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STRIKE VIOLENCE: THE NEED FOR FEDERAL INJUNCTIONS

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No country has a good code of laws. The reason for this is evident: the laws have been made according to the time, the place [and] the need. When the needs have changed, the laws which have remained have become ridiculous. Thus the law which forbade the eating of pig and the drinking of wine was very reasonable in Arabia, where pig and wine are injurious. But it is absurd at Constantinople.

Voltaire, *Laws*, from the
Philosophical Dictionary

An assault is an assault and a battery is a battery. In every jurisdiction in the United States these common-law torts are actionable, civilly and criminally. One is not privileged to strike the landlord, the policeman, or the professor except in self defense. If one disagrees with an opponent he should seek legal redress—except in labor disputes. The mystique of labor law is that strike violence is an aberration so strange and perplexing that ordinary standards of assault and battery simply will not do. The theory seems to be that, since violence is a traditional part of labor disputes, tradition sanctions its use. This

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point of view was articulated by the Third Circuit in *Republic Steel Corp. v. NLRB*:¹

We think it must be conceded, however, that some disorder is unfortunately quite usual in an extensive or long drawn out strike. A strike is essentially a battle waged with economic weapons. Engaged in it are human beings whose feelings are stirred to the depths. Rising passions call forth hot words. Hot words lead to blows on the picket line. The transformation from economic to physical combat by those engaged in the contest is difficult to prevent even when cool heads direct the fight. Violence of this nature, however much it is to be regretted, must have been in the contemplation of the Congress when it provided in Sec. 13 of the Act, 29 U.S.C.A. § 163, that nothing therein should be construed so as to interfere with or impede or diminish in any way the right to strike. If this were not so the rights afforded to employees by the Act would be indeed illusory.

The court did not attempt to document its assumption that the right to strike is illusory if not accompanied by violence. Indeed, had it attempted to do so it would have searched the legislative history in vain. Nevertheless, the *Republic Steel* concept of strike violence is widely held, and as a result strike violence has achieved a protection afforded no other violent conduct.

The Problem

The strike is the union's ultimate weapon. Its success depends on closing the plant and keeping it closed until the employer comes to terms. Strike violence generally erupts only when the employer attempts to continue operating during the strike, using supervisors, permanent replacements, and returning employees. When persons begin to cross the picket line—though they have a legal right to do so²—unions see the economic injury to the employer diminishing. No one quarrels with the union's right to picket peacefully. But peaceful picketing does not always do the job.³ The message is far stronger when backed up by dozens of men, whose demeanor runs from anger to sullen fury. If the picketing should result in violence, unions seek to convince police chiefs, sheriffs and judges that any effort to curb strike misconduct is "taking sides" and, in effect, "strike breaking."

¹ 107 F.2d 472, 479 (3d Cir. 1939), *modified on other grounds*, 311 U.S. 7 (1940).

² *United Steelworkers* (Wright Line Div.), 146 N.L.R.B. 71, 75 (1964).

³ At one time, this subject was a favorite in the reviews. For an excellent summary, see GREGORY, *LABOR AND THE LAW* 289-340 (2d rev. ed. 1961).

No union openly avows strike violence. All say it is lamentable. But the assemblage of the crowd invites its use. The psychological workings of a crowd have been extensively analyzed by persons competent to do so.⁴ The rhythm of crowd behavior—its assemblage, destructiveness, and discharge—is clearly applicable to strike misconduct. Therefore, whether it is manipulated or allowed to follow its own bent is really beside the point.⁵ The crowd keeps the plant closed, and the economic aim is achieved.⁶

Strike violence is permitted, we believe, because the local law enforcement officials are politically vulnerable. Few of the authorities charged with maintaining peace and order do so in a strike with any great relish. They quietly defer, when they can, to another agency. On the other hand, for all intents and purposes, the Norris-LaGuardia Act says that federal courts must defer when faced with picket line misconduct.⁷ This act strips the federal courts of any real power over strike violence. It would be useless to attempt to alter the political realities. The only realistic way to prevent strike violence is to restore the injunctive power of the federal courts.

An injunction is the only meaningful remedy against strike violence. Damage actions, tried years later to a jury, have little present effect. Arrests are not effective because unions are generally able to post bond or find replacements. Discharges for strike violence generally prolong a strike. In addition, unions cling to the hope that the National Labor Relations Board, an arbitrator, or the strike settlement will reinstate everyone. But the injunction operates here and now; it runs not only to the union, but to all operating in concert with the union; it is enforced by the court that issued it through proceedings that sometimes end in criminal sanctions.

Although initially there may have been valid reasons for passing the Norris-LaGuardia Act, thirty-four years later, the act shows its age. As Professor Gregory has written:

Enough has been said, however, to show that it is high time for a complete overhauling of the Norris-LaGuardia Act. Its original purpose—enabling unions to organize by recourse to economic pressures—has long since been fulfilled; and in many ways the statute has become obsolete. Certainly the situations in which it now plays an important role suggest that already powerful unions are using it to obstruct whole-

⁴ See, e.g., CANETTI, *CROWDS AND POWER* 16-22, 485-95 (1960); PENROSE, *ON THE OBJECTIVE STUDY OF CROWD BEHAVIOR* (1952).

⁵ CANETTI, *op. cit. supra* note 4, at 19-26.

⁶ In this connection, civil rights leaders have been far more candid about the violence that attends their cause. See *Time*, Aug. 20, 1965, p. 17.

⁷ 47 Stat. 70 (1932), as amended, 29 U.S.C. §§ 101-15 (1964).

some developments, to evade their responsibilities, and unfairly to serve their own interests in ways forbidden to others. Where the Supreme Court either will not or cannot do anything about this, perhaps Congress should reconsider the area of immunity afforded to unions in their recourse to economic pressures in pursuit of their self-interest.⁸

Norris-LaGuardia—Its Objectives

Norris-LaGuardia erected stiff standards before a federal court could enjoin strike violence. Section 7 requires:

- 1) That unlawful acts have been threatened and will be committed, or will be continued unless restrained,
- 2) That substantial and irreparable injury will follow if no injunction is issued,
- 3) That as to each item of relief granted, bigger or greater injury will be inflicted upon the plaintiff by denial of the relief than upon the defendant by the granting of the relief,
- 4) That no adequate remedy is present at law, and
- 5) That the public officers charged with the duty to protect the plaintiff's property are unable or unwilling to furnish adequate protection.⁹

There follows a provision for a temporary restraining order not to exceed five days.

The first four requirements of section 7 are those traditionally required by equity jurisprudence. It is the fifth requirement, "that the public officers charged with the duty" of protecting property are "unable or unwilling" to do their duty, which has made injunctions against strike violence extremely rare. In supporting this fifth requirement Professor Felix Frankfurter and Nathan Greene in *The Labor Injunction* wrote that

violence and other breaches of the peace are concededly the primary concern of the police and the machinery of the criminal law. To require, therefore, proof by complainant to the court's satisfaction that the normal resources of government are unable or unwilling to furnish adequate protection emphasizes official responsibility, and at the same time checks dangerous short cuts in the enforcement of the criminal law.¹⁰

⁸ GREGORY, *op. cit. supra* note 3, at 551.

⁹ Norris-La Guardia Act § 7, 47 Stat. 71 (1932), 29 U.S.C. § 107 (1964).

¹⁰ FRANKFURTER & GREENE, *THE LABOR INJUNCTION* 222 (1930).

None of the proponents of the bill saw Norris-LaGuardia as sanctioning violent conduct. Senator Norris' report stated that "it is not sought by this bill to take away from the judicial power any jurisdiction to restrain by injunctive process, unlawful acts, or acts of fraud or violence."¹¹ Similarly, Congressman LaGuardia wrote that labor disputes were to be immune from the injunctive process only so long as that conduct did not involve "fraud or violence."¹²

Nonetheless, the minority views of the Senate committee as to the effect of the fifth requirement of section 7 were prophetic:

All such officers are required to be given personal notice of the hearing. The difficulties thus created must be apparent. They would impose a great burden upon the complainant, first to ascertain the names and official duties of all officers charged with the protection of property, and second, to prove (a) that they have failed to afford protection, or (b) that they have been unable to do so.

