegal.\textsuperscript{65}

While some courts have agreed that organizational picketing is

\textsuperscript{60} Fraenkel, supra note 30 at 8-9.
\textsuperscript{61} Hughes v. Superior Court, supra note 33; International Brotherhood v. Hanke, supra note 33; Bitzer Motor Co. v. Local 604, 349 Ill. 389, 110 N.E. 2d 674 (1953); Chucales v. Royalty, 164 Ohio St. 214, 128 N.E. 2d 829 (1955).
\textsuperscript{62} "The attempt to draw distinctions as to whether ... picketing is done in order to get the employees to join the union or done in order to get the employer to get his employees to join the union impresses me as wholly lacking in any reality. I cannot even think of what criterion can be invoked in order to determine whether the picketing of employer A by union X is one or the other. Certainly, the criterion cannot be whether the picketing does or does not cause the employer to succumb to the temptation to say to his employees 'join this X union or you will be fired.' Certainly, too, it would be equally inadmissible to let determination rest on whether the union's lawyer describes the object as being one or the other; or on whether some union organizer, unskilled in the accurate use of words or unconscious of the legal effect of his words, says 'we are picketing in order to get the employees of A to join our union' or 'we are picketing in order to make A tell his employees to join our union or get fired.'"
\textsuperscript{63} Meltex, Inc. v. Livingston, supra note 39, 28 Labor Cases at p. 59, 875-76; see Blue Boar Cafeteria v. Hotel & Restaurant & Bartenders International, supra note 7 at 389; Pappas v. Stacey, supra note 39 at 116 A. 2d 500; Rains, supra note 39 at 539, 542, 591-92.
\textsuperscript{64} Bellerive Country Club v. McVey, Mo. 1955, 284 S.W. 2d 492 at 500 (1955).
\textsuperscript{65} Pappas v. Stacey, supra note 39 at 500.
coercive in effect, the vast majority have held it to be lawful in the absence of a showing that its purpose is coercion of the employees through pressure upon the employer. Since a union will seldom admit that the purpose is other than peaceful persuasion of the employees, courts have usually had to infer the illegal purpose from the actions of the union, but it is not always clear which factors are important in making such an inference. In the Kentucky decisions in which an injunction against organizational picketing was upheld, the picketing followed the employer’s refusal to accede to a demand for a union contract or recognition as exclusive bargaining representative. Although courts will infer that the picketing was for the illegal purpose of enforcing these demands, the presence of such demands is not a prerequisite to a finding that the purpose is illegal. Courts have stressed the fact that the union had made no real effort to communicate with the employees personally or that the pickets’ placards were directed at the employer and third persons. The illegal purpose has been inferred where the picketing has been confined to those entrances through which the employer must receive supplies and where the picketing occurred at the time at which the employer’s business was greatest. Courts have also been quick to find an illegal purpose when the picketing was accompanied by violence, misrepresentation, and harassing tactics, but the fact that means used in conducting the picketing were illegal is a poor basis upon which to hold that the purpose is illegal. A finding of illegal means does not necessitate the conclusion that the purpose was also illegal. No one factor

66 See annotation 11 A.L.R. 2d 1338.
67 Hotel & Restaurant Employees v. Lambert, supra note 54.
71 “Certainly the request on the banners that the friends and sympathizers of the Local should not patronize plaintiff’s restaurant had no relevancy whatever to an appeal to the employees to join the Union but could be intended only to damage or destroy the business of the employer until it should succumb to the Local’s demands.” Anchorage v. Waiters & Waitresses Union, supra note 69, 119 A. 2d at 203; see also, Audubon Homes v. Spokane Building & Construction Trades Council, Wash. ......., 298 P. 2d 1112 at 1115 (1956).
73 Bellerive Country Club v. McVey, supra note 63.
74 Sansom House Enterprises v. Waiters & Waitresses Union, supra note 70; Meltex, Inc. v. Livingston, supra note 39; Anchorage v. Waiters & Waitresses Union, supra note 69.
can be said to be controlling, and it has been found that the purpose was lawful even though several of the above factors were present.\textsuperscript{76}

