Labor Law

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Labor Law

Cases and Materials

Ninth Edition

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For Robert and Dorothea Harper, in loving appreciation

M.C.H.

For Chuna David Estreicher (December 4, 1917–January 19, 2003)

וְתַלְמוּד תּוֹרָה כְּנֶגֶד כֻּלָּם.

("And the study of Torah is the foundation of all.")

S.E.

For Jack and Joyce Griffith

K.L.G.

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PREFACE

This ninth edition of our basic text takes account of the substantial recent developments in labor law and new issues, such as those defining the employment relationship, that have become salient in labor and employment policy debates since the publication of the eighth edition. This edition also replaces some older cases, such as those dealing with midterm bargaining and defining an appropriate bargaining unit, with recent cases highlighting current debates. The organization remains the same as previous editions, however. No commonly used sections have been cut.

Michael C. Harper
Samuel Estreicher
Kati L. Griffith

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CHAPTER 1

THE HISTORICAL AND INSTITUTIONAL FRAMEWORK

This book is about the legal framework governing the organization of workers and the process of collective bargaining in private industries in the United States. Representing an important regulatory intervention into the operation of private markets, labor law has been (and continues to be) contested terrain. Its early history was marked by pitched battles between organizations of workers seeking to improve their compensation and other conditions of employment and employers seeking to maintain control over the costs and processes of production. The legal system evolved from an initial hostile legal reception of labor organizations to growing recognition of the legitimacy of worker organization and the law's role in facilitating the development of labor unions and collective bargaining.

Because our labor relations system, as well as its underlying legal framework, is a product of this history, the first chapter explores the historical underpinnings of the basic labor law governing private companies, the National Labor Relations Act of 1935 and the Railway Labor Act of 1926. It reflects the ways in which labor organizations evolved, the methods they used to attempt to further their goals, and the response they received in dealings with employers and in the courts and legislatures of this country. Particular features of the system—for example, a federal law restricting federal courts from issuing injunctions in labor disputes, and the relative unimportance of compulsory interest arbitration of the content of labor agreements and of legislated minimum terms—are understandable principally through an appreciation of American labor history.

A. THE COMMON LAW

1. The Evolution of Labor Organizations

Although guilds of craftsmen can be traced back to a much earlier period, trade unions in the United States did not begin to develop until

the end of the eighteenth century. Unions first emerged in larger cities where relatively large numbers of employees were engaged in the same occupations, and distinct classes of employees and employers evolved. Organization initially embraced skilled workers. Such workers had the education necessary for organizing and running a union, and they desired to safeguard their investment in their apprenticeship. The relative scarcity of skilled workers impeded their replacement during strikes and increased the power of their organization.

The early unions were highly unstable. They often were formed to press a particular demand, such as increased wages during a period of rising prices. Organization frequently disappeared along with the occasion that generated it because of a lack of continuing interest on the part of the employees or because of employer or judicial hostility. In addition, during depressions members drifted away because workers, fearing unemployment, sought to protect individual interests rather than those of the group.

The first permanent national unions were formed in the 1850s, beginning with the National Typographical Union in 1852. A national union was originally a federation of local unions representing one craft or occupation in various localities. (The term "international" was used to indicate affiliation with Canadian unions. Today, the terms "national" and "international" are interchangeable.) An important stimulus to the development of national unions came from improvements in transportation and communication, principally the growth of interstate railroads. Formation of such unions was, in part, an effort to deal with problems caused by the flow of goods produced at low wages into markets offering goods produced at higher wages. Such unions were also formed in response to problems raised by the movement of workers to new locations where they sought admission to the local of their trade. Rules for the admission of migratory workers were an important concern of many early national unions. Today, the national union in the mass-production industries is generally the most important unit of organization; in such industries it is usually more realistic to view the local as a subordinate division of the national union rather than to consider the national as a federation of locals. By contrast, in the construction trades, locals play a critically important role in bargaining and in other activities.

The strong demand for labor and the inflation accompanying the Civil War promoted the growth of established unions and the formation of new ones, both nationally and locally. In 1866, another central federation of American labor unions, the National Labor Union, was formed. It was a loose association of national social reform groups.

The Civil War also accelerated developments that were to influence significantly the workplace and union development. War profits laid the basis for increased capital formation and industrialization. New technology further stimulated two great capital-goods industries—iron-steel and

machinery. Industrial establishments increased in size, and larger enterprises were employing a larger proportion of the workers. As cities became more important, a growing number of urban workers became completely dependent on wages. Those forces, and particularly the increased scale of enterprises, ended the personal relationship between employer and employed that was typical of smaller enterprises.

In the 1870s, financial panic and depression took its toll on unions. During that period, labor-management relations were turbulent. Substantial paralysis of traffic and extensive disruption resulted from large-scale railroad strikes in protest against wage cuts. After riots in several cities, federal troops and state militia were called out to restore order. Few railroad workers had been organized, and the strikes appeared to be largely spontaneous. They were unsuccessful, partly because violence alienated the public.

Between the formation and collapse of the National Labor Union, another effort to unite workers for economic and political action led to the formation of the Noble Order of the Knights of Labor, founded in 1869 as a secret society. The depression of 1870 contributed to its growth. The Knights began to abandon their secrecy in 1879, and the organization grew rapidly in the next few years. The Knights differed from most early organizations in several respects. They admitted not only skilled craftsmen but also the unskilled, women, farmers, and in some cases self-employed businessmen. Lawyers, doctors, liquor dealers, and other "non-workingmen" were ineligible. The Knights also emphasized political action and producer cooperatives rather than collective bargaining. In principle, they opposed strikes and advocated legislation and education to achieve their aims. In practice, the Knights achieved their greatest successes when some of their district assemblies, representing railroad workers of a particular craft or occupation, won major strikes against wage cuts and discriminatory discharges.

The Knights of Labor achieved their most dramatic victory in 1885 when various railroads controlled by Jay Gould, a symbol of unrestrained economic power, agreed to end discrimination against striking members of the Order. Thereafter, the organization's prestige and membership soared, and in 1886 reached a peak of 700,000—almost seven times the 1885 membership.

