upon receipt must also have a zero cost. Consequently when such a dividend is sold, the entire proceeds would again be susceptible to tax. And such a result would seem to be a *reducto ad absurdum* of the construction.[12] But it should be remembered that such a case could not arise under the statute the Court was construing since under it no stock dividend was taxable on receipt. Further, such a dilemma can be avoided even under the present statute which taxes dividends on receipt by distinguishing between *cost* and other *bases* for computing gain from sale. Within limits the government can add up a series of realized gains at whatever point it finds most convenient. Thus, the gain arising from the purchase below market value is not taxed until resale.[13] On the other hand, since the gain is taxed upon receipt, the value at the time of receipt and not cost is the basis for computing gain from the sale of property acquired through gift[14] or death.[15] Thus, although it would be impossible for a court in future cases to vary the *cost* figure with the incidence of taxation, it would not be impossible for it to interpolate into the statute a new *basis* for computing gains from the sale of dividends taxable on receipt.

By not taxing the dividend until sale the Court delayed the tax. It is quite possible that the statute of limitations[16] has run in similar cases since the receipt of dividends but not since their sale, and because of the exemption in section 115(f) the government has not attempted to tax these dividends on receipt. Conceivably the Court may have adopted the cost of zero approach to enable the government to tax the transaction at the latest possible date and thus avoid the statute of limitations.

Labor Law—Anti-injunction Act—Picketing of Company-unionized Plant by National Union—[Federal].—The plaintiff's employees, over 1,300 in number, organized an independent labor union, found by the court to be neither company inspired nor company dominated, and negotiated an agreement providing for wages, hours, terms, and conditions of employment. Subsequently, the defendant union, an affiliate of the C.I.O., began a unionization campaign to supplant the independent union as the sole representative of all employees, though the employees were satisfied, none belonged to the defendant union, and they had expressed their opposition to that affiliation. In an effort to compel recognition by the plaintiff, the defendant had publicized many false charges, had endeavored to intimidate the plaintiff's customers, and had contemplated using physical violence. The plaintiff alleged that the conduct complained of was a conspiracy violative of the Federal Anti-Trust Acts,[1] and sought an injunction restraining the alleged conspiracy. *Held* (one judge dissenting), temporary injunction granted. The Norris-LaGuardia Act[2] is inapplicable, for the definition of a

[12] It is not of course suggested that the government would actually attempt to tax twice here. But see 51 Harv. L. Rev. 744, 745 (1938).

[13] Magill, Taxable Income 119, 120 (1936); see also Comm'r. v. Van Vorst, 59 F. (2d) 677, (1932).

[14] 45 Stat. 818 (1928), 26 U.S.C.A. § 113a (2) (Supp. 1936).

[15] § 113a (5).

[16] 45 Stat. § 275 (1928), 26 U.S.C.A. § 275 (Supp. 1936).

[1] Sherman Act, 26 Stat. 209 (1890), 15 U.S.C.A. §§ 1–8 (1927); Clayton Act, 38 Stat. 730 (1914), 15 U.S.C.A. §§ 12–27 (1927).

[2] 47 Stat. 70 (1932), 29 U.S.C.A. §§ 101–115 (1937).

"labor dispute" in section 13[3] must be construed in conformity with the policy expressed in section 2.[4] To prevent the coercion of the employees deplored by section 2, the term "labor dispute" must be confined to a controversy which concerns wages and conditions of employment, and which is between the employer and the employee or arises out of that relationship. *Donnelly Garment Co. v. International Ladies' Garment Workers' Union.*[5]

The instant case once more illustrates the tendency of courts to override the legislative policy behind statutes benefiting labor and to emasculate them by a restrictive interpretation.[6] The court relied on the statement of public policy enunciated in section 2 of the Act as encouraging the issuance of an injunction, apparently disregarding the fact that the section expressly prohibits coercion by the employer but is silent about coercion by employees or union leaders.[7] The Circuit Courts of Appeal are not in accord on the meaning of "labor dispute" within the Act;[8] so the forthcoming decision[9] by the United States Supreme Court on this question should have a vital effect on future unionization campaigns.