The question of organizational picketing is probably the most pressing problem of labor law in state courts today. However, an examination of the vast number of these cases leaves the impression that the arguments put forward by both labor and management are unrealistic. It is naive to conceive of organizational picketing as a rational appeal to employees to join this union as opposed to that union. It is equally as unrealistic to believe that decisions such as the Blue Boar case are primarily to prevent employees from being coerced in the choice of their bargaining representative. In all organizational picketing, the employer is the person who will suffer economically, and it is he who seeks the injunction. Against the recognized interest of unions to secure industry-wide unionization,\textsuperscript{76} the courts have had to balance the interests of the employer who has a mutually satisfactory relationship with his employees. At best, they have been able to achieve only rough justice. The most reasonable solution would seem to be legislation which would provide machinery for conducting organizational drives whereby the interests of all parties—employee, employer, union, and public—would be protected.\textsuperscript{77} If such machinery could be perfected, any need for organizational picketing with its attendant economic loss and ill will would be eliminated.

c. boycotts

The third major labor technique is the boycott. The simplest form of the boycott is the primary boycott in which direct pressure is brought to bear on the employer by the union through a refusal to purchase the employer's product or by withdrawing the union's services in a strike.\textsuperscript{78} So long as it is conducted for a legitimate objective, the primary boycott is a lawful labor activity.\textsuperscript{79} However, a union may be unable to secure its demands by means of direct pressure upon the employer, and it may then seek to enlist the aid of third parties or neutrals to the dispute. In the secondary boycott, the union re-enforces its pressures by getting the third parties to deny the employer necessary services and goods or to cease consumption of his products.\textsuperscript{80} In seeking to enlist the support of neutrals, the union may resort to peaceful

\textsuperscript{75}Wood v. O'Grady, supra note 70.
\textsuperscript{76}American Steel Foundries v. Tri-City Trades Council, 257 U.S. 184 at 209 (1921).
\textsuperscript{78}1 CCH Labor L. Rep., par. 237.
\textsuperscript{79}Prosser, Torts, sec. 107 at 758 (2nd Ed. 1955).
\textsuperscript{80}1 CCH Labor L. Rep., par. 237.
persuasion or it may exert economic pressure on the neutral by the same means that pressure is exerted upon the employer with whom it has the dispute.81

As a general rule, unions may request third parties to refrain from dealing with the employer,82 and the Kentucky Court of Appeals has refused to allow injunctions which would restrain unions from requesting the general public83 or retail stores84 to refrain from patronizing the employer. In the Purnell Sausage Co. case,85 picketing was enjoined under the Blue Boar doctrine on the ground that it was for the illegal purpose of forcing the employer to coerce his employees in violation of KRS 336.130, but the union was not enjoined from requesting retailers to cease stocking the employer's product. Although the ultimate object of these requests was clearly the same as the admitted illegal purpose of the picketing, the court attempted to distinguish the Blue Boar case, stating:

[In the Blue Boar case] the solicitation of the public not to patronize Blue Boar cafeterias was by the pickets themselves; and the display of the sign urging a boycott of Blue Boar cafeterias was so closely connected with the picketing as to constitute merely an extension of the picket line. . . .86

The court cannot have meant that requests which seek to achieve an illegal objective are not constitutionally protected when made on a picket line, but that the same requests for the same ends are non-enjoinable and constitutionally protected when uttered independent of a picket line. The only rational reason for such a distinction must be a belief that such a secondary consumption boycott would have little coercive effect and that any pressure brought to bear on the employees of the Purnell Sausage Co. would be too remote to justify enjoining the union's requests. However, such an approach seems to be unrealistic, since an effective secondary boycott will cause the employer to interfere with his employees' rights as quickly as would effective picketing.87 If the public policy behind the Blue Boar decision is sound, it should be immaterial that the evil complained of is to be achieved by enlisting the aid of third parties.