The decline of the Knights was even swifter than their rise. The organization embraced groups and interests that were difficult to reconcile. It suffered from weak and inexperienced leadership. In the second half of 1886, the Knights were also involved in important strikes that ended disastrously for labor and resulted in the loss of many members. The virtual disappearance of the Knights by the 1890s marked a major turning point in the history of American unions. Never again was a major union to advocate primary reliance on social reform and producer cooperation rather than on collective bargaining backed by economic weapons.

The Knights had become involved in jurisdictional controversies with craft unions and had recruited their members. As a defensive measure, those unions called a convention in 1881 and formed the Federation of Organized Trades and Labor Unions, which was reorganized in 1886 as the American Federation of Labor (AFL). At first the group largely appealed to craft unions. Its leaders, including Samuel Gompers, its first president, rejected the more utopian and radical features of earlier movements. The new federation adopted a philosophy of pure "job and wage consciousness" and "business unionism," which accepted capitalism and sought to enlarge "the bargaining power of the wage earner in the sale of his labor." See Selig Perlman, A Theory of the Labor Movement 197-207 (1928). The principles announced by Gompers included (1) autonomy in the internal affairs of each affiliated international union; (2) exclusive jurisdiction for each affiliate; (3) avoidance of a permanent commitment to any political party, and the use of labor's political influence to support its friends and punish its enemies regardless of their party affiliations; and (4) the principle of voluntarism, that is, the improvement of wages and hours principally through trade unions, as distinguished from legislative action. Those principles were attractive to all national unions of any importance, except those representing railroad-operating employees. Many of these unions soon joined the AFL.

The Federation failed to secure the affiliation of at least one of the railroad brotherhoods because of Gompers's insistence on the elimination from national union constitutions of provisions discriminating against African Americans; racial discrimination would persist in the railroad brotherhoods and several AFL affiliates until the onset of civil rights legislation in the 1960s.

Despite the victory for craft unionism reflected in the success of the Federation, the United Mine Workers in 1890 succeeded in organizing the first permanent industrial union, embracing all coal miners in the bituminous and anthracite fields irrespective of craft or skill. Later, the AFL was to recognize the UMW's right to organize certain skilled workers in and around the mining industry despite rival jurisdictional claims of craft unions.

The AFL, and its philosophy of business unionism, was also challenged by radical movements, including the Industrial Workers of the World (IWW), formed in 1905. The IWW developed a militant syndicalism encompassing strikes and other forms of direct action designed to eliminate the wage system and to replace existing institutions by organization of workers along industrial lines. Early in its history, most of its strength was in the West, especially among lumberjacks and migratory workers. It did, however, support several large, spontaneous, and successful strikes in the East. Nevertheless, its radical program appeared to divert it from building a permanent organization. It opposed American participation in World War

I and military conscription. Those positions, along with violence by IWW members, violence against the IWW, federal prosecution of its leaders for hampering the government's war efforts, and state "criminal syndicalism" statutes, contributed to its virtual disappearance in the postwar period. Socialists, although a minority group, from 1890 to 1918, also challenged the AFL's established leadership and played a significant role in keeping the issue of industrial unionism alive.

2. Judicial Response to Labor Disputes

Labor's difficulties forming stable organizations in the nineteenth century may have been principally the result of larger economic and social factors, such as the abundant supply of land, the continuing waves of immigration to this country, and the relative absence of a unifying working-class consciousness in a workforce that was ethnically and racially heterogeneous. However, the manner in which the judiciary responded to the concerted efforts of working people to improve their wages also played an important role.

a. Criminal Conspiracy

The judiciary's initial response was to treat combinations of craftsmen (virtually all were men at the time) as a criminal conspiracy. The early cases involved journeymen's associations.

Philadelphia Cordwainers (Commonwealth v. Pullis)

Philadelphia Mayor's Court (1806), in 3 John R. Commons & Eugene A. Gilmore, A Documentary History of American Industrial Society 59-248 (1910)

[The indictment in this celebrated case charged that the defendants, journeymen and cordwainers of the city of Philadelphia, had conspired as follows: (1) They would work only at specified rates (wages), higher than those that had customarily been paid. (2) They would, "by threats, menaces, and other unlawful means," try to prevent other workmen from working at different rates. (3) They would not work for any person who employed a workman who had broken any of the rules or bylaws of their association and, pursuant to that agreement, had refused to work for the usual rates and prices.

Recorder Levy charged the jury, in part, as follows:]

"It is proper to consider, is such a combination consistent with the principles of our law, and injurious to the public welfare? The usual means by which the prices of work are regulated, are the demand for the article and the excellence of its fabric. Where the work is well done, and the demand

is considerable, the prices will necessarily be high. Where the work is ill done, and the demand is inconsiderable, they will unquestionably be low. If there are many to consume, and few to work, the price of the article will be high: but if there are few to consume, and many to work, the article must be low. . . . These are the means by which prices are regulated in the natural course of things. To make an artificial regulation, is not to regard the excellence of the work or quality of the material, but to fix a positive and arbitrary price, governed by no standard, controlled by no impartial person, but dependent on the will of the few who are interested; this is the unnatural way of raising the price of goods or work. This is independent of the number of customers, or of the quality of the material, or of the number who are to do the work. It is an unnatural, artificial means of raising the price of work beyond its standard, and taking an undue advantage of the public. Is the rule of law bottomed upon such principles, as to permit or protect such conduct? Consider it on the footing of the general commerce of the city. Is there any man who can calculate (if this is tolerated) at what price he may safely contract to deliver articles, for which he may receive orders, if he is to be regulated by the journeymen in an arbitrary jump from one price to another? It renders it impossible for a man, making a contract for a large quantity of such goods, to know whether he shall lose or gain by it. If he makes a large contract for goods today, for delivery at three, six, or nine months hence, can he calculate what the prices will be then, if the journeymen in the intermediate time, are permitted to meet and raise their prices, according to their caprice or pleasure? Can he fix the price of his commodity for a future day? It is impossible that any man can carry on commerce in this way. . . . What then is the operation of this kind of conduct upon the commerce of the city? It exposes it to inconveniences, if not to ruin; therefore, it is against the public welfare. . . ."