Where plaintiff's workers are non-unionized and an outside union seeks recognition as the sole representative of the employees, it would hardly appear arguable that it is not a "labor dispute" within the Act,[10] since section 13 of the Act, specifically intended

[3] *Id.* at § 113 (c), "The term labor dispute includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, *regardless of whether or not the disputants stand in the proximate relation of employer and employee*" (italics added).

[4] *Id.* at § 102, ". . . . He should be free to decline to associate with his fellows; it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . . ."

[5] 21 F. Supp. 807 (Mo. 1937) (appeal pending before the Supreme Court, entitled International Ladies' Garment Workers Union v. Donnelly Garment Co.).

[6] In Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921), § 20 of the Clayton Act, 38 Stat. 738 (1914), 29 U.S.C.A. § 52 (1934), was held inapplicable where the disputants did not stand in an employer and employee relationship.

See Frankfurter and Greene, The Labor Injunction, c. 4 (1930); 36 Col. L. Rev. 157 (1936).

[7] See Monkemeyer, Five Years of the Norris-LaGuardia Act, 2 Mo. L. Rev. 1, 7 (1937); 31 Ill. L. Rev. 688 (1937).

[8] Disputants need not stand in an employer and employee relationship. Levering & Garrigues Co. v. Morrin, 71 F. (2d) 284 (C.C.A. 2d 1934); Mayo v. Dean, 82 F. (2d) 554 (C.C.A. 5th 1936), affirming Dean v. Mayo, 8 F. Supp. 73 (La. 1934). *Contra:* United Elec. Coal Cos. v. Rice, 80 F. (2d) 1 (C.C.A. 7th 1935), *cert. denied*, 297 U.S. 714 (1936); Lauf v. E. G. Shinner & Co., 82 F. (2d) 68 (C.C.A. 7th 1936). See also Newton v. Laclede Steel Co., 80 F. (2d) 636 (C.C.A. 7th 1935).

[9] Lauf v. E. G. Shinner Co., 82 F. (2d) 68 (C.C.A. 7th 1936), noted 84 U. of Pa. L. Rev. 1027 (1936). The Lauf case has been argued before the Supreme Court, and the decision is pending.

[10] See 50 Harv. L. Rev. 1295 (1937).

to avoid the restrictions imposed by unsympathetic decisions under the Clayton Act,[11] contains an express provision that the disputants need not stand in an employer and employee relationship.[12] The decisions under the Norris-LaGuardia Act have given full effect to the provisions in question where the only controversy concerned an outside union and an employer with non-unionized workers.[13] In cases, however, holding no "labor dispute" to exist in a controversy between an outside union and an employer whose workers are organized, there is a clear indication that no labor dispute would be found even if the workers were non-unionized.[14]

The provisions of section 4,[15] denying the power to enjoin non-violent conduct involved in carrying on a strike, make no exception for activities carried on by third persons against an employer operating under a collective agreement. It might be argued that activities in connection with such a strike could be enjoined on the theory that they constitute an interference with contractual rights.[16] But such a holding is plainly contrary to the expressed legislative intent.[17] A court should hesitate to deny the existence of a "labor dispute" in such a case simply because of its sympathy for the employer caught in a struggle between two competing unions.[18] Organization of labor contemplates strong national or sectional unions completely divorced from local employer influence or suspicion thereof. Even though the "in" union appeared to the court in this case to have been independently organized and free from employer domination of any sort, it is hard to see how such a view affects in the slightest the applicability of the Norris-LaGuardia Act. Enough is known of the subtle influences which employers can assert on independent local organizations to intimidate and control them.[19] Furthermore, the national or sectional union has a definite interest in the labor

[11] The House Committee Report on the Norris-LaGuardia Act states that section 13 contains a definition of "labor dispute" broad enough to correct the law as decided in Duplex v. Deering, 254 U.S. 443 (1921). See Sen. Rep. No. 163, 72d Cong., 1st Sess. (1932); H. R. Rep. No. 669, 72d Cong. 1st Sess. (1932) 8–11; 75 Cong. Rec. 4916, 5483, 5489 (1932). See also note 6 *supra*.

[12] Note 3 *supra*.