It must be remembered that many of the acts of which employers of labor have complained in the course of labor disputes are not of the nature which come within the purview of the duties of public officers generally. Even a most cursory examination of the forms of injunctions which have heretofore been issued in labor disputes will disclose this fact. If, however, the provisions of paragraph (e) are to be limited in their operation to acts of destruction of property, there again the difficulty of establishing proof of neglect or inability of public officers to afford protection may, in some instances, and no doubt will, be impossible to sustain. We can well visualize a situation where the destruction of property has occurred wholly without the knowledge of public officers, and yet in seeking to establish proof that such public officers are unable or unwilling to furnish protection it would be quite impossible to do so.¹³

The Act in Application

In 1966, after thirty-four years of experience, the conclusion that the injunction should not supplement the local constabulary is too facile. The differences between an injunction and an arrest are sharp. An injunction runs to the union and all acting in concert with it; arrests run only to individuals. It is the union which manages the strike. Its effectiveness in this area is peculiarly institutional and wholly apart from individual responsibility.¹⁴

¹¹ S. REP. No. 163, 72d Cong., 1st Sess. 111 (1932) (majority report).

¹² H.R. REP. No. 669, 72d Cong., 1st Sess. 7 (1932).

¹³ S. REP. No. 163, 72d Cong., 1st Sess. Part II, 11-12 (1932) (minority report).

¹⁴ See Cox, *Some Aspects of the Labor-Management Relations Act, 1947: I*, 61 HARV. L. REV. 1, 25, 46-47 (1947).

Local criminal arrests are hardly the solution. The individual filing the arrest warrant has no control over its prosecution, and the prosecutor, who thereafter controls the suit, may be less than diligent in attempting to secure a conviction.¹⁵ Frequently he has an eye on the ballot box. It is not unknown for strike misconduct cases to be continued and continued until the strike is over, then dismissed. Moreover, the criminal sanction, even if pursued, may be totally inadequate. Juries may not convict because they do not like the action.¹⁶ Even if they are willing to convict, the punishment may not be enough to act as a deterrent.¹⁷ A union whose objective is keeping a struck plant closed may look on payment of a small fine with equanimity. The injunction, looking to present and future conduct, is a far greater block to violence than one, or a dozen, arrests.¹⁸

Whether foreseen or not, the requirement that the employer must prove local police officers unable or unwilling to do their job has been almost impossible to surmount. For example, in *Donnelly Garment Co. v. Dubinsky*,¹⁹ the employer notified the sheriff of Jackson County, Missouri, and the chief officer of the Kansas City police force of the hearing on its application for a Norris-La Guardia injunction. Neither of these officials was called to the stand. The court stated that the failure to call them "justifies, if it does not compel, the inference that the testimony of the absent witnesses would have been against the [employer]." The court did not consider the possibility that the police would be reluctant to testify that they were unable to perform their duty effectively. Needless to say, the publicity attending strike proceedings is not likely to make police officers garrulous. Yet without their testimony federal courts are now powerless to restrain union violence.

Courts are also unwilling to find the police derelict in their duty, even when the police testify that they do not know what their duty is. In *Knapp-Monarch Co. v. Anderson*,²⁰ the chief of police and the sheriff

¹⁵ *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1016 (1965).

¹⁶ *Ibid.*

¹⁷ *Ibid.*; see Local 346, Int'l Leather Goods Union (Baronet of Puerto Rico, Inc.), 133 N.L.R.B. 1617, 1627-28 (1961), where persons were prohibited from entering the plant, cars were rocked and damaged, and men were struck—all in plain view of police. Though the police acted in each specific event, the arrests merely served to withdraw one wrongdoer from the fray. The others continued as before.

¹⁸ See the order in the national steel strike of 1959, *United States v. United Steelworkers*, 178 F. Supp. 297-98 (W.D. Pa.), *aff'd*, 271 F.2d 676 (3d Cir.), *aff'd*, 361 U.S. 39 (1959), 58 MICH. L. REV. 595 (1960). Such an order does not violate the involuntary servitude prohibition in the thirteenth amendment to the Constitution. *General Elec. Co. v. UAW*, 93 Ohio App. 139, 157-61, 108 N.E.2d 211, 222-42, *appeal dismissed*, 158 Ohio St. 555, 110 N.E.2d 424 (1953).

¹⁹ 154 F.2d 38 (8th Cir. 1946).

²⁰ 7 F. Supp. 332 (E.D. Ill. 1934).

testified that it was their "understanding, in substance, that mass picketing is entirely lawful, and, as officers charged with the duty of protecting personal and property right [*sic*] from unlawful invasion . . . their only recourse . . . is to attend where such mass picketing is in progress to prevent riots, traffic jams, fighting, assaults" ²¹ The court denied the injunction in the expressed hope that now the police knew mass picketing was unlawful under Illinois law—as it had been for many years—they would thereafter do their duty. Unfortunately, few courts have been able to view strike violence as dispassionately as one court did in sensibly observing that at best police cannot maintain all law and order at a struck plant:

No just complaint can be made of the conduct of the police. They have afforded the plaintiff all the protection which it is possible to give. No police protection is adequate in a strike or can be fully given. This strike is an illustration. If the expression is an allowable one, it is as orderly a strike as any could be. Notwithstanding this there has been resort to unjustified violence. How much more there would have been and may yet be except for the proceedings instituted to restrain violence cannot be forecast. The good old Patrick Henry rule justifies the inference that there will be violence from the fact that there has been. The finding called for may be made.²²

The Police

"Votes are the currency of politics." ²³ Most sheriffs and police departments are either elected, or responsible to elected officials, and here lies the root of the problem. Rightly or wrongly, many elected officials believe that unions, when aroused, can secure their defeat. A public official sees many votes on the picket line; few in the office. Perhaps in 1932 it was true that local officials were ignorant of union objectives and brutal in the extreme toward peaceful picketers. Nothing could be further from the truth in 1966.

Extensive research into police protection of mass picketing and violence in Philadelphia showed an astonishing lack of concern for law and order.²⁴ The official police policy has been that enforcement

²¹ *Id.* at 337. Compare *Cater Constr. Co. v. Nischwitz*, 111 F.2d 971 (7th Cir. 1940), where the court said: "No doubt the protection which the statute contemplates is that which would have enabled the plaintiffs to proceed with work on the projects. No such protection was forthcoming." *Id.* at 977. There, the police chief, when asked for help, advised the employer to agree to the union's demands. *Ibid.*

²² *Tri-Plex Shoe Co. v. Cantor*, 25 F. Supp. 996, 998 (E.D. Pa. 1939).

²³ *Swigert, Where Labor Unions Get Their Power*, U.S. News & World Report, Jan. 21, 1963, p. 96.

²⁴ Note, 113 U. PA. L. REV. 111 (1964).

Contempt for law and order generates further contempt. In the 1966 transit strike in New York, after the head of the union received an order citing him for

of access rights to a struck plant "would be taking sides in the labor disputes."²⁵ Police make no arrests, which encourages the attitude expressed by one union leader that "as long as we're not in jail, we're not breaking the law. If we broke the law, we would be arrested."²⁶ Philadelphia police apparently welcome and encourage a company to resort to the courts because this alleviates their responsibility. Police inaction has the expected result: mass picketing and violence reach mammoth proportions before the sheer volume of misconduct generates some restraint.

The Philadelphia experience is not at all unusual:

1. At a strike of the Bethlehem Ship Yards in Quincy, Massachusetts, where incidents of unlawful picketing lasted over a period of two months, the general manager requested the police to open a massed picket line so that he and an assistant could go into their offices. "The pickets pushed the police back into the middle of the street. The police captain then told . . . [the general manager] that they could not get them through."²⁷ Twice, pickets forced the police chief and his subordinates into the street.²⁸ On one occasion, the police chief told the assistant plant superintendent that he could not gain plant entrance for the group unless the picket captain ordered the line open.²⁹ Finally, with about seventy-five policemen standing nearby in the street, nineteen top management people were permitted by the pickets to go in. "As the group 'squeezed' by, they were continually being kicked in the shins and jabbed in the ribs with elbows."³⁰

2. In Worcester, Massachusetts, at a strike of the Charles Weinstein Company,³¹ a nonstriker who went through the picket line was grabbed, twisted and pinched. Another nonstriker called out of the plant window and asked a nearby police officer, "Hey, officer, can't you see what's going on down there? Why don't you do something about that?" The police officer "put his hands on his hips and looked down the street . . . turned his back on us."³² Again, a nonstriker

contempt he stated "Just as we promised you, . . . the judge can drop dead in his black robes. Personally I don't care if I rot in jail." He also invited "the sheriff and his lackeys" to come and pick him up for jail. The Wall Street Journal, Jan. 5, 1966, p. 2, col. 3.