". . . One man determines not to work under a certain price and it may be individually the opinion of all: in such a case it would be lawful in each to refuse to do so, for if each stands, alone, either may extract from his determination when he pleases. In the turnout of last fall, if each member of the body had stood alone, fettered by no promises to the rest, many of them might have changed their opinion as to the price of wages and gone to work; but it has been given to you in evidence, that they were bound down by their agreement, and pledged by mutual engagements, to persist in it, however contrary to their own judgment. The continuance in improper conduct may therefore well be attributed to the combination. The good sense of those individuals was prevented by this agreement, from having its free exercise. . . . Is this like the formation of a society for the promotion of the general welfare of the community, such as to advance the interests of religion, or to accomplish acts of charity and benevolence? . . . [O]r the meeting of the city wards to nominate candidates for the legislature or the executive? These are for the benefit of third persons: [the object of] the

society in question [is] to promote the selfish purposes of the members. . . . The journeymen shoemakers have not asked an increased price of work for an individual of their body, but they say that no one shall work unless he receives the wages they have fixed. They could not go farther than saying, no one should work unless they all got the wages demanded by the majority; is this freedom? Is it not restraining instead of promoting the spirit of '76 when men expected to have no law but the constitution, and laws adopted by it or enacted by the legislature in conformity to it? Was it the spirit of '76, that either masters or journeymen, in regulating the prices of their commodities should set up a rule contrary to the law of their country? General and individual liberty was the spirit of '76. . . . It is not a question, whether we shall have . . . besides our state legislature a new legislature consisting of journeymen shoemakers. It is of no consequence, whether the prosecutors are two or three, or whether the defendants are ten thousand, their numbers are not to prevent the execution of our laws . . . though we acknowledge it is the hard hand of labour that promises the wealth of a nation, though we acknowledge the usefulness of such a large body of tradesmen and agree they should have everything to which they are legally entitled; yet we conceive they ought to ask nothing more. They should neither be the slaves nor the governors of the community."

The jury found the defendants guilty, and the court fined them $8.00 each plus costs.

[Counsel for the prosecuting masters had told the jury that the masters wanted only to establish a principle and not to punish the defendants. The modest fine was presumably designed to keep that implied promise and to avoid exacerbation of popular feelings. See Walter Nelles, The First American Labor Case, 41 Yale L.J. 165, 193 (1931).]

Commonwealth v. Hunt

45 Mass. (4 Met.) 111 (1842)

[The opinion in *Commonwealth v. Hunt* marked an important departure in the law's response to labor organization. The case arose from the conviction, after a jury trial, of seven members of the Boston Journeymen Bootmakers Society for criminal conspiracy. The prosecution had been instigated by a journeyman named Jeremiah Horne, who had accepted pay below the Society's rate schedule. After objection by the Society, Horne's master paid him what was due under that schedule. When Horne again broke its rules, the Society expelled him and required that he pay a fine of $7 and sign its rules as a condition of reinstatement. His employer, having failed to persuade Horne to capitulate, fired him at the union's insistence in order to avoid a strike. Horne then filed a complaint with the district attorney.

The essence of the five-count indictment was that the defendants had agreed to maintain what later was to be called a closed shop — that all must be members of the Society to continue to work — had brought about the discharge of Horne, and had formed a combination to exclude him from his trade as a bootmaker.

After the verdict of guilty for criminal conspiracy, exceptions raised the issue of whether the indictment had stated a criminal offense. Those exceptions were sustained by Chief Justice Shaw:]

Shaw, C.J.

The manifest intent of the [Journeyman's] association is, to induce all those engaged in the same occupation to become members of it. Such a purpose is not invalid. It would give them a power which might be exerted for useful and honorable purposes, or for dangerous and pernicious ones. If the latter were the real and actual object, and susceptible of proof, it should have been specially charged. . . .

Nor can we perceive that the objects of this association, whatever they may have been, were to be attained by criminal means. The means which they proposed to employ, as averred in this count, and which, as we are now to presume, were established by the proof, were, that they would not work for a person, who, after due notice, should employ a journeyman not a member of their society. Supposing the object of the association to be laudable and lawful or at least not unlawful, are these means criminal? The case presupposes that these persons are not bound by contract, but free to work for whom they please, or not to work, if they so prefer. In this state of things, we cannot perceive, that it is criminal for men to agree together to exercise their own acknowledged rights, in such a manner as best to subserve their own interests.

NOTES AND QUESTIONS

1. **Means-Ends Distinction**. *Commonwealth v. Hunt* was a milestone in the decline of the criminal conspiracy doctrine. Although Shaw did not squarely repudiate the doctrine, his opinion has been hailed as a major advance for American trade unionism in that it rejected the view that a labor organization is ipso facto a criminal conspiracy. Instead, it directed attention to the justifications for union objectives and the propriety of the means used to achieve those objectives. See Walter Nelles, *Commonwealth v. Hunt*, 32 Colum. L. Rev. 1128 (1932); Leonard W. Levy, The Law of the Commonwealth and Chief Justice Shaw, ch. 11 (1957).

In the 25 years after the decision in *Commonwealth v. Hunt*, no indictment against labor unions for criminal conspiracy appears to have been returned in Massachusetts. In some other states, however, application of the

criminal conspiracy doctrine continued—e.g., State v. Donaldson, 32 N.J.L. 151 (Sup. Ct. 1867) (indictment charging defendants with criminal conspiracy to quit working for their employer unless he fired two named employees)—until the labor injunction emerged as an effective weapon against harms attributed to labor unions.

2. **Who Were the Complainants?** In many criminal conspiracy cases "the complainants were not employers seeking to discipline unions but rather fellow employees whom union members had attempted to exclude from the labor market because of their willingness to work at too low a wage." Herbert Hovenkamp, Enterprise and American Law 1836-1937, at 227 (1991). To what extent did the conspiracy doctrine try to protect the nonunion worker? To what extent should the law protect this interest? The competing rights of strikers and replacements continue to be a source of controversy. See infra pages 32-39.

b. The Labor Injunction

The use of collective action to achieve union objectives can inflict harm—at least in the short run—on employers, nonunion employees, rival unions, or the general public. After the early doctrine of criminal conspiracy lapsed, civil actions were brought against unions for damages and, more typically, for injunctive relief restraining a strike, picketing, or a boycott.