82 Jerome R. Hellerstein, Secondary Boycotts in Labor Disputes, 47 Yale L.J. 341 at 350-51, 357 (1939); Smith, supra note 81 at 278.
84 Local No. 227 v. F. B. Purnell Sausage Co., supra note 54.
85 Ibid.
86 Id. at 871.
87 As a result of the union's requests, the Purnell Company lost sixteen customers who together did an average monthly business of $1,064.55 with Purnell. Appellee's brief on petition for rehearing, p. 4-5.
A related problem has arisen in Kentucky when employees of a common carrier have refused to cross a picket line at an employer's plant to pick up or deliver goods. In the *American Tobacco Co.* case, the Court of Appeals held that employees of common carriers could not lawfully refuse to serve any customer so long as they voluntarily remained in the carrier's hire, and they were enjoined from refusing to cross a picket line at plaintiff's plant. The court stated that motor carriers had a duty to serve all customers without discrimination and the employees' interference with that duty was a violation of state statute. A provision in the contract between the carrier and his employees which provided that the employees were not required to cross picket lines was held to be no justification. Since the effectiveness of picketing may, to a large degree, depend on its ability to curtail the movement of goods in and out of the picketed establishment, the *American Tobacco Co.* case offered a means by which an employer might escape serious economic loss during lawful picketing. However, several limitations to this decision should be noted. In the *American Tobacco Co.* case, the carrier employees were not on strike but were participating in a partial work stoppage only. Where the carrier's employees are on strike, the picketed employer could not complain, since under the better view the strike would relieve the carrier of his duty to serve the employer. If the picketing has been accompanied by violence or intimidation, a carrier's employees are clearly justified in refusing to cross the picket line since the common carrier's duty does not require him to subject his employees to bodily harm. More important, however, than these limitations in the decision itself, federal labor relations legislation has severely limited the power of the states to act in such cases.

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88 General Drivers v. American Tobacco Co., 253 S.W. 2d 903 (Ky. 1953), modified on rehearing, 264 S.W. 2d 250 (Ky. 1954), reversed per curiam 348 U.S. 978 (1955) on the ground that the state did not have jurisdiction in the case; see infra note 123.

89 Id. at 253; "[N]or shall any common carrier . . . make or give any unreasonable preference or advantage to any person, or subject any person to any unreasonable discrimination." KRS 281.685; KRS 281.990.

90 Ibid.

91 See Bellerive Country Club v. McVey, supra note 63.


94 Minneapolis & St. Louis R. v. Pacific Gamble Robinson Co., 215 F. 2d 126 (CA8 1954); Meier & Pohlmann Furniture Co. v. Gibbons, 233 F. 2d 296 (CA8 1956); Elbert & Rebman, supra note 93.

94a See infra note 123.
Notes

Only two Kentucky decisions are found in which strikers picketed an employer with whom they had no dispute as a means of applying additional pressure on their own employer, and in both cases the Court of Appeals refused to enjoin such activity.\(^{95}\) In both instances, there were peculiar circumstances which allowed the court to justify the picketing without holding that all such picketing is lawful as a general rule. In *Boyd v. Deena Artware, Inc.*,\(^{96}\) strikers picketed the construction of a new building on the plaintiff company’s property although the contractor had no dispute with either the strikers or his own employees. It was acknowledged that additional pressure was exerted upon the plaintiff company through the refusal of the contractor’s employees to cross the picket line, but the court held that the plaintiff company could not secure an injunction prohibiting the union from picketing the contractor. The court considered the picketing of the contractor to be only an extension of the lawful picketing of the plaintiff company, since the construction area was an integral part of the industrial facilities of the company. Moreover, the court stated that the plaintiff company could not avail itself of any rights of the contractor which might have been infringed.\(^{97}\) In the *American Tobacco Co.* case,\(^{98}\) strikers picketed the plaintiff parent company, with whom it had no dispute, as well as the subsidiary company against whom they were striking. The facilities of the two companies were so integrated physically that it was impossible to picket the subsidiary company without also picketing the plaintiff parent company. More important was the fact that the parent company could not be considered a neutral in the dispute. The court emphasized that the two companies were so closely allied that they should be considered as engaged in a single operation.\(^{99}\) From these two decisions, it is not clear whether it is lawful in Kentucky to conduct a secondary boycott by applying economic pressure rather than persuasion on third parties who are neither allied nor physically integrated with the employer with whom the union has its primary dispute.\(^{100}\)