²⁵ *Id.* at 123.

²⁶ *Id.* at 116.

²⁷ Industrial Union of Marine Workers (Bethlehem Steel Co.), 130 N.L.R.B. 412, 416 (1961).

²⁸ *Id.* at 417.

²⁹ *Id.* at 421.

³⁰ *Id.* at 422.

³¹ Central Mass. Joint Bd. (Charles Weinstein Co.), 123 N.L.R.B. 590 (1959).

³² *Id.* at 598.

said "Officer, what's the matter with you? Can't you see what's going on down there?" The officer, "didn't pay attention, and he didn't even look."³³ Later in the strike, pickets refused to let a truck leave the struck plant, and upon complaining to police officers sitting in a patrol car after something was thrown at the truck cab, the policeman said "go up and tell [the owner] . . . , he knows them all, and let him get a complaint."³⁴

3. Pickets armed with clubs put large railroad ties across the main plant entrance in a strike at Smith Cabinet,³⁵ Salem, Indiana. At another entrance steel gutter plates, permanently attached to a concrete base by hinges on the plant side, were raised ten or twelve inches from the ground and bricks and blocks were inserted beneath them, thus preventing the passage of automobiles into the plant. After several days, the vice president of the company, accompanied by the chief of police, went to the plant and asked the president of the local union to lower the barricade. The president of the union said he would, but he also said he would smash the windshields if the company attempted to bring in cars. After the chief of police extracted from the company a promise "not to crash the picket line," the union agreed and the barricades were lowered.³⁶

4. Strike violence in the mine fields is notorious. In *West Kentucky Coal Co.*³⁷ roving United Mine Workers' pickets told mine operators in West Virginia and Kentucky to stop operating. The sheriff and the police captain advised the company to "yield unconditionally to the UMW demands saying there were too many men in the invading force for them 'to control' or 'try to handle.'"³⁸ The sheriff advised the company to agree to UMW demands because he was "'just unable to handle a group of men like this.'"³⁹ On other occasions, police officers said they could not keep UMW pickets off the company's property line and advised them to go to the office and await a UMW committee who would call upon them.⁴⁰ One mine was shut down when the sheriff said that "'for the safety of all concerned,'" he thought "it best" for the mine superintendent to yield to UMW demands that the mine be shut down.⁴¹ At another mine the

³³ *Ibid.*

³⁴ *Id.* at 602.

³⁵ *United Furniture Workers (Smith Cabinet Mfg. Co.)*, 81 N.L.R.B. 886 (1949).

³⁶ *Id.* at 901.

³⁷ *United Mine Workers (West Kentucky Coal Co.)*, 92 N.L.R.B. 916 (1950), *enforced*, 195 F.2d 961 (6th Cir. 1952), *cert. denied*, 344 U.S. 920 (1953).

³⁸ 92 N.L.R.B. at 934.

³⁹ *Id.* at 937.

⁴⁰ *Id.* at 938.

⁴¹ *Id.* at 940.

state police advised that violence could best be avoided by closing the mines. The employers yielded.⁴²

5. At a newspaper strike in Youngstown, Ohio: "The record indicates that the police department maintained an attitude of neutrality throughout the strike and that no arrests were made even when assaults and other serious acts of misconduct occurred in the presence of police officers, as for example during the main mass picketing period from August 19 through 24. . . ." ⁴³

These examples are not culled from a manufacturers' bulletin. They are taken almost at random from reports of trial examiners for the National Labor Relations Board.⁴⁴ It is obvious that police inactivity in the face of picket line violence generates more violence. Although federal law gives employees the right to cross a picket line, this right is meaningless unless it can be protected. Police officers who are "neutral" in the face of strike violence are of course taking sides. This is not neutrality; it is capitulation.

The Governors

The larger strike, of course, touches higher levels of the political network. Governors, too, want reelection. A vivid example of gubernatorial action is found in the case of *Wilson & Co. v. Freeman*.⁴⁵ There, the strike began at the Wilson Company's packing plant at Albert Lea, Minnesota. After negotiations stalled, the company resumed production, first with supervisors and then with permanent

⁴² *Id.* at 943.

⁴³ Intermediate Report, American Newspaper Guild (Vindicator Printing Co.), 151 N.L.R.B. No. 154, n.4 (1965).

⁴⁴ See also United Steelworkers (Wright Line Div.), 146 N.L.R.B. 71, 74 (1964) (police unable to cope with violence); Taxicab Drivers Union (Crown Metal Mfg. Co.), 145 N.L.R.B. 197 (1963), *enforced*, 340 F.2d 905 (7th Cir. 1964); Street, Elec. Ry. Employees (Plymouth & Brockton Street Ry.), 142 N.L.R.B. 174, 178-79 (1963) (on one day, police unable to disperse pickets and none of the company's busses could run); District 65, Retail Store Union (I. Posner, Inc.), 133 N.L.R.B. 1555, 1562-65 (1961) (violence occurs on picket line despite presence of police); United Steelworkers (Carrier Corp.), 132 N.L.R.B. 127 (1961), *modified on other grounds*, 311 F.2d 135 (2d Cir. 1962), *rev'd*, 376 U.S. 492 (1964); Brotherhood of Locomotive Firemen (Phelps Dodge Corp.), 130 N.L.R.B. 1147, 1156 (1961) (despite presence of the sheriff, full access to employer's premises denied); Local 901, Teamsters Union (Editorial "El Imparical", Inc.), 129 N.L.R.B. 1373, 1376 (1961) (police arrested one picket, but quickly released him; violence on the picket line continued); UMW (Blue Ridge Coal Corp.), 129 N.L.R.B. 146 (1960) (firearms carried on picket line with at least one incident where shooting occurred; police unable to be present at all times to allow full access to employer's premises; violence ran rampant); United Elec. Workers, 106 N.L.R.B. 1372 (1953); National Union of Marine Cooks (Irwin-Lyons Lumber Co.), 87 N.L.R.B. 54 (1949).

⁴⁵ 179 F. Supp. 520 (D. Minn. 1959). For a discussion of the actions of Governor Romney in closing the plant and removing company guards from the Essex Wire and Steel strike in Hillsdale, Michigan, see Howlett, *The Battle of Hillsdale—The Essex Wire Strike Emergency*, 15 LAB. L.J. 770 (1964).

replacements. An injunction from a local court was ignored. The strikers threw rocks, smashed windows, and threatened nonstrikers with bodily harm.

Police, as well as union officials, unsuccessfully attempted to quell the acts of violence and the massing of pickets by pleading with the pickets to disperse, to refrain from violence, and to return to their homes. However, such pleas were of no avail. No attempts were made by the police to arrest any of the mob indulging in the acts of violence.⁴⁶

At the height of the violence, local law enforcement officials requested Orville L. Freeman, then governor of Minnesota, to assume responsibility for the maintenance of law and order and to close the plant temporarily, which he did, declaring a state of martial law in Albert Lea. A federal district court of three judges went to the heart of the governor's order:

Obviously, however, plaintiff was within its rights notwithstanding the strike in attempting to keep its plant in production and to afford employment to those persons who were willing to work. Plaintiff is protected by the Constitution of the United States in its right to possess its property and to use it in any lawful manner that it may desire to pursue. Plaintiff cannot be held responsible for mob violence which was allegedly precipitated by its attempt to keep its plant open. A strike by union workers does not prevent the employer from employing non-union workers in its plant.⁴⁷

. . . .

Peace and order may be restored by acceding to the demands of the mob, but at the sacrifice of law. Such expedient measures would encourage and breed mob rule and law violations in every labor dispute. No citizen would be secure in the peaceful possession of his property.⁴⁸

The governor and the state militia were enjoined from unconstitutionally depriving Wilson and Company of the lawful use of its property.

The problems of strike violence become still more dramatic when the governor refuses to act. In *Lake Charles Stevedores, Inc. v. Mayo*,⁴⁹ recognition picketing brought the port of St. Charles, Louisiana, to a complete halt. Appeals were made first to the sheriff, then to the governor. The sheriff said he was unable to increase his depu-

⁴⁶ *Wilson & Co. v. Freeman*, 179 F. Supp. 520, 523 (D. Minn. 1959).