Vegelahn v. Guntner

167 Mass. 92, 44 N.E. 1077 (1896)

[Workers established a patrol in front of the plaintiff's factory. After a preliminary hearing, an injunction was issued pendente lite, restraining the respondents and their agents and servants] from "interfering with the plaintiff's business by patrolling the sidewalk in front or in the vicinity of the premises occupied by him, for the purpose of preventing any person in his employment, or desirous of entering the same, from entering it, or continuing in it . . . or by any scheme or conspiracy for the purpose of annoying, hindering, interfering with, or preventing any person in the employment of the plaintiff, or desirous of entering the same, from entering it, or from continuing therein. . . ."

[After a hearing on the merits, the trial court judge, Justice Holmes, issued a more permissive injunctive order and reported the case for the full court as follows:] "The facts admitted or proved are that, following upon a strike of the plaintiff's workmen, the defendants have conspired to prevent the plaintiff from getting workmen, and thereby to prevent him from carrying on his business unless and until he will adopt a schedule of prices which has been exhibited to him, and for the purpose of compelling him to

accede to that schedule but for no other purpose. If he adopts that schedule, he will not be interfered with further. The means for preventing the plaintiff from getting workmen are, (1) in the first place, persuasion and social pressure. And these means are sufficient to affect the plaintiff disadvantageously, although it does not appear, if that be material, that they are sufficient to crush him. I ruled that the employment of these means for the said purpose was lawful, and for that reason refused an injunction against the employment of them. . . ."

"(2) I find also, that as a further means for accomplishing the desired end, threats of personal injury or unlawful harm were conveyed to persons seeking employment or employed, although no actual violence was used beyond a technical battery, and although the threats were a good deal disguised, and express words were avoided. It appeared to me that there was danger of similar acts in the future. I ruled that conduct of this kind should be enjoined."

"The defendants established a patrol of two men in front of the plaintiff's factory, as one of the instrumentalities of their plan. The patrol was changed every hour, and continued from half-past six in the morning until half-past five in the afternoon, on one of the busy streets of Boston. The number of men was greater at times, and at times showed some little inclination to stop the plaintiff's door, which was not serious, but seemed to me proper to be enjoined. The patrol proper at times went further than simple advice, not obtruded beyond the point where the other person was willing to listen, and conduct of that sort is covered by (2) above, but its main purpose was in aid of the plan held lawful in (1) above. I was satisfied that there was probability of the patrol being continued if not enjoined. I ruled that the patrol, so far as it confined itself to persuasion and giving notice of the strike, was not unlawful, and limited the injunction accordingly."

"There was some evidence of persuasion to break existing contracts. I ruled that this was unlawful, and should be enjoined. . . ."

[Holmes's order was as follows:] . . . "[I]t is ordered, adjudged, and decreed that the defendants, and each and every of them, their agents and servants, be restrained and enjoined from interfering with the plaintiff's business by obstructing or physically interfering with any persons in entering or leaving the plaintiff's premises numbered 141, 143, 145, 147 North Street in said Boston, or by intimidating, by threats, express or implied, of violence or physical harm to body or property, any person or persons who now are or hereafter may be in the employment of the plaintiff, or desirous of entering the same, from entering or continuing in it, or by in any way hindering, interfering with, or preventing any person or persons who now are in the employment of the plaintiff from continuing therein, so long as they may be found so to do by lawful contract. . . ."

[Justice Allen reviewed Holmes's trial court opinion and wrote on behalf of a majority of the court.]

ALLEN, J.

. . . The patrol was maintained as one of the means of carrying out the defendants' plan, and it was used in combination with social pressure, threats of personal injury or unlawful harm, and persuasion to break existing contracts. It was thus one means of intimidation, indirectly to the plaintiff, and directly to persons actually employed, or seeking to be employed, by the plaintiff, and of rendering such employment unpleasant or intolerable to such persons. Such an act is an unlawful interference with the rights both of employer and of employed. An employer has a right to engage all persons who are willing to work for him, at such prices as may be mutually agreed upon; and persons employed or seeking employment have a corresponding right to enter into or remain in the employment of any person or corporation willing to employ them. These rights are secured by the Constitution itself. . . . Patrolling or picketing, under the circumstances stated in the report, has elements of intimidation like those which were found to exist in Sherry v. Perkins, 147 Mass. 212. . . . The patrol was an unlawful interference both with the plaintiff and with the workmen, within the principle of many cases, and, when instituted for the purpose of interfering with his business, it became a private nuisance. . . .

[In the opinion of a majority of the court] the injunction should be in the form originally issued [as set forth in the first paragraph of the court's opinion].

[The dissenting opinion of Chief Justice Field is omitted.]

HOLMES, J. (dissenting).

. . . I agree, whatever may be the law in the case of a single defendant . . . that when a plaintiff proves that several persons have combined and conspired to injure his business, and have done acts producing that effect, he shows temporal damage and a cause of action, unless the facts disclose, or the defendants prove, some ground of excuse or justification. And I take it to be settled, and rightly settled, that doing that damage by combined persuasion is actionable, as well as doing it by falsehood or by force. . . .

Nevertheless, in numberless instances the law warrants the intentional infliction of temporal damage because it regards it as justified. It is on the question of what shall amount to a justification, and more especially on the nature of the considerations which really determine or ought to determine the answer to that question, that judicial reasoning seems to me often to be inadequate. The true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and the general propositions of law which

nobody disputes. Propositions as to public policy rarely are unanimously accepted, and still more rarely, if ever, are capable of unanswerable proof. They require a special training to enable any one even to form an intelligent opinion about them. In the early stages of law, at least, they generally are acted on rather as inarticulate instincts than as definite ideas, for which a rational defense is ready.

To illustrate what I have said in the last paragraph, it has been the law for centuries that a man may set up a business in a country town too small to support more than one, although he expects and intends thereby to ruin some one already there, and succeeds in his intent. In such a case he is not held to act "unlawfully and without justifiable cause." . . . 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. Commonwealth v. Hunt, 4 Met. 111, 134. . . .