[13] Levering & Garrigues Co. v. Morrin, 71 F. (2d) 284 (C.C.A. 2d 1934); Cinderella Theatre Co. v. Sign Writers' Local, 6 F. Supp. 164 (Mich. 1934); Dean v. Mayo, 8 F. Supp. 73 (La. 1934); Miller Parlor Furn. Co. v. Furn. Workers' Ind. Union, 8 F. Supp. 209 (N.J. 1934). For a like construction of state statutes see American Furn. Co. v. International Brotherhood, 222 Wis. 338, 268 N.W. 250 (1936); Geo. B. Wallace Co. v. International Ass'n of Mechanics, 155 Ore. 652, 63 P. (2d) 1090 (1936).

[14] United Electric Coal Cos. v. Rice, 80 F. (2d) 1 (C.C.A. 7th 1934), *cert. denied.*, 297 U.S. 714 (1936); Lauf v. E. G. Shinner Co., 82 F. (2d) 68 (C.C.A. 7th 1936).

[15] 47 Stat. 70 (1932), 29 U.S.C.A. § 104 (1937).

[16] See Goyette v. C. V. Watson Co., 245 Mass. 577, 140 N.E. 285 (1923).

[17] 47 Stat. 70 (1932), 29 U.S.C.A. §§ 104, 113 (1937).

[18] See Stillwell Theatre, Inc. v. Kaplan, 259 N.Y. 405, 182 N.E. 63 (1932); Cupples Co. v. Am. Fed. of Labor *et al.*, 1 Prentice-Hall Lab. & Unemploy. Ins. Service, ¶ 18213 (U.S.D.C. Mo. 1937).

[19] It is unfair labor practice under § 8 of the National Labor Relations Act for the employer to dominate or interfere with the labor organization of his employees. 49 Stat. 452 (1935), 29 U.S.C.A. § 158 (1937). For a discussion of decisions by the National Labor Relations Board concerning such practice, see Feller and Hurwitz, How to Deal with Organized Labor, 252–361

conditions of any shop in competition with nationally unionized shops, since competitive conditions must remain stabilized if organized labor is to succeed in its aims of mutual protection and bargaining.[20]

To return to the Act, it seems clear that an attempt by national union *A* to supplant national union *B* as the sole representative of the plaintiff's employees is a "labor dispute," since it is concerned with "representation in negotiating"[21] "between associations of employees."[22] It has been held, however, that even though it be a "labor dispute," the Norris-LaGuardia Act would be no barrier to injunctive relief if union *B* had been certified as the appropriate bargaining representative by the National Labor Relations Board. The recent decision of *Oberman & Co. v. United Garment Workers of America*,[23] construing section 10(h) of the National Labor Relations Act,[24] held that rights secured under the Wagner Act will be protected by the federal equity courts subject to none of the limitations imposed by the Anti-Injunction Act. In addition, it has been suggested in at least two decisions that since the Wagner Act is the more recent enactment, an exception to the Norris-LaGuardia Act might arise irrespective of section 10(h).[25] Even after the Labor Relations Act has been invoked by a union on strike, it has been held that the Anti-Injunction Act applies until the Board has certified the appropriate representatives.[26] But recourse to the Wagner Act was not sought in this case. It must be noted, however, that a petition for investigation and certification of representatives can be filed only by or on behalf of an employee.[27] Thus, the employer is wedged between the demands of rival unions, each requesting sole recognition but refusing to invoke the Labor Relations Act. Under such circumstances it is difficult to see how the employer can rely on the *Oberman* case, and why the Anti-Injunction Act would not apply.

The policy in the Norris-LaGuardia Act seems clearly to contemplate effective organization of labor without injunctional interference. If this entails competition between unions to eliminate the possibilities of corruption and inertia, it is hard to see why organizational activities in such cases should not fall under the protection of the statute. But serious doubts exist concerning the social desirability of subjecting the employer to the cross-fire of union warfare arising out of the competition between two national organizations.[28] If the standards of labor maintained by each union are equal-

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(1937) See also Zoslow v. United Shoe Workers of America, 1 Prentice-Hall Lab. & Unemploy. Ins. Service ¶ 18219 (U.S.D.C., D. of Col. 1937).