⁴⁷ *Id.* at 525.

⁴⁸ *Id.* at 527.

⁴⁹ 20 F. Supp. 698 (W.D. La. 1935).

ties (at that time five) without the approval of a bureau dominated by the governor. The governor declined. Local authorities then appealed directly to the governor to use state police or the National Guard. He refused. Then the local employers' association hired guards to protect its property. Three of them were murdered; six were wounded. A federal injunction was granted.

There probably would not have been any shooting but for the bringing into the port of the heavily armed guards, and a sufficient number of bona fide and impartial deputy sheriffs or other recognized state officers to maintain peace had been sent to the scene by the Governor or other state authorities, upon whom the responsibility for maintaining peace and order rested. The attitude of these officials is rather forcefully illustrated by the fact that one of the two deputy sheriffs supplied had three sons in the picket line. Both the sheriff and the Governor, as well as their adherents, were in the midst of a campaign for the general state election of officers . . . and there appears little doubt but that this fact accounts for the failure or refusal of these officials to do their duty. In other words, politics was being played at the risk of human life.⁶⁰

The State Courts

Sir Francis Bacon wrote that "A popular judge is a deformed thing, and plaudits are fitter for players than for magistrates."⁶¹ Perhaps this was true at the turn of the seventeenth century, but today most state judges are elected and as a result there is a premium on popularity. It is not by accident that in the constitution of the International Association of Machinists, for example, a stated aim is that "all judges, without exception, . . . be elected by a vote of the people."⁶²

The Labor Injunction's underlying thesis was that injunctions were entirely too easy for employers to obtain. Though there has been abundant criticism of the excessive use of injunctions, there is almost no literature on the wrongful denial of an injunction. One reason for this is that there is virtually no record of most of these cases. Denials of temporary restraining orders are usually not appealable; they are almost never reported. The denial remains in the memory—and tactical position—of the losing party. "The law's delay works a special hardship in labor cases. If a strike or picket line is enjoined, the

⁶⁰ *Id.* at 701.

⁶¹ THE VIKING BOOK OF APHORISMS 208 (1962).

⁶² CONSTITUTION OF INTERNATIONAL ASSOCIATION OF MACHINISTS (1965).

unions lose. If it is denied, management will probably settle. In either case, there is little pressure to obtain a 'correct' ruling from the state supreme court. Only when a union desires to get an authoritative holding for future activity will it appeal."⁵³

No other section of this article has been as difficult to write; the information is just not available. But scattered bits and pieces indicate that employers have a difficult time in some state courts when they try to enjoin union violence. The student research into Philadelphia strike activity shows that judges are extremely reluctant to issue a restraining order;⁵⁴ they first prefer a conference in chambers,⁵⁵ which is supposed to produce a "gentlemen's agreement" that access to a struck plant will be permitted. Weeks may pass before the employer's legal right to operate, and the employees' legal rights to ignore strike pressure, are observed. For example, the 1960 General Electric strike in Philadelphia produced a "gentlemen's agreement" to permit access on October 5, 1960. Not until October 20, however, were pedestrians and automobiles allowed unhindered access to the plant.⁵⁶ For an employer with fewer resources than General Electric, the two week period might be crucial. Lack of access might force capitulation.

Moreover, courts are often reluctant to enforce their own orders. The Philadelphia judiciary was agonizingly slow in enforcing an order at the Yale and Towne strike, and, indeed, even when contemnners were arrested, the court released them with the finding that the strikers had no "serious intent or any desire to breach the law and order."⁵⁷

The reason for the failure of many state judges to enforce law and order is, as we have said before, largely political. It is not a frequently found admission, of course. Few judges are as candid as

Ohio Appeals Court Judge John J. Duffey [who] confesses he was worried about having to decide, shortly before the 1960 election, whether a transit workers' strike in Columbus constituted an illegal secondary boycott. "If I had decided for the company, I would have lost considerable union support," says Judge Duffey. "If for the union, the Columbus Dispatch would have blasted me. That sort of thing is enough to make even the strongest of men blanch a little." Fortunately for the judge and his conscience the strike was settled before he had to make a ruling.⁵⁸

⁵³ Hopson, *Kansas Labor Law and District Court Injunctions*, 6 KAN. L. REV. 1, 2-3 (1957).

⁵⁴ Note, 113 U. PA. L. REV. 111, 128 (1964).

⁵⁵ *Id.* at 129 n.138.

⁵⁶ *Id.* at 130.

⁵⁷ *Ibid.*

⁵⁸ The Wall Street Journal, Jan. 15, 1965, p. 1, col. 1. See also *State Court Injunctions, Report of a Subcommittee on Labor-Management Relations of the Committee on Labor and Public Welfare*, S. Doc. No. 7, 82d Cong., 1st Sess. 7-9 (1951).

The NLRB

The NLRB cannot prevent violence wherever it occurs;⁵⁹ that is properly the domain of the courts—state or federal. However, the Board has the power to discourage strike misconduct, for it frequently must pass on reinstatement of violent strikers.

In the last three years, the Board has developed a double standard for weighing strike violence. If the strike is declared an economic strike, then strikers who engage in misconduct may be discharged.⁶⁰ But if the Board decides that the strike was called to protest employer unfair labor practices, the strikers will probably be reinstated. The Board's position is summarized by Trial Examiner Bennett in *Oneita Knitting Mills, Inc.*⁶¹ Though plainly uncomfortable at recommending the reinstatement of strikers who threw eggs and tomatoes at those who crossed the picket line, followed employees in cars almost running them off the road, and grabbed an employee by the leg and forced her to the ground, he said he had little choice in view of the decisions of the Board and the courts in the *Kohler* cases:⁶²

[E]ngagement in conduct unprotected under Section 7 of the Act does not, *ipso facto*, preclude a reinstatement order for an unfair labor practice striker and that the seriousness of the employer's unfair labor practices is to be considered in balancing the issue.

. . . .

[T]he net result of . . . [these cases] may be that anything short of aggravated assault will not disqualify such a striker

. . . .⁶³

The Board, on remand of the *Kohler* case, reinstated employees who engaged in this misconduct:

The Supreme Court appears to recognize the possibility of politics in the state courts. In *United Steelworkers v. Boulogny, Inc.*, 3 CCH LAB. L. REP. ¶ 51,415 (1965), the Court was asked to permit removal of a defamation action to the federal courts. One of the union's arguments was that local courts would be opposed to unionization and that federal judges would be "less exposed to local pressures than their state court counterparts" The Court reluctantly rejected these "appealing" arguments. *Id.* ¶ 51,415, at 65101.

⁵⁹ But see *Potter v. United Cement Workers*, 48 L.R.R.M. 2968 (E.D. Tex. 1962) (*Texas Portland Cement Co.*). In the 1964 fiscal year, the Board sought only eighteen petitions for injunctive relief under its discretionary injunction section, the only section of the act that permits the Board to directly attack strike violence. 29 NLRB ANN. REP. 133 (1965).

⁶⁰ See *Ekco Prod. Co. (Sta-Brite Div.)*, 117 N.L.R.B. 137, 221-24 (1957).

⁶¹ 153 N.L.R.B. 1434 (1965).

⁶² *Kohler Co.*, 128 N.L.R.B. 1062, *enforced as modified*, 300 F.2d 699 (D.C. Cir.), *cert. denied*, 370 U.S. 911 (1962), *on remand*, 148 N.L.R.B. No. 147 (1964).

⁶³ Intermediate Report, 153 N.L.R.B. No. 4 (June 17, 1965).

1. They actively engaged in halting, circling, blocking, shouldering, and bumping nonstrikers or job applicants during the mass picketing or employment office picketing.
2. They verbally harassed, insulted, and abused nonstrikers at the picket line, their homes, business establishments and places of amusement.
3. They inspected railroad cars leaving the Kohler plant and attempted to halt trucks leaving that plant.

The only strikers denied reinstatement were those who engaged in assaults upon nonstrikers or in threats against their families.