Writers have taken two approaches to the problem of secondary boycotts in which the union has used economic coercion to enlist the

\(^{96}\) Supra note 49.  
\(^{97}\) Ibid.  
\(^{98}\) Supra note 88.  
\(^{99}\) Id. at 252.  
\(^{100}\) See Byck Brothers & Co. v. Martin, 4 Labor Cases, par. 60,430 (Cir. Ct., Jefferson Co., Ky. 1941). The union had a dispute with a contractor who hired non-union men. When the plaintiff employer hired the contractor to re-decorate his store, the union picketed the store. The circuit court refused to enjoin the picketing, citing Blanford v. Press Publishing Co., supra note 11.
aid of third parties. One school maintains that there can be no real neutral in a labor dispute. Third parties aid an employer in a labor dispute if they refuse to abstain from patronizing him, and if they do cease dealing with the employer, they are aiding the union. Hence, it is argued that one must be an ally of either the employer or the union in any labor dispute; neutrality is impossible. According to this view, the union would be justified in applying any pressure on the employer’s ‘ally’ which it could lawfully exert on the employer himself. However, this approach neglects the fact that the employer would be equally justified in bringing economic pressure to bear on the third party if he acceded to the union’s demand, leaving the third party caught between the pressure of both participants in the dispute. The other view rejects the proposition that the relationship between an employer and his customers or suppliers justifies the union’s inflicting economic loss on the latter. A sound public policy should recognize that it is socially undesirable to allow the participants in labor disputes to seek the aid of third parties by coercion rather than persuasion.

**The Regulation of Labor Techniques**

While the debate on labor’s right to strike and picket has been long and impassioned, it has been generally recognized that numerous illegal or tortious acts are enjoinable even though accompanying otherwise legal activities. The purpose of this section will be to determine what acts may be enjoined, and the extent to which legitimate labor techniques may be restricted because of accompanying illegal acts.

Where a labor technique such as picketing has been accompanied by overt acts of violence, intimidation, and threats of violence to person or property, the Court of Appeals of Kentucky has consistently held that such conduct may be enjoined. Whether picketing is intimidating must turn on the particular facts of each case for, as stated in the Restatement:

> The question is in each case whether the number of pickets plus the attendant circumstances are such that fear of physical harm rather than persuasion is the force loosed upon the persons sought to be influenced. Thus it is important to consider the kind of place picketed and the character of persons sought to be influenced, that is, for ex-

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101 Hellerstein, supra note 82 at 354-55.  
102 Smith, supra note 81 at 284-85.  
103 Id. at 280-81.  
104 See, Music Hall Theater v. Moving Picture Machine Operators, supra note 1 at 642-43, 61 S.W. 2d at 285.  
105 Underhill v. Murphy, supra note 42 at 650, 78 S.W. at 484; Music Hall Theater v. Moving Picture Machine Operators, supra note 1 at 643-44, 61 S.W. 2d at 285; Boyd v. Deena Artware, Inc., supra note 49 at 88; Local No. 181 v. Broadway & Fourth Avenue Realty Co., 248 S.W. 2d 713 (Ky. 1952).
ample, whether the place picketed is a foundry approached only by men or a department store patronized chiefly by women. And it is important to consider the conduct of the pickets: whether they behave in a quiet orderly manner or are boisterous and equipped with weapons of physical harm.

Violence and intimidation have not been the only conduct enjoined. Picketing must be truthful, and an employer is entitled to an injunction when he is subjected to defamation or misrepresentation. On the ground that it constitutes a breach of peace, the Court of Appeals has held that verbal abuse may be enjoined, including calling non-strikers "scabs" and other derogatory names. The court has also held that pickets cannot resort to annoyance and harassment of the general public.

However, the presence of any or several of these types of conduct does not necessarily entitle an employer to an injunction as a matter of right. The Court of Appeals has stated:

[An injunction will not] issue in a case of this character where there is no proof of irreparable injury or the evidence fails to show that the acts complained of are likely to be continued, nor will an injunction lie because of a single act of trespass in entering upon the premises of the complainant where there is no threatened repetition of the act.