I have chosen this illustration partly with reference to what I have to say next. It shows without the need of further authority that the policy of allowing free competition justifies the intentional inflicting of temporal damage, 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. . . . The only debatable ground is the nature of the means by which such damage may be inflicted. We all agree that it cannot be done by force or threats of force. We all agree, I presume, that it may be done by persuasion to leave a rival's shop, and come to the defendant's. It may be done by the refusal or withdrawal of various pecuniary advantages, which, apart from this consequence, are within the defendant's lawful control. It may be done by the withdrawal of, or threat to withdraw, such advantages from third persons who have a right to deal or not to deal with the plaintiff, as a means of inducing them not to deal with him either as customers or servants. Commonwealth v. Hunt, 4 Met. 111, 132, 133. Bowen v. Matheson, 14 Allen, 499. Heywood v. Tillson, 75 Me. 225. [Mogul] Steamship Co. v. McGregor, [1892] App. Cas. 25. I have seen the suggestion made that the conflict between employers and employed is not competition. But I venture to assume that none of my brethren would rely on that suggestion. 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 struggles between persons of the same class competing for the same end. It applies to all conflicts of temporal interests. . . .

One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. 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. . . .

NOTES AND QUESTIONS

1. **Special Characteristics of the "Labor Injunction."** Employers typically preferred the injunction proceeding to the action in damages. Relief could be obtained quite quickly. The decree operated prospectively as an ongoing restraint during the pendency of the dispute. Jury trials were (and are) not available in equity, and judges were often more willing than the community at large to restrict labor protest. Finally, the decrees often were framed in broad, inclusive terms, casting a wide restraining net that could reach all supporters of the labor protest, whether or not they had previously engaged in tortious activity.

Between 1880 and 1930, the labor injunction became the characteristic form of legal intervention in labor strife. Abuses associated with the labor injunction, as cataloged in Felix Frankfurter and Nathan Greene's *The Labor Injunction* (1930), not only undermined the economic strength of unions but also placed in question the neutrality and prestige of the courts. Reflecting the labor movement's disquiet, Frankfurter and Greene criticized the courts for issuing ex parte temporary restraining orders (TROs) on the basis of allegations of union misconduct entered by employers, without giving the unions an opportunity to respond. Even if the injunction was lifted by the trial judge without the further delay of an appeal, the momentum of an organizing drive or strike would often have been dissipated.

Frankfurter and Greene's book identified other abuses, such as the issuance of restraints and contempt citations against union leaders and supporters; the deputization of company guards and other agents to ensure compliance with injunctions; and the ability of employers to bypass juries and select judges with strong class identifications and a pro-business ideology predisposed against unions. The evolution of the labor injunction during the "Gilded Age" is recounted in William E. Forbath, Law and the Shaping of the American Labor Movement, ch. 3 (1991).

2. **Is Labor Picketing Inherently Coercive?** The opinions in *Vegelahn* take differing views of labor picketing. Is such picketing simply a means of communicating the labor group's protest to the community to solicit support, or does it coerce the employer and nonstriking workers beyond any loss of patronage by community members supporting the protest?

Although the *Vegelahn* majority's interdiction of peaceful picketing has few modern defenders, Professor Epstein has argued that it may have been justified as a prophylactic against disguised threats or use of force:

> [T]he broader injunction can be defended by pointing to the weaknesses of the finely tuned injunction that Holmes had adopted. Leaving the pickets in place by the plaintiff's business invites, or at least increases the likelihood of, the threat or use of force, which will go unredressed because the summary remedies available in principle are imperfect in practice.

> Case-by-case determinations are expensive to make, and are subject to very high error rates, especially where disguised threats are a substantial possibility.

Richard A. Epstein, A Common Law for Labor Relations: A Critique of New Deal Labor Legislation, 92 Yale L.J. 1357, 1377 (1983). Does Epstein's position adequately take into account the communicative aspects of picketing? For further discussion of the line between "persuasion" and "intimidation," see Eileen Silverstein, Collective Action, Property Rights and Law Reform, 11 Hofstra Lab. L.J. 97, 104-106 (1993). For consideration of the constitutional status of labor picketing, see infra pages 569-576 and pages 600-617.

3. Judicial Response to Protective Labor Legislation

Lochner v. New York

198 U.S. 45 (1905)

[The Court held unconstitutional a New York statute providing that no employee shall "work in a biscuit, bread or cake bakery or confectionary establishment more than sixty hours in any one week, or more than ten hours in any one day."]

Mr. Justice PECKHAM . . . delivered the opinion of the court:

. . . The question whether [the New York law] is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action. They are in no sense wards of the State. Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other portion of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. . . .

We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free

contract on the part of the individual, either as employer or employee. . . . It might be safely affirmed that almost all occupations more or less affect the health. There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? . . .

[The dissenting opinion of Justice Harlan, with whom Justices White and Day concurred, is omitted.]

Mr. Justice HOLMES dissenting. . . .

. . . It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. . . . [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

. . . I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first instalment of a general regulation of the hours of work. . . .

NOTES AND QUESTIONS

1. **Origins of Labor's "Voluntarism" Strategy.** Decisions like *Lochner* in the federal and state courts had a profound impact on the evolution of the

labor movement's attitude toward securing its objectives through protective labor legislation rather than economic action. Consider the following excerpt from Forbath, Law and the Shaping of the American Labor Movement, supra, at 37-42:

