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

states picketing a retailer in order to get him to bring pressure against the manufacturer with whom labor has a legitimate grievance has been held enjoinable[5] and even at the suit of the manufacturer.[6] But twenty years ago *Bossert v. Dhuy*[7] established the right in New York of the employees of *B* to refuse to work on the materials made in the non-union plant of *A*. Since the difference between a union calling on its members to cease working and calling upon its sympathizers to cease buying is not appreciable,[8] the instant case does not mark a surprising advance in New York law.[9]

The court attempted however to find a half-way house between forbidding all union activity against the retailer and allowing direct activity against him by restricting the picketing to requests not to buy the product as distinguished from requests to cease all buying at the store.[10] It is true that the union has a clear right to publicize the facts of the dispute by circulars and other advertising[11] and that the retailer must bear in such case the attendant loss of good will of the product. He has no greater cause to complain than in any case where he has bought something which will no longer sell. From one point of view picketing the product in front of the retailer's store presents no significant difference, since giving the publicity about the labor trouble in the place where it is most likely to be effective can hardly be objectionable. But viewed more realistically, it must be admitted that the picket has a strong rhetorical significance not likely to be weakened by variations in the wording of the sign,[12] and

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did not mention "secondary boycott" while Hubbs and Rippey found one and Lehman did not; finally, only Finch mentioned the anti-injunction statute and "labor dispute."

For a general discussion, see Feinburg, Analysis of the New York Law of Secondary Boycott, 6 Brooklyn L. Rev. 209 (1936); Hellerstein, Secondary Boycotts in Labor Disputes, 47 Yale L. J. 341 (1938); 14 N.Y.U.L.Q. 83 (1936); 50 Harv. L. Rev. 1295 (1937).

[5] Frankfurter and Greene, The Labor Injunction 43 (1930).

[6] See Duplex Co. v. Deering, 254 U.S. 443 (1921); Parker Paint & Wall Paper Co. v. Local Union No. 813, 87 W. Va. 631, 105 S.E. 911 (1921).

[7] 221 N.Y. 342, 117 N.E. 582 (1917).

[8] The boycott may be the more severe of the two because of the greater difficulty of regaining customers than employees after the strike is over.

[9] Picketing the secondary party's place of business has been held lawful where the picketing was at least nominally directed solely against the primary party. Englemeyer v. Simon, 148 Misc. 621, 265 N.Y. Supp. 636 (1933); Spanier Window Cleaning Co. v. Awerkin, 225 App. Div. 735, 232 N.Y. Supp. 886 (1928). But where activity was directed against the secondary party an injunction was granted. Commercial Window Cleaning Co. v. Awerkin, 138 Misc. 512, 240 N.Y. Supp. 797 (1930).

[10] Even in the Bossert case it is indicated that this would be unlawful, 221 N.Y. 342, 366, 117 N.E. 582, 587 (1917).

[11] Perfect Laundry Co. v. Marsh, 120 N.J. Eq. 508, 186 Atl. 470 (1936); also see Senn v. Tile Layers Protective Ass'n, 301 U.S. 468 (1937), where the Supreme Court intimated that peaceful picketing is protected by the constitutional guarantee of freedom of speech. *Cf.* the view that "unfair lists" are unlawful. Gompers v. Bucks Stove and Range Co., 221 U.S. 418 (1911); Fink & Sons v. Butchers' Union, 84 N.J. Eq. 638, 95 Atl. 182 (1915); see cases collected in 6 A.L.R. 909 *et seq.* (1920).

[12] It is doubtful that the consuming public would distinguish to any extent between the signs: "This store sells non-union products. Please buy union-made products only," and "This store sells non-union products. Please trade with dealers in union-made products only."

that consequently picketing the product has substantially the same effect as picketing the store generally.[13] The real problem, then, is to justify direct action against the retailer and in doing so it must be recognized that labor will be permitted to use the same degree of coercion against the retailer as against the employer with whom they primarily have a grievance.

An effective labor movement has a two-fold need. First, it must be able to focus coercion on the non-union employer, and second and equally important it must preserve present gains by protecting union employers from the competition of the non-union employer, made possible by his low wages.[14] To achieve these ends it must be able to discourage as completely as possible the market for the non-union employer's product. Since the most effective way of reaching the product is through the retailer, the losses of the retailer represent from a pro-labor viewpoint a necessary sacrifice to the larger objectives of the labor movement.

But such a sacrifice would be somewhat difficult to justify were it not that the retailer is scarcely a complete neutral. Very probably because of the interdependencies of modern marketing and, however he is set up legally,[15] he is substantially an agency of the manufacturer and even, as in the case of the chain store, may control the manufacturer's policies.[16] At the very least, his interest coincides with that of the manufacturer insofar as the benefits from low wages are passed along to him in the form of lower costs and selling prices. These considerations seem implicit in the court's use of "unity of interest" in the instant case.[17] There are, however, strong equities in favor of the retailer who has already heavily stocked with the boycotted merchandise or who has a pre-existing contract with the manufacturer. He is hardly in a position to exert much pressure on the manufacturer.

Although it is probable that the result in the instant case could have been reached in New York without the aid of the anti-injunction statute, similar statutes[18] may make possible the same result in other jurisdictions where the common law is less favorable toward labor.[19] Unfortunately, the definition of *labor dispute* under such statutes is sufficiently vague to permit a conservative court easily to deny its application to picketing designed to bring about a secondary boycott.[20]

[13] Feinberg, *op. cit. supra* note 4, at 216.

[14] In the instant case the manufacturers of Ukor products were the only non-union kosher provisions producers in New York City and paid salaries from 50 to 75 cents per hour as compared with the union scale of 95 cents to $1.25.

[15] See Steffen, Cases on Agency 65 (1933).

[16] See note 37 Col. L. Rev. 77 (1937).

[17] While Judge Finch spoke of unity of interest arising from sale of the same product, Judge Rippey found "complete" unity of interest possibly indicating a closer connection between the plaintiff and the employer than merely that of buyer and seller.

[18] Fourteen states have enacted such legislation modeled after the Federal Norris-LaGuardia Act, 47 Stat. 70 (1932), 29 U.S.C.A. § 101 *et seq.* (Supp. 1937). The Wisconsin statute, however, expressly excludes secondary boycott.

[19] See note 5 *supra*.

[20] Circuit Court of Appeals already differ as to the meaning of "labor dispute" under the Norris-LaGuardia Act. 50 Harv. L. Rev. 1295 (1937); 5 Univ. Chi. L. Rev. 514 (1938); Hellerstein, *op. cit. supra* note 4, at 363.