Whenever a court issues an injunction because of illegal conduct in a labor dispute, it should as a general rule be careful to enjoin only that conduct which is unlawful, and all lawful activity should be allowed to continue.

Restatement, Torts, Sec. 779, comment h.

dispute may show that it has been impossible to conduct picketing without attendant acts of violence. In such extreme cases, all picketing may be enjoined even though it would prohibit picketing which might be conducted in a lawful manner. More common are injunctions restricting the number of pickets and requiring that a certain distance be maintained between pickets so as to provide free access to and from the picketed establishment and to prevent the obstruction of public streets. Courts have also restricted the picketing to the situs of the dispute. Although such regulation is proper when reasonably related to the maintenance of public peace and welfare, legal labor activities should not be hamstrung by unnecessary and arbitrary restrictions. An injunction which is unduly restrictive and technical invites violation and can serve no useful purpose.

**Federal Versus State Jurisdiction**

The enactment of the Taft-Hartley amendments to the National Labor Relations Act (NLRA) in 1947 greatly magnified the problem of determining the extent to which state power in labor disputes affecting interstate commerce has been pre-empted by federal legislation. Prior to 1947, the NLRA was primarily concerned with the protection of the rights of employees against certain unfair practices by employers, but the Taft-Hartley amendments provided a comprehensive plan for the regulation of union as well as employer conduct. This increase in the scope of the NLRA has resulted in a much greater diminution in state power to enjoin unlawful labor conduct. However, the practicing attorney is faced with the fact that "the areas

112 Local No. 181 v. Broadway & Fourth Avenue Realty Co., supra note 105. All picketing was enjoined after the following acts of violence: employees were assaulted; rocks and bricks were thrown through the windows of employees' homes at night; poison was placed in food served to employees and guests of a hotel; explosive and stench bombs were placed in hotel lobbies on the night before the Kentucky Derby; a truck belonging to a company making deliveries to the plaintiff was dynamited; a policeman was cut while attempting to arrest a picket carrying an open knife; and acid was thrown in the faces of two women employees. See also, Milk Wagon Drivers v. Meadowmoor Dairies, 312 U.S. 287 (1941).


114 Carpenters Union v. Ritter's Cafe, supra note 29; Allen-Bradley Local v. Wisconsin Employment Relations Board, 237 Wis. 164, 235 N.W. 791 at 793 (1941); aff. 315 U.S. 740 (1942); Bell v. Rogers, 30 LRRM 2731 at 2738-34 (Ct. of Com. Pleas, Ohio 1952).

115 29 U.S.C., Chap. 7.

that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds.\footnote{117}

As Congress exercised its power under the commerce clause to the fullest degree by extending the scope of the NLRA to all labor disputes affecting interstate commerce,\footnote{118} the conflict between state and federal power in the field is a constant problem. Although there are some who argue that Congress intended to occupy the entire field so as to foreclose any state action in the area,\footnote{119} the Supreme Court has taken the position that the federal legislation "leaves much to the states, though Congress has refrained from telling us how much."\footnote{120} It is quite clear that a state cannot enjoin any activities which are protected by the NLRA,\footnote{121} and in the Garner case,\footnote{122} the Supreme Court held that a state has no jurisdiction to enjoin an activity which is an unfair labor practice under the NLRA. Whenever an employer's complaint directly or indirectly alleges conduct which would be either protected or prohibited under federal law, the state court must decline jurisdiction.\footnote{123} On the other hand, the Supreme Court has held that the states retain jurisdiction over conduct which is not regulated in any manner by the NLRA.\footnote{124} A state court may award damages in a common law tort action arising out of acts which could also have been enjoined by the National Labor Relations Board (NLRB) as an unfair labor practice, since the nature of the two remedies is different.\footnote{125} The only instances in which duplication of state and federal remedies has been tolerated are those in which violence, mass picketing, and threats of violence are present. The interest of the state in the prevention of violence and property damage is so great that the state may enjoin such conduct even though it constitutes a violation of Sec. 8(b)(1) of the NLRA.\footnote{126}