> Judicial review was the most visible and dramatic fashion in which courts curtailed labor's ability to use laws to redress asymmetries of power in the employment relationship. By the turn of the century state and federal courts had invalidated roughly sixty labor laws. During the 1880s and 1890s courts were far more likely than not to strike down the very laws that labor sought most avidly. For workers, judicial review — the invalidation of labor laws under the language of "liberty of contract" and "property rights" — became both evidence and symbol of the intractability of the American state from the perspective of labor reform.
>
> The decision of the New York Court of Appeals in In re Jacobs [98 N.Y. 98 (1885)], the first high court decision to strike down a piece of labor legislation for infringing a workingman's constitutional liberty, is a landmark in the history of "laissez-faire constitutionalism." Invalidating an 1884 statute prohibiting the manufacture of cigars in tenement dwellings, *Jacobs* is an eloquent, if ironic, statement of the Gilded Age courts' vision of "free labor" and workers' dignity and independence. . . .
>
> *Jacobs* also figured as a landmark in Samuel Gompers's political evolution. . . . Gompers and the Cigarmakers considered whether to return to the political-legislative fray [after *Jacobs*] but decided instead that they would henceforth pursue their ends solely through "strikes and agitation." In that fashion, . . . they forced the manufacturers "to abandon the tenement manufacturing system and carry on the industry in factories under decent conditions. Thus we accomplished through economic power what we had failed to achieve through legislation." In retrospect the experience became a nice text on the wisdom of voluntarism.
>
> By the end of the century, Gompers's and the Cigarmakers' experience with reform by legislation in the era of rising judicial supremacy had been repeated roughly sixty times and shared by trade unionists in almost every industrial state.

2. **The *Lochner* Era.** From the 1905 decision in *Lochner* until the New Deal period of the mid-1930s, the Supreme Court invalidated over 200 laws regulating the economy, typically under the implied "substantive" dimension of the Due Process Clause of the Fourteenth Amendment. Some of the notable "highlights" of this period include Adair v. United States, 208 U.S. 161 (1908), and Coppage v. Kansas, 236 U.S. 1 (1915), which invalidated, respectively, federal and state laws forbidding employers from requiring their workers to enter into "yellow-dog" contracts — i.e., agreements not to join a union — as a condition of employment. See also Adkins v. Children's Hospital, 261 U.S. 525 (1923), striking down a law establishing minimum wages for women. Some laws did overcome the constitutional hurdles imposed by the Court; a state law requiring an eight-hour day for miners

was sustained in Holden v. Hardy, 169 U.S. 366 (1898), and a state law prohibiting the employment of women in laundries for more than ten hours a day was upheld in Muller v. Oregon, 208 U.S. 412 (1908). See generally Frank R. Strong, Substantive Due Process of Law: A Dichotomy of Sense and Nonsense (1986). The Court's 1937 decision in West Coast Hotel v. Parrish, 300 U.S. 379, which overturned *Adkins* and validated Washington's minimum wage law for women, stood in stark contrast to the Court's *Lochner* era hostility to protective labor legislation and signaled the era's decline.

3. **The Theoretical Underpinnings of *Lochner*.** The *Lochner* Court took a limited view of legitimate state power. Government could properly act to (1) facilitate private undertakings by, for example, enforcing contracts; (2) require private actors to absorb costs imposed on third parties through the law of torts; (3) regulate health and safety in industries considered hazardous, as in Holden v. Hardy, 106 U.S. 366 (1898) (sustaining state statute limiting underground mining work to 8 hours per day) or (4) protect dependent groups like women, who were considered incapable of protecting themselves, as in *Muller v. Oregon*, supra. It was not permitted, however, to attempt to redistribute wealth from one class in society to another through law.

Lochner's position on redistributive legislation is defended in Bernard Siegan, Economic Liberties and the Constitution (1980), and criticized in Cass R. Sunstein, *Lochner*'s Legacy, 87 Colum. L. Rev. 873 (1987); see also the exchange of views continued in David E. Bernstein, *Lochner's* Legacy, 82 Tex. L. Rev. 1 (2003) (critiquing Sunstein's article); and Cass R. Sunstein, Reply: *Lochnering*, supra, id. at 65.

4. **What's Wrong with *Lochner*?** *Lochner* is one of the most heavily criticized decisions in American constitutional law. Does the flaw lie in the Court's transformation of the proceduralist thrust of the Due Process Clause into a doctrine of "substantive due process"—that is, of substantive limitations on the power of the state? See John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980). But see Samuel Estreicher, Platonic Guardians of Democracy: John Hart Ely's Role for the Supreme Court in the Constitution's Open Texture, 56 N.Y.U. L. Rev. 547 (1981). Or does it lie, rather, in the Court's treatment of liberty of contract as a fundamental right whose infringement requires a compelling justification? Even if liberty of contract is a fundamental right, should not the Court have taken more seriously New York's health and safety concerns? Professor Sunstein also questions *Lochner*'s political theory, arguing that the Court simply assumed that departures from the preexisting wealth distributions required extraordinary justification, whereas status quo entitlements were conclusively presumed to be legitimate. See Sunstein, *Lochner*'s Legacy, supra; Cass R. Sunstein, The Partial Constitution (1993).

Reconsider also Justice Holmes's dissent. Do the courts have the institutional competence to determine whether the benefits of economic

legislation are outweighed by their probable costs, or to engage in an evaluation of the political process to determine whether the "winners" have an unfair advantage over the probable "losers"? For instance, assuming that minimum-wage and maximum-hour laws result in depressed employment levels, how can courts balance these costs against the benefits to employed workers? Furthermore, the effects of legislation are difficult to gauge. See, e.g., David E. Card & Alan B. Krueger, Myth and Measurement: The New Economics of the Minimum Wage (1995) (presenting evidence that while substantial boosts in minimum wages can create significant disincentives to hiring additional workers, modest increases have no effect on employment levels).

B. THE ANTITRUST LAWS

Note: Union Growth and Industrial Strife in the 1890s and the Early Twentieth Century

The physical output of American industry increased 14 times between 1870 and 1929, creating a demand for workers that attracted waves of immigration from Europe. At the outset of World War I, close to 60 percent of the industrial workforce was foreign-born. See David Brody, Workers in Industrial America: Essays on the Twentieth Century Struggle 14-15 (2d ed. 1993). In the prosperous years following the depressed 1890s, the labor movement experienced a major period of growth, climbing from 447,000 members in 1897 to 2 million in 1904. Construction unions grew from 67,000 in 1897 to 391,000 in 1904; transportation unions expanded from 116,000 to 446,000. The bituminous miners struck in 1897 and won the Central Competitive Field Agreement covering virtually the entire industry in Pennsylvania, Ohio, Indiana, and Illinois; the 1902 anthracite strike led to complete organization of the hard-coal fields. See Brody, Workers in Industrial America, supra, at 24.