Two intellectual props support the *Kohler* decision and those decisions following it.⁶⁴ The first is *Republic Steel*⁶⁵ which, it will be recalled, states that Congress must have contemplated strike violence in guaranteeing the right to strike. Apart from the complete failure of Congress to sanction violence in guaranteeing the right to strike, the *Republic Steel* dictum is of doubtful legal validity for these reasons:

1. *Republic Steel* was decided in 1939—eight years before the 1947 amendments to the act. One of those amendments was the new phrase in section 7 which guarantees to employees “the right . . . to refrain from any or all of such [concerted] activities. . . .”⁶⁶ This section was added to the act so that “the Board will be prevented from compelling employees to exercise such [protected] rights against their will, as it has consistently done in the past. In other words, when Congress grants to employees the right to engage in specified activities, it also means to grant them the right to refrain from engaging therein if they do not wish to do so.”⁶⁷ This is clear from the House Conference Report:

The second change made by the House bill in section 7 of the act (which is carried into the conference agreement) has also an important bearing on the kinds of concerted activities which are protected by section 7. That provision, as heretofore stated, provides that employees are also to have the right to refrain from joining in concerted activities with their fellow employees if they choose to do so. Taken in conjunction with the provisions of section 8(b)(1) of the conference agreement (which will be hereafter discussed),

⁶⁴ *Oneita Knitting Mills*, 153 N.L.R.B. No. 4 (1965); *Elmira Mach. & Specialty Works, Inc.*, 148 N.L.R.B. 1695 (1964). See also *Trumbull Asphalt Co.*, 139 N.L.R.B. 1221 (1962).

⁶⁵ *Republic Steel Corp. v. NLRB*, 107 F.2d 472 (3d Cir.), *cert. denied*, 309 U.S. 684 (1939).

⁶⁶ § 7, 61 Stat. 141 (1947), 29 U.S.C. § 157 (1958).

⁶⁷ H.R. REP. No. 245, 80th Cong., 2d Sess. 27 (1948), in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 318 (1948).

wherein it is made an unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of rights guaranteed in section 7, it is apparent that many forms and varieties [*sic*] of concerted activities which the Board, particularly in its early days, regarded as protected by the act will no longer be treated as having that protection, since obviously persons who engage in or support unfair labor practices will not enjoy immunity under the act.⁶⁸

The right to refuse to engage in union activities is obviously frustrated when violent strikers are reinstated with back pay under government sanction.

2. In 1947, Congress also added section 8(b)(1)(A) to the act, making it an unfair labor practice for a union to coerce or restrain employees in their section 7 rights,⁶⁹ including the right to refrain from engaging in union activity.

3. In addition Congress added section 10(c) to the act in 1947.⁷⁰ This section denies the Board power to reinstate any individual discharged or suspended for cause. It was added to the act "to put an end to the belief, now widely held and certainly justified by the Board's decisions, that engaging in union activities carries with it a license to loaf, wander about the plants, refuse to work, waste time, break rules, and engage in incivilities and other disorders and misconduct."⁷¹

The second, and most sophisticated, prop to the *Kohler* rationale is the decision of the First Circuit in *NLRB v. Thayer Co.*⁷² That decision said that when a strike is caused by an unfair labor practice of the employer, "the power of the Board to order reinstatement is not necessarily dependent upon a determination that the strike activity was a 'concerted activity' within the protection of § 7."⁷³ The court reasoned that the discharge of strikers may be for cause "or their reinstatement may not effectuate the policies of the Act, but in certain circumstances it may."⁷⁴ In short, the Board may determine that reemployment of persons who take the law into their own hands ful-

⁶⁸ H.R. REP. No. 510, 80th Cong., 1st Sess. 39-40 (1947), in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 543-44 (1948).

⁶⁹ § 8(b)(1)(A), 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(1)(A) (1964); § 7, 61 Stat. 141 (1947), 29 U.S.C. § 157 (1964).

⁷⁰ § 10(c), 61 Stat. 147 (1947), 29 U.S.C. § 160(c) (1964).

⁷¹ H.R. REP. No. 245, 80th Cong., 2d Sess. 42, in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 333 (1948).

⁷² 213 F.2d 748 (1st Cir.), *cert. denied*, 348 U.S. 883 (1954).

⁷³ *Id.* at 753.

⁷⁴ *Ibid.*

fills a larger design. The analytic block to this reasoning is the express statement in section 10(c) that the Board may not order reinstatement of employees discharged "for cause." The court's statement that a discharge is not necessarily for cause when the employer who does the discharging has engaged in other unlawful conduct⁷⁵ is a distinction which makes no sense. If cause for discharge exists, it must logically exist independently of prior activities of the employer, who is subject to a broad range of remedies if he has acted unlawfully.⁷⁶

There are at least three flaws in the *Kohler* reasoning. The first is the Board's theory that the company's "flagrant" unfair labor practices enraged the strikers beyond reason. This theory assumes that the strikers were thinking of *Kohler's* conduct when they engaged in misconduct. The unfair labor practice in that case was *Kohler's* refusal to bargain in good faith. The bargaining, which was carried on over a period of many months and covered thousands of employees, contained some very complicated issues.⁷⁷ The connection between individual misconduct and the company's bargaining position was tenuous, to say the least. Even the Board recognized the weakness of this theory, for it stated that "while striker participation in . . . [mass picketing and home demonstrations] may not be specifically attributable to any individual instance of . . . [*Kohler's*] numerous unfair labor practices perpetrated during that period, the total causative effect of . . . [*Kohler's*] illegal acts is unquestionable."⁷⁸ The real reason for the violence at *Kohler*, we believe, was the company's decision to operate during the strike. Unions view such a decision as the supreme threat to the strike effort. Naturally, they claim the employer's "unfair" conduct played a large part in causing the strike. But whatever the employer's conduct, his right to operate his plant during the strike must not be impinged by threats of strike violence.

The second flaw of *Kohler* is the Board's preoccupation with the fear that the company would "profit by its own wrong" if strikers were not reinstated. Yet the Board's reinstatement order permits the strikers to profit by *their* own wrongs. And wrongs they are, for even the Board does "not condone the mass picketing of the strikers or the planning and direction of such activity by the union leaders. . . ." ⁷⁹

⁷⁵ *Id.* at 753 n.6.

⁷⁶ See *NLRB v. Mylan-Sparta Co.*, 166 F.2d 485, 491 (6th Cir. 1948) ("The Act does not authorize the Board to substitute its own ideas of discipline or management for those of the employer, except barring discrimination or discharge for union membership."); *Russell-Newman Mfg. Co.*, 135 N.L.R.B. 1 (1962); Note, *Need for Creative Orders Under Section 10(c) of the National Labor Relations Act*, 112 U. PA. L. REV. 69 (1963).

⁷⁷ See Stewart, *Conversion of Strikes: Economic to Unfair Labor Practice: II*, 49 VA. L. REV. 1297, 1307-11 (1963).

⁷⁸ *Kohler Co.*, 148 N.L.R.B. 1434 (1964).

⁷⁹ *Id.* at 1446.

Finally, the balance struck in *Kohler* cannot be sustained since its reasoning ultimately sanctions mob rule. Congress has passed a complex statute which establishes the rights of employees and their representatives and provides remedies if these rights have been violated. Violence is not part of that scheme. Whether Kohler's labor policy was antediluvian is beside the point. Congress did not tell employees or unions that, if their employer committed an unfair labor practice, they could take the law into their own hands. *Kohler* rewards those who do.

It was not always thus. On the *Thayer* remand from the First Circuit,⁸⁰ the Board, which had previously reinstated eighty-three employees, refused to reinstate strikers who called at the homes of nonstrikers, told potential nonstrikers they were not threatening "but that things of that nature have happened during strikes," and strikers who, in a group of five, accosted another nonstriker near his home with various threats. Though recognizing that Thayer's unfair labor practices were "of the most serious kind"⁸¹ the Board also recognized its obligation to protect the section 7 rights of individual employees. The Board majority was not impressed with the argument that barring violent strikers from Thayer's employment would give that company an unconscionable profit. Eight years later, the Board in *Kohler* ordered reinstatement of persons who verbally harassed, insulted and abused nonstrikers at the picket line, their homes, business establishments or places of amusement. Board personnel and philosophy had shifted; the federal administration had changed.

If the striker does not commit his violence in an unfair labor practice strike, a far different standard is applied. For example, the Board recently sustained the discharge of an economic striker who, while drunk, acted up at the pay window and resisted arrest.⁸² In another case an economic striker who followed a truck, cut in front of it, and reached inside the truck cab to threaten the driver with a tire iron was also denied reinstatement.⁸³ That case contains some particularly candid testimony explaining strike violence:

It is undisputed that the strike duties assigned to Heaney, Wojciechowski, and Frey on the morning of July 8 were to follow the Tidewater Oil trucks, or trucks used by Tidewater,

⁸⁰ H. N. Thayer Co., 115 N.L.R.B. 1591 (1956).