Although other states have been reluctant to admit the extent of

\footnote{118} National Labor Relations Board v. Fainblatt, 306 U.S. 601 at 607 (1939).  
\footnote{119} Harry Brody, Federal Pre-emption Comes of Age in Labor Relations, 5 Labor L.J. 743 at 759 (1954).  
\footnote{120} Garner v. Teamsters Union, 346 U.S. 485 at 488 (1953).  
\footnote{122} Supra note 120.  
\footnote{126} United Automobile Workers v. Wisconsin Employment Relations Board, 351 U.S. 266 at 272-75 (1956).
federal pre-emption in labor disputes, the Court of Appeals of Kentucky has frankly recognized the limitations on state power in the area. In National Electric Service Corp. v. District 50, it was held that the Blue Boar doctrine could not be applied to disputes affecting interstate commerce, since such picketing would also constitute an unfair labor practice under sec. 8(b)(2) of the NLRA. Although recognizing the wide import of the Garner case, the Court of Appeals made it clear that Kentucky still had jurisdiction in cases involving violence and intimidation.

When an employer invokes the machinery of the NLRB, he cannot simultaneously seek relief from a state court. In such case, the NLRB may maintain the integrity of its jurisdiction by securing a decree from a federal district court enjoining the employer from prosecuting the state action. However, if the employer bypasses the NLRB and seeks relief only from a state court, the union cannot remove the case to federal court, since the jurisdiction of the lower federal courts in labor disputes is limited to enforcement of NLRB orders. Consequently, if a state court erroneously assumes jurisdiction, a union cannot avoid any injunction of that court unless it is reversed by a higher state court or ultimately by the Supreme Court. In all probability, the employer will have achieved his purpose by the time the injunction is dissolved for want of jurisdiction. In view of the complexities of the NLRA and the difficulty in applying the Act to specific controversies, the possibility of state courts' erroneously assuming jurisdiction is great. Even in cases in which the employer did not seek state relief until after his complaint had been dismissed by the NLRB, it is often difficult to determine whether the state court may exercise jurisdiction. The state would have power to act only if the conduct involved was not regulated by the NLRA, and the NLRB may have dismissed the complaint because the conduct was protected by the NLRA.


128 279 S.W. 2d 808 (1955).


131 Id., Douglas, J., dissenting, at 526.


By establishing jurisdictional yardsticks based upon a certain minimum volume of business, the NLRB has contracted the area in which it will assert its jurisdiction.\textsuperscript{134} Although the NLRB has been criticized for refusing to exercise its full jurisdiction,\textsuperscript{135} the Supreme Court has indicated that the NLRB's powers are discretionary rather than mandatory.\textsuperscript{136} In \textit{Guss v. Utah Labor Relations Board},\textsuperscript{137} the Supreme Court held that the states do not have jurisdiction in those cases in which the NLRB will not exercise its jurisdiction. Under sec. 10(a) of the NLRA, the NLRB is granted the power to cede jurisdiction in certain areas by agreements with state agencies if the state law is the same as the federal law.\textsuperscript{138} Emphasizing the legislative history of the 1947 amendments to the NLRA, the Supreme Court held that sec. 10(a) "is the exclusive means whereby States may be enabled to act concerning the matters which Congress has entrusted to the National Labor Relations Board."\textsuperscript{139} Although some courts had anticipated the \textit{Guss} decision,\textsuperscript{140} a number of state courts had held that they could enter the area abandoned by the NLRB.\textsuperscript{141} The latter courts pointed out the resulting chaos that would result from a jurisdictional no-man's land in which unlawful labor activity would be subject to neither state nor federal control. While recognizing this problem, the Supreme Court stated that the solution must rest with Congress.\textsuperscript{142}