Many of the famous strikes of this period, such as the Carnegie Steel and Pullman disputes, were accompanied by considerable violence on both sides. Moreover, where unions took hold in an industry, it often was the result of an agreement with an association of employers that sought to control competition. Control was often imperfect, and union efforts to regulate output and shop practices often spurred lower-cost, nonunion competitors, leading to a destabilization of many of these agreements.

In the late 1890s and early twentieth century, union success provoked a counteroffensive by employers, and one by one the trade associations broke with the unions. Some of these associations, like the National Founders' Association, provided strikebreaking and industrial espionage services for its members. Others, like the National Metal Trades Association, helped

maintain for its members "an ample supply of skilled workers, while rigging the market, cheapening their price and increasing their flexibility by destroying workers' collective attempts to share in determining the rules under which they worked." Howell Harris, Employers' Collective Action in the Open Shop Era: The Metal Manufacturers' Association of Philadelphia, c. 1903-1933, at 117, 128, in The Power to Manage? Employers and Industrial Relations in a Comparative-Historical Perspective (Steven Tolliday & Jonathan Zeitlin eds., 1991). The courts also were enlisted in this struggle. In March 1893, in the first case to rely on the recently enacted Sherman Antitrust Act, a federal court in Louisiana issued an injunction against the Workingmen's Amalgamated Council of New Orleans arising out of the general strike of 1892. The court stated: "The evil, as well as the unlawfulness of the act of the defendants, consists in [the fact] that, until certain demands of theirs were complied with, they endeavored to prevent, and did prevent, everybody from moving the commerce of the country." United States v. Workingmen's Amalgamated Council, 54 F. 994, 1000 (C.C.E.D. La. 1893). The Supreme Court in In re Debs, 158 U.S. 564 (1895), held that federal courts had authority under the Commerce Clause to enjoin labor unions that threatened to disrupt interstate commercial transactions. The Court discussed but did not rest its decision on the Sherman Act.

1. The Sherman Antitrust Act of 1890

Note: Loewe v. Lawlor (*The* "Danbury Hatters" *Case*)

The passage of the Sherman Act in 1890 provided employers with a powerful weapon for curbing labor unions. Although Congress was principally concerned with restraints of trade and other acts of monopolization by large business enterprises, the statute's language was sufficiently broad to potentially cover agreements between laborers to exert control over a labor market. In particular, §1 of the Act states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." Within the Act's first two decades the Supreme Court had an opportunity to consider whether this language reached at least some combinations of laborers.

During the 1890s and early 1900s, vigorous national boycott campaigns, organized by the Hatters, Ironmolders, and other national craft unions, were successful in wresting concessions from previously resistant large manufacturers. These successes prompted the creation of the American Anti-Boycott Association (AABA), founded by two nonunion hat manufacturers in Danbury, Connecticut, Dietrich Loewe and Charles Merritt. In 1902, Loewe refused to recognize the Hatters' union, and all but ten of his

men struck in support of the union. Loewe then hired a new workforce and resumed production, leading the AFL to place his firm on its "We Don't Patronize" list. Wherever Loewe's hats were sold, union agents or rank-and-file activists were on the scene, pressuring the local labor groups to put the retailer on their unfair list. In the first *Danbury Hatters* decision, Loewe v. Lawlor, 208 U.S. 274 (1908), the Supreme Court held that the Sherman Act applied to combinations of workers, at least where the union boycotted goods that crossed state lines. Seven years later, the Court sustained a ruling that enabled Loewe to collect treble damages from 248 Connecticut members of the union. Lawlor v. Loewe, 235 U.S. 522 (1915). Walter Merritt, son of the AABA cofounder who was counsel for the plaintiffs, searched state real estate and bank records to determine which of the union's 2,000 Connecticut members had seizable assets. See David Bensman, The Practice of Solidarity: American Hat Finishers in the Nineteenth Century 202-203 (1985).

Danbury Hatters involved a "primary" dispute, between Loewe and his striking workers, and a "secondary boycott," in which the union sought a boycott of third parties not directly involved in the dispute but who were wholesalers and retailers of Loewe's hats. Is there a justification for attempting to limit the scope of industrial conflict by condemning secondary boycotts? Were the retailers truly neutrals in a dispute not of their own making? Did they benefit in some sense from the low-cost hats Loewe could produce with nonunion labor? Was the impact of the boycott on the retailers the same as if the Hatters' strike against Loewe had been wholly successful, or was the union seeking a broader boycott of the retailers' entire operations as a means of placing pressure on Loewe?

Note also that the *Danbury Hatters* case involved a secondary *consumer* boycott, where the union sought to encourage the public not to patronize hats produced by Loewe, rather than a secondary *producer* boycott, where the union would be calling on employees of Loewe's distributors or retailers to refuse to handle Loewe's hats. Should this distinction make a difference in defining the proper limits of a labor dispute? Is such a distinction readily drawn under the Sherman Act?

Labor's supporters expressed outrage at the Supreme Court's application of the Sherman Act to labor disputes, and some commentators charged the Court with a usurpation of the legislative role. See, e.g., Edward Berman, Labor and the Sherman Act 11-51 (1930). Others, however, defended *Danbury Hatters* based on legislative history indicating that Congress had declined to incorporate amendments expressly exempting agreements between or combinations of laborers. See Hovenkamp, Enterprise and American Law, supra, at 229; 21 Cong. Rec. 2611-2612, 2728-2731 (1890); Alpheus T. Mason, Organized Labor and the Law, ch. VII (1925).