⁸¹ *Id.* at 1596.

⁸² United States Plywood Corp., 153 N.L.R.B. No. 53 (June 21, 1965).

⁸³ Tidewater Oil Co., 145 N.L.R.B. 1547, 1552-55 (1964). See also Valley Die Cast Corp., 130 N.L.R.B. 508, 509 (1961), *enforced*, 303 F.2d 64 (6th Cir. 1962); Revere Metal Art Co., 127 N.L.R.B. 1028, 1029-30 (1960), *enforced*, 287 F.2d 632 (2d Cir. 1961).

to their destination in New York City, to check for fire violations while gasoline was being poured, to check on the driver's certificate of fitness and the amount of gasoline delivered, and to picket the trucks. These strikers had been performing their assigned tasks all week without visible success and decided that they were tired of continuing that type of strike duty. As Wojciechowski explained, "Frank Frey that morning had mentioned the fact that he was tired of playing cowboys and Indians, and so was I. We were getting nowhere following the trucks. They would dump the gas and you would eat your heart out watching them dump the gas. They were getting a \$100 a day and we were getting nothing."⁸⁴

The Board has indicated that one unfair labor practice does not excuse another.⁸⁵ A party who is wronged has a right to petition the Board for redress, but the remedy for union misconduct and employer misconduct is poles apart. Kohler must pay back wages amounting to millions of dollars.⁸⁶ It must bargain with the union and cease all other unlawful activity. On the other hand, should anyone invoke Board sanctions against union misconduct, he would find that the remedy is a paper tiger. The Board will issue complaints against unions for violations of section 8(b)(1)(A),⁸⁷ but the section 8(b)(1)(A) remedy is simply a cease and desist order which comes months after the violence. In *American Photocopy Equip. Co.*,⁸⁸ the misconduct took place on or about March 7, 1964. On July 31, 1964, the trial examiner issued his report, finding the union strike effort unlawful. The NLRB affirmed this order on March 3, 1965. While this remedy may be a future deterrent, it is no more than a slap on the wrist at present.

Though for years the Board has argued to the courts of appeals that it must have wide latitude in fashioning *meaningful* remedies for employer unfair labor practices, it has shown no anxiety to make the section 8(b)(1)(A) orders fit the violation. The facts in *International Union of Operating Eng'rs (Long Constr. Co.)*⁸⁹ show that certain employees were beaten while working on the job site. The trial ex-

⁸⁴ Tidewater Oil Co., *supra* note 83, at 1552.

⁸⁵ See *Communications Workers (Ohio Consolidated Tel. Co.)*, 120 N.L.R.B. 684 (1958), *modified on other grounds*, 266 F.2d 823 (6th Cir. 1959), *aff'd as modified*, 362 U.S. 479 (1960).

⁸⁶ See *NLRB v. Kohler Co.*, 60 L.R.R.M. 2049 (D.C. Cir. 1965).

The Kohler settlement specified payment by Kohler of \$3,000,000 in back pay to individual workers and restoration of certain pension rights estimated at \$1,500,000. See NLRB News Release R-1029, Dec. 30, 1965.

⁸⁷ *E.g.*, *Fur Workers Union (American Photocopy Equip. Co.)*, 151 N.L.R.B. No. 33 (1965).

⁸⁸ *Ibid.*

⁸⁹ 145 N.L.R.B. 554 (1963).

aminer recommended that the Board order the union to pay these employees for the wages they lost when forced to stay away from work. The Board declined to do so. The gist of the Board's argument was that these employees had a right to seek damages in the civil courts of Tennessee.

The Board will not even require the union to pay for the direct result of physical injury. In *International Hodcarriers (Owen Langston)*⁹⁰ some employees suffered a savage beating as they crossed the picket line and several required hospitalization and medical attention.⁹¹ The beatings took place on May 9. Not until May 21 was the employer able to convince nonstrikers it was safe to return to work. The trial examiner recommended that the union be required to reimburse these employees for their medical expenses. The Board again declined. The union, which was found responsible, had merely to post a notice for sixty days saying it would not engage in such conduct again. Here, as in *Long Construction*, the Board's view of its own competence was in sharp contrast to the remedy it designed in the *Kohler* case: "the numerous and complicated factual questions involved in settling such claims are not such questions as fall within the Board's special expertise, but do fall within the special competence of judge and jury."⁹² Whether these employees will have the stamina and the financial resources to pursue the remedy the Board has left them is pure conjecture. But what is not open to conjecture is the result of these cases: the union profits by its own unfair labor practices.

Arbitrators

Arbitrators are frequently faced with the question of reinstatement of strikers for misconduct. Moreover, this forum for weighing strike misconduct has assumed far greater importance since the Supreme Court's 1960 arbitration trilogy.⁹³ Therefore it is significant to note that arbitrators, perhaps even more than the Labor Board, are fond of the theory that strike violence cannot be judged by ordinary standards of assault and battery. Arbitrator Holly, in a case involving the General Electric Company,⁹⁴ listed the criteria he would use in weighing strike misconduct:

⁹⁰ 145 N.L.R.B. 565 (1963).

⁹¹ *Id.* at 569.

⁹² *Id.* at 565; *International Union of Operating Eng'rs (Long Constr. Co.)*, 145 N.L.R.B. 554, 556 (1963).

⁹³ *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960).

⁹⁴ *General Elec. Co.*, 38 Lab. Arb. 1182 (Holly, 1961); *accord*, *West Penn Power Co.*, 42 Lab. Arb. 169 (Duff, 1963); *Yale & Towne Mfg. Co.*, 39 Lab. Arb. 1273 (Gill, 1962); *American Enka Corp.*, 39 Lab. Arb. 441 (Updegraff, 1962); *Southwest Steel Prods.*, 31 Lab. Arb. 552 (Caraway, 1958).

1. How serious was the offense in terms of injury to persons or damage to property?
2. Was the act provoked or unprovoked?
3. Was the act a premeditated one of aggression, or was it a spur of the moment reaction to an unanticipated situation?
4. Were remedies at law available for the offense, and if so, were they exercised? Was the conduct more properly the concern of civil authorities than the concern of the employer?
5. Was the conduct destructive of good employee-employer relations?
6. Was the conduct destructive of good community relations? Did the conduct increase community fears and did terror result?
7. What will be the effect of the administration of the discipline? Or, to put it another way, what purposes are to be accomplished by discipline? Will it restore good relations? Will it create a respect for law and order? Or, is the discipline being administered in a spirit of vindictiveness [*sic*] or for the purpose of establishing a "show case"?
8. Was the disciplinary action administered without discrimination?
9. Was the conduct and its results such that it would be unreasonable to expect that the employee could be re-absorbed into the work force?⁹⁵

Applying these criteria, the arbitrator, although suspending and revoking their seniority rights, reinstated the following employees: a striker who struck another in the jaw (since little injury was inflicted), a striker who broke another's windshield (since "the striker's action was spontaneous"), a striker involved in an attack on a fellow worker's car (since "the damage that he inflicted was meager"), and a striker who opened a car door and kicked the driver (though discharge would have been proper if it were "not for the highly inflamed atmosphere surrounding the incident").

General Electric was held responsible for part of the violence: Labor history amply demonstrates that token picketing is practiced if the employer closes the plant during a strike, and that picket line incidents almost inevitably occur when the plant is kept open. It must be presumed that Company offi-

⁹⁵ General Elec. Co., *supra* note 94, at 1185-86.

cials were aware of this possibility. Although the Company had a legal right to keep the plant open, its decision to do so gives it some share of the responsibility for creating an environment conducive to violence.⁹⁶

These sentiments are in sharp contrast to those of a three judge federal court in a labor case:

The fact that a large group of individuals may have a grievance, just or unjust, against an owner of property will not warrant a resort to violence to remedy that grievance, nor will the hazard, inconvenience, and expense involved in suppressing the violence justify the state in refusing to enforce the law or in depriving the owner of his property or his right to enjoy it.⁹⁷

Conclusion

Law and order should be enforced by the state. But because unions possess the political power to influence elections, and the power to veto arbitrators under a contract or other agreement, they have successfully prevented timely action in cases of strike violence.⁹⁸ We believe that labor relations without law and order are little more than labor anarchy. We propose to restore the injunctive power to federal courts, thus permitting them to remedy violence in labor relations. A federal judge, appointed for life and adequately paid, is better equipped than any other person to view picket line misconduct dispassionately.