[20] See Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917); Sayre, Labor and the Courts, 39 Yale L. J. 682, 696 (1930); Feller and Hurwitz, *op. cit. supra* note 19, at 3–21.

[21] Note 3 *supra*.

[22] 47 Stat. 73 (1932), 19 U.S.C.A. § 113(a) (1937). [23] 21 F. Supp. 20 (Mo. 1937).

[24] 49 Stat. 453 (1935), 29 U.S.C.A. § 160(h) (1937).

[25] Virginia Ry. Co. v. System Federation, 300 U.S. 515 (1937); Grace Co. v. Williams, 20 F. Supp. 263, 266 (Mo. 1937).

[26] Cupples Co. v. Am. Fed. of Labor *et al.*, 1 Prentice-Hall Lab. & Unemploy. Ins. Service ¶ 18213 (U.S.D.C., Mo. 1937).

[27] Rules and Regulations of National Labor Relations Board, Art. III, § 1 (1936); Wolf, Administrative Procedure before the National Labor Relations Board, 5 Univ. Chi. L. Rev. 358, 375 (1938).

[28] Note 18 *supra*.

ly high, the objective of such strife ceases to be union recognition and collective bargaining throughout an industry, and degenerates into a struggle for power and for for the "spoils" of victory. In this warlike competition the employer is apt to be the "goat," an unfortunate result if he is sincerely disinterested in his dealing with the opposing unions. It is not likely that the framers of the Anti-Injunction Act anticipated this intense inter-union rivalry. Nevertheless, since the Act fails to make allowance for such situations and to differentiate between the varying types of labor organizations, it is doubtful if it remains open to the courts to interpolate a solution by holding the anti-injunction provision of the Act inapplicable.* It would seem that a solution to the hardship arising therefrom lies in an amendment to the Act allowing injunctive relief at the behest of the harassed employer who has already entered into a collective agreement with a national union.

Labor Law—Secondary Boycott—Labor Dispute—Unity of Interest—[New York]. —Attempting to unionize the manufacturer of "Ukor" meat products, the defendant butcher's union urged boycotting these products by picketing retail stores to which the manufacturer sold, including the plaintiff's store. One or two pickets carried signs which read, "This store sells delicatessen that is made in a non-union factory," and "Ukor Provisions Company is unfair to Union labor. Please buy Union-made delicatessen only." Section 876(a) of the New York Civil Practice Act provides that no relief granted in any "labor dispute" shall prohibit peaceful picketing and that a case involves a "labor dispute" when it concerns "persons who are engaged in the same industry, trade, craft or occupation. . . . ." The plaintiff alleged loss of trade to the extent of one hundred dollars a week and sought an injunction restraining the picketing. The Special Term refused relief; the Appellate Division granted an injunction; the Court of Appeals modified the injunction to restrain only breach of the peace, threats, and acts of intimidation, *holding* (one dissent) that inasmuch as both the manufacturer and the plaintiff were engaged in selling the same product, a "unity of interest" existed between them which enabled the plaintiff to be classed as a party to the labor dispute between the manufacturer and the union, thus disentitling him to relief against peaceful picketing of the manufacturer's product.[1] *Goldfinger v. Feintuch.*[2]

The extent to which labor may coerce the immediate employer by strike or picketing is today relatively well settled.[3] But how far a labor union may implicate third parties in its struggle for recognition presents a more difficult problem.[4] In most

* After this note had gone to press, the Supreme Court reversed the decision in the Lauf case, notes 9 and 14 *supra*, fully in accord with the views expressed herein. Lauf v. E. G. Shinner Co. 58 S. Ct. 578 (1938).

[1] This is Judge Finch's opinion. For the view of the rest of the court see note 4 *infra*.

[2] 276 N.Y. 281, 11 N.E. (2d) 910 (1937).

[3] Magruder, A Half Century of Legal Influence upon the Development of Collective Bargaining, 50 Harv. L. Rev. 1071 (1937).

[4] The difficulty of the problem is well illustrated by the variations in the judges' vocabulary. There were separate majority opinions by Finch, Lehman, Rippey, and a dissent by Hubbs. Finch and Rippey found "a unity of interest," Lehman and Hubbs did not mention it; Finch