2. The Clayton Antitrust Act of 1914

Note: The Origins of the Labor Exemption

Danbury Hatters alarmed the labor movement not so much because of its impact on the consumer boycott tactic as for its implications for a very important source of the economic leverage of AFL-affiliated unions — the ability through strike or boycott action to secure industry-wide "closed shop" agreements. Through such agreements, the employer was bound to hire only union members, enabling the unions to seek to control the labor practices of new entrants into the industry. See Lloyd Ulman, The Rise of the National Labor Union 526-531 (2d ed. 1966). The efficacy of these agreements depended on an ongoing union campaign to ensure that all firms in the industry agreed to abide by union pay and work rules. In 1907, a state court had ordered a national trade union, the Amalgamated Window Glass Workers of America, dissolved on common-law antitrust grounds because the union's by-laws established a closed shop, limited the number of workers who could be employed by a firm, and regulated methods of production. See Kealey v. Faulkner, 18 Ohio Dec. 498 (1907). In the same year, the *Hitchman Coal & Coke Co. v. Mitchell* litigation was commenced to enjoin an alleged conspiracy between the United Mine Workers (UMW) and coal operators in western Pennsylvania, Ohio, Indiana, and Illinois, the so-called Competitive Coal Fields, to impose a closed shop on a nonunion West Virginia company. The litigation resulted in a 1913 final decree granting "a perpetual injunction," which was reversed pending review by the U.S. Supreme Court. In 1917, the Supreme Court sustained the injunction. 245 U.S. 229, 234-35 (1917). As AFL President Gompers explained in Congress, closed-shop agreements and pressure tactics to obtain such pacts were "a matter of self-defense"; the union's task was to compel the Loewes in an industry to conform to union pay and work rules or risk undercutting the competitive position of employers who had already agreed to those terms. See Daniel R. Ernst, The Labor Exemption, 1908-1914, 74 Iowa L. Rev. 1151, 1155-1156 (1989) and citations therein.

Despite some reverses in the courts, labor was enjoying considerable support among Progressive politicians and improved access to the political process. In order to determine the underlying causes of industrial strife, Congress in 1912 established a United States Commission on Industrial Relations, a tripartite body with broad investigatory power. 37 Stat. 415 (1912). A staff report signed in 1915 by the Commission's chair and labor representatives found that labor was not receiving a fair share of the nation's wealth. The report recommended new laws to protect the rights of organization and collective bargaining. Near the end of his term, President William Howard Taft, who as a lower federal judge had been a strong voice

in favor of the use of injunctions to restrain labor boycotts, signed the law creating the present Department of Labor. 37 Stat. 736 (1913).

In 1914, President Woodrow Wilson issued a call for changes in the antitrust laws and for creation of a federal trade commission. Labor saw this as an opportunity to revive its campaign for a labor exemption from the antitrust laws. Wilson rejected the demand for a wholesale exclusion and the Clayton bill that passed the House did not incorporate the AFL's broad exclusionary language. Labor's supporters in the Senate were convinced that the bill legalized the secondary boycott and the declaration in §6 of the Act that "[t]he labor of a human being is not a commodity or article of commerce" amounted to, in Samuel Gompers's terms, "Labor's Magna Carta." It did not turn out that way, at least not right away. See Daniel R. Ernst, The Labor Exemption, 1908-1914, 74 Iowa L. Rev. 1151 (1989).

Duplex Printing Press Co. v. Deering

254 U.S. 443 (1921)

Mr. Justice PITNEY delivered the opinion of the Court.

. . . Complainant conducts its business [at a factory in Battle Creek, Michigan,] on the "open shop" policy, without discrimination against either union or non-union men. The individual defendants and the local organizations of which they are the representatives are affiliated with the International Association of Machinists, an unincorporated association having a membership of more than 60,000; and are united in a combination, to which the International Association also is a party, having the object of compelling complainant to unionize its factory and enforce the "closed shop," the eight-hour day, and the union scale of wages, by means of interfering with and restraining its interstate trade in the products of the factory. . . .

The acts complained of made up the details of an elaborate programme adopted and carried out by defendants and their organizations in and about the city of New York as part of a country-wide programme adopted by the International Association, for the purpose of enforcing a boycott of complainant's product. The acts embraced the following, with others: warning customers that it would be better for them not to purchase, or, having purchased not to install, presses made by complainant, and threatening them with loss should they do so; threatening customers with sympathetic strikes in other trades; notifying a trucking company usually employed by customers to haul the presses not to do so, and threatening it with trouble if it should; inciting employees of the trucking company, and other men employed by customers of complainant, to strike against their respective employers in order to interfere with the hauling and installation of presses, and thus bring pressure to bear upon the customers; notifying repair shops not to do repair work on Duplex presses; coercing union men,

by threatening them with loss of union cards and with being blacklisted as "scabs" if they assisted in installing the presses; threatening an exposition company with a strike if it permitted complainant's presses to be exhibited; and resorting to a variety of other modes of preventing the sale of presses of complainant's manufacture in or about New York City, and delivery of them in interstate commerce, such as injuring and threatening to injure complainant's customers and prospective customers, and persons concerned in hauling, handling, or installing the presses. In some cases the threats were undisguised; in other cases polite in form but none the less sinister in purpose and effect. . . .

The substance of the matters here complained of is an interference with complainant's interstate trade, intended to have coercive effect upon complainant, and produced by what is commonly known as a "secondary boycott"; that is, a combination not merely to refrain from dealing with complainant, or to advise or by peaceful means persuade complainant's customers to refrain ("primary boycott"), but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them to withhold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with it. . . .

[Section 20 of the Clayton Antitrust Act] assumes the normal objects of a labor organization to be legitimate, and declares that nothing in the anti-trust laws shall be construed to forbid the existence and operation of such organizations or to forbid their members from *lawfully* carrying out their *legitimate* objects; and that such an organization shall not be held in itself — merely because of its existence and operation — to be an illegal combination or conspiracy in restraint of trade. But there is nothing in the section to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects and engage in an actual combination or conspiracy in restraint of trade. And by no fair or permissible construction can it be taken as authorizing any activity otherwise unlawful, or enabling a normally lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade as defined by the anti-trust laws.

The principal reliance is upon section 20. . . .

The first paragraph merely puts into statutory form familiar restrictions upon the granting of injunctions already established and of general application in the equity practice of the courts of the United States. It is but declaratory of the law as it stood before. The second paragraph declares that "no *such* restraining order or injunction" shall prohibit certain conduct specified — manifestly still referring to a "case between an employer and employees, . . . involving, or growing out of, a dispute concerning terms or condition of employment," as designated in the first paragraph. It is very clear that the restriction upon the use of the injunction is in favor only of those concerned as parties to such a dispute as is described. The words