Any attempt to restore federal injunctive power over picket line violence must overcome one of the shibboleths that is part of the folklore of American labor law—"government by injunction." Frank-

⁹⁶ *Id.* at 1186.

General Electric has refused to accept as binding the decision of Arbitrator Gomberg in *General Electric Co.*, 45 Lab. Arb. 490 (1965). See the press release of General Electric at 60 LRR 203-04. The most objectionable feature of the Arbitrator's decision was that strike violence has to result in injury to persons or property before discipline could be issued.

⁹⁷ *Strutwear Knitting Co. v. Olson*, 13 F. Supp. 284, 390 (D. Minn. 1936).

Judge Paul Hays of the United States Court of Appeals for the Second Circuit, formerly a labor arbitrator, has described the political nature of arbitration in these terms:

In literally thousands of cases every year decisions are made by arbitrators who are wholly unfitted for their jobs, who do not have the requisite knowledge, training, skill, intelligence and character. In fact, a proportion of arbitration awards, no one knows how large a proportion, is decided not on the basis of the evidence or of the contract or other proper considerations, but in a way calculated to encourage the arbitrator's being hired for other arbitration cases.

Hays, *The Future of Labor Arbitration*, 74 YALE L.J. 1019, 1035 (1965).

⁹⁸ There are, of course, many state police officers and judges who do not permit strike violence, regardless of the political influence of those involved. See Aaron, *Labor Injunctions in the State Courts—Part I: A Survey*, 50 VA. L. REV. 951, 977-80 (1964).

furter and Greene inveighed mightily against "government by injunction."⁹⁹ The phrase capsuled many years of abuse into a handy tag. It epitomized the loose injunctive procedures of the federal courts, which enjoined conduct they found socially undesirable—especially secondary boycotts.

What "government by injunction" really means is that judges should not establish labor policy by enjoining conduct *they* find indefensible. But since 1935, the legislature and not the judge has spoken, and it has spoken with sufficient precision that the courts are no longer left free to establish labor policy.

Labor injunctions are not foreign to federal judges. Since 1947 federal district courts throughout the country have been hearing injunction suits started by the NLRB.¹⁰⁰ These injunction suits cover conduct *The Labor Injunction* said must be forever immunized from judicial taint. Moreover, NLRB cease and desist orders are not, and have never been, self-enforcing. The Board must get its orders enforced against recalcitrant respondents in the courts of appeals.¹⁰¹ Since these cases now number in the hundreds, it is fatuous to say that federal appellate judges, too, are ignorant of the facts of labor life.

A federal judge is perfectly capable of hearing cases involving strike violence. That he may know little of the exaggerated mystique of labor relations is no answer. If federal judges can change the social and political fabric of the nation, as they have done in the areas of racial segregation¹⁰² and state legislative apportionment,¹⁰³ they are surely capable of limiting strike violence under a clear mandate from Congress.

Unions certainly do not object to government by an injunction when they are the successful plaintiff. A "cease and desist order" entered by the NLRB against an employer, when enforced by a court of appeals, is essentially an injunction. Upon enactment of the original Wagner Act, unions promptly began to file unfair labor practice charges seeking cease and desist orders, many of which were enforced in court. Since *Lincoln Mills*,¹⁰⁴ unions have sought (and obtained)

⁹⁹ FRANKFURTER & GREENE, *THE LABOR INJUNCTION* 1 (1930).

¹⁰⁰ In the fiscal year ending June 30, 1964, the Board filed 252 10(I) petitions. 29 NLRB ANN. REP. 135 (1965). In the preceding year, it filed 215. 28 NLRB ANN. REP. 147 (1964). See Note, *Temporary Injunctive Relief Under Section 10(I) of the Taft-Hartley Act*, 111 U. PA. L. REV. 460 (1963). Section 10(I) makes it mandatory for the General Counsel to seek an injunction when unfair labor practices are charged involving strikes or picketing either in a secondary boycott, jurisdictional dispute or organizational context.

¹⁰¹ 49 Stat. 454 (1935), as amended, 29 U.S.C. § 160(e) (1964).

¹⁰² *Brown v. Board of Educ.*, 347 U.S. 483 (1954), 349 U.S. 294, 301 (1955); see *Cooper v. Aaron*, 358 U.S. 1, 7 (1958).

¹⁰³ *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Baker v. Carr*, 369 U.S. 186 (1962); see *The Supreme Court, 1963 Term*, 78 HARV. L. REV. 143, 244-53 (1964).

¹⁰⁴ *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

injunctions against employers, compelling them to arbitrate. There is nothing evil or antisocial about this conduct. Unions are entitled to injunctive redress if a violation of law or of an agreement has occurred. The point is simply that the same redress should be available to employers. To achieve this, we propose the following amendments to the Norris-La Guardia Act:

Section 6. Section 6 of the Norris-La Guardia Act¹⁰⁵ abolishes ordinary tests of agency, and sets up an evidentiary rule that is extremely difficult to meet. Its reach was construed in *United Bhd. of Carpenters v. United States*:¹⁰⁶

We hold that its [Section 6's] purpose and effect was to relieve organizations, whether of labor or capital, and members of those organizations from liability for damages or imputation of guilt for lawless acts done in labor disputes by some individual officers or members of the organization, without clear proof that the organization or member charged with responsibility for the offense actually participated, gave prior authorization, or ratified such acts after actual knowledge of their perpetration.

Mr. Justice Frankfurter's dissenting opinion well states the result of this holding: "But the conditions formulated by this Court, which must now be met before a union may be held to liability, are practically unrealizable, whether in the case of a big or small union, a local or an international. Escape from responsibility can be easily contrived."¹⁰⁷

The Norris-LaGuardia test for agency was specifically rejected in two sections of Taft-Hartley: section 2(13) and section 301(e),¹⁰⁸ in almost identical fashion, return to the common-law tests of agency. This follows the intent of Congress that: "Hence, under the conference agreement, as under the House bill, both employers and labor organizations will be responsible for the acts of their agents in accordance with the ordinary common law rules of agency (and only ordinary evidence will be required to establish the agent's authority)."¹⁰⁹ We propose to apply Taft-Hartley agency standards (section 2(13)) to Norris-La Guardia injunctions by amending section 6 to read: "In determining whether any person is acting as an 'agent' of another person so as to

¹⁰⁵ Norris-La Guardia Act § 6, 47 Stat. 71 (1932), 29 U.S.C. § 106 (1964).

¹⁰⁶ 330 U.S. 395, 403 (1947).

¹⁰⁷ *Id.* at 415; see *Heintz Mfg. Co. v. Local 515, UAW*, 20 F. Supp. 116 (E.D. Pa. 1936).

¹⁰⁸ § 2(13), 61 Stat. 139 (1947), 29 U.S.C. § 152(13) (1964); § 301(e), 61 Stat. 157 (1947), 29 U.S.C. § 185(e) (1964).

¹⁰⁹ H.R. No. 510, 80th Cong., 1st Sess. 36 (1947), in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 540 (1948).

make such other person responsible for his acts, the question of whether the specific acts were actually authorized or subsequently ratified shall not be controlling." There is no good reason why unions should not be as liable as any other respondents for the acts of their agents.

Section 7. Unions should be entitled to no less, but no more, than any other defendant. We have shown previously that it is almost impossible for an employer to meet the standards of section 7 of the Norris-La Guardia Act, and we therefore propose to amend this section so that it conforms more closely to Rule 65 of the Federal Rules of Civil Procedure. That part of subsection (e) of Rule 65 which makes the rule inapplicable to labor disputes would have to be repealed.