There are several possible solutions to the situation created by the

\textsuperscript{134} 1 CCH Labor L. Rep., par. 1610 at p. 1613.
\textsuperscript{135} Redmond H. Roche, Jr. and Kurt L. Hanslowe, NLRB Absolutism—A Dogma Revisited, 6 Labor L.J. 279 at 293-94 (1955).
\textsuperscript{136} "Even when the effect of the activities on interstate commerce is sufficient to enable the Board to take jurisdiction of a complaint, the Board sometimes properly declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case." National Labor Relations Board v. Denver Building & Construction Trades Council, 341 U.S. 675 at 684; see also Office Employees International Union v. National Labor Relations Board, \textit{infra} U.S. 77 S.Ct. 799 at 803 (1957).
\textsuperscript{137} 383 U.S. 1, 77 S.Ct. 598 (1957); see also the companion cases, Amalgamated Meat Cutters & Butcher Workmen v. Fairlawn Meats, Inc., \textit{infra} U.S. \textit{77} S.Ct. 604 (1957) and San Diego Building Trades Council v. Garmon, \textit{infra} U.S. \textit{77} S.Ct. 607 (1957).
\textsuperscript{138} 29 U.S.C. Sec. 160(a).
\textsuperscript{139} \textit{Guss} v. Utah Labor Relations Board, supra note 137, 77 S.Ct. at 602.
\textsuperscript{140} Retail Clerks Local No. 1564 v. Your Food Stores, 225 F. 2d 659 at 663 (CA10 1955); Universal Car & Service Co. v. International Association of Machinists, 27 Labor Cases, par. 68,825 at p. 87,759-64 (Cir. Ct., Mich. 1954); New York State Labor Relations Board v. Wags Transportation System, 180 N.Y.S. 2d 731 at 741-44 (Sup. Ct., N.Y. 1954).
\textsuperscript{142} \textit{Guss} v. Utah Labor Relations Board, supra note 137, 77 S.Ct. at 608.
Guss decision. Although the Supreme Court has thus far refused to pass on the question,\textsuperscript{143} it is unlikely that the Supreme Court would hold that the present jurisdictional yardstick is an unreasonable exercise of the NLRB's discretionary powers, even though it may have been the purpose of those standards to allow greater state regulation of labor disputes as well as to lighten the pressing number of cases before the NLRB.\textsuperscript{144} However, the ultimate solution must lie with Congress as it seems evident that the NLRB may refrain from exercising its jurisdiction in many cases. The NLRB has suggested that the states be allowed to assume jurisdiction in these cases so long as they apply federal law.\textsuperscript{145} While this plan seems to reach a reasonable solution, states would find it difficult to apply federal law in the absence of agencies comparable to the NLRB,\textsuperscript{146} and at the present time there is no state labor board which meets the requirements of sec. 10(a) of the NLRA.\textsuperscript{147} Probably the most practical solution would be Congressional legislation establishing jurisdictional yardsticks similar to those used by the NLRB. Such yardsticks would delineate the line between federal and state authority clearly. If, on the other hand, Congress feels that a uniform national labor policy should be applied to all labor disputes affecting interstate commerce, the only solution would seem to be a great expansion of the machinery of the NLRB which would enable the NLRB to handle all the cases which would come before it. Whatever the eventual Congressional action may be, it is important that it mark out the line between state and federal jurisdiction with much more precision than it has in the past.

The long litigation in a recent Kentucky labor dispute vividly illustrates the confusion that may be caused by the jurisdictional question. The employer secured a temporary injunction in a state circuit court against picketing by the union. The union attempted to remove that case to the federal district court on the ground that the state court was without jurisdiction. However, the federal district court ruled that it could not exercise jurisdiction even though the state court might be without jurisdiction.\textsuperscript{148} A year later, the state court dissolved its injunction on the ground that the NLRB had exclusive jurisdiction over the conduct involved, even though it was clear that the NLRB

\textsuperscript{143} Id., 77 S.Ct. at 599.
\textsuperscript{144} Compare the majority opinion with the dissents of Members Murdock and Patterson in Breeding Transfer Co., 110 NLRB No. 64 at p. 497, 502-03, 528 (1954).
\textsuperscript{145} 5 CCH Labor L. Rep., par. 50,267 at p. 50,522; 25 L.W. 3212.
\textsuperscript{146} 5 CCH Labor L. Rep., par. 50,267 at p. 50,523.
\textsuperscript{147} Dissent, Guss v. Utah Labor Relations Board, supra note 137, 77 S.Ct. at 611.
would not hear the case since the employer's volume of business was
less than the minimum set by the NLRB's jurisdictional yardstick. By the time that the Court of Appeals ruled on the case the following
year, the question was moot since the employer's business had in-
creased so that it then met the NLRB's standards. It is quite clear
that a speedy determination of labor disputes will be difficult, if not
impossible in some instances, unless the line between state and federal
jurisdiction is much more clearly drawn than it is at the present time.