Some further changes would be needed. In the absence of a special statute, federal courts have only diversity jurisdiction, and absent diversity, union defendants who clearly participated in strike violence have been dismissed as parties defendant.¹¹⁰ It is obviously unfair to permit suits against diversity defendants who engage in violence, yet immunize nondiversity defendants who engage in the same conduct. In addition, restraint and coercion should be defined so that the federal courts will not be bound by definitions supplied by the NLRB. The Board's limited idea of restraint and coercion, subject to the prevailing political whims, requires expansion. Recommended subsection (c) is obviously necessary to prevent any possible holding that a party seeking relief must first go to the NLRB or to an arbitrator. The proposed section 7 would read as follows:

The district courts of the United States shall, without respect to the amount in controversy, or without regard to the citizenship of the parties, have jurisdiction to hear and, where appropriate, to grant equitable relief in suits between an employer in an industry affecting commerce as defined in the National Labor Relations Act and a labor organization, where it is alleged that either party is engaged in, or has encouraged or induced acts of restraint or coercion growing out of, or during the course of any strike, work stoppage, withholding of services, or lockout, where such conduct is not otherwise enjoined under Section 10(l) of the National Labor Relations Act.

(a) As used in this Section, restraint or coercion shall mean, but shall not be limited to, mass picketing, actual or threatened physical violence, direct or indirect prevention of ingress or egress, coercion and intimidation, and destruction of property, without regard to whether such acts or threats are per-

¹¹⁰ *J. B. Michael & Co. v. Iron Workers Local 782*, 173 F. Supp. 319, 321 (W.D. Ky. 1959).

formed at the location of the plant, plants, or other facilities undergoing such strike, work stoppage, withholding of services, or lockout.

(b) In any suit brought under this Section, the district courts of the United States shall be governed by the rules of civil procedure then applicable to injunctions and equitable relief.

(c) No party seeking relief under this section shall, as a condition to such relief, be required to pursue any other available legal, equitable, administrative or contractual remedy.

Section 8. Section 8 of Norris-La Guardia makes injunctive relief against violence unavailable if the party seeking relief has "failed to comply with any obligation imposed by law," or has failed to settle reasonably the dispute with available governmental machinery for mediation, *or* voluntary arbitration *or* negotiation.¹¹¹ It bears repeating that this section was enacted in 1932, three years before the Wagner Act required employers to bargain with unions that represent a majority of their employees.¹¹² The reach of section 8 is shown by *Cinderella Theatre Co. v. Sign Writers' Local 591*.¹¹³ In that case, unions asked a theatre to fire a nonunion sign writer. When the theatre refused, stench bombs were thrown into the theatre and "un-fair" signs appeared outside the box office. The theatre satisfied the court that public officers were unable to protect it adequately against stench bombs and mutilation of its displays; but no injunction issued because the theatre had not made every effort to mediate, conciliate or arbitrate the dispute.

There are two good and sufficient reasons why the theatre should not be required to "mediate" this dispute. The union might not have represented any employees. A settlement reached by an outside union and the employer would violate rights guaranteed to the employees by the NLRA.¹¹⁴ In addition, requiring the theatre to negotiate under threats of violence encourages resort to these tactics.

We have no quarrel with the proposition that the employer—or any plaintiff—must comply with all legal bargaining obligations. But we do not believe that anyone must be required to mediate, much less arbitrate, until law and order is restored. Mediation or arbitration

¹¹¹ Norris-La Guardia Act § 8, 47 Stat. 72 (1932), 29 U.S.C. § 108 (1964).

¹¹² § 8(5), 49 Stat. 453 (1935), 29 U.S.C. § 158(a) (5) (1964).

¹¹³ 6 F. Supp. 164 (E.D. Mich. 1934). See also *Oswald v. Leader*, 20 F. Supp. 876 (E.D. Pa. 1937) (no irreparable injury where union physically seized plant; plaintiff failed to "settle" the seizure by negotiations).

¹¹⁴ § 7, 49 Stat. 452 (1935), as amended, 29 U.S.C. § 157 (1964).

under threat of continued violence is hardly designed to produce a truly voluntary solution of any kind.

The National Labor Relations Board, which polices the duty to bargain, does not require one to bargain under mob rule. Kohler was justified in breaking off negotiations on two separate occasions when violence at the plant and at the homes of nonstrikers reached "mob proportions."¹¹⁵ But it is clear that satisfaction of the bargaining obligation under the National Labor Relations Act does not satisfy section 8 of Norris-La Guardia. As the Fifth Circuit told an employer who argued he need only bargain with a majority representative, "this attitude, correct enough under the National Labor Relations Act . . . does not satisfy the affirmative requirements of . . . Norris-La Guardia. . . ." ¹¹⁶

Indeed, section 8 is perhaps the most obsolete section of Norris-La Guardia. It has been read to bar injunctions where two unions employed violence during a campaign for recognition. Obviously, recognition of either union would subject the employer to Board action for violation of the Act,¹¹⁷ but recourse to the National Labor Relations Board to settle the issue *still* does not satisfy the requirements of section 8 that the plaintiff mediate, conciliate or arbitrate.¹¹⁸ That such strikes are now unfair labor practices¹¹⁹ is no answer; rather, it shows how remote the framework of Norris-La Guardia is from the present time.

In 1944 the Supreme Court ruled in *Brotherhood of Railroad Trainmen v. Toledo P. & W.R.R.*¹²⁰ that the requirements of section 8 are cumulative; the plaintiff must comply with his obligations under law *and* mediate *and* engage in voluntary arbitration, even if strike violence is involved. The Court was not at all troubled by withholding the one effective remedy against strike violence for, as it observed, "other means of protection remain. Suits for recovery of damages still may be brought in the federal courts, when federal jurisdiction is shown to exist."¹²¹ The reach of the *Toledo* holding is vividly shown by *General Elec. Co. v. Gojack*.¹²² In that strike the union barred

¹¹⁵ Kohler Co., 128 N.L.R.B. 1062, 1176 (1960), *modified*, 300 F.2d 699 (D.C. Cir.), *cert. denied*, 370 U.S. 911 (1962).

¹¹⁶ Carter v. Herrin Motor Freight Lines, Inc., 131 F.2d 557, 561 (5th Cir. 1942).

¹¹⁷ Midwest Piping & Supply Co., 63 N.L.R.B. 1060 (1945).

¹¹⁸ See Cupples Co. v. AFL, 20 F. Supp. 894, 899-900 (E.D. Mo. 1937).

¹¹⁹ 61 Stat. 142 (1947), as amended, 29 U.S.C. § 158(b) (4) (D) (1964).

¹²⁰ 321 U.S. 50 (1944).

¹²¹ *Id.* at 63.

¹²² 68 F. Supp. 686 (N.D. Ind. 1946). See also Cater Constr. Co. v. Nischwitz, 111 F.2d 971 (7th Cir. 1940); Newton v. Laclede Steel Co., 80 F.2d 636 (7th Cir. 1935); United Elec. Coal Cos. v. Rice, 80 F.2d 1 (7th Cir. 1935), *cert. denied*, 297 U.S. 714 (1936).

entrance to the plant by mass picketing. However, it did consent to permit certain persons to enter, and these employees were handed union passes in order to go to work. A protest by other employees to the chief of police that the right of ingress and egress did not depend on a union pass brought this answer: "I can't do you any good; I don't have enough manpower."¹²³ His officers were present during mass picketing, but their presence was futile. "The only inference that can be drawn from the evidence is that a person who crossed the picket line on the 7th or 12th of February would have had to come in bodily contact with the pickets although a police officer would have been at his side at the time."¹²⁴ The court concluded that public officers were derelict in their duty of furnishing adequate protection for those who wished to work. The requirements of section 7 were overwhelmingly met. But the company had not, in the court's view, gone as far as it should have in negotiating with the union responsible for this conduct. The injunction was denied.

Today it is the NLRB, and not a district court, which weighs the duty to bargain and its fulfillment. The Wagner Act of 1935 required the employer to bargain; the Taft-Hartley amendments of 1947 further defined that duty¹²⁵ and established the Federal Mediation and Conciliation Service.¹²⁶ There were no comparable obligations or facilities in 1932 when Norris-La Guardia was passed. Repeal of section 8 is called for; the principles underlying the broad requirements of the section have since been accomplished by later legislation.

Section 9. The requirements of section 9 of adequate and specific findings of fact are essentially duplicated by Rule 65. This section should therefore be repealed.

¹²³ 68 F. Supp. at 687.

¹²⁴ *Ibid.*

¹²⁵ 61 Stat. 142 (1947), as amended, 29 U.S.C. § 158(d) (1964).

¹²⁶ 61 Stat. 152 (1947), as amended, 29 U.S.C. §§ 171-85 (1964).