**Conclusions**

The rights of participants in a labor dispute in Kentucky have
been based upon the doctrine that self-interest justifies the infliction
of economic loss on another. Under the common law of Kentucky,
labor has been allowed to organize and press its demands on business
with relatively few impediments, and the rights of business and labor
have been placed on an equal level. The small amount of labor legis-
lation that has been enacted is little more than a codification of the
common law. However, in meeting new situations, the common law
has not always been entirely adequate, and the interests of the public
today may require that labor disputes be regulated to a greater degree
to prevent disruption in the economic life of the state as much as
possible. Although the courts may be expected to exercise increased
powers of regulation derived from growing policy considerations, the
legislature should play a much greater role in labor relations than it
has previously. In the words of Brandeis:

> Because I have come to the conclusion that the common
law of a State and a statute of the United States declare the right of
industrial combatants to push their struggle to the limits of the justifi-
cation of self-interest, I do not wish to be understood as attaching any
constitutional or moral sanction to that right. All rights are derived
from the purposes of the society in which they exist; above all rights
rises duty to the community. The conditions developed in industry
may be such that those engaged in it cannot continue their struggle
without danger to the community. But it is not for judges to de-
termine whether such conditions exist, nor is it their function to set
the limits of permissible contest and to declare the duties which the
new situation demands. This is the function of the legislature which,
while limiting individual and group rights of aggression and defense,
may substitute processes of justice for the more primitive method of
trial by combat.

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140 *Food Basket v. Amalgamated Meat Cutters & Butcher Workmen*, 29 Labor
Cases, par. 69,561 (Cir. Ct., Jefferson Co., Ky. 1955).
150 *Food Basket v. Amalgamated Meat Cutters & Butcher Workmen*, 293
S.W. 2d 861 (Ky. 1956).
151 Johnson, supra note 77 at 65.
152 Duplex Co. v. Deering, supra note 22 at 488.
Today, industrialization is taking place at the fastest rate in the history of the state. If the state does not in fact need a comprehensive labor relations statute, it is at least the duty of the legislature to make a thorough study of the law governing labor disputes in Kentucky and demonstrate that fact.

James Park, Jr.

AUTHOR'S NOTE

After this note reached the printer's, the Supreme Court decided the case of International Brotherhood of Teamsters v. Vogt, Inc., ......., U.S. ......., 77 S.Ct. 1166 (1957). This decision constitutes the latest statement by the Supreme Court on the relation of picketing and the freedom of speech.

THE BROWN DECISIONS AND THE ADVISORY OPINION

According to a recent survey made by the State Board of Education, integration in Kentucky is proceeding in an orderly and reasonable manner, indicating that there has been a good faith implementation of those constitutional principles set forth in the Brown decisions. The results of the survey show that integration has begun or a plan of integration has been adopted in 108 of the 177 school districts which contain Negroes of school age. These 108 districts contain about 75 percent of the Negro population. Complete integration has been effected in 18 to 20 percent of these districts. The report further states,

As seen from the following tabulation of all local school districts, there still remain about 69 districts with about 25 percent of the Negro population that have taken no steps toward complying with the decision. No doubt many of these districts had once thought of following the informal plan of integration when Negro pupils applied for entrance in formerly all white schools. This is not legal procedure according to an opinion of the Attorney General. At the close of the school year, two school terms will have passed since the final decision and these school districts should proceed immediately to move toward the adoption of a plan. In some districts this plan may not be more than a simple order of the board of education while in others it may require much study and preparation before the plan is finally adopted by the board. The important thing to do now is to take steps and proceed in good faith toward the building of a total school service for all people of the district.

3 Supra note 1 at page 2.
4 Id. at page 2.
5 Id. at